No. 24-20051

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GUARDIAN FLIGHT, LLC, *et al.*,

Plaintiffs-Appellees,

v.

MEDICAL EVALUATORS OF TEXAS ASO, LLC,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Texas, Hon. Alfred H. Bennett
Case Nos. 4:22-cv-03805 & 4:22-cv-03979

PLAINTIFFS-APPELLEES' UNOPPOSED MOTION TO CONSOLIDATE APPEAL NO. 24-20051 WITH APPEAL NO. 24-20204 AND TO SET BRIEFING FORMAT

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CERTIFICATE OF INTERESTED PERSONS

No. 24-20051, *Guardian Flight, LLC, et al., v. Medical Evaluators of Texas ASO, LLC*
and
No. 24-20204, *Guardian Flight, LLC, et al., v. Aetna Health, Inc. and Kaiser Foundation Health Plan Inc.*

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Local Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Defendant-Appellant (No. 24-20051): **Medical Evaluators of Texas ASO, LLC**
2. Plaintiff-Appellee (No. 24-20051), Plaintiff-Appellant (No. 24-20204): **Guardian Flight, LLC,** is a wholly-owned subsidiary of Global Medical Response, Inc. through a holding company, Air Medical Group Holdings Company LLC.
3. Plaintiff-Appellee (No. 24-20051), Plaintiff-Appellant (No. 24-20204): **CALSTAR Air Medical Services, LLC**, is a wholly-owned subsidiary of Global Medical Response, Inc. through a holding company, Air Medical Group Holdings Company LLC.
4. Plaintiff-Appellant (No. 24-20204): **REACH Air Medical Services, LLC**, is a wholly-owned subsidiary of Global Medical Response, Inc.

through a holding company, Air Medical Group Holdings Company LLC.

5. Defendant-Appellee (No. 24-20204): **Aetna Health, Inc.**
6. Defendant-Appellee (No. 24-20204): **Kaiser Foundation Health Plan Inc.**
7. Amicus Curiae Movant (in the district court): **America's Health Insurance Plans**

The following law firms and counsel have participated in this case, either in the district court or on appeal:

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Dated: May 13, 2024	*/s/ Charlotte H. Taylor* Charlotte H. Taylor *Counsel for Plaintiffs-Appellees*

MOTION TO CONSOLIDATE AND SET BRIEFING FORMAT

Plaintiffs Guardian Flight, LLC and CALSTAR Air Medical Services, LLC (who are Appellees in Appeal No. 24-20051 and Appellants in Appeal No. 24-20204) and Plaintiff REACH Air Medical Services LLC (who is an Appellant in Appeal No. 24-20204)—collectively, "Plaintiffs"—respectfully move to consolidate these related appeals for briefing, argument, and disposition. *See* Fed. R. App. P. 3(b)(2). Both appeals arise out of the same district court action, involve the same facts and statutory provisions, involve overlapping legal questions, and involve some of the same parties. For efficiency and administrative convenience, as well as clear presentation of the issues raised, the appeals should be consolidated. If the appeals are consolidated, Plaintiffs further request that the Court adopt a cross-appeal briefing format, initiated by Plaintiffs filing an opening brief addressing the issues raised by Appeal No. 24-20204. Neither of these requests is opposed.

I. Background

While the consolidation standard is straightforward, a summary of the somewhat complicated history of this case is necessary to understand the basis for Plaintiffs' motion.

The No Surprises Act. In 2020, Congress enacted the No Surprises Act ("NSA"), codified in 42 U.S.C. §§ 300gg-111–12. As relevant here, the NSA imposes a regulatory scheme for the resolution of disputes between air ambulance

providers and health insurance companies over payment for transport services for out-of-network patients covered by commercial insurance. *See* D. Ct. Doc. 76 at 2 (hereinafter "Dismissal Order"). Under this scheme, if the provider and insurer cannot agree upon payment, they must engage in an independent dispute resolution ("IDR") process before an IDR entity, which is a federal contractor. *See id.* at 2–3.

The IDR entity chooses between the parties' proposed payment amounts without a hearing or exchange of written submissions between the parties. *See id.* at 3. The IDR entity's decision is binding on the parties unless there has been a misrepresentation of fact to the IDR entity or the case meets the requirements for vacatur under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 10(a). 42 U.S.C. §§ 300gg-111(c)(5)(E)(i).

The NSA requires IDR entities to consider certain categories of information in determining the appropriate out-of-network rate. One relevant piece of information is the "qualifying payment amount" submitted by the insurer ("QPA"). This payment amount is subject to federal regulations and represents "the equivalent median in-network reimbursement rate or, if the insurer has no equivalent in-network data, the median in-network rate for the geographic area." Dismissal Order at 3 (internal quotation marks omitted). The IDR entity is not permitted to attach presumptive weight to the QPA. *LifeNet, Inc. v. United States Dep't of Health & Hum. Servs.*, 617 F. Supp. 3d 547, 555, 562–63 (E.D. Tex. 2022).

Plaintiffs' Claims. Plaintiffs are providers of air medical transport services. As required by the No Surprises Act, they engaged in IDR in front of Defendant-Appellant (No. 24-20051) Medical Evaluators of Texas ("MET"), which serves as an IDR entity under the statute. Dismissal Order at 4–5. Plaintiffs brought suit seeking to vacate several IDR determinations that disfavored them, naming as defendants both MET and the respective Insurers who were parties to those IDR proceedings—Aetna Health, Inc. and Kaiser Foundation Health Plan Inc. *Id.* Plaintiffs alleged, in sum, that (1) the Insurer Defendants (Appellees in No. 24-20204) violated the NSA by misrepresenting facts about their QPAs in their submissions to MET and (2) that MET violated the NSA by applying an illegal presumption in favor of the Insurer Defendants' payment calculation in making the determination. *Id.* Plaintiffs sued both the Insurer Defendants and MET because they claim both the Insurer Defendants and MET violated the rules of the IDR process under the NSA, and both are necessary parties for remedial purposes.

The District Court's Resolution of Defendants' Motions to Dismiss. All Defendants moved to dismiss. *Id.* at 1–2. The Insurer Defendants contended that Plaintiffs' Complaints should be dismissed because they failed to sufficiently allege corruption, fraud, or undue means to trigger judicial review of the IDR determinations. *Id.* at 11–12. The District Court agreed, interpreting the NSA to provide that misrepresentations of fact (including allegations that the Insurer

Defendants misrepresented the amounts they pay for similar transports in the same geographic area) do not trigger judicial review. *Id.* at 12–13. On this ground, the District Court dismissed the claims of Guardian Flight and CALSTAR without prejudice.

Separately, the District Court granted Kaiser and MET's motion to dismiss as applied REACH Air Medical Services, LLC on the ground that REACH's claims are barred by collateral estoppel because it brought similar claims against an IDR entity and insurers in suits filed in the Middle District of Florida and that judge had already ruled on similar issues. Dismissal Order at 9–11; *see also Med-Trans Corp. v. Capital Health Plan, Inc.*, Nos. 3:22-cv-1077-TJC-JBT, 3:22-cv-1153-TJC-JBT, 2023 WL 7188935, at *l (M.D. Fla. Nov. 1, 2023). REACH's claims were dismissed with prejudice. Dismissal Order at 11.

For its part, MET argued that it should be entitled to arbitrator's immunity and that Plaintiffs' allegations did not trigger judicial review of the determination under the NSA. *Id.* at 14–15. The District Court disagreed, concluding that IDR entities do not have arbitrator immunity and that Plaintiffs plausibly alleged a claim that MET exceeded its powers under the NSA by applying an illegal presumption in selecting the Insurer Defendants' payment calculations. *Id.* at 14–16. As a result, Plaintiffs' claim for vacatur on this ground remains in the case and MET was not dismissed from the proceeding.

In sum, in its Dismissal Order, the District Court dismissed all claims against the Insurer Defendants but denied MET's motion to dismiss. MET then appealed (No. 24-20051). Because MET was not dismissed, there was no immediately appealable judgment from the part of the Dismissal Order disposing of Plaintiffs' claims against the Insurer Defendants.

Plaintiffs' Reconsideration Motion and This Court's Stay. Plaintiffs believed (and continue to believe) that judicial efficiency would be furthered by allowing this Court to review this case's multiple, interrelated issues of first impression in a single appeal.

Accordingly, Plaintiffs filed a Reconsideration Motion with the District Court asking it to reconsider its dismissal of the Insurer Defendants and take steps to facilitate an immediate appeal so that all issues of the case could be addressed by the Fifth Circuit at the same time. *See* D. Ct. Doc. 79. While that motion was pending, this Court agreed to stay further proceedings in Appeal No. 24-20051. *See* No. 24-20051 (5th Cir.), Doc. 19, Doc. 28-2. On April 9, 2024, the District Court granted Plaintiffs' Motion in part, determining that it was appropriate to enter final judgment with respect to the Insurer Defendants under Rule 54(b) for the purpose of allowing the Fifth Circuit to "address multiple issues in this case at once." D. Ct. Doc. 89. On April 10, 2024, the District Court entered final judgment against the Insurer Defendants. D. Ct. Doc. 90. Plaintiffs filed a notice of appeal in the District Court

on May 6, 2024, which was docketed in this Court on May 10, 2024 (No. 24-20204). On May 13, 2024, before Plaintiffs received formal notice of assignment to this Court, this Court removed Appeal No. 24-20051 from abeyance and resumed briefing.

II. Argument

"When the parties have filed separate timely notices of appeal, the appeals may be joined or consolidated by the court of appeals." Fed. R. App. P. 3(b)(2). As relevant, this Court exercises its discretion to consolidate appeals when the appeals "share a common record," *Bansal v. Consulate Gen. of India Houston*, 99 F. App'x 535, 537 (5th Cir. 2004), when the appeals "implicate common facts and issues," *United States v. Majors*, 2022 WL 301545, at *1 (5th Cir. Feb. 1, 2022), when the appeals "are closely related," *Wright v. McCain*, 703 F. App'x 281, 282 (5th Cir. 2017), and "[i]n the interest of judicial economy," *Forkner v. Fisher*, 678 F. App'x 210, 211 (5th Cir. 2017).

These appeals should be consolidated. They arise from the same decision in the same district court action; they implicate common facts; and they are closely related and overlapping. MET's appeal (No. 24-20051) brings before this Court only one piece of the case—the availability of arbitrator immunity for IDR entities—even though the Dismissal Order *also* ruled on other interrelated issues of first impression regarding the NSA. In particular, the District Court addressed whether

Plaintiffs stated a legally valid claim under the NSA for vacatur of the IDR determination with allegations that the Insurer Defendants had made misrepresentations of fact. That question is now ripe for this Court's review in Plaintiffs' appeal (No. 24-20204), *and* it bears on the immunity issue in MET's appeal because the court must interpret the statute as a whole and consider what remedies are available if Plaintiffs do make out a claim. Put differently, joining the appeals will allow this Court to consider the *grounds* for vacatur or judicial review of payment determinations made through the NSA's mandatory dispute-resolution process at the same time that it considers appropriate *remedies—i.e.*, whether the entities making determinations are immune from suit or necessary parties for the relief sought.

Consolidation would also serve judicial economy by (1) allowing one panel to review the facts of the case and the interrelated issues in consolidated briefing, instead of forcing different panels to consider separate briefs, and (2) once this Court disposes of these appeals, providing timely clarity to the District Court as it considers the proper scope of the proceeding, the proper parties, the discovery needed, and which issues need to be tried. Indeed, this Court has already stayed Appeal No. 24-20051 for the very purpose of allowing the District Court to facilitate the immediate appeal of Appeal No. 24-20204 so that the two appeals could be briefed and heard together. *See* No. 24-20051 (5th Cir.), Docs. 19, 28-2. The District Court has now

done so precisely because it "agree[d] that it would promote judicial efficiency to enter the final judgment against Aetna and Kaiser so the Fifth Circuit can address multiple issues in this case at once." D. Ct. Doc. 89 at 2. This Court should take the logical next step of consolidating the appeals.

If the appeals are consolidated, Plaintiffs further move to set briefing in a format akin to that used in cross appeals. *See* Fed. R. App. P. 28.1. Plaintiffs suggest as follows: (1) Plaintiffs file an opening brief with respect to their appeal from the judgment against the Insurers; (2) MET files an opening brief with respect to its appeal from the denial of its immunity claim at the same time that the Insurers file a response to Plaintiffs' opening brief; (3) Plaintiffs file a brief that combines their reply to the Insurers' response and their response to MET's opening brief; and then (4) MET files its reply.[3]

All parties consent to this format.

* * *

For the reasons stated above, Plaintiffs respectfully request that the Court grant this Motion.

[3] By order earlier today, this Court set June 24, 2024 as the deadline for MET's opening brief in Appeal No. 24-20051. Under the proposed consolidated briefing format, Plaintiffs would file the first brief.

May 13, 2024

Respectfully submitted,

/s/ Charlotte H. Taylor

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CERTIFICATE OF CONFERENCE

In accordance with Fifth Circuit Rule 27.4, the undersigned hereby certifies that counsel contacted counsel for MET, Aetna, and Kaiser, who have all responded that they do not oppose this motion.

Dated: May 13, 2024

/s/ Charlotte H. Taylor
Charlotte H. Taylor

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that on this date, the foregoing document was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system. Service will be accomplished on Aetna and Kaiser via email on May 13, 2024, and via USPS mail initiated on May 14, 2024, at the following addresses:

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I further certify that this document complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2) because it contains 1,867 words. This

document complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in 14-point Times New Roman, a proportionally spaced typeface.

And I certify that: (1) any required privacy redactions have been made; (2) the electronic submission of this document is an exact copy of any corresponding paper document; and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free from viruses.

Dated: May 13, 2024

/s/ Charlotte H. Taylor
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