IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

NEUROLOGICAL SURGERY PRACTICE OF LONG ISLAND, PLLC, Plaintiff, v. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*, Defendants.	Civil Action No. 1:23-cv-2977-BMC

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

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INTRODUCTION

The No Surprises Act (the "Act") prohibits health care providers from balance billing patients for certain out-of-network items or services. In lieu of receiving payment (other than cost-sharing) for those services directly from patients, if the provider and the health plan[1] cannot agree on a payment amount through negotiation, the Act creates an independent dispute resolution ("IDR") process in which a private, independent arbitrator ("IDR entity") selects between offers submitted by each party. The Act sets forth a framework of statutory timelines for a health plan's initial payment decision, the IDR entity's selection of an offer, and the health plan's additional payment following an IDR determination, if necessary.

The Defendants here, the Departments of Labor, Health and Human Services, and the Treasury ("Departments"), have worked tirelessly over the past two and a half years to implement the Act's requirements and get the IDR process up and running. This has not been an easy task, and the overwhelming and unanticipated volume of disputes has led to a backlog awaiting resolution. In response, the Departments have devoted additional resources to help IDR entities resolve disputes more quickly. Although Plaintiff wishes overwhelmed IDR entities could issue determinations faster, it identifies no enforcement mechanism against them other than decertification—a step it never requested, and which would only worsen the backlog. And while Plaintiff also complains that health plans have failed to comply with various statutory requirements, including payment deadlines, the Departments are fully committed to those requirements, as reflected in agency guidance, and the Departments, as well as state authorities, have enforced them on many occasions.

Plaintiff seeks a wide-ranging mandatory injunction ordering the Departments to take 13 indistinct actions, including that they force health plans and IDR entities to comply with the Act's statutory requirements. But Plaintiff lacks standing because it is the private health plans and IDR entities, not the Departments, that it alleges are failing to meet statutory deadlines, causing

[1] For ease of reference, this brief uses "health plan" to refer to group health plans and health insurance issuers offering group or individual health insurance coverage, and "provider" to refer to providers, facilities, and providers of air ambulance services.

Plaintiff's alleged injuries. Plaintiff's claims also fail as a matter of law because Plaintiff cannot point to specific and unequivocal statutory commands requiring the Departments to take the laundry list of actions that it asks this Court to compel. Plaintiff's claims that the Departments have inadequately enforced the Act's requirements likewise fail, because an agency's enforcement decisions are presumptively immune to judicial review. Implementing the Act requires a careful balancing of limited resources and complex policy choices that Congress charged the Departments, not courts, to make. This Court should dismiss this case in its entirety.

ARGUMENT

I. The Court should dismiss the Complaint for lack of subject-matter jurisdiction because Plaintiff lacks standing to bring its claims against the Departments.

Plaintiff paints with a broad brush to blame the Departments for its alleged injuries. But closer inspection reveals that Plaintiff's claimed injuries—allegedly resulting from payment delays by health plans and delayed determinations from IDR entities—are caused not by the Departments, but by independent third parties, namely, health plans and IDR entities. *See* Compl. ¶ 32, ECF No. 1 ("health plans fail to comply with the 30-day deadline"); *id*. ¶ 43 (blaming "plans' bad faith conduct"); *id*. ¶ 45 ("the certified IDR entity shall" select an offer within 30 days); *id*. ¶ 57 ("health plans have delayed"); *id*. ¶ 70 ("the plans have breached their statutory obligations [] to pay"); Pl.'s Opp'n to Defs.' Mot. to Dismiss and Reply in Supp. of Mot. for PI ("Pl.'s Reply") at 1, ECF No. 18 ("Defendants have failed to . . . require adherence to statutory timelines").

"When, as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, much more is needed" to establish standing. *Lujan v. Defenders. of Wildlife*, 504 U.S. 555, 562 (1992). The burden is on Plaintiff "to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury." *Id*. In other words, there must still be a "causal nexus between the defendant's conduct and the injury." *Heldman v. Sobol*, 962 F.2d 148, 156 (2d Cir.1992). But Plaintiff does not point to any actions by the Departments that have caused the injuries it complains of—for example, Plaintiff does not dispute that the massive and unanticipated

volume of disputes initiated in the IDR process, which has overwhelmed the IDR entities, is responsible for the delays in payment determinations that Plaintiff claims injure it. *See* Ctrs. for Medicare & Medicaid Servs., Amendment to the Calendar Year 2023 Fee Guidance for the Federal Independent Dispute Resolution Process Under the No Surprises Act: Change in Administrative Fee, 3-4 (Dec. 23, 2022), https://perma.cc/9QCD-FVH4 (recognizing backlog of disputes and the Departments' efforts to address it). Likewise, payment delays from health plans are caused by the plans themselves—in fact, at virtually the same time it filed this case, Plaintiff filed lawsuits against those health plans directly, further demonstrating that Plaintiff recognizes that the health plans are the cause of its injuries.[2]

Plaintiff's reliance on cases involving indirect causation do not save it here because those cases are inapposite. For example, in *Fulani v. League of Women Voters Education Fund*, 882 F.2d 621, 627 (2d. Cir. 1989), there was an "evident nexus" between the challenged government action and the plaintiff's injury. But for the League's 501(c)(3) status, it would not have been authorized to sponsor candidate debates, and thus would not have been able to exclude the plaintiff from its debates, causing the plaintiff's injuries. *Id*. at 628. Here, by contrast, Plaintiff can point to no specific action by the Departments authorizing the health plans and arbitrators to fail to meet the statutory deadlines. *See Turaani v. Wray*, 988 F.3d 313, 316 (6th Cir. 2021) ("An indirect theory of traceability requires that the government cajole, coerce, command."). Indeed, Plaintiff alleges that the third-party actions it complains of are in violation of clear statutory requirements and agency guidance, but it cannot establish standing based on an alleged failure to adequately enforce those requirements. *See In re Attorney Disciplinary Appeal*, 650 F.3d 202, 203-04 (2d Cir.2011) (per curiam) (recognizing "rule that 'a private citizen lacks a judicially cognizable interest in the

[2] *See Neurological Surgery Prac. of Long Island, PLLC v. UnitedHealthCare Ins. Co. of N.Y.*, No. 1:23-cv-3007-NRM-PK (E.D.N.Y. Apr. 21, 2023); *Neurological Surgery Prac. of Long Island, PLLC v. Emblemhealth, Inc*., No. 1:23-cv-3029-JS-SIL (E.D.N.Y. Apr. 21, 2023); *Neurological Surgery Prac. of Long Island, PLLC v. Cigna Health & Life Ins. Co.*, No. 2:23-cv-3047-GRB-SIL (E.D.N.Y. Apr. 21, 2023); *Neurological Surgery Prac. of Long Island, PLLC v. Cigna Health & Life Ins. Co.*, No. 2:23-cv-3048-GRB-JMW (E.D.N.Y. Apr. 21, 2023); *Neurological Surgery Prac. of Long Island, PLLC v. Empire Blue Cross Blue Shield*, No. 2:23-cv-3050-JS-LGD (E.D.N.Y. Apr. 21, 2023).

prosecution or nonprosecution of another,' and therefore 'lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution.'") (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973)); *see also R.R. 1900, LLC v. City of Sacramento*, 604 F. Supp. 3d 968, 973-74 (E.D. Cal. 2022) (collecting cases on lack of standing by third parties to challenge civil enforcement decisions).

Plaintiff also cannot establish that the requested injunction will redress its alleged injuries. As an initial matter, although Plaintiff asks the Court to order the Departments to compel health plans and IDR entities to comply with statutory deadlines, Pl.'s Reply at 7, *see also id.* at 22 n.7 (asking Court to order Departments to "compel the managed care companies' compliance with deadlines"), the law, of course, *already* compels those third parties to do so, *see* Defs.' Br. at 5-6. The Departments, and in some instances state authorities, may take enforcement action against private parties when they fail to comply with the law, and they have done so. *See* ECF No. 15-2 (Decl. of William Barron; ECF No. 15-3 (Decl. of Jeff Wu).[3] This is a case where it is entirely speculative that an exercise of the "court's remedial powers" would achieve Plaintiff's desired result. *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 43 (1976). Plaintiff identifies no enforcement mechanism against IDR entities that fail to meet statutory timelines other than decertification, which it never claims to have petitioned for, *see* Defs.' Br. at 20 n.9 (explaining process), and which would result in even fewer IDR entities to resolve the massive volume of disputes. Certainly, decertifying IDR entities would not redress Plaintiff's alleged injuries—it would only exacerbate them.

II. The Court should dismiss the Complaint for failure to state a claim.

A. Plaintiff fails to identify a discrete, mandatory obligation that the Departments have violated.

To state a claim under Section 706(1) of the APA or the All-Writs Act challenging agency

[3] In many states, including New York, it is state authorities who have primary enforcement authority against health insurance issuers. *See* Letter from Ellen Montz, Director, Center for Consumer Information and Insurance Oversight to Governor Hochul, at 2 (July 29, 2022), https://perma.cc/32LL-CW45 (explaining state enforcement authority).

*in*action, Plaintiff must show that Defendants failed to take a "*discrete* agency action that [an agency] is *required to take*." *Norton v. S. Utah Wilderness All.* ("*SUWA*"), 542 U.S. 55, 64 (2004). To meet its burden under either of these statutes, Plaintiff must establish that the No Surprises Act imposes a "ministerial or non-discretionary" duty amounting to a "specific, unequivocal command." *Id*. at 63-64 Plaintiff has failed to make that showing. Plaintiff does not even attempt to cite to specific statutory provisions that it claims mandate the requested actions, instead vaguely referencing the statutory requirement to "establish an IDR process." Pl.'s Reply at 12; *see SUWA*, 542 U.S. at 66 (holding that "[g]eneral deficiencies in compliance . . . lack the specificity requisite for agency action").

Plaintiff's assertions that health plans and IDR entities have failed to meet mandatory deadlines imposed by the Act are insufficient to state a claim that the Departments have failed to take a required action. Pl.'s Reply at 12-13, 14. The Departments complied with their statutory obligation to establish an IDR process and did so within the requisite timeframe. *See* 42 U.S.C. § 300gg-111(c)(2)(A) (requiring regulations to establish the IDR process no later than December 27, 2021); *Requirements Related to Surprise Billing; Part II*, 86 Fed. Reg. 55,980 (Oct. 7, 2021) (regulations establishing IDR process). They have issued the regulations required by the Act and have complied with every other relevant statutory requirement that has come due. *See, e.g.*, 42 U.S.C. § 300gg-111(c)(4)(A) (requiring Departments to establish a process to certify IDR entities); 45 C.F.R. § 149.510(e) (establishing process for certifying IDR entities); 42 U.S.C. § 300gg-111(c)(3)(A) (requiring Departments to specify criteria for batching); 45 C.F.R. § 149.510(c)(3)(i) (establishing criteria for batching). "[T]he mandatoriness requirement [of Section 706(1)] means that courts cannot compel agencies to take action beyond what is legally required of them." *Ctr. for Biological Diversity v. Zinke*, 260 F. Supp. 3d 11, 20 (D.D.C. 2017). A court's authority under the APA is thus limited to directing the agency to take a specific, non-discretionary, action "without directing *how* it shall act." *SUWA*, 542 U.S. at 64 (quoting Attorney General's Manual on the Administrative Procedure Act 108 (1947)). Plaintiff cannot and does not identify any specific, mandatory, statutory obligation that the Departments were required, but failed, to

undertake, but instead attempts to improperly use this Court to dictate *how* the Departments should expend their limited resources.[4]

Plaintiff points to statistics regarding how often IDR entities are unable to resolve disputes within the statutory timelines. Pl.'s Reply at 13-14. But those statistics do not suggest a failure on the part of the Departments to comply with a specific statutory obligation, but instead reflect the reality that arbitrators have been overwhelmed by an unanticipated volume of disputes and are unable to keep up with the growing backlog. And the backlog hardly represents a "complete failure" of the IDR process, as Plaintiff claims. *Id*. at 13. IDR entities have resolved over 100,000 disputes—more than five times the volume that they were expected to resolve. Ctrs. For Medicare & Medicaid Servs., Federal Independent Dispute Resolution Process—Status Update (April 27, 2023), https://perma.cc/R2VD-JV2G. The Departments likewise cannot force private arbitration businesses to choose to become certified IDR entities—they can only offer additional support to assist arbitrators, which they have done. *See* Amendment to the Calendar Year 2023 Fee Guidance at 3-4 (explaining goal of increased resources was to "ensure more timely processing of disputes assigned to certified IDR entities").

Plaintiff's allegation that the Departments have improperly rejected certain disputes involving state-regulated payors where patients were "aware before arriving in the hospital that the provider was out-of-network, but chose to proceed anyway," Pl.'s Reply at 15-16, likewise fails to state a claim under the APA. First of all, it is IDR entities, not the Departments, who make eligibility determinations under the current regulations. *See* 45 C.F.R. § 149.510(c). Plaintiff has

[4] Plaintiff appears to suggest that the Departments failed to open the IDR portal in a timely fashion, but this suggestion misrepresents the Act's timelines and procedures. The Act applies to items or services furnished on or after January 1, 2022. 42 U.S.C. §§ 300gg-131; 300gg-132. The IDR portal opened in April of 2022, when disputes were beginning to reach the IDR process after completing all of the Act's processes, including the 30-day initial payment deadline after receipt of a bill for services, 42 U.S.C. § 300gg-111(a)(1)(C)(iv)(I), (b)(1)(C), and the 30-day open negotiation period, *id*. § 300gg-111(c)(1)(A), among others. Since the portal first opened, IDR determinations were paused for only a few weeks while the Departments drafted new guidance in response to the court's opinion in *Texas Medical Association v. U.S. Department of Health and Human Services* ("TMA II"), __ F Supp. 3d __, 2023 WL 1781801 (E.D. Tex. Feb. 6, 2023), *appeal filed*, No. 23-40217, 2023 WL 1781801 (5th Cir. Apr. 11, 2023).

thus failed to identify a mandatory, non-discretionary duty that the Departments are failing to undertake. Plaintiff does not take issue with, or even mention, the guidance provided to IDR entities by the Departments regarding when a specified state law applies and renders a dispute ineligible for the Federal IDR process. *See* Ctrs. For Medicare & Medicaid Servs., Chart Regarding Applicability of the Federal Independent Dispute Resolution Process in Bifurcated States, (Jan. 13, 2023) https://perma.cc/86R7-N3EM. [5]

Plaintiff's argument that health plans' and IDR entities' failure to meet statutory timelines amounts to a "complete abrogation of [the Departments] mandate to establish an IDR process" is an inaccurate hyperbole. Reply at 17. The Departments have complied with every relevant obligation imposed by the Act, and have established an IDR process which, while not perfect, has resolved over 100,000 disputes in less than a year. Because Plaintiff fails to identify an unambiguous, non-discretionary statutory obligation that the Departments have failed to comply with, the Court should dismiss Plaintiff's APA and All-Writs Act claims.

B. Plaintiff cannot reasonably dispute that the Departments have taken steps to enforce the Act's requirements, and any claims about the exercise of that enforcement discretion are nonreviewable.

To the extent that Plaintiff seeks an injunction requiring the Departments to devote more resources towards enforcement of the Act's requirements, Plaintiff's claims must be dismissed because an agency's enforcement decisions are "committed to [its] discretion," 5 U.S.C. § 701(a)(2), and thus "immune from judicial review," *Heckler v. Chaney*, 470 U.S. 821, 828-33 (1985). Plaintiff's only response on this point is to assert that this case falls into the exception to *Chaney's* principle of non-reviewability where an agency has "'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory

[5] In its reply brief, Plaintiff appears to suggest for the first time that certain of its patients had knowledge that they were receiving out-of-network care and chose to proceed anyway, but did not sign the Act's notice and consent forms, and that IDR entities should have determined that disputes involving such patients were eligible for the Federal IDR process on the ground that New York's balance billing law did not apply. *See* Pl.'s Reply at 16 & n.6. Despite this assertion, Plaintiff submits no evidence concerning any such patients. Nor does it contend that it has brought this issue to the Departments' attention in any manner before filing suit.

responsibilities." *Id.* at 833 n.4; *see* Pl.'s Reply at 17-18. But this is a far cry from such a case: Not only does Plaintiff identify no "expressly adopted," across-the-board policy of nonenforcement, but it completely ignores the uncontroverted declarations submitted by the Departments attesting that they have undertaken enforcement actions against health plans that have failed to comply with statutory payment deadlines. *See* ECF No. 15-2 (Decl. of William Barron), ECF No. 15-3 (Decl. of Jeff Wu). Plaintiff's assertion that the Departments have "completely failed to do *anything* to enforce" the Act's requirements, Pl.'s Reply at 17, is demonstrably incorrect.[6]

Indeed, here the Departments have simply engaged in the usual "complicated balancing of a number of factors which are peculiarly within [the agencies'] expertise" in deciding how to allocate limited resources towards enforcement priorities. *Chaney*, 470 U.S. at 831-32. Plaintiff offers no rejoinder to the well-established legal principle that agencies have discretion to "choose their own enforcement priorities" and such choices are not reviewable by courts. *Nat. Res. Def. Council, Inc. v. U.S. Food & Drug Admin.*, 760 F.3d 151, 171 (2d Cir. 2014); *see also Riverkeeper, Inc. v. Collins*, 359 F.3d 156, 166 (2d Cir. 2004) (rejecting argument that *Chaney* exception to non-reviewability applied, where plaintiff "does not direct us to an [agency] policy expressly abdicating any relevant statutory responsibility"). Plaintiff's request that the Departments devote additional monetary resources to the IDR process is likewise not reviewable under the APA, because it too is committed to agency discretion by law. *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993).

C. Plaintiff's attempts to obtain wholesale improvement of a government program through court order should be rejected.

Any doubt as to whether Plaintiff seeks "wholesale improvement of [a government] program" can be resolved by looking at the broad and wide-ranging relief sought by the Complaint and the requested injunction. *See, e.g.*, Compl. ¶ 88.[7] Plaintiff does not identify specific, discrete

[6] Plaintiff also concedes that the Departments have responded to complaints of statutory violations. *See* Pl.'s Reply at 18 (citing a study that Departments have responded to 14% of complaints).

[7] The requested injunction is also so vague and imprecise that it fails to satisfy the requirements of Fed. R. Civ. P. 65(d), which requires that injunctive relief "state its terms specifically" and "describe in reasonable detail . . . the act or acts restrained or required." *See Yunus v. Robinson*, No. 17-cv-5839-AJN, 2019 WL 168544, at *18 (S.D.N.Y. Jan. 11, 2019 ("follow-the-law" injunctions are impermissibly vague).

actions that it is requesting the Departments to take, but rather seeks vague improvement of the Departments' enforcement efforts and re-allocation of the Departments' limited funding towards Plaintiff's preferred policies. *Id*. Plaintiff argues that the Departments have "failed to contribute the required amounts of resources and implement the required level of oversight" and have failed to establish "a timely, effective, and efficient IDR process," Pl.'s Reply at 20; Compl. ¶¶ 49, 124. What Plaintiff seeks is essentially a "general order[] compelling compliance with broad statutory mandates," precisely the kind of "pervasive oversight by federal courts over the manner and pace of agency compliance with []congressional directives [that] is not contemplated by the APA." *SUWA*, 542 U.S. at 66-67; *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 879 (1990). Plaintiff's request for the Court to insert itself into the management of the Departments' administration of this complex statutory scheme is squarely foreclosed by unambiguous Supreme Court precedent.

III. Plaintiff's constitutional claims fail as a matter of law.

Because the APA supplies the cause of action for Plaintiff's constitutional claims, *see* 5 U.S.C. §§ 702 (granting judicial review of agency action), 706(2) (authorizing the review of agency action "contrary to constitutional right, power, privilege, or immunity"), the constitutional claims are subject to dismissal for the same threshold reasons as the APA and All-Writs Act claims. Additionally, Plaintiff recognizes that, to state a claim for violation of procedural due process rights, a plaintiff must "first identify a property right, second show that the [government] has deprived him of that right, and third show that the deprivation was effected without due process." Pl.'s Reply at 21-22 (quoting *DeFabio v. Hampton Union Free Sch. Dist.*, 658 F. Supp. 2d 461, 487 (E.D.N.Y. 2009)) (citation omitted). *Before* an IDR entity has rendered a payment determination, a provider's claim for deprivation of property is not yet ripe.[8] *Haller v. U.S. Dep't of Health & Hum. Servs.*, 621 F. Supp. 3d 343, 356-57 (E.D.N.Y. 2022), *appeal filed*, No. 22-3054 (2d Cir. Nov. 30, 2022). And *after* an IDR entity has rendered a payment determination, the obligation is on the health plan, not the Departments, to issue necessary payment to the provider.

[8] Plaintiff does not allege that the arbitration procedures established by the Act are facially constitutionally inadequate.

Indeed, Plaintiff does not allege that the Departments are withholding payments to it and thus depriving it of property. Plaintiff has therefore failed to allege the second element of a due process or takings claim because it does not allege that it is the *government* that has deprived it of its property. Plaintiff recognizes that it is "the plans [that] have breached their statutory obligation under [the Act] to pay these additional reimbursement amounts," Compl. ¶ 70, and it has sought relief against those health plans directly, *see supra* n.2. And the Second Circuit has rejected due process claims based on an agency's failure to act or perceived inadequacies in the agency's actions "even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *Benzman v. Whitman*, 523 F.3d 119, 130 (2d Cir. 2008); *see also Chambers v. N. Rockland Cent. Sch. Dist.*, 815 F. Supp. 2d 753, 763 (S.D.N.Y. 2011) ("the purpose of the Due Process Clause . . . 'was to protect the people from the State, not to ensure that the State protected them from each other.'") (quoting *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989)). These claims should be dismissed.

CONCLUSION

For the foregoing reasons, the Court should dismiss the Complaint in its entirety.[9]

Dated: June 12, 2023

Respectfully submitted,

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[9] In its reply brief, Plaintiff for the first time asks this Court to advance the final merits determination and consolidate it with the preliminary injunction. Pl.'s Reply at 28. Accelerating a trial on the merits under Rule 65(a)(2) is "generally inappropriate," *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981), unless "a real exigency . . . justifies giving the case preference over other disputes that already are on the docket." 11A Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 2590 (3d ed.). There are no exigent circumstances here, given that Plaintiff's injury is purely financial. Moreover, it is black-letter law that an APA case like this one must be decided not at trial, but on the basis of the full administrative record, typically through summary judgment motions under Rule 56. In this case, there is every reason to follow the ordinary procedural course, including consideration of the motion to dismiss that would narrow any issues that might need to be addressed on the merits, and thus the scope of the administrative record, which would need to cover amorphous agency inaction in this case.

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