**No. 24-20051**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

**GUARDIAN FLIGHT, L.L.C.,**

*Plaintiff–Appellee,*

**V.**

**MEDICAL EVALUATORS OF TEXAS ASO, L.L.C.,**

*Defendant–Appellant,*

consolidated with

**No. 24-20204**

**GUARDIAN FLIGHT, L.L.C.; REACH AIR MEDICAL SERVICES, L.L.C.; CALSTAR AIR MEDICAL SERVICES, L.L.C.,**

*Plaintiffs–Appellants,*

**V.**

**AETNA HEALTH, INCORPORATED; KAISER FOUNDATION HEALTH PLAN, INCORPORATED,**

*Defendants–Appellees.*

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

# BRIEF OF DEFENDANT-APPELLEE AETNA HEALTH INC.

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## CERTIFICATE OF INTERESTED PERSONS

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 Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges on this Court may evaluate possible disqualification or recusal.

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Aetna Health Inc. is 100% owned by Aetna Health Holdings, LLC, which is 100% owned by Aetna Inc., which is 100% owned by CVS Pharmacy, Inc., which is 100% owned by CVS Health Corporation, a publicly traded company. CVS Health has no parent company, and no other publicly held corporation owns 10% or more of its stock.

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## STATEMENT REGARDING ORAL ARGUMENT

Aetna believes the district court's dismissal of Guardian Flight's complaint seeking to vacate an arbitration award in Aetna's favor should be affirmed on the briefs, without oral argument. In the No Suprises Act ("NSA"), 42 U.S.C. §§ 300gg-111 & 112, Congress created a mandatory, binding independent dispute resolution ("IDR") process for disputes between health care providers and health plans over medical bills for out-of-network care. The NSA expressly provides that an IDR award "shall not be subject to judicial review" except in a case that fits an exception in Section 10(a) of the Federal Arbitration Act ("FAA"), 9 U.S.C §§ 1–16. 42 U.S.C. § 300gg-111(c)(5)(E)(i)(II). Section 10(a)'s exceptions are narrow, and the district court correctly held that Guardian Flight failed to allege a viable basis for judicial review of the IDR award.

That said, Aetna would be pleased to present oral argument if it would aid the Court in the disposition of the appeal.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**Statutes**

**Rules and Regulations**



**Other Authorities**

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

Did the district court correctly dismiss Guardian Flight's complaint against Aetna?

- 42 U.S.C § 300gg-111(c)(5)(E)(i)(II) states that an IDR award "shall not be subject to judicial review, except in a case described in any of paragraphs (1) through (4) of section 10(a)" of the FAA. Is the district court correct that this provision provides the exclusive avenue for judicial review of an IDR award?
- Did the district court correctly hold that Guardian Flight failed to properly allege a viable claim under 42 U.S.C. § 300gg-111(c)(5)(E)(i)(II)?
- Assuming that, notwithstanding its plain language, 42 U.S.C. § 300gg-111(c)(5)(E)(i)(II) does not provide the exclusive avenue for challenging an IDR award in court, did Guardian Flight sufficiently allege fraud with the particularity required by Federal Rule of Civil Procedure 9(b)?

# I. INTRODUCTION

Before the NSA's passage in 2020, surprise medical bills were a widespread problem in the healthcare industry. *See* Erin C. Fuse Brown, Mark A. Hall, *Private Equity and the Corporatization of Health Care*, 76 STAN. L. REV. 527, 539–40 (2024). "Surprise medical bills occur when consumers covered by health insurance are subject to higher-than-expected out-of-pocket costs when they receive care from a provider who is outside their plan's network." H.R. REP. No. 116-615(1), at 52 (2020).

Air ambulance transports frequently resulted in surprise bills, as many air ambulance providers did not participate in health plan or insurer networks and had "little incentive to do so." 86 Fed. Reg. 36872, 36923 (July 13, 2021). Avoiding network participation was "a business strategy." *Id.* By staying out-of-network, air ambulance providers could use the threat of billing patients directly for any unpaid amounts (*i.e.*, "balance billing") to pressure health plans or insurers to pay exorbitant and ever-escalating air ambulance charges. H.R. REP. No. 116-615(1), at 51, 53; *see* 86 Fed. Reg. at 36874, 36924 & n.130.

With the vast majority of air ambulance services being furnished by out-of-network providers, it "creat[ed] a 'market failure' that has permitted air ambulance providers to charge far more than the price they would command if the services were provided in network." *Ass'n of Air Med. Servs. v. U.S. Dep't of Health & Human Servs.*, No. CV 21-3031 (RJL),

2023 WL 5094881, at *4 (D.D.C. Aug. 9, 2023) (observing that the market failure enabled some providers to charge amounts for their services that resulted "in compensation far above what is needed to sustain their practice") (citing H.R. REP. No. 116-615(1), at 52–53). Recognizing an opportunity, private equity groups centered on investments "with short-term horizons" began to take over the air ambulance industry, causing charges to soar even higher. 86 Fed. Reg. 55980, 56046 (Oct. 7, 2021).

"The effort to curb surprise medical bills generated considerable policy action—starting with dozens of state laws and culminating in the passage of the federal No Surprises Act." Brown & Hall, *Private Equity*, *supra* at 540–41. The NSA prohibits providers from attempting to balance bill patients and establishes a mandatory, binding IDR arbitration process for providers and payors to resolve all payment disputes.[1] *See id.*; 42 U.S.C. §§ 300gg-112, -135.

To resolve billing disputes between providers and payors, the NSA provides for "baseball-style" arbitration: the provider and payor each submit a proposed offer for payment of the services, and the independent

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[1] In addition to regulating certain types of health insurance policies, the NSA regulates certain types of health plans that are "self-funded," *i.e.*, funded by employer and employee contributions. *See* 42 U.S.C. § 300gg-111(a)(1). Third parties (like Aetna) may provide administrative services to self-funded plans. As such, not all health plans under discussion in this appeal are funded by traditional "insurance."

IDR arbitrator selects between them to determine the payment amount. *Id.* § 300gg-112(b)(5)(C)(i)(I–II). Neither party has a right to discover any of the confidential materials the other side submitted to the IDR arbitrator. The IDR process is designed for efficiency and ***finality***. The NSA expressly provides that an IDR arbitrator's award "***shall not be subject to judicial review***, except in a case described in any of" four narrow exceptions in Section 10(a) of the FAA. 42 U.S.C. § 300gg-111(c)(5)(E)(i)(II) (emphasis added).

Private-equity-backed air ambulances like Guardian Flight "aggressively use the [NSA's] arbitration process to push for higher payments and preserve their profits." Brown & Hall, *Private Equity*, *supra* at 540–41. Here, Guardian Flight seeks to overturn a certified IDR arbitrator's award selecting Aetna's offer of the payment amount because Aetna allegedly refused to make required disclosures to Guardian Flight and submitted an "improbably low" number to the arbitrator. Neither claim is true. Aetna emailed the required disclosures (*see* ROA.24-20204.578 for the email), and Aetna's submission was not low—it was right on the money.

More importantly for this appeal, Guardian Flight's case against Aetna does not fit within any of the four FAA exceptions. The district

court thus properly dismissed Guardian Flight's complaint. The Court should affirm.

## II. STATEMENT OF THE CASE

### A. Guardian Flight disagrees with Aetna's payment and initiates the binding IDR process

Aetna provides third-party claims administrative services to self-funded, employer-sponsored health plans.[2] In February 2022, Guardian Flight, an air ambulance service that is not in Aetna's provider network, transported a member of an Aetna-administered plan 225 miles from Alliance, Nebraska, to a hospital in Kearney, Nebraska.[3] Guardian Flight claimed that the services rendered cost $56,742.20.[4] Aetna calculated the total qualifying payment amount ("QPA") for Guardian Flight's services was $31,965.53, and Aetna "allowed" this amount on the claim.[5]

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[2] ROA.24-20204.558. Guardian Flight's complaint named "Aetna Health, Inc." ROA.24-20204.502 (¶9). The Aetna entity that administered the patient's self-funded health plan is Aetna Life Insurance Company. *See* ROA.24-20204.557 n.1. In this brief, when referring to events giving rise to Guardian Flight's complaint, "Aetna" refers to Aetna Life Insurance Company, the proper party.

[3] ROA.24-20204.503-04 (¶¶14-16).

[4] ROA.24-20204.1869.

[5] ROA.24-20204.501 (¶4), .510 (¶28) ("Aetna claimed the QPA for the transport at issue was $12,755.87 for the base rate, $19,134.00 for mileage, and $75.66 for wait time, a total of $31,965.53.").

The QPA is a health plan/insurer's median negotiated rate (or "in-network rate") for the "same or a similar item or service" in the same market. 42 U.S.C. § 300gg-112(b)(5)(C). An IDR arbitrator is required to consider the QPA when selecting between offers. *Id.* § 300gg-112(b)(5)(C)(i)(I). However, a health plan need not reimburse at its QPA rate or offer an amount equal to its QPA in the IDR arbitration. *See id.*

Under the NSA, a provider dissatisfied with a payment has 30 days to initiate an "open negotiation period" to informally resolve the dispute. *Id.* § 300gg-112(b)(1)(A). Believing it should be paid more for its services than the $31,965.53 Aetna allowed, Guardian Flight initiated open negotiation and requested information from Aetna about how it calculated the QPA.[6]

45 C.F.R. § 149.140(d)(2) specifies the information a payor must provide upon request regarding its calculation of the QPA:[7]

- information about whether the QPA included contracted rates that were not set on a fee-for-service basis;
- whether the QPA was determined using underlying fee schedule rates or a derived amount;

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[6] ROA.24-20204.509-10 (¶¶26–27).

[7] *See* ROA.24-20204.509-10 (¶26).

- whether a related service code was used to determine the QPA for a new service code and, if so, information to identify which related service code was used;

- whether an eligible database was used to determine the QPA and, if so, information to identify which database was used to determine the QPA; and

- whether the plan's or issuer's contracted rates include risk-sharing bonus, penalty, or other incentive-based or retrospective payments or payment adjustments for the items and services involved that were excluded for purposes of calculating the QPA.

Aetna emailed the 45 C.F.R. § 149.140(d)(2) information about how it calculated the QPA to Guardian Flight on August 21, 2022:[8]

- We did not include contracted rates that were not on a fee-for-service basis. Our QPA was determined based on derived amounts.
- Aetna did not use a database to determine our QPA; internal data was used.
- We did not use related services codes to determine a QPA for a new service code. If a service code was created or substantially revised in a year after 2019, our 2020/2021 rates were used
- Our calculated median contracted rate(s) do not include risk-sharing, bonus or other incentive-based or retrospective payments or payment adjustments.

[8] ROA.24-20204.578. Aetna filed an unredacted copy of the email in its Reply in support of its Motion to Dismiss filed under seal (Dist. Ct. Dkt. No. 19). Aetna contends that its email to Guardian Flight was properly before the district court as a document that is central to Guardian Flight's claim and referenced by the complaint (as not having been sent). *See* ROA.24-20204.562 n.2; *Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010). However, the district court did not rely on Aetna's email in dismissing Guardian Flight's complaint. *See* § II.D.2, *infra*.

Aetna's email to Guardian Flight also identified six additional circumstances or factors it used in calculating the QPA.[9]

The parties' negotiations failed, and they proceeded to binding IDR arbitration.[10] *See* 42 U.S.C. § 300gg-112(b)(1)(B).

### B. The IDR arbitrator, MET, enters an award in Aetna's favor, and Guardian Flight sues Aetna and MET

Aetna and Guardian Flight agreed on Medical Evaluators of Texas ASO, LLC ("MET") as the certified IDR arbitrator.[11] Both parties submitted final offers and associated briefing.[12] After carefully considering the parties' submissions, MET selected Aetna's offer as best representing the value of the services at issue and issued a final award consistent with Aetna's allowed amount, $31,965.53.[13]

Dissatisfied with its loss, Guardian Flight sued Aetna and MET, seeking to vacate the IDR award and have the district court direct MET to assign a different arbitrator to rehear the claim.[14] As to Aetna, Guardian Flight alleged that it secured the arbitrator's determination in

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9 ROA.24-20204.578-79.

10 ROA.24-20204.501 (¶9).

11 ROA.24-20204.501 (¶6).

12 *See* ROA.24-20204.510 (¶28); ROA.24-20204.562.

13 ROA.24-20204.581-83 (IDR award).

14 *See* ROA.24-20204.517 (¶¶41-42).

its favor by submitting an "improbably low QPA" and "refused to explain how it calculated its QPA."[15] As to MET, Guardian Flight alleged that "MET exceeded its authority by applying an illegal presumption in favor of Aetna's QPA."[16]

### C. The district court consolidates the case with a lawsuit against Kaiser and MET

Fifteen days after suing Aetna, Guardian Flight and its affiliates REACH and CALSTAR (collectively, the "Providers") sued Kaiser and MET, seeking to vacate six IDR awards.[17] While the relief sought was the same, the allegations against Kaiser were different from those against Aetna. For example, the Providers alleged that Kaiser "manipulated QPAs" and "submitted a second, lower QPA" to MET than it submitted to the Providers "in some instances."[18] Nonetheless, the district court consolidated the lawsuits.[19]

Congress specifically designed the NSA's IDR process to provide for an efficient and streamlined means of dispute resolution at minimal

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15 App. Br. at 13.

16 App. Br. at 14.

17 *See* ROA.24-20204.484.

18 App. Br. at 2 (emphasis omitted); *see id.* at 16; *see also* ROA.24-20204.24.

19 ROA.24-20204.484-85.

cost. *See* 42 U.S.C. §§ 300gg-111(c)(3)(A), (c)(4)(E). As part of this design, the NSA tightly circumscribes any judicial review of an IDR award. Section 300gg-111(c)(5)(E), titled "Effects of determination," provides:

> **(i) In general**[20]
>
> A determination of a certified IDR entity under subparagraph [§ 300gg-111(c)(5)(A)]—
>
> (I) shall be binding upon the parties involved, in the absence of a fraudulent claim or misrepresentation of facts presented to the IDR entity involved regarding such claim; and
>
> (II) shall not be subject to judicial review, except in a case described in any of paragraphs (1) through (4) of section 10(a) of title 9.

42 U.S.C. § 300gg-111(c)(5)(E)(i). Title 9 is the FAA, and paragraphs (1) through (4) of Section 10(a) of the FAA provide:

> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;

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[20] In their brief, Appellants twice quote "In general" as if it is part of the statutory text, rather than the heading to Section 300gg-111(c)(5)(E). *See* App. Br. at 11, 14. However, "the title of a statute and the heading of a section cannot limit the plain meaning of the text." *Knapp v. U.S. Dep't of Agric.*, 796 F.3d 445, 465 (5th Cir. 2015).

> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a).

Aetna, Kaiser, and MET separately moved to dismiss the complaints, in relevant part because the Providers failed to allege any viable grounds for vacatur of the IDR awards under section 300gg-111(c)(5)(E)(i)(II).[21] After full briefing, the district court granted Aetna's and Kaiser's motions to dismiss but denied MET's motion.[22]

### D. The district court dismisses the complaints against Aetna and Kaiser but not the complaint against MET

#### 1. The district court analyzes and adopts some holdings from another district court's opinion addressing the same issues

In its dismissal order, before getting to the merits of the motions, the district court outlined Chief Judge Timothy J. Corrigan's opinion in

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[21] ROA.24-20204.80-95 (MET); ROA.24-20204.96-123 (Kaiser); ROA.24-20204.539-49 (MET); ROA.24-20204.557-83 (Aetna).

[22] ROA.24-20204.1866-83.

*Med-Trans Corp. v. Capital Health Plan*, 700 F. Supp. 3d 1076 (M.D. Fla. 2023).[23] Chief Judge Corrigan had earlier notified the district court that *Med-Trans* involved "similar facts, parties, and motions."[24] The *Med-Trans* plaintiffs had sued Kaiser and another insurer challenging IDR awards, claiming they had misrepresented their QPAs to the IDR entity, and the entity gave too much weight to the QPAs during the IDR process.[25] Chief Judge Corrigan's opinion "determined: (1) how the NSA and the [FAA] intersect; (2) the proper way to seek judicial review of IDR awards; and (3) whether IDR entities are proper parties to lawsuits."[26]

First, as to the intersection of the NSA and the FAA, Chief Judge Corrigan held that the NSA incorporates only FAA Section 10(a) "regarding vacating an arbitration award. As such, none of the other provisions of the FAA, including its procedural rules, are applicable to interpretations of the NSA."[27]

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[23] ROA.24-20204.1872-74. At the time, Chief Judge Corrigan's opinion had not yet been published, so the district court used its Westlaw reference, 2023 WL 7188935.

[24] ROA.24-20204.1871.

[25] ROA.24-20204.1872.

[26] ROA.24-20204.1872.

[27] ROA.24-20204.1872 ("If it were Congress' intent to incorporate other parts of the FAA, it would have done so. Thus, Chief Judge Corrigan held, 'Neither the NSA nor the FAA says that the FAA bears on the NSA outside the four explicitly

Second, as to the proper way to seek judicial review, Chief Judge Corrigan determined that "'courts review arbitration awards with deference and restraint, interpreting the § 10(a) categories narrowly. Thus, challenges by either air ambulance companies or insurers to NSA IDR awards may rarely succeed.'"[28] The district court noted this "is consistent with Fifth Circuit precedent as well."[29] Chief Judge Corrigan rejected the *Med-Trans* plaintiffs' argument that 42 U.S.C. § 300gg-111(c)(5)(E)(i)(I) "regarding fraudulent claims or misrepresentation of facts to the IDR entity creates additional avenues for judicial review of IDR awards."[30] While Chief Judge Corrigan did "'not foreclose that misrepresentation of facts to the IDR entity might support judicial review in a given case, such claims must be asserted within the confines of § 10(a) of the FAA.'"[31]

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incorporated paragraphs. The Court will not assume otherwise.'") (internal citations omitted).

28 ROA.24-20204.1873 (quoting *Med-Trans*, 700 F. Supp. 3d at 1085).

29 ROA.24-20204.1873 (citing *Gulf Coast Indus. Workers Union v. Exxon Co., U.S.A.*, 991 F.2d 244, 248 (5th Cir. 1993); *Antwine v. Prudential Bache Sec., Inc.*, 899 F.2d 410, 413 (5th Cir. 1990)).

30 ROA.24-20204.1873.

31 ROA.24-20204.1874 (quoting *Med-Trans*, 700 F. Supp. 3d at 1086).

Third, Chief Judge Corrigan concluded that IDR entities "are not proper parties to these lawsuits" because while the NSA creates a limited right to judicial review of IDR awards, it does not create a cause of action to sue IDR entities themselves.[32]

The district court adopted Chief Judge Corrigan's first two rulings, "regarding how the NSA and FAA intersect and the proper way to seek judicial review of IDR."[33] However, it reached "a different conclusion than Chief Judge Corrigan with regard to whether the IDR entities are proper parties to these lawsuits."[34] The district court then turned to the merits of Aetna's, Kaiser's, and MET's motions to dismiss.

**2. The district court's rulings**

The district court first addressed Kaiser's and MET's arguments that *Med-Trans* collaterally estopped the Providers' claims.[35] The district court held that REACH's claims are barred by collateral estoppel "because REACH is a Plaintiff in this case and in *Med-Trans*, and it seeks a ruling on the exact same issues that have been ruled upon by Chief

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32 ROA.24-20204.1874.

33 ROA.24-20204.1874.

34 ROA.24-20204.1874.

35 ROA.24-20204.1874-76.

Judge Corrigan."[36] It thus dismissed REACH's claims with prejudice.[37] As to Guardian Flight and CALSTAR, however, the district court held that "their affiliation as subsidiaries of the same parent company and representation by the same attorneys" was not enough for their claims to be precluded.[38]

The district court then addressed Aetna's and Kaiser's motions to dismiss.[39] It rejected the Providers' "reading of the NSA that [alleged] misrepresentations of facts are a type of 'undue means,' which triggers judicial review."[40] The district court agreed with Chief Judge Corrigan's opinion in *Med-Trans* that "the NSA uses exclusive language regarding when judicial review is permitted—only when one of the four paragraphs in Section 10(a) of the FAA is triggered. Otherwise, judicial review is prohibited, and subsection (I) of Section 300gg-111(c)(5)(E)(i)(I) does not create an additional avenue for judicial review."[41]

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36 ROA.24-20204.1875-76.

37 ROA.24-20204.1876.

38 ROA.24-20204.1876.

39 ROA.24-20204.1876-79.

40 ROA.24-20204.1877.

41 ROA.24-20204.1877 (internal citation omitted).

"[T]he NSA clearly separates when an IDR award is binding—absent a fraudulent claim or evidence of misrepresentation of fact to the IDR entity—and when an IDR award is subject to judicial review—pursuant to Section 10(a) of the FAA."[42] The district court thus held that the NSA prohibited judicial review of the Providers' claims that Aetna and Kaiser misrepresented their respective QPAs.

"Out of an abundance of caution," the district court also considered if the Providers' complaints properly alleged "that Aetna and Kaiser used fraud or undue means to procure their IDR awards that would fall within the ambit of Section 10(a)."[43] The district court found that "courts interpret 'fraud' and 'undue means' together."[44] There must be "a nexus between the alleged fraud or undue means and the basis for the arbitrators' decision."[45]

"Fraud requires a showing of bad faith during the arbitration proceedings, such as bribery, undisclosed bias of an arbitrator, or willfully destroying or withholding evidence. Undue means connotes

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42 ROA.24-20204.1877.

43 ROA.24-20204.1878.

44 ROA.24-20204.1878 (citing *In re Arb. Between Trans Chem. Ltd & China Nat'l Mach. Imp. & Exp. Corp.*, 978 F. Supp. 266, 304 (S.D. Tex. 1997)).

45 ROA.24-20204.1878.

behavior that is immoral if not illegal or otherwise in bad faith."[46] The district court held that the Providers' complaints against Aetna and Kaiser fell "woefully short of alleging fraud or undue means."[47] As to Aetna in particular, all Guardian Flight alleged in its complaint was:

> Aetna secured the award through undue means and misrepresentations of fact to MET. It misrepresented the facts by submitting a purported QPA that was not properly calculated under federal law. It further refused to provide the information needed on its QPA for Guardian to explain why it was improperly calculated and was not an appropriate rate for the transport at issue.[48]

As the district court observed in the dismissal order, the "Departments of the Treasury, Labor, and Health and Human Services are responsible for monitoring the accuracy of the QPA calculation methodology."[49] *See* 87 Fed. Reg. 52618, 52627 n.31 (Aug. 26, 2022). It is not the role of an IDR arbitrator to assess a health plans' QPA or reimbursement amount—its only task is to "determine[e] which offer is the payment to be applied …." 42 U.S.C § 300gg-112(b)(5).

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46 ROA.24-20204.1878.

47 ROA.24-20204.1878.

48 ROA.24-20204.1878 (quoting ROA.24-20204.514-15 (¶35)).

49 ROA.24-20204.1879.

By rule, "[t]o the extent there is a question whether a plan" has complied with the rules "for calculating the QPA, it is the Departments' (or applicable State authorities') responsibility, not the certified IDR entity, to monitor the accuracy of plan's or issuer's QPA calculation …." Requirements Related to Surprise Billing (Final Rules) 87 Fed. Reg., at 52627 n.31. The district court thus concluded that "Plaintiffs' complaints about the accuracy of Aetna and Kaiser's QPA calculations are better suited for the aforementioned Departments to address."[50]

The district court thus granted Aetna's and Kaiser's motions to dismiss but granted the Providers leave to amend their complaints if they could do so consistent with the dismissal order.[51] (Likely unable to do so, the Providers chose not to amend; they appealed instead.)

The district court then denied MET's motion to dismiss because: (1) it would not "summarily assume the protections afforded to arbitrators under the federal common law automatically extend to IDR entities"; and (2) Guardian Flight's and CALSTAR's allegations against MET were sufficient to state a claim "that MET may have exceeded its powers in contravention of Section 10(a) of the FAA."[52]

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50 ROA.24-20204.1879.

51 ROA.24-20204.1879.

52 ROA.24-20204.1879-81.

## III. SUMMARY OF THE ARGUMENT

The district court correctly dismissed Guardian Flight's complaint against Aetna. The NSA limits judicial review of an IDR award to the four narrow grounds in Section 10(a) of the FAA. The Providers' argument that a court can judicially "consider" and vacate an IDR award for alleged fraud and misrepresentations in the IDR process without conducting a judicial review is semantic nonsense. Judicial "consideration" of an IDR award is the same as judicial review of the award. Guardian Flight thus had to allege a basis for judicial review under Section 10(a) in its complaint against Aetna. Guardian Flight failed to do so.

Moreover, Guardian Flight failed to state a claim against Aetna even under the Providers' nonsensical judicial "consideration" standard. Guardian Flight argues that Aetna committed fraud in reporting its QPA to the IDR arbitrator because the QPA calculation is allegedly "improbably low." Guardian Flight's complaint did not allege fraud with the particularity Rule 9(b) requires for all averments of fraud. Indeed, Guardian Flight's complaint is devoid of any factual allegations whatsoever explaining why Aetna's QPA was not properly calculated.

Thus, Guardian Flight's complaint lacked any basis for the district court to review or consider the IDR arbitrator's award selecting Aetna's payment amount for Guardian Flight's services.

## IV. STANDARD OF REVIEW

The dismissal of a complaint is reviewed *de novo*. *Lewis v. Danos*, 83 F.4th 948, 953 (5th Cir. 2023). The Court accepts as true "all well-pleaded facts and construes the allegations in the light most favorable to the plaintiff." *Id.* That said, the Court does "not accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions." *Id.* "A complaint must include 'sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

"This court may affirm a district court's dismissal of a suit for failure to state a claim on any basis supported by the record." *Favre v. Sharpe*, __ F.4th __, No. 23-60610, 2024 WL 4196552, at *3 (5th Cir. Sept. 16, 2024) (citation omitted).

## V. ARGUMENT AND AUTHORITIES

### A. The NSA limits judicial review of an IDR award to the four narrow exceptions in Section 10(a) of the FAA

#### 1. There is no distinction between judicial "consideration" of an IDR award and judicial review of the award

42 U.S.C. § 300gg-111(c)(5)(E)(i)(II) ("Subsection (II)") is unambiguous: an IDR entity's award "shall not be subject to judicial review, except in a case described in any of paragraphs (1) through (4) of section 10(a)" of the FAA. The Providers argue, however, that a court can also

order vacatur of an IDR arbitrator's award even when Subsection (II) is ***not*** triggered, *i.e.*, when the case is ***not*** one described in any of paragraphs (1) through (4) of Section 10(a).

The Providers premise their argument on 42 U.S.C § 300gg-111(c)(5)(E)(I) ("Subsection (I)"), under which an IDR arbitrator's award "shall be binding upon the parties involved, in the absence of a fraudulent claim or misrepresentation of facts presented to the IDR entity involved regarding such claim." The Providers argue that notwithstanding Subsection (II), in a case where "the inputs to the [IDR] determination are tainted by fraud or factual misrepresentation," "vacatur of the determination is appropriate with remand to the IDR entity for another proceeding."[53]

According to the Providers, "this is not judicial review of the determination," but "is instead a recognition that the determination was unfairly obtained and cannot be given legal effect."[54] Stated differently, the Providers maintain a court can issue "a declaration that an IDR determination must be disregarded or set aside" because it is infected

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[53] App. Br. at 29–30.

[54] App. Br. at 30 n.10.

with misrepresentations ***without*** conducting a judicial review.[55] "This is semantic nonsense." *Chao v. Rothermel*, 327 F.3d 223, 226 (3d Cir. 2003).

There cannot be a judicial "recognition" or a judicial "declaration" that an IDR award was "unfairly obtained and cannot be given legal effect" ***without*** a preceding judicial review of the IDR award. *See Judicial Review*, BLACK'S LAW DICTIONARY (12th ed. 2024) ("**1.** A court's power to review the actions of other branches or levels of government; esp., the courts' power to invalidate legislative and executive actions as being unconstitutional. **2.** The constitutional doctrine providing for this power. **3.** A court's review of a lower court's or an administrative body's factual or legal findings.").

For a district court to "recognize" or "declare" that an IDR award was tainted by fraud or factual misrepresentation and should be vacated, it would first ***have*** to conduct a judicial review of the award. *See* 28 U.S.C. § 2106 ("The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully ***brought before it for review*** …") (emphasis added). A court cannot simply accept the complainant's word that the taint exists and enter judgment in its favor vacating an IDR award.

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[55] App. Br. at 35.

Indeed, to vacate an award without first conducting a judicial review would be misconduct. *See* Code of Conduct for United States Judges, 175 F.R.D. 363, 367, Canon 3(A)(4) ("A judge should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law …"). And, under Subsection (II), a court can only conduct such a judicial review if the complainant meets its burden to show the case is one described in paragraphs (1) through (4) of Section 10(a) of the FAA. *See* 42 U.S.C. § 300gg-111(c)(5)(E)(i)(II).[56]

The Providers theorize that a court can "consider" whether an IDR award should be vacated under Subsection (I) without satisfaction of the Subsection (II) prerequisites for judicial review.[57] In other words, the Providers attempt to split hairs and create a distinction between judicial "consideration" of an IDR award and judicial "review" of the award. But no such distinction exists in law or reality. *See Review*, BLACK'S LAW

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[56] *See* App. Br. at 31 ("The plain text of [Subsection (II)] therefore indicates that a party asking a court to review and IDR entity's determination … must establish that the 'case' meets one of these four criteria.").

[57] App. Br. at 36 ("In [Subsection (I)], the court considers whether the [IDR] determination is void altogether, while in [Subsection II], the court evaluates the determination through judicial review on the model of an appeal.") (citation omitted).

DICTIONARY (12th ed. 2024) ("***Consideration***, inspection, or reexamination of a subject or thing.") (emphasis added). Judicial "consideration" of an IDR award is judicial review.

The only putative support the Providers offer for their "judicial consideration" theory is a comment in the Restatement (Second) of Judgments.[58] That comment, however, does not recognize a distinction between judicial consideration and judicial review; indeed, the comment does not even address the subject. Rather, the comment asserts that there are two connotations of invalidity regarding modern administrative procedure. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 83 cmt. d (1982).

"One connotation entails that kind of irregularity which justifies judicial review." *Id.* The other connotation involves treating an administrative determination as a nullity because of lack of subject-matter or territorial jurisdiction or adequate notice. *Id.* (stating that the definition of this second connotation is guided by comments in § 12, which addresses contesting subject matter jurisdiction, and § 65, which addresses invalidity in a default judgment for lack of subject-matter or territorial jurisdiction or adequate notice); *see* RESTATEMENT (SECOND) OF JUDGMENTS §§ 12, 65 (1982).

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[58] *See* App. Br. at 36.

Here, the alleged irregularities—fraud and misrepresentations in the pre-IDR process—fall squarely within the first connotation. Nothing in the Restatement comment provides any authority for the Providers' notion that a court can "consider" the validity of an IDR arbitrator's award because of alleged fraud or misrepresentations without conducting a judicial review of the award. Suffice it to say that the lengths to which Providers go to try and distinguish judicial "review" from judicial "consideration" only highlights their inability to meet the requirements for federal jurisdiction under Subsection (II).

In short, "[S]ubsection (II) is the final word on reviewability." *Med-Trans*, 700 F. Supp. 3d at 1086. The district court correctly held that the NSA prohibits judicial review of the Providers' claims that Aetna and Kaiser misrepresented their respective QPAs because Subsection (II) provides the exclusive avenue for judicial review of the IDR awards. Contrary to the Providers' claim, in so holding, the district court did ***not*** "read Subsection (I) out of the statute."[59] Rather, the district court properly recognized that the Providers were seeking judicial review and so must satisfy Subsection (II)'s requirements for reviewability.

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[59] App. Br. at 34 (emphasis omitted).

### 2. The NSA does not raise due process concerns

The Providers argue that "if a party to NSA IDR cannot obtain relief from an IDR determination where it has plausibly alleged that its adversary has misrepresented a crucial fact—and won the IDR on that basis—then the scheme raises substantial constitutional concerns."[60]

The Providers ignore that the Departments of the Treasury, Labor, and Health and Human Services provide regulatory oversight, including "monitor[ing] the accuracy of plan's or issuer's QPA calculation methodology by conducting an audit of the plan's or issuer's QPA calculation methodology." Requirements Related to Surprise Billing (Final Rules) 87 Fed. Reg. at 52627 n.31. The Department of Health and Human Services has set up a portal through which a provider can file a complaint if it believes a QPA asserted in the IDR process was erroneous or misrepresented. *See No Surprises Complaint Form*, https://NSA-idr.cms.gov/providercomplaints/s/. Moreover, the Providers here did ***not*** plausibly allege misrepresentations in the QPA process under any standard. *See* § B, *infra*. But even if they had, that would not undermine the district court's dismissal.

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[60] App. Br. at 48.

The Providers' primary concern is that Congress replaced the common-law right to sue with the NSA's mandatory IDR process.[61] However, the Supreme Court has affirmed Congress's authority to create statutory schemes with binding arbitration and only limited judicial review. *See Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 571 (1985) (upholding a statutory scheme in the Federal Insecticide Fungicide and Rodenticide Act ('FIFRA') requiring that disputes over compensation for data sharing be decided by arbitration, with the arbitration decisions being subject to judicial review only for "fraud, misrepresentation, or other misconduct"); *see also Switchmen's Union of N. Am. v. Nat'l Mediation Bd.*, 320 U.S. 297, 301 (1943) (Railway Labor Act). "To hold otherwise would be to erect a rigid and formalistic restraint on the ability of Congress to adopt innovative measures such as negotiation and arbitration with respect to rights created by a regulatory scheme." *Thomas*, 473 U.S. at 594.

The Providers argue that in *Thomas*, and in other cases Aetna and Kaiser cited below in which arbitration was mandatory and judicial review was limited, the underlying arbitrations had more robust

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61 *See* App. Br. at 48–51

procedures than what is available under the NSA.[62] But the Providers do not cite any authority for their hypothesis that IDR procedures they deem inadequate must be balanced by heightened levels of judicial review that depart from the judicial review prescribed by Section 10(a) of the FAA. That the NSA mandates participation in the IDR process does not provide any basis to relieve the Providers of their Subsection (II) burden to plead with particularity a basis for judicial review under Section 10(a).

## B. As the district court held, Guardian Flight's complaint against Aetna "falls woefully short" of satisfying Section 10(a)

### 1. Guardian Flight did not sufficiently allege "fraud or undue means" under Section 10(a)

Under Subsection (II), judicial review of an IDR award is permitted only under a narrow set of circumstances described in paragraphs (1) through (4) of Section 10(a) of the FAA. *See* 42 U.S.C. § 300gg-111(c)(5)(E)(i)(II); *see YPF S.A. v. Apache Overseas, Inc.*, 924 F.3d 815, 819 (5th Cir. 2019) (recognizing that the circumstances are "extraordinarily narrow").

Stated differently, an IDR award is not subject to judicial review except where (1) it was "procured by corruption, fraud, or undue means"; (2) there was evident partiality or corruption by the IDR

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[62] *See* App. Br. at 51.

arbitrator; (3) the IDR arbitrator was guilty of misconduct; or (4) the IDR arbitrator exceeded its powers or so imperfectly executed them that a mutual, definite, and final award upon the subject matter submitted was not made. 9 U.S.C § 10(a)(1)–(4). "[R]eview under § 10 focuses on misconduct rather than mistake." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350–51 (2011).

After going to great lengths attempting to attempt to create a non-existent distinction between judicial review and judicial "consideration," the Providers argue that their allegations satisfy the Section 10(a)(1) standard for judicial review for fraud or undue means.[63] The district court correctly rejected the Providers' argument.

Because Subsection (II) directly incorporates paragraphs (1) through (4) of Section 10(a), "the 'understood meaning'" of these paragraphs "is incorporated as well." *Med-Trans*, 700 F. Supp. 3d at 1084; *see Assa'ad v. United States. Att'y Gen.*, 332 F.3d 1321, 1329 (11th Cir. 2003) ("When Congress uses language with a well-known legal meaning, [courts] generally presume that it was aware of and intended the statute to incorporate that understood meaning.").[64]

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[63] *See* App. Br. at 42.

[64] *See also Georgia v. Public Res. Org., Inc.*, 590 U.S. 255, 270 (2020) ("[W]hen Congress adopts the language used in an earlier act, we presume that Congress adopted also the construction given by this Court to such language, and made it a part of

"The 'understood meaning' of the incorporated § 10(a) categories is extremely narrow." *Med-Trans*, 700 F. Supp. 3d at 1085. "In other words, an arbitration award will fall under § 10(a) only in 'very unusual circumstances.'" *Id.* (quoting *Gherardi v. Citigroup Glob. Mkts. Inc.*, 975 F.3d 1232, 1236–37 (11th Cir. 2020)). Those very unusual circumstances are not present here.

Simply put, "fraudulent conduct" is not enough to meet the requirements of Section 10(a)(1). Courts have established that Section 10(a)(1) "does not provide for vacatur in the event of any fraudulent conduct, but only where the award was procured by corruption, fraud, or undue means." *Forsythe Int'l, S.A. v. Gibbs Oil Co. of Tex.*, 915 F.2d 1017, 1022 (5th Cir. 1990); *see* 9 U.S.C. § 10(a)(1). Notably, the "phrase 'undue means' in the statute follows the terms 'corruption' and 'fraud.' It is a familiar principle of statutory construction that a word should be known by the company it keeps." *Nat'l Cas. Co. v. First State Ins. Grp.*, 430 F.3d 492, 499 (1st Cir. 2005).

In this context, "'undue means' connotes "behavior that is immoral if not illegal or otherwise in bad faith." *In re Arb. Between Trans Chem.*

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the enactment.") (cleaned up); *United States v. Fla.*, 938 F.3d 1221, 1228 (11th Cir. 2019) ("When Congress adopts a new law that incorporates sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law ….") (quotation omitted).

*Ltd.*, 978 F. Supp. at 304 (citation omitted); *see Am. Postal Workers Union, AFL-CIO v. United States Postal Serv.*, 52 F.3d 359, 362 (D.C. Cir. 1995) ("[U]ndue means must be limited to an action by a party that is equivalent in gravity to corruption or fraud, such as a physical threat to an arbitrator or other improper influence.") (emphasis omitted).

The Providers argue that their complaints satisfy Section 10(a) because, "[w]here a complaint alleges that an insurer won the IDR by misrepresenting its QPA after refusing to provide the mandatory disclosures that would have revealed its maneuvers, it shows 'bad faith.'"[65] Again, the allegation that Aetna refused to provide the mandatory 45 C.F.R. § 149.140(d)(2) disclosures to Guardian Flight is incorrect. The email in which Aetna made the required disclosures to Guardian Flight during the open negotiation period is at ROA.24-20204.578.[66]

More importantly, the salient issue is that the Providers' conclusory allegations of alleged QPA misrepresentations do not state a claim under Section 10(a)(1). As the district court correctly held, the

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[65] App. Br. at 45.

[66] Guardian Flight complained below that Aetna made the disclosures after Guardian Flight submitted its position statement to the IDR arbitrator. *See* ROA.24-20204.623-24. But the NSA contemplates continuing negotiations while the IDR process is pending. *See* 42 U.S.C § 300gg-112(b)(2)(B).

Providers' "allegations do not rise to the level of suggesting that Aetna nor Kaiser engaged in immoral or illegal behavior. And any allegations about either entity behaving in bad faith are conclusory, at best, and are not factually supported."[67]

### 2. The Providers' arguments for an alternative understanding of "fraud or undue means" are unavailing

The Providers also contend that their complaints did not have to satisfy the understood meaning of "fraud and undue means" in Section 10(a). Instead, they argue, these terms "should be given their plain meaning" because "the NSA does not state that vacatur of an IDR determination is available only where it would be available under the FAA," and because the IDR process is "different from arbitration."[68]

Neither of these arguments provides a basis to disregard the "cardinal rule of statutory construction that, when Congress employs a term of art, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken." *Fed. Aviation Admin. v. Cooper*, 566 U.S. 284, 292 (2012). Here, Congress did not merely repeat the FAA's language but actually incorporated the entirety of Section 10(a)(1)–(4) by reference.

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[67] ROA.24-20204.1879.

[68] App. Br. at 44.

In any event, the Providers concede that, even under their self-invented "plain meaning" standard, their complaints would have to satisfy Federal Rule of Civil Procedure 9(b).[69] Guardian Flight's complaint against Aetna did not come anywhere close to satisfying Rule 9(b)'s requirements that a plaintiff "specify the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent." *Hermann Holdings Ltd. v. Invent Techs., Inc.*, 302 F.3d 552, 564–65 (5th Cir. 2002) (citation omitted).

Guardian Flight "believe[s]" Aetna misrepresented its QPA based on an alleged "divergence" from unidentified "market data."[70] However, Guardian Flight's complaint is devoid of any factual allegations whatsoever explaining why Aetna's QPA was not properly calculated. Guardian Flight argues its mere belief in Aetna's fraud is sufficient because the facts are "not within [Guardian Flight's] control."[71] In support, the Providers repeat Guardian Flight's false allegation that

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69 *See* App. Br. at 47 (stating it is the Providers' position that "Rule 9(b) standards should apply here").

70 App. Br. at 40. In summarizing their allegations, the Providers notably focus on Kaiser and a separate Aetna entity that has nothing to do with this litigation, not Aetna. *See id.* at 40 & n.14

71 App. Br. at 41.

Aetna "with[e]ld information regarding [its] QPA calculation."[72] Guardian Flight possessed the very information it claims Aetna has refused to provide.

While fraud "may be based on information and belief" if the "facts pleaded in a complaint are peculiarly within the opposing party's knowledge," this "exception must not be mistaken for license to base claims of fraud on speculation and conclusory allegations." *Tuchman v. DSC Commc'ns Corp.*, 14 F.3d 1061, 1068 (5th Cir. 1994); *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir. 1997).

That is, "even where allegations are based on information and belief, the complaint ***must set forth a factual basis*** for such belief." *Id.* (emphasis added); *see Wexner v. First Manhattan Co.*, 902 F.2d 169, 172 (2d Cir. 1990) ("Where pleading is permitted on information and belief, a complaint must adduce specific facts supporting a strong inference of fraud or it will not satisfy even a relaxed pleading standard."). Guardian Flight did not allege any such factual basis in its complaint against Aetna. Guardian Flight's unsupported belief that Aetna procured the IDR decision through fraud simply because Aetna's QPA calculation was a

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[72] App. Br. at 41.

few thousand dollars less than what Guardian Flight would like to be paid does not give rise to any inference—much less a strong inference—of fraud in any form.

Accordingly, Guardian Flight's complaint is deficient even under the Providers' misbegotten Subsection (I) "judicial consideration" theory.

### C. Even under the Providers' erroneous review theory, Guardian Flight failed to state a claim against Aetna

As Subsection (I) does not provide an independent avenue for judicial review (*see* § V.A, *supra*), the Providers' arguments that the IDR awards are not binding under Subsection (I) are legally irrelevant.

However, assuming *arguendo* that Subsection (I) provides an avenue for judicial "consideration" and vacatur of an IDR award despite Subsection (II)'s limitation on judicial review, the Providers' complaints would still have to satisfy Rule 9(b)'s pleading requirements—as even the Providers acknowledge.[73] *See* 45 C.F.R. § 149.510(c)(4)(vii)(A)(1) (providing that an IDR determination is "binding upon the parties, in the absence of fraud or evidence of intentional misrepresentation of material facts presented to the certified IDR entity regarding the claim"). Thus,

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[73] *See* App. Br. at 38–39.

Guardian Flight's complaint fails to state a claim against Aetna for the reasons stated in § V.B.2, *supra*.[74]

## VI. CONCLUSION

Congress enacted the NSA to protect patients from surprise bills for out-of-network emergency services and to provide an efficient IDR mechanism for providers and health plans to resolve payment disputes. A key method for achieving that efficiency is limiting the bases on which an IDR award may be challenged in court to the four narrow grounds provided in the FAA, thereby discouraging a proliferation of litigation. The NSA cannot be interpreted to permit judicial review and vacatur of final IDR awards based on conclusory assertions that the QPA was "improbably low" or otherwise allegedly misrepresented.

The Court should affirm the district court's dismissal of Guardian Flight's complaint against Aetna.

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[74] To the extent the district court did not reach this fully-briefed issue because it held—correctly—that Subsection (II) provides the exclusive avenue for judicial review, the Court can address it in the first instance and affirm. *See Favre*, 2024 WL 4196552, at *3; *Peavy v. WFAA-TV, Inc.*, 221 F.3d 158, 168 (5th Cir. 2000).

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2024, an electronic copy of the Brief of Defendant-Appellee Aetna Health Inc. was served by notice of electronic filing via this Court's CM/ECF system on all counsel of record.

Upon notification that the electronically filed Brief has been accepted as sufficient, and upon the Clerk's request, seven (7) paper copies of this Brief will be submitted to the Clerk. *See* 5th Cir. R. 25.2.1; 5th Cir. R. 31.1.

*/s/ John B. Shely*
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## CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limitation of FED. R. APP. P. 32(a)(7) because this document contains 8,719 words, excluding the parts of the document exempted by FED. R. APP. P. 32(f).

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