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

REPLY OF PLAINTIFFS-APPELLANTS IN NO. 24-20204 & RESPONSE OF PLAINTIFFS-APPELLEES IN NO. 24-20051

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No. 24-20051, *Guardian Flight, LLC 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: **America's Health Insurance Plans**
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REPLY IN SUPPORT OF APPEAL NO. 24-20204

The No Suprises Act ("NSA") sets forth a detailed process for resolving disputes between medical providers and insurers over payment for out-of-network services. Congress's design depends on an insurer's accurate representations about its "qualifying payment amount" ("QPA"), or median in-network rate. The NSA scheme requires insurers to disclose and certify the accuracy of their QPAs. The NSA also requires insurers to provide additional information about their QPA calculations when providers request it.

So what happens when an insurer makes a material misrepresentation about its QPA and defies the mandatory disclosure requirements? According to the Insurer Defendants, nothing. In their view, the NSA allows insurers to manipulate their QPAs and ignore disclosure requirements with impunity. That cannot be right.

Consider just one fact pattern alleged here. For three transports at issue, after the Providers submitted a bill for services, Kaiser provided an explanation of benefits ("EOB") naming an amount Kaiser represented as its QPA—which it was required to certify had been calculated in compliance with federal requirements. When the Providers requested further information about Kaiser's calculations, as was their right, Kaiser refused to respond. Then, when the parties proceeded to IDR (with the Providers relying on the initial QPA statements from Kaiser), Kaiser submitted a different, *lower* QPA to the IDR entity without disclosing the change to

the Providers. Kaiser's subterfuge worked. The IDR entity selected Kaiser's offer, noting expressly that it understood the offer to be substantially higher than Kaiser's QPA.

Citing the "virtues" of "[f]inality" in arbitration, *see* Kaiser Br. 28–29; Aetna Br. 3 (emphasizing finality), the Insurer Defendants ask this Court to hold that these and similar facts do not state a claim under either Subsection (II), which allows for "judicial review" where a party uses "fraud or undue means" in the IDR process, or Subsection (I), which provides that IDR determinations are not "binding" where there is a "fraudulent claim or … misrepresentation of facts." 42 U.S.C. § 300gg-111(c)(5)(E)(i). But Congress did not put finality above all other values in NSA IDR. Rather, it established pathways to relief when a party procures an award by misrepresentation, fraud, or undue means.

Subsection (II) could hardly be more explicit, and indeed all parties agree that it provides for judicial review and vacatur of otherwise binding IDR awards when procured by "fraud or undue means." Unable to evade Subsection (II)'s text, the Insurer Defendants claim that the standards the NSA supposedly imported from the Federal Arbitration Act ("FAA") bar relief. But the facts the Providers pleaded satisfy any version of the "fraud or undue means" standard.

Separately, Subsection (I) specifies that IDR awards are not "binding" if procured by misrepresentations of fact. The Insurer Defendants would have this

Court read Subsection (I) out of the NSA. But this Court must give meaning to the text. If Subsection (I) means anything, it means courts can enforce binding awards and invalidate nonbinding awards. The Insurer Defendants' misrepresentations about their QPAs render the IDR awards nonbinding and subject to judicial invalidation. This Court can reverse the district court's judgment on this independent basis.

I. THE PROVIDERS ARE ENTITLED TO RELIEF UNDER SUBSECTION (II).

All parties agree that where a challenger properly pleads that an IDR award was procured through "fraud or undue means," judicial review and vacatur are available under Subsection (II).[3] The Insurer Defendants invoke FAA caselaw to

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[3] Vacatur is independently appropriate where the IDR entity "exceeded [its] powers." 42 U.S.C. § 300gg-111(c)(5)(E)(i)(II); 9 U.S.C. § 10(a)(4). The Providers prevailed on this basis for vacatur below. Op. Br. 14, 16, 20. Kaiser (at 33 n.11) claims that the Providers "do not argue this issue on appeal, thereby forfeiting it as a basis to reverse the judgment against the health plans." But the Providers had "no reason to raise" that issue on appeal. *Cf. United States v. Lee*, 358 F.3d 315, 324 (5th Cir. 2004). Again, the Providers *prevailed* on that issue. Op. Br. 20. True, the district court mistakenly dismissed the Insurer Defendants as to that issue, even though they are ostensibly necessary parties—an error the Providers sought to correct in a partial motion for reconsideration. ROA.24-20204.1889. Both Insurer Defendants opposed that motion, arguing that they were not necessary parties, had no interest in defending the "exceeds authority" basis for vacatur, and would participate in a new IDR proceeding if an IDR award was vacated on that basis. ROA.24-20204.1932–1933; ROA.24-20204.1942; ROA.24-20204.1949. "In light of [those] judicial admissions and [the] future collateral estoppel their briefs and a final judgment … create[d]," the Providers agreed to drop their motion for reconsideration. ROA.24-20204.1958; ROA.24-20204.1963 (recognizing the Providers' withdrawal of their request for partial reconsideration). In sum, the Insurer Defendants waived and conceded this issue below.

argue that the Providers have a "heavy burden to establish the existence of a specific statutory ground for vacatur." Kaiser Br. 31; Aetna Br. 29 (similar). But even if it were proper to rely on FAA caselaw here—it is not—the analysis still must take account of the unique features of the IDR process. Accordingly, whether courts apply the plain meaning of statutory text (as the Providers have argued) or instead apply FAA caselaw in a way that accounts for the NSA's peculiarities (the only plausible interpretation of the Insurer Defendants' position), both methods point to the same outcome. The Providers pleaded adequate facts under Rule 9(b) to state claims against the Insurer Defendants.

A. The Providers Sufficiently Stated Claims for "Fraud or Undue Means."

1. The Insurer Defendants agree that the Providers can obtain relief if they properly pleaded "fraud or undue means."

Subsection (II) unambiguously states that "[a] determination of a certified IDR entity … 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]." 42 U.S.C. § 300gg-111(c)(5)(E)(i)(II); *see id.* § 300gg-112(b)(5)(D). Under FAA § 10(a)(1), judicial review is available "where the award was procured by corruption, fraud, or undue means." 9 U.S.C. § 10(a)(1). Unsurprisingly, then, all participants agree that if the Providers properly pleaded that the IDR determinations were "procured by … fraud or undue means," then they can obtain judicial review and vacatur of those awards.

See Kaiser Br. 33; Aetna Br. 27–28; Providers' Opening Br. (Op. Br.) 42. Given this broad agreement, Subsection (II) therefore provides the simplest way for this Court to resolve the case.

2. A Subsection (II) "fraud or undue means" claim requires an intentional, material misrepresentation or bad-faith act.

In order to determine whether the Providers properly pleaded claims for "fraud" or "undue means," this Court must determine the substantive standard that applies—*i.e.*, what constitutes "fraud" or "undue means" triggering vacatur. As the Providers explained (at 43–45), the standard fleshed out in FAA caselaw should not be imported wholesale into the NSA for two reasons. *First*, and contrary to suggestions from Kaiser (at 32) and Aetna (at 28, 31), the NSA does not incorporate the FAA's vacatur standard by reference. Instead, it references "a case described" in four particular paragraphs of that provision. 42 U.S.C. § 300gg-111(c)(5)(E)(i)(II). Subsection (II) is precisely targeted at case descriptions—*e.g.*, a case "where the award was procured by corruption, fraud, or undue means," 9 U.S.C. § 10(a)(1)—and omits any reference to parts of FAA § 10(a) that use the word "vacate." There is thus no basis for importing the FAA's vacatur standard. *Second*, IDR differs meaningfully from ordinary arbitration. It is statutorily imposed, not contractually agreed-upon; requires blind simultaneous submissions, not exchange of adversarial briefing; and concludes after written submissions are made, not after discovery and a hearing. It does not make sense to adopt the FAA standard

for IDR review where the narrowness of the standard is driven by (1) parties' "consent[] to arbitration" over litigation, *Mantle v. Upper Deck Co.*, 956 F. Supp. 719, 726 (N.D. Tex. 1997), and (2) an understanding that arbitration provides robust procedures to police opponent misconduct, *see* Op. Br. 49–51.

In any case, there is no meaningful substantive difference between applying FAA caselaw or construing the NSA according to its plain text and context. To vacate an award for fraud under FAA § 10(a)(1), a movant must demonstrate that the fraud (1) "occurred," (2) "was not discoverable by due diligence before or during the arbitration," and (3) "materially related to an issue in the arbitration." *See, e.g.*, *Morgan Keegan & Co. v. Garrett*, 495 F. App'x 443, 447 (5th Cir. 2012) (citation omitted); Op. Br. 46; Kaiser Br. 35.[4] To vacate an award for "undue means" under the FAA, a party must similarly show "bad faith" conduct, as well as diligence and materiality. *See, e.g.*, *In re Arb. Between Trans Chem. Ltd. & China Nat'l Mach. Imp. & Exp. Corp.*, 978 F. Supp. 266, 304 (S.D. Tex. 1997), *aff'd*, *Trans Chem. Ltd. v. China Nat'l Mach. Imp. & Exp. Corp.*, 161 F.3d 314 (5th Cir. 1998); Op. Br. 45; Aetna Br. 29–30; Kaiser Br. 36. While Kaiser and Aetna gesture at a "strong presumption" and "extremely narrow" standard applicable in the FAA context,

[4] Aetna does not cite the FAA fraud standard.

Kaiser Br. 30; Aetna Br. 29 (quotation omitted), there is nothing magical about the elements for vacatur under these theories—especially here, at the pleading stage.[5]

Start with the definitions of "fraud" and "undue means." Courts construing the FAA are generally guided by these terms' "plain meaning." *PaineWebber Grp. Inc. v. Zinsmeyer Trts. P'ship*, 187 F.3d 988, 991 (8th Cir. 1999). As commonly understood, "fraud" entails "the knowing misrepresentation of a material fact … done to induce another to act to his or her detriment." *Info-Hold, Inc. v. Sound Merch., Inc.*, 538 F.3d 448, 456 (6th Cir. 2008) (citation omitted). And "undue" means "excessive or unwarranted." UNDUE, *Black's Law Dictionary* (11th 2019); *see also Groff v. DeJoy*, 600 U.S. 447, 469 (2023) ("[T]he modifier 'undue' means that the requisite burden … must rise to an … 'unjustifiable' level."). In context, both terms carry elements of intent and bad faith. *Trans Chem. Ltd.*, 978 F. Supp. at 304.

Nor does materiality have any extra requirements under the FAA. For example, materiality does not require a party "to establish that the result of the arbitration would have been different if the fraud had not occurred." *Morgan*

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[5] To prevail on a motion for vacatur under the FAA, a challenger must establish the fraud by "clear and convincing evidence." *Morgan Keegan & Co.*, 495 F. App'x at 447. Whether or not that requirement applies under the NSA, "clear and convincing evidence" is a merits standard that cannot be applied to a complaint. All agree that the Rule 9(b) pleading standard applies here. *Infra* 10.

Keegan & Co., 495 F. App'x at 447 (citation omitted). Instead, a party must show merely "a nexus between the alleged fraud or undue means and the basis for the arbitrators' decision." *Trans Chem. Ltd.*, 978 F. Supp. at 304.

Unsurprisingly, with the plain meaning of those elements in mind, courts agree that intentional misrepresentations about material facts and withholding material evidence constitute "fraud or undue means" under the FAA. For example, in one case, a court reversed the denial of vacatur of an award because the sole testifying expert "committed perjury by falsifying his credentials" and the arbitrator's decision "unquestionably reflect[ed] the influence of [his] testimony." *See Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1385 (11th Cir. 1988); *Morgan Keegan & Co.*, 495 F. App'x at 447 (endorsing *Bonar*). In a different case, a court affirmed vacatur for fraud where a witness "appeared to change his answer after [someone] directed him to not implicate [the respondent]" regarding facts that "related directly to issues that the court had ordered the parties to [arbitrate]." *NuVasive, Inc. v. Absolute Med. LLC*, 71 F.4th 861, 878–79 (11th Cir. 2023). And courts regularly acknowledge that "willfully destroying or withholding evidence" on a material issue can constitute "bad faith" prompting vacatur. *See Trans Chem. Ltd.*, 978 F. Supp. at 304; *Bauer v. Carty & Co*., 246 F. App'x 375, 378–79 (6th Cir. 2007).

To be sure, the third element—due diligence—can be a stumbling block for an FAA vacatur motion. In the FAA context, "due diligence" imposes a high hurdle because typical arbitration provides for many litigation-like procedures—discovery, adversarial briefing, and a hearing—that make malfeasance discoverable by reasonably vigilant parties. *See* Op. Br. 50. For example, in *Morgan Keegan & Co.*, this Court held that an arbitration award could not be vacated because even if revised calculations presented during arbitration constituted fraud, "[t]hose calculations were provided to the [movant's] lawyers" and "used [the movant's] own numbers"; thus the errors could have been identified with due diligence. 495 F. App'x at 447–48. But the NSA lacks similar procedures. That is why the Providers argued that importing the FAA's due-diligence requirement into the NSA makes no sense. *See supra* 5–6; Op. Br. 44–45.

Kaiser resists this conclusion (at 37 & n.12) by pointing to the sparse process the NSA does provide—narrowly targeted *pre-IDR* disclosures. But Kaiser does not rebut the Providers' basic conceptual point that the due-diligence prong must be applied in light of the discovery opportunities that were actually available to the party seeking vacatur. Indeed, in the parallel Eleventh Circuit litigation, Kaiser expressly conceded that "the procedures provided by the IDR arbitration may influence what the party should have discovered upon the exercise of due diligence." Kaiser Appellee Brief at 32 n.9, *Reach Air Medical Servs. v. Kaiser Foundation*

Health Plan, No. 24-10135 (11th Cir.) (Aug. 21, 2024). At the end of the day, whether the diligence prong does not apply in the NSA context or instead is virtually always satisfied, it does not matter: A party will satisfy the diligence requirement by demonstrating that it used all available tools to uncover the fraud at the time of the proceeding.

3. The Providers sufficiently alleged "fraud or undue means" under any construction of Subsection (II).

To state a claim for vacatur under Subsection (II), then, the Providers were at most required to plead fraud or undue means that materially related to an issue in the arbitration and was not discoverable with due diligence before or during the IDR proceeding, using the limited tools available. *Supra* I.A.2. All parties agree that the pleading standard set forth in Rule 9(b) applies here. Op. Br. 38–39, 42 n.15; Kaiser Br. 34–35; Aetna Br. 32. Rule 9(b) requires a party to plead fraud with "specificity," *Plotkin v. IP Axess, Inc.*, 407 F.3d 690, 696 (5th Cir. 2005); *Pace v. Cirrus Design Corp.*, 93 F.4th 879, 890 (5th Cir. 2024), except that "state of mind" need only be alleged "generally," *Pace*, 93 F.4th at 889; *see* Fed. R. Civ. P. 9(b). Taken together, the allegations must make relief "plausible." *U.S. ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 186 (5th Cir. 2009); Op. Br. 38–39.

Here, by alleging with specificity how the Insurer Defendants misrepresented their QPAs and illegally withheld information about their QPA calculations, the

Providers satisfied Rule 9(b) for each transport at issue.[6] The Providers' complaints against Kaiser and Aetna cover seven transports but break down into three general fact patterns: (1) For three transports Kaiser told the Providers the QPA was one number and then told the IDR entity a different, much lower number. Op. Br. 14–15. (2) For three transports Kaiser "allowed" a certain amount without expressly identifying its QPA (despite its obligation to disclose its QPA in that communication), failed to make required disclosures, and later submitted a much lower number as the QPA to the IDR entity. Op. Br. 14–15. (3) For one transport, Aetna failed to provide required disclosures and then submitted an improbably low QPA to the IDR entity. Op. Br. 13. The Providers address the sufficiency of the allegations related to each fact pattern in turn.

(a) Kaiser's "two QPA" scheme

The Providers sufficiently pleaded that Kaiser committed "fraud or undue means" when it submitted different QPAs to the Providers and the IDR entity, with

[6] Information related to the Insurer Defendants' QPAs was "peculiarly within [their] knowledge," so Rule 9(b)'s heightened standard should be relaxed. *See* Op. Br. 39 (citation omitted). Aetna does not appear to disagree. *See* Aetna Br. 33. Kaiser disagrees (at 40), purporting to factually distinguish one of the cases the Providers cited. But Kaiser's distinctions do not address the central issue: Kaiser ignored its legal obligation to provide further information about its QPA when the Providers asked. In any event, the Providers sufficiently pleaded fraud or undue means regardless of whether Rule 9(b)'s standard is relaxed.

the QPA to the IDR entity consistently totaling less than half of the QPA given to the Providers.

First, the Providers alleged that the QPA is "materially related" to the NSA IDR process. *Morgan Keegan & Co.*, 495 F. App'x at 447. In their complaint, the Providers explained that "[b]y regulation, insurers are required to include with each initial payment or denial the insurer's QPA for each item or service involved" and "must … certify that each QPA was determined in compliance with federal requirements." ROA.24-20204.20–21 ¶33. Insurers are also required to "provide additional information [about the QPA] upon request of the provider." ROA.24-20204.21 ¶34. Insurers must again disclose their QPA to the IDR entity, which in turn must consider the QPA in its decision. ROA.24-20204.17 ¶28. Indeed, the Providers alleged that the QPA was the most important factor in the IDR entity's decisions at issue. ROA.24-20204.26–27 ¶48; *see* ROA.24-20204.25 ¶46. Kaiser does not, and cannot, dispute that an insurer's representations about the QPA materially relate to a provider's decision to accept payment or initiate IDR. Likewise, Kaiser does not, and cannot, dispute that an insurer's representations about its QPA materially relate to the IDR entity's award.

Second, the Providers alleged that they could not have discovered Kaiser's misrepresentations even having exercised due diligence. *See Morgan Keegan & Co.*, 495 F. App'x at 447. After Kaiser made its initial QPA representation, "Kaiser

refused to provide additional information regarding the alleged QPA calculations in response to questions from [the Providers]." ROA.24-20204.23 ¶41. And because the parties to IDR do not exchange submissions, the Providers had no means of discovering Kaiser's second QPA representations to the IDR entity. ROA.24-20204.16 ¶26. Indeed, the only reason the Providers discovered the fraud was because the IDR entity's decisions identified the QPAs Kaiser submitted. ROA.24-20204.11 ¶7; ROA.24-20204.23 ¶42. Accordingly, Kaiser does not, and cannot, argue that the Providers could have discovered its misrepresentations on the three "two QPA" claims through due diligence.

Finally, the Providers alleged with sufficient particularity that Kaiser's material misrepresentations and its withholding of relevant information amounted to fraud or undue means. *Morgan Keegan & Co.*, 495 F. App'x at 447. Indeed, the Providers included detailed allegations showing the "who, what, when, where, and how of the fraud or misrepresentation." *Pace*, 93 F.4th at 890. The Providers recounted Kaiser's legal obligation to provide its QPA with its initial payment and to certify that such QPA "was determined in compliance with federal requirements." ROA.24-20204.20–21 ¶33 (citing 45 C.F.R. § 149.140(d)(1)). The Providers then stated the dates on which they received an explanation of benefits ("EOB") from Kaiser for the three relevant transports in which Kaiser listed an "allowed" amount and "represented on this EOB that the allowed amount was also the QPA." ROA.24-

20204.22–23 ¶¶39–40; *see* ROA.24-20204.22 ¶36; ROA.24-20204.24 ¶42. The Providers further alleged that when they asked for additional information regarding Kaiser's QPA calculations—as was their right, *see* ROA.24-20204.21 ¶34; 45 C.F.R. § 149.140(d)(2)—"Kaiser refused to provide [it]." ROA.24-20204.23 ¶41. The complaint went on to state that Kaiser "submit[ted] to MET *different*, even lower QPAs" for each of the three claims. ROA.24-20204.23–24 ¶42 (specifying the amount presented to the Providers and the amount identified in the IDR decision). The bait and switch resulted in the Providers "submitting their IDR briefs under false pretenses," ROA.24-20204.28 ¶51; ROA.24-20204.25 ¶46, and it "misled MET into believing [Kaiser] was offering an amount higher than its QPA," ROA.24-20204.26 ¶47. These tactics resulted in Kaiser "securing IDR awards" in its favor. ROA.24-20204.27 ¶49. And those allegations together rise to the level of fraud and bad-faith. *See supra* 7–8.

If Kaiser's "two QPA" conduct does not rise to the level of fraud or undue means, then *nothing* an insurer does in the NSA IDR process ever would. That cannot be. Nevertheless, Kaiser launches several attacks on the Providers' allegations. Each should be rejected.

(i) The Providers adequately pleaded that Kaiser's misrepresentations were intentional.

Kaiser first argues (at 38–39) that the Providers "fail to allege facts demonstrating, or even suggesting, that the alleged misstatements in the EOBs were

intentional." That argument is divorced from both law and reality. For one thing, it is blackletter law that "intent … may be alleged generally" under Rule 9(b). Fed. R. Civ. P. 9(b); *see Pace*, 93 F.4th at 889–90 (discussing the "less demanding pleading standard" for state of mind). For another, the misrepresentations at issue are not focused exclusively on "the alleged misstatements in the EOBs," as Kaiser frames it (at 38). While Kaiser's QPA representations in the EOBs helped to perpetuate the fraud—by "dup[ing]" the Providers into "basing IDR offers and their briefing on the amounts listed on Kaiser EOBs" and by "misl[eading] MET into believing" that Kaiser had offered to pay more than its QPA, ROA.24-20204.11 ¶6; ROA.24-20204.26 ¶47—and while the representations in the EOBs were themselves likely *mis*representations, *see* ROA.24-20204.25 ¶44, the point is that Kaiser developed a "scheme to minimize payments" that culminated in the IDR reviewer relying on the *second, lower* QPA to make a determination in Kaiser's favor. ROA.24-20204.27 ¶49. Such a strategic *scheme* is intentional.

Kaiser responds (at 38) that it is "not plausible that Kaiser would have intentionally" submitted different QPAs to the Providers and the IDR entity "because the discrepancy was bound to be discovered eventually." Not so. As the Providers alleged, they would never have known of Kaiser's duplicity if the IDR entity had not specified the QPA that Kaiser submitted to it in its determination. ROA.24-20204.23 ¶42. Nor does Kaiser cite any support for the notion that the fear

of getting caught renders intentional conduct implausible or merely mistaken conduct "more likely," especially where inferences must be drawn in favor of the plaintiffs. *See* Kaiser Br. 38–39. Even if the fear of getting caught could be given any weight, it does not make Kaiser's claim of a "typographical error" in *three* relevant EOBs—not just one—a "more likely explanation" when measured against all the allegations in the complaint and in light of the "less demanding" state-of-mind pleading standard. *Pace*, 93 F.4th at 890.

As Kaiser concedes (at 38–40), at least one of the two QPAs for each claim had to be false. The Providers' allegations support an inference of intentional falsity: *First*, the allegations indicate that both Kaiser's specific practice of asserting a higher QPA to the Providers and a significantly lower QPA to the IDR entity, and its general practice of scheming to underpay providers, are patterns, not isolated incidents. ROA.24-20204.23 ¶42 (noting the occurrence on three of six claims in this case alone); ROA.24-20204.25 ¶45 (Kaiser has employed such schemes in the past); ROA.24-20204.24–25 ¶43 (insurers have been known to use tactics to depress QPAs). Such patterns alone support an inference of intent "rather than inadvertence." *See United States v. Robinson*, 99 F.4th 344, 357–58 (6th Cir. 2024).

Second, if Kaiser's EOB QPA representations were merely mistakes, one would expect it to correct the mistakes—not persist in them, where, as here, (1) Kaiser was legally required to disclose to the Providers an accurate QPA,

ROA.24-20204.20–21 ¶33 (citing 45 C.F.R. § 149.140(d)(1)), (2) the Providers specifically asked for additional information regarding the alleged QPA calculations, ROA.24-20204.23 ¶41, and (3) Kaiser was legally required to provide that additional information, ROA.24-20204.21 ¶34; 45 C.F.R. § 149.140(d)(2). Instead, in the face of both opportunity and obligation to correct, Kaiser remained silent, which supports an inference of intent. *Cf. Hill v. United States*, 363 F.2d 176, 180 (5th Cir. 1966).

The Providers thus had more than sufficient basis to allege generally, as Rule 9(b) permits, that Kaiser intentionally "developed a scheme to minimize payments." ROA.24-20204.27 ¶49; *see U.S. ex rel. Clausen v. Lab'y Corp. of Am.*, 290 F.3d 1301, 1313 (11th Cir. 2002) ("When Rule 9(b) applies …, a plaintiff is not expected to actually *prove* his allegations, and [courts] defer to the properly pleaded allegations of the complaint." (emphasis in original)).

(ii) The Providers adequately pleaded that Kaiser's intentional misrepresentations demonstrate bad faith *during the arbitration proceedings*.

Kaiser next argues (at 39–40) that even if it acted in bad faith, the Providers "provide no basis to conclude" that the QPA submitted to the IDR entity was the misrepresented or bad-faith one. Therefore, Kaiser claims, there is no basis to conclude that the misrepresented, bad-faith QPA was submitted *during the arbitration proceedings*, so no basis for inferring fraud or undue means. That is nonsensical for three independent reasons.

First, even assuming that only Kaiser's initial QPA representations to the Providers were intentionally inaccurate, that would not somehow shield the IDR process from Kaiser's bad faith. For starters, Kaiser's required initial disclosure of its QPA is part of the very limited discovery the NSA allows. Discovery is part of the proceeding itself, and bad faith during discovery supports a claim for fraud or undue means, as the case Kaiser cites on this point confirms. *See Trans Chem. Ltd.*, 978 F. Supp. at 305 (rejecting FAA fraud claim only because objecting party offered "no evidence" that its adversary "intentionally or even recklessly delayed or otherwise attempted in any way to prevent production of the report"). Moreover, the limited process the NSA entails is meant to "ensure transparent and meaningful disclosure about the calculation of the QPA," 86 Fed. Reg. 36,872, 36,898 (July 13, 2021), precisely because those disclosures directly inform the offers made to the IDR entity, *see, e.g.*, 45 C.F.R. § 149.510(c)(4)(i)(A)(1) (offers must be "expressed as both a dollar amount and the corresponding percentage of the [QPA]"). Making an intentional misrepresentation about the QPA on which one's adversary will rely in formulating its payment offer and IDR briefing, *see* ROA.24-20204.11 ¶6; ROA.24-20204.25 ¶46, and refusing to correct that misrepresentation when asked,

ROA.24-20204.23 ¶41, demonstrates "bad faith" and an effort "to secure an undue advantage *in the IDR process*," ROA.24-20204.28–29 ¶51 (emphasis added).[7]

Second, while logic dictates that where two QPA values are given for the same transport, *at least one* must be false, here, the Providers' allegations support an inference that *both* alleged QPAs for each claim were mispresented given that they were drastically out of step with 2019 market data for similar services. ROA.24-20204.25 ¶44. Kaiser spills much ink (at 41–42) attempting to duck this point by resorting to assertions—straying far beyond the four corners of the complaint—about the "highly coercive nature of the pre-2022 air ambulance market." But even if a market-rate comparison is imperfect, it is a data point (one of the few available to the Providers given Kaiser's tactics) that indicates both QPAs were too low. Kaiser will have its opportunity to present evidence at a different stage of litigation. *See Clausen*, 290 F.3d at 1313.[8]

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[7] Kaiser's hair-splitting argument (at 40) that an "EOB is not a discovery response" or "part of an arbitration proceeding" is both irrelevant and wrong. Just because the NSA orders parties to pause and negotiate after obtaining the relevant information but before sending the claim to IDR does not render the exchange of information a separate process, any more than a pause for court-ordered pre-trial mediation segregates discovery from trial.

[8] Kaiser claims (at 42) the Providers have a "gripe" with the NSA, but that is wrong. In fact, when not subverted by misrepresentations or illegal presumptions, the IDR process is often quite successful for the Providers. ROA.24-20204.17 ¶27.

Finally, the Providers in fact alleged that Kaiser misrepresented the QPA *submitted to the IDR entity*, which independently moots Kaiser's argument here. As alleged, the entire point of Kaiser's scheme was to "create [a] *false* impression," ROA.24-20204.28 ¶51 (emphasis added), and "*misl[ead]* MET into believing" that Kaiser had offered to pay "an amount higher than its QPA," ROA.24-20204.26 ¶47 (emphasis added). That scheme hinges on submitting falsely low QPAs *to MET*, whether or not the first alleged (higher) QPAs (given to the Providers) were themselves misrepresentations.

Thus, on any of these three grounds, the Providers sufficiently pleaded that Kaiser employed its bad-faith scheme during the IDR process. Kaiser's efforts to skirt that conclusion simply ignore the substance of the Providers' allegations.

(iii) There is no statutory basis for exempting from judicial scrutiny insurer fraud related to QPAs.

Kaiser (with AHIP's support) resorts to an atextual argument that judicial review is precluded because the Providers' allegations concern Kaiser's QPA. Kaiser posits that the "responsibility [for assessing the accuracy of Kaiser's QPA calculation] rests exclusively with the Departments." Kaiser Br. 43 (quotation omitted); *see* AHIP Br. 22–26 (similar). No such exemption appears on the face of Subsection (II); and the regulation Kaiser cites specifies only that IDR entities are

not responsible for monitoring QPA accuracy—it says nothing about courts. *See* Kaiser Br. 43 (citing 87 Fed. Reg. 52,618, 52,627 n.31 (Aug. 26, 2022)).[9]

Even setting aside this textual deficiency, Kaiser and AHIP are wrong to characterize the Providers' claims as concerning a simple miscalculation or improper methodology in Kaiser's QPAs. Rather, the Providers assert that Kaiser intentionally misrepresented its QPAs to gain advantage. Op. Br. 47. Allowing this case to proceed does not open the courthouse doors to technical quibbles about QPA methodologies. Not only are courts well-equipped to decide such claims of intentional misrepresentation, they are expressly empowered to do so by Subsection (II)—as everyone agrees. *Supra* 4–5, 10.

(b) Kaiser's "hidden QPA" scheme

The Providers also sufficiently pleaded that Kaiser committed "fraud or undue means" when it *failed to disclose* its QPA to the Providers—even after the Providers asked for information—and then submitted an improbably low QPA to the IDR entity.

[9] Notably, relevant to the importance of insurers complying with disclosure requirements in a way that informs briefing to the IDR entity, *e.g.*, *infra* 28, the same footnote indicates that IDR entities can consider arguments from a provider that "additional information points in favor of the selection of its offer" *instead* of the insurer's QPA. 87 Fed. Reg. at 52,627 n.31.

First, for the same reasons as above, *supra* 12, the Providers alleged that the QPA is materially related to the NSA IDR process. *Morgan Keegan & Co.*, 495 F. App'x at 447. Kaiser does not contest this point.

Second, for similar reasons as above, *supra* 12–13, the Providers alleged that they could not have discovered Kaiser's misrepresentations even having exercised due diligence. *Morgan Keegan & Co.*, 495 F. App'x at 447. After Kaiser failed to make an initial QPA representation, "Kaiser refused to provide additional information regarding its alleged QPA calculations in response to questions from [the Providers]." ROA.24-20204.23 ¶41. And because parties to IDR do not exchange submissions, the Providers had no means of discovering what Kaiser represented to the IDR entity. ROA.24-20204.16 ¶26. Indeed, the Providers discovered the fraud only because the IDR decisions identified the QPAs Kaiser submitted. ROA.24-20204.11 ¶7; ROA.24-20204.23 ¶42.

Finally, the Providers adequately alleged that Kaiser's withholding of relevant information and subsequent material misrepresentations to the IDR entity amounted to fraud or undue means. This second Kaiser scheme operates just like the first, except instead of directly inducing provider reliance on an initially alleged QPA, Kaiser does not explicitly label the offer to the Providers in its EOB as the QPA. ROA.24-20204.22 ¶¶37–38. This approach leaves the Providers to guess at whether Kaiser's offer is the QPA—not an unreasonable inference given Kaiser's obligation

to provide the QPA at that time, ROA.24-20204.20 ¶33—or whether the QPA is something else entirely. Kaiser perpetuates the information asymmetry by ignoring requests for additional information—contrary to law. ROA.24-20204.23 ¶41. From there, the "hidden QPA" scheme is effectively the same as the "two QPA" scheme. The Providers make their submission to the IDR entity without the benefit of the information Kaiser was supposed to disclose. Meanwhile, Kaiser submits to the IDR entity an improbably low QPA that is significantly below its offer, ROA.24-20204.23–24 ¶42; ROA.24-20204.26 ¶47, as well as out of step with available data and consistent with practices of scheming to underpay providers. ROA.24-20204.24–25 ¶¶43–45. Kaiser conducts this two-step dance so that MET will believe Kaiser has offered to pay more than its QPA, ROA.24-20204.11 ¶6, which helps Kaiser "secur[e] IDR awards" in its favor. ROA.24-20204.27 ¶49.

Here, too, Kaiser's challenges to the sufficiency of these allegations fail.

(i) Kaiser made fraudulent representations about its QPA to the IDR entity.

Kaiser argues (at 36–37) that its illegal behavior insulates its fraudulent behavior from review. Specifically, Kaiser reasons that because it failed to disclose its QPAs to the Providers and then ignored requests for additional information about its QPAs, it made no representations to the Providers and therefore made no fraudulent representations to the Providers. But that argument is as confused as it is perverse.

As before, *supra* 15, 20, Kaiser fails to appreciate that the Providers have alleged a "scheme to minimize payments," ROA.24-20204.27 ¶49, whereby Kaiser submits a fraudulent QPA to the IDR entity that is significantly lower than the amount it "allowed" on the claim in its offer to the Providers, in order to mislead the IDR entity and secure awards in its favor, *supra* 22–23. Thus, contrary to Kaiser's protests (at 37–38), the fact that "Kaiser originally paid an amount higher than the QPA it reported to [MET]" is quite relevant to the fraudulent scheme, whether or not the Providers reasonably assumed that the offer was also Kaiser's purported QPA. In any case, the scheme does not depend on fraudulent representations *to the Providers*. And although not necessary for the fraud claim, Kaiser's silence to the Providers regarding its QPAs perpetuates the fraudulent scheme—in this instance by denying the Providers the information and transparency necessary to evaluate Kaiser's offer and make their own to the IDR entity. ROA.24-20204.28 ¶51; ROA.24-20204.21 ¶34 (quoting 86 Fed. Reg. 36,898).

(ii) Despite due diligence, the Providers could not have discovered Kaiser's misrepresentation before or during the IDR proceedings.

Kaiser next argues (at 37) that, with respect to the "hidden QPA" claims, the Providers "cannot meet the [diligence] element" because "the alleged absence of QPA information" was "discoverable," and the Providers "say they did in fact

discover it." But here again Kaiser confuses the issues.[10] The relevant point is not whether the Providers knew of Kaiser's illegal omissions. The point is that the Providers did not and could not have discovered Kaiser's fraudulent scheme, which hinges on the misrepresented QPAs that Kaiser submitted *to the IDR entity*. The Providers discovered those misrepresentations only after the fact when MET included the figure in its determination. *Supra* 22.

Kaiser also briefly suggests (at 43–44) that for the same reason, the Providers' undue means claim with respect to the "hidden QPA" transports falls short. But again, even if the Providers' were "aware of [Kaiser's] omission," they were not and could not have been aware that Kaiser would so boldly misrepresent its QPA to the IDR entity. Such an omission that insulates a fraudulent representation from discovery is indeed the type of bad-faith suppression of evidence that amounts to "undue means." *See supra* 7–8.

(c) Aetna's withheld disclosures and improbably low QPA

Guardian Flight sufficiently pleaded that Aetna committed "fraud or undue means" when it (1) provided an improbably low and misrepresented QPA and

[10] Kaiser apparently misses the irony of arguing (at 37 n.12) that its flagrant violations of the NSA's limited discovery process demonstrate a meaningful discovery process.

(2) illegally withheld information that deprived Guardian Flight the ability to assess and explain Aetna's malfeasance to the IDR entity.

First, Guardian Flight's allegations sufficiently established fraud or undue means. *See Morgan Keegan & Co.*, 495 F. App'x at 447. Guardian Flight alleged that Aetna intentionally misrepresented its QPA to the IDR entity so that the IDR entity would rely on a falsely and improbably low QPA in its determination. ROA.24-20204.501 ¶¶4–5; ROA.24-20204.510–511 ¶¶28–32. Meanwhile, Aetna illegally concealed information that would have allowed Guardian Flight to fully explain the misrepresentation to the IDR entity. ROA.24-20204.509–510 ¶¶26–27. *Second*, Guardian Flight alleged that despite its due diligence it did not discover, and could not have discovered, the basis of Aetna's misrepresentation before submitting its own offer and briefing to the IDR entity because Aetna concealed relevant information, ROA.24-20204.509–10 ¶¶26–27, and because the NSA's "black-box" system precludes any additional means of discovery outside those that Aetna subverted, ROA.24-20204.505 ¶19. *Third*, as with the Kaiser complaint, Guardian Flight indisputably alleged that the QPA submitted to MET was material to the IDR determination. ROA.24-20204.505–506 ¶21; ROA.24-20204.512 ¶33.

Aetna primarily challenges Guardian Flight's claims on the grounds that the allegations do not rise to the level of bad faith necessary for a "fraud or undue

means" claim and that they are too conclusory in any event. Aetna Br. 30–31, 32–34. That is wrong.

First, an intentional misrepresentation about a material fact suffices to show fraud. *See Bonar*, 835 F.2d at 1385; *Morgan Keegan & Co.*, 495 F. App'x at 447; *NuVasive*, 71 F.4th at 878–79. And "willfully … withholding evidence" on a material issue constitutes "bad faith" and "undue means." *Trans Chem. Ltd.*, 978 F. Supp. at 304; *see Bauer*, 246 F. App'x at 378–79. Guardian Flight alleged both forms of misconduct. *Supra* 26.

Second, Guardian Flight's allegations regarding Aetna's bad-faith misrepresentations and use of undue means were not conclusory but rather sufficiently particular to satisfy Rule 9(b). To support its claim of intentional misrepresentation, Guardian Flight alleged that Aetna's improbably low QPA was consistent with insurers' improper practices of deflating QPAs and out of step with both available market data and other Guardian Flight contract rates in the same state.[11] ROA.24-20204.510–511 ¶¶29–32. Aetna says (at 32–33) that these allegations were not specific enough. That is wrong given the circumstances created

[11] Moreover, since the filing of the Providers' complaint, further evidence from a CMS audit confirms that insurers—and specifically, an Aetna affiliate—have a track record of miscalculating their QPAs to the disadvantage of providers. *See* Op. Br. 40–41 n.14. Aetna has no substantive response to this point. *See* Aetna Br. 32 n.70.

by the NSA, where even full compliance with its procedures results in minimal information sharing.[12] *See Guidry v. Bank of LaPlace*, 954 F.2d 278, 288 (5th Cir. 1992) ("What constitutes 'particularity' will necessarily differ with the facts of each case."). But more important, Aetna's response ignores the totality of Guardian Fight's allegations.

Specifically, Guardian Flight also alleged that Aetna concealed information that would have allowed Guardian Flight to explain the misrepresentation to the IDR entity. ROA.24-20204.509–510 ¶¶26–27; ROA.24-20204.514–515 ¶35. That is evidence of Aetna's intent to insulate its misrepresented QPA from inspection. *See supra* 17. Moreover, and independently, Guardian Flight would not have had to convince the IDR entity that Aetna's alleged QPA rose to the level of fraud in order to provide persuasive reasoning that Aetna's QPA was an unreliable benchmark that should not be given much, if any, weight. *Supra* n.9. Aetna's concealment, ROA.24-20204.509–510 ¶¶26–27, unduly deprived Guardian Flight of the opportunity to make its case to the IDR entity.

In response, Aetna claims (*e.g.* at 30) that it "made the required disclosures to Guardian Flight during the open negotiation period." Even assuming Aetna

[12] Indeed, not even Aetna's minimal after-the-fact disclosures gave the Providers the information necessary for more particular allegations. *See* ROA.24-20204.624.

eventually made disclosures—a factual question the district court, appropriately, did not reach—Aetna's representation to this Court is both false and irrelevant. By its own assertion (at 6), Aetna made the disclosures on August 21, 2022. But Guardian Flight requested the information on June 6, 2022, in its notice initiating the required 30-day open-negotiation period. ROA.24-20204.509 ¶26. By statute, "the open negotiation period … is the 30-day period beginning on the date of initiation of the negotiations with respect to such services." 42 U.S.C. § 300gg-112(b)(1)(A). Thus, even reading the record in the light most favorable to Aetna (inappropriate at this stage), the *76 days* that elapsed between when Guardian Flight initiated negotiations and when Aetna says it made certain disclosures does not fall with in the statutory open-negotiation period.

Of course, Aetna knows this, and so pivots in a footnote (at 30 n.66) to arguing that "the NSA contemplates continuing negotiations while the IDR process is pending." (citing 42 U.S.C. § 300gg-112(b)(2)(B)). Maybe so. But that is irrelevant. The time for initiating IDR, and subsequently, for submitting IDR briefs, is based on the 30-day open-negotiation period. *See* 42 U.S.C. § 300gg-112(b)(1)(B) (parties may initiate IDR "during the 4-day period beginning on the day after such open negotiation period"); *id.* § 300gg-112(b)(5)(B) (calling for submission of offers "[n]ot later than 10 days after the date of selection of the certified IDR entity"). Here, that clock ran out, and Guardian Flight submitted its brief to the IDR entity

before Aetna claims to have made certain disclosures, ROA.24-20204.514–515 ¶35—a point Aetna buries in a footnote (at 30 n.66).[13] Put differently, Aetna withheld information that would have helped Guardian Flight "explain why [Aetna's QPA] was improperly calculated and was not an appropriate rate for the transport at issue." ROA.24-20204.514–515 ¶35. Thus, even indulging Aetna's factual protests, Guardian Flight sufficiently pleaded fraud or undue means.[14]

II. SUBSECTION (I) PROVIDES A SEPARATE BASIS FOR RELIEF.

This Court can reverse because the Providers pleaded sufficient facts with respect to each of the three sets of claims to proceed under Subsection (II). But in the alternative, the Court can reverse on the grounds that the allegations state a claim for invalidation of the IDR awards under Subsection (I). Contrary to the Insurer Defendants' protests, Subsection (I) provides an additional avenue to invalidate IDR awards that have been procured by misrepresentations or fraud. And the Providers have stated such a claim for each of the IDR awards at issue here.

[13] Aetna's treatment of this critical piece of information is particularly questionable given that (1) it devotes parts of several pages (at 3, 6–7, 30, 32–33) to asserting, despite the fact that the district court did not rely on or affirm the assertion, that it made all required disclosures and (2) it wrongly suggests (at 5–7) that the parties "proceeded" to IDR *after* negotiations that *included* such disclosure.

[14] While Aetna suggests (at 17, 25) that fraud or undue means related to QPAs should be left to the Departments, that argument fails for the reasons discussed above. *Supra* 20–21.

A. The Insurer Defendants' Ancillary Arguments for Avoiding Subsection (I) All Fail.

The Insurer Defendants attempt to dodge analysis of Subsection (I) with multiple ancillary attacks on the Providers' claims. All fail.

First, Kaiser leads (at 46–48) with a meritless claim of forfeiture. But the Providers clearly relied on Subsection (I) as a basis for relief below. They alleged that under the NSA, "the IDR entity's decision is binding … unless there has been a misrepresentation of fact to the IDR entity or it meets the requirements to be vacated under the [FAA]." ROA.24-20204.9–10 ¶2; ROA.24-20204.500 ¶2. The Providers further asserted that the IDR awards "should be vacated under *all five of these grounds*"—the four FAA grounds and "where there is evidence of misrepresentation of facts presented to an IDR entity." ROA.24-20204.514 ¶ 34 (emphasis added); ROA.24-20204.27–28 ¶ 50 (similar). As even Aetna acknowledges (at 35 n.74), Subsection (I) was a "fully-briefed issue" before the district court.

And the district court *ruled on* the issue when it addressed Subsection (I) but held that Subsection (II) was the only way to vacate an IDR award. ROA.24-20204.1877. The district court did not simply "declin[e] to adopt" a Subsection (I) theory of recovery, as Kaiser frames it (at 46). The court affirmatively rejected Subsection (I) as a path to relief for the Providers. ROA.24-20204.1877; *see also* ROA.24-20204.1874 ("adopt[ing]" Chief Judge Corrigan's conclusion that claims

based on "misrepresentation of facts" "must be asserted within the confines of § 10(a) of the FAA" (quotation omitted)).

Kaiser's theory that the Providers forfeited the issue is wrong. To the extent the Providers have further developed their Subsection (I) arguments on appeal, that is entirely proper. "[P]arties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). Indeed, it would be "unfortunate" if the "quality and depth" of a party's argument were fixed in the district court. *Sec'y, U.S. Dep't of Lab. v. Preston*, 873 F.3d 877, 883 n.5 (11th Cir. 2017). Thus, courts, including this Court, allow parties to make more robust arguments on appeal in support of positions advanced in the district court. *See, e.g.*, *Templeton v. Jarmillo*, 28 F.4th 618, 622 (5th Cir. 2022). And in any case, even if—contrary to the record—this "claim [was] not raised … below, [this Court should] feel free to address it, since it was *addressed* by the court below." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (emphasis added).

Second, both Insurer Defendants challenge the sufficiency of the allegations on grounds already addressed with respect to Subsection (II). Specifically, Kaiser again claims (at 48–50) that the Providers have not pleaded an "intentional" misrepresentation. And, as before, it claims (at 50–51) that any misrepresentation was not made *to* the IDR entity. But as stated above, both arguments fail. *See supra* 14–20, 23–24. Likewise, Aetna claims (at 34–35) that Guardian Flight's allegations

lack sufficient particularity to survive Rule 9(b). Here, too, the argument fails for the reasons above. *See supra* 27–30.

Finally, Kaiser resurrects (at 51–52, 56–58) multiple forms of its argument that courts cannot consider claims based on insurer misrepresentations about QPAs, and that all issues regarding QPAs should be submitted to the Departments. *Cf.* Aetna Br. 17, 25. Again, that is wrong as a matter of law and ineffectual for the Providers as a matter of practice. *See supra* 20–21; Op. Br. 40–41 n.14.

B. Subsection (I) Should Be Given Effect to Invalidate Awards that Are Not Binding Due to Misrepresentations of Fact.

When it comes to the heart of the Subsection (I) issue—whether the provision establishes an independent basis on which to invalidate IDR awards—the Insurer Defendants devote significant attention to what they say the provision *does not* mean, without offering a plausible account of what it *does* mean. *See* Kaiser Br. 52–54; Aetna Br. 19–24; *infra* 38–41.

This Court does not have the luxury of punting on the meaning of statutory text. A court must construe a statute "so that effect is given to all its provisions" and no part is rendered "inoperative or superfluous, void or insignificant." *United States v. Coney*, 689 F.3d 365, 373 (5th Cir. 2012) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)). Subsection (I) has to mean *something*.

What it means is determined by the statute's language. Op. Br. 25–26. Subsection (I) provides that an IDR entity's determination "shall be binding upon

the parties involved." 42 U.S.C. § 300gg-111(c)(5)(E)(i)(I). "Binding" means "having legal force to impose an obligation" or "requiring obedience." BINDING, *Black's Law Dictionary* (11th ed. 2019). When something is binding, it is "given effect" by courts. *Jones v. Cent. of Ga. Ry. Co.*, 331 F.2d 649, 653 (5th Cir. 1964) (quotation omitted). Therefore, if IDR awards are binding, they are enforceable in court. Indeed, where binding arbitration awards result from "an executed arbitration agreement," "United States courts have always been willing to promptly interfere to enforce awards … without hesitation or question." *Sverdrup Corp. v. WHC Constructors, Inc.*, 989 F.2d 148, 154–55 (4th Cir. 1993) (quotation omitted); *see also, e.g.*, *Red Cross Line v. Atl. Fruit Co.*, 264 U.S. 109, 121 n.1 (1924) ("[Courts] have and can have no just objection to [arbitrations] and will enforce, and promptly interfere to enforce their awards when fairly and lawfully made." (citation omitted)). There is no reason a court should treat a binding IDR award any differently.

But Subsection (I) says more. It specifies that IDR awards are not binding if there is "a fraudulent claim or evidence of misrepresentation of facts presented to the IDR entity involved regarding such claim." 42 U.S.C. § 300gg-111(c)(5)(E)(i)(I); *see* Op. Br. 25–26. That means that if a party tried to enforce an award based on a fraudulent claim or tainted by misrepresentation, the court would refuse. *Cf. Sverdrup Corp.*, 989 F.2d at 155 ("The court will enter judgment upon [an award], but not if the award was fraudulent or arbitrary or the result of gross

mistake of fact …." (quotation omitted)). And if a court can deny enforcement of an award where a party asserts the defense that the award is not binding, then equity and common sense dictate that a court can grant a party's affirmative request to invalidate an award as not binding.

Otherwise, Subsection (I) becomes a heads-I-win, tails-you-lose proposition favoring insurers. Compare two hypothetical cases involving a "fraudulent claim or … misrepresentation of facts": In the first, a provider tries to enforce its IDR award in court because an insurer refuses to pay. The insurer, citing Subsection (I), argues that the award cannot be enforced because the provider's material misrepresentations of fact to the IDR entity render the award nonbinding. The court agrees with the insurer and declares the award invalid, and the insurer does not have to pay. In the second case, a provider seeks invalidation of an IDR award based on the insurer's similar misrepresentations of material fact. In the Insurer Defendants' view, even if the court agrees that the insurer made the qualifying misrepresentations, it cannot invalidate the award under Subsection (I). If, in this hypothetical, the court finds that the misrepresentations do not rise to the level of fraud or undue means—which the insurer would doubtless argue is a prohibitively high bar, as the Insurer Defendants do here—then Subsection (II) relief is foreclosed as well. Such a lopsided scheme makes no sense and is contrary to Congress's intent of creating a fair and efficient billing dispute resolution process for both insurers *and*

providers. *See Turkiye Halk Bankasi A.S. v. United States*, 598 U.S. 264, 275 (2023) (statutory provisions must be read "with a view to their place in the overall statutory scheme").[15]

C. The Insurer Defendants Fail to Negate A Straightforward Reading of Subsection (I)'s Text.

The Insurer Defendants offer a variety of arguments intended to dissuade the Court from effectuating—or even considering—the plain meaning of the text outlined above. None succeeds.

1. Kaiser's "possib[le]" alternative interpretations are unserious.

Implicitly recognizing that this Court cannot simply ignore Subsection (I), Kaiser halfheartedly offers (at 54–56) two "possibilities" of what the text *might* mean—without "tak[ing] a position on whether either of these possibilities … is correct." Kaiser Br. 56. Neither is correct.

Kaiser's first "possib[le]" interpretation of Subsection (I) (at 54–55) is that it creates a "right without a remedy" by making IDR determinations "binding"—but not allowing courts to enforce them. Kaiser draws this theory from a district court opinion that is currently the subject of a separate appeal before this Court in which the United States disagrees with the reading Kaiser advances. *See* Brief of United

[15] Of course, the Insurer Defendants' intentional misrepresentations of their QPAs here satisfy both Subsection (I) and Subsection (II).

States as Amicus Curiae in Support of Providers at 7–16, *Guardian Flight v. HCSC*, No. 24-10561 (5th Cir.) (Oct. 4, 2024).[16] As providers argue there, consistent with the Providers' arguments in this appeal, Subsection (I) *does* make IDR awards binding and enforceable, except where there is a fraudulent claim or a misrepresentation of material fact to the IDR entity. *See* Appellants' Brief at 22–44, *Guardian Flight v. HCSC*, No. 24-10561 (5th Cir.) (Sept. 27, 2024); *supra* II.B. As that briefing explains, Kaiser's "right without a remedy" theory has many problems, none of which Kaiser acknowledges. Most relevant here, Kaiser does not seriously engage with the statutory text or attempt to explain *why* Congress would expressly make IDR determinations binding in the absence of "misrepresentations of fact" but at the same time deny parties any judicial forum for misrepresentation claims.

Kaiser's second "possib[le]" interpretation of Subsection (I) acknowledges (at 55) that the provision "relates to efforts to enforce" IDR awards and would allow a party to "resist enforcement of an award by showing that the claim was fraudulent or that its opponent intentionally misrepresented material facts to the IDR entity." But with that concession, Kaiser runs headlong into common sense and equity, as discussed above: If courts can decline to enforce IDR awards due to

[16] Indeed, in its brief to this Court in this case, the United States doubles down (at 12 n.5) on its position that "the No Surprises Act does establish a cause of action against insurers to enforce IDR awards, because the Act contains rights-creating language to that effect."

misrepresentations in a way that benefits *insurers*, under what perverse set of rules could they not also invalidate IDR awards due to misrepresentations in a way that benefits *providers*? *Supra* 35.

Kaiser is aware of this problem and so suggests (at 55) that an insurer or health plan "could theoretically want to enforce an IDR determination, so both sides would stand to benefit from such a defense." But that possibility cannot save Kaiser's lopsided account of a statutory scheme that Congress designed to be fair and equitable. The number of insurer-enforced IDR awards will, at best, be vanishingly small. After all, the insurer controls the initial payment. 42 U.S.C. § 300gg-111(a)(1)(C)(iv)(I); *id*. § 300gg-112(a)(3)(A). It is difficult to imagine cases where (1) an insurer pays more than what is fair *and* (2) the provider is nevertheless unsatisfied and proceeds to IDR *and* (3) the IDR entity finds that an insurer in fact paid more than it needed to—all assumptions on which Kaiser's theory relies. Kaiser's "theoretical[]" application of Subsection (I) does not come close to making its reading even-handed. In contrast, the Providers' interpretation of Subsection (I) makes good sense, is fair, and explains the statutory text.

2. Subsection (II) provides no basis for reading Subsection (I) out of the statute.

Instead of engaging in any serious way with the textual issues discussed above, the Insurer Defendants claim that because Subsection (II)'s language indicates it is the sole avenue for "judicial review," that means Subsection (I) affords

no relief whatsoever here. *See* Kaiser Br. 52–54; Aetna Br. 19–24. In their view, judicial review provides the only judicial mechanism for invalidating an award. Kaiser Br. 53; Aetna Br. 21–22.

But as the Providers have explained, pointing to the Restatement (Second) of Judgments among other sources, Op. Br. 27–29, 35–38, Subsection (I) calls not for judicial review of an otherwise binding, enforceable decision but for judicial *action* in the form of a declaration that an IDR determination must be disregarded or set aside "as a nullity" when infected with misrepresentations from the start. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 83 cmt. d (1982). In that case, there is no binding or enforceable award to review. Subsection (II), in turn, provides that where an IDR determination is binding, it is subject to "judicial review" "on the model of an appeal" in limited circumstances. *Id.*

Aetna dismisses (at 21–22) the Providers' argument as "semantic nonsense." But it mischaracterizes the distinction the Providers are drawing as one between judicial "consideration" and judicial "review"—which, again, is not the Providers' argument. And Aetna never explains how nullifying a fraudulently procured judgment or order so that it lacks *res judicata* effect (as under, for example, Rule 60(b), *see* Op. Br. 28–29) can be considered "judicial review" of the same judgment. *Cf. Hernandez v. Results Staffing, Inc.*, 907 F.3d 354, 359–61 (5th Cir. 2018) (district court can reopen a case under Rule 60(b) even after appellate review). Nor is

Aetna's argument responsive to a statute that contains two subsections, both of which must be given meaning, and only one of which refers to "judicial review." Instead, Aetna quibbles with the Providers' reading of a single Restatement provision. Aetna's analysis is wrong, but regardless, its hair-splitting over particular comments to the Restatement does not change the fact that the law commonly recognizes a distinction between "judicial review" of a valid decision and releasing a party from the binding effect of a judgment that is inherently defective. *See* Op. Br. 28–29.[17]

Finally, Kaiser suggests (at 53–54 & n.19) that because the Providers' reading of the statute would mean that the factual predicates for Subsection (I) and Subsection (II) relief overlap, the distinction between judicial review under Subsection (II) and a different form of judicial action under Subsection (I) breaks down. Not so. As a practical matter, Subsection (II) has plenty of independent work to do on fact patterns that Subsection (I) does not reach—including, but not limited to, "undue means" unrelated to fraud or misrepresentation Op. Br. 36–37.

[17] Aetna claims (at 23) that the Restatement distinguishes between "that kind of irregularity which justifies judicial review" and another that "involves treating [a decision] as a nullity because of lack of subject matter … jurisdiction or adequate notice" (quotation omitted). In Aetna's view, fraud and misrepresentation are not the kinds of "irregularities" that fall within the second connotation. But lack of subject matter jurisdiction *is* an apt analogy where the Insurer Defendants' misrepresentations, combined with their concealment of relevant information, fundamentally undermined the validity of the IDR process.

Moreover, factual overlap does not change the fact that Subsection (I) and Subsection (II) are analytically distinct, and Subsection (I) is analytically first. *Id.* The Insurer Defendants would just prefer to skip over it.

3. Giving effect to Subsection (I) will not open the floodgates.

Determining that the Providers can obtain relief from the Insurer Defendants' QPA-related misrepresentations will not, as Kaiser (at 48–50, 64) and AHIP (at 15–22) claim, generate a flood of lawsuits.

The NSA's implementing regulations require misrepresentations under Subsection (I) to be both "intentional" and "material" in order to render a decision nonbinding. 45 C.F.R. § 149.510(c)(4)(vii)(A); *see* Kaiser Br. 48–49. Moreover, the parties agree that Rule 9(b)'s pleading requirements apply to misrepresentations covered by Subsection (I). Kaiser Br. 45; Aetna Br. 34. Accordingly, not every false statement will clear Subsection (I)'s threshold, and not every aggrieved party will get to court. But the Insurer Defendants' intentional misrepresentation of their QPAs—the accuracy of which is of paramount importance in the NSA scheme—easily clears the threshold, and Subsection (I) provides a judicial remedy.

III. The Providers Were Not Required to Proceed By Motion Instead of Complaint.

The Providers initiated the underlying lawsuits by filing complaints, rather than motions for vacatur under the FAA, because the NSA did not incorporate the FAA wholesale. Kaiser disagrees (at 60–64). But as the Providers explained above,

the NSA incorporates the FAA only to the extent indicated by the text. *See also* Brief of United States as Amicus Curiae at 11, *Guardian Flight v. HCSC*, No. 24-10561 (5th Cir.) ("Congress did not incorporate the FAA in its entirety into the NSA."). For example, the NSA narrowly incorporates the descriptions in "paragraphs (1) through (4) of section 10(a) of [the FAA]." 42 U.S.C. § 300gg-111(c)(5)(E)(i)(II)); *supra* 5. It does not incorporate FAA section 6, on which Kaiser relies. Nor does it offer any other textual indication that the NSA imports all of the FAA's procedural rules. And none of the cases Kaiser cites identifies any statutory basis for applying the FAA's procedural rules to challenges to NSA IDR awards. Kaiser's alternative basis for affirmance must therefore be rejected, and this Court should reverse the district court's judgment dismissing the Providers' claims against the Insurer Defendants.

RESPONSE TO MET'S APPEAL NO. 24-20051

No party to this consolidated appeal disputes that courts may—indeed must—vacate IDR awards under certain circumstances. But what point would vacatur have if there were no means by which an IDR entity could be made to rehear the claim? Ensuring a method for meaningful remand is thus a critical corollary of allowing vacatur and providing effective relief. Yet the NSA's novel scheme does not explicitly specify such a method. Perhaps IDR entities must be joined to the litigation so that the judgment binds them. Or perhaps remand flows automatically from a court's vacatur. There must be a way for Providers to obtain meaningful relief.

MET puts the cart before the horse, arguing at great length about the impropriety of allowing suits against IDR entities—primarily based on a theory of arbitrator immunity—without acknowledging or addressing the more fundamental question about how providers obtain relief under the NSA. The Providers did not name MET as a defendant in these cases in order to harass it or seek damages; they named it to ensure a remedy. If it were established that IDR entities will rehear claims vacated and remanded by district courts—which is the view of the United States, and which another IDR entity conceded in the parallel Eleventh Circuit litigation—then perhaps it would be appropriate for MET to have immunity akin to an arbitrator or judge. After all, there is no *need* to join arbitrators or judges as

parties in analogous circumstances because there is no question that they will reconsider claims upon remand. MET rigidly insists that it cannot be made to have any part in this litigation. But that could be true only if its presence is not necessary for an effectual remedy.

JURISDICTIONAL STATEMENT

MET's jurisdictional statement is correct as to the immunity question. But this Court does not have jurisdiction over the private-right-of-action or collateral-estoppel issues MET attempts to insert into this appeal. *See Austin Mun. Sec., Inc. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 757 F.2d 676, 685 (5th Cir. 1985) (issue must be effectively unreviewable on appeal from a final judgment); *see also Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1133–35 (D.C. Cir. 2004); *United Disaster Response, LLC v. Omni Pinnacle, LLC*, 511 F.3d 476, 482 n.12 (5th Cir. 2007); No. 24-20051 (5th Cir.) Dkt. 1 (MET notice of appeal raising only immunity).

STATEMENT OF THE ISSUES

I. Whether MET is a necessary and proper party to effectuate relief for the Providers.

II. If this Court has jurisdiction to consider the issue, whether two nonparties to an earlier litigation are collaterally estopped from pursuing their claims, if necessary, against MET, another nonparty to the earlier litigation.

STATEMENT OF THE CASE

The Providers adopt the statement of the case set forth in their opening brief to the consolidated appeal. Op. Br. 5–21.

SUMMARY OF ARGUMENT

I. Whether IDR entities are necessary parties to effectuate relief was not resolved by statute or court decision at the time the Providers filed suit. The Providers included MET as a defendant to this action in case that was necessary to ensure a remand and redo of the IDR proceedings after vacatur of the IDR awards. If MET is a necessary party, the Court must reject MET's claim of arbitrator immunity. Any other result would undermine the NSA and raise other serious concerns. Moreover, the NSA provides sufficient independent basis to find that IDR entities are not entitled to arbitrator immunity.

If MET need not be a party to effectuate relief, that would be because it functions like an arbitrator who can be ordered to rehear a claim upon vacatur of its decision. The United States has advanced the latter view. The Providers' concerns about available remedies are satisfied if this Court affirms the district court's immunity holding *or* if this Court confirms the view of the United States. The

important thing is that this Court clarify how relief is effectuated under the NSA and reject positions that would eliminate meaningful relief.

II. The Court lacks jurisdiction to consider collateral estoppel at this stage; nor would it otherwise need to reach the issue if MET is not a proper party. But if it does, not even REACH is properly precluded as to its claims against MET, so *a fortiori* neither are Guardian Flight and CALSTAR. Even if REACH were properly precluded, the other Providers still would not be because MET fails to show—or argue in any meaningful way—that they are in privity with REACH.

ARGUMENT

I. IF IDR ENTITIES ARE NECESSARY PARTIES TO EFFECTUATE RELIEF, THEY ARE NOT IMMUNE.

When the Providers filed their complaints, no court had decided when and how courts can remand to IDR entities for further proceedings under the NSA's novel scheme; and the statute does not provide an express mechanism by which IDR entities may initiate new proceedings pursuant to court order. The Providers named MET in light of this ambiguity. Under one reading of the statute, for example, determinations by IDR entities could be seen as a kind of agency action, Op. Br. 32–33; an agency or administrator is generally a named defendant in a suit seeking equitable relief from, or judicial review of administrative action, *see Stark v. Wickard*, 321 U.S. 288, 307–08 (1944). Or the IDR entity could be seen as a necessary party under Fed. R. Civ. P. 19(a)(1), because the court could not "accord

complete relief among existing parties," *i.e.*, the provider and the insurer, unless the IDR entity was also a party. Thus, to ensure they could obtain a remedy if MET's award was vacated, the Providers named MET as a defendant. *See* Op. Br. 30 n.11; ROA.24-20204.215–216.[18]

If IDR entities are necessary to ensure that a vacated award can be remanded for subsequent proceedings, it follows that MET's claim of arbitrator immunity, *see* MET Br. 11–30, must be rejected. Otherwise, it would "create internal inconsistencies or contradictions" throughout the NSA. *See In re McBryde*, 120 F.3d 519, 525 (5th Cir. 1997). What would be the point of designing a mandatory and exclusive dispute resolution system that explicitly allows for judicial invalidation of the fruits of that system under Subsections (I) and (II) but simultaneously provides no mechanism for a redo? Moreover, such a dead-end system would magnify due process concerns raised by Congress replacing previously available common-law claims and remedies with mandatory and streamlined IDR. *See* Op. Br. 47–53. Thus, if IDR entities like MET are necessary parties to afford relief in challenges to IDR determinations, the district court was surely correct to find that they are not immune. ROA.24-20204.1879–80. And while this Court does not have jurisdiction

[18] MET uses the ROA from Appeal No. 24-20204. *See* MET Br. 3 n.1. For consistency and simplicity, so do the Providers.

to consider MET's argument (at 30–33) that IDR entities are not proper parties, these same points all apply to defeat that contention.

Moreover, even aside from the point that IDR entities *must* be named defendants if their presence is necessary to effectuate relief, the NSA provides independent reasons to conclude that IDR entities are not immune from suit. For example, the many material differences between the NSA's IDR process and arbitration, as well as the fact that the statute itself does not use the term "arbitrator" or "arbitration," indicate that IDR entities are not "arbitrators" in the traditional sense nor subject to arbitrator immunity. ROA.24-20204.1879–80; Op. Br. 49–52. That is especially true here, where the Providers simply seek vacatur and remand, not money damages, obviating MET's "policy" concerns about IDR entity "liability." *See* MET Br. 19–20.

Now, however, as part of its argument that IDR entities function like arbitrators, the United States (at 10, 14–15) takes the position that IDR entities are *not* necessary parties to effectuate relief. Indeed, in the parallel Eleventh Circuit appeal, the United States asserted that providers *can* obtain vacatur and remand of an IDR award, as well as a redo of the IDR proceeding, where the IDR entity is not named as a party to the lawsuit. *See* Brief of United States as Amicus Curiae at 13–14, *Reach Air Medical Servs. v. Kaiser Foundation Health Plan*, No. 24-10135 (11th Cir.) (Aug. 28, 2024). According to the United States, nothing in the NSA

"require[s] the [IDR entity] to be a party" and nothing in the "Act prohibit[s] a court from remanding to the [IDR entity] for a new determination." *Id.* Further, the IDR entity in that case took the position that the NSA does not "impliedly require[] parties to name the [IDR entity] as a defendant when challenging an NSA IDR award" because IDR entities "must comply" with a district court's decision to vacate an IDR award and must "arbitrate the matter a second time," just as "a district court must comply with this Court's mandate." C2C Appellee Brief at 16–17, *Reach Air Medical Servs. v. Kaiser Foundation Health Plan*, No. 24-10135 (11th Cir.) (Aug. 21, 2024). MET could take a similar position, but so far it has simply insisted on its immunity.

The Providers' concerns about available remedies would be satisfied if this Court accepts the view of the United States and holds that IDR entities should be treated like courts and arbitrators that must accept remand orders from the district court. If it does, then it may be appropriate to revisit the district court's immunity holding.[19] But if this Court finds that a remand to the IDR entity for another

[19] If IDR entities are treated like courts and arbitrators for these purposes, however, then they must be treated like that for all relevant purposes. That means where, as here, there is a problem with the IDR determination warranting vacatur caused by the decisionmaker, the legal dispute still lies "between the provider and the insurer." U.S. Br. 9; *see id.* at 14. Below the district court held that the Providers sufficiently pleaded that MET "applied an illegal presumption in selecting the prevailing payment amounts," thereby "exceed[ing] MET's powers" under the NSA and triggering review under Subsection (II). ROA.24-20204.1880–1881; 42 U.S.C. § 300gg-111(c)(5)(E)(i)(II); 9 U.S.C. § 10(a)(4). That portion of the decision was

proceeding would not flow automatically from vacatur of an IDR award, it should affirm the district court's decision as to MET or otherwise provide clarity on how to obtain relief.

II. Guardian Flight and CALSTAR Are Not Collaterally Estopped From Pursuing Claims Against MET If Necessary.

This Court does not have jurisdiction to consider collateral estoppel here. *Supra* 44. Regardless, the district court properly held that Guardian Flight's and CALSTAR's claims against MET are not barred. Collateral estoppel precludes relitigation of an issue by "parties who have had a prior full and fair opportunity to litigate their claims." *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 338 (5th

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undoubtedly correct, and if this Court agrees with the district court that MET is a proper party, the Providers will press the claim against MET below.

But while the district court determined that MET was a proper party to defend against the claim, it did not recognize that the Providers pressed the claim against all Defendants, including the Insurer Defendants. *See, e.g.*, ROA.24-20204.235–238. Again, the Providers raised this oversight to the district court in their motion for partial reconsideration of the dismissal of the Insurer Defendants. ROA.24-20204.1889 (explaining that because the district court found that the Providers stated a viable claim for vacatur, "[t]hat means [the Providers] stated a viable claim against the Insurer Defendants as well as against MET" because "the Insurer Defendants are necessary parties to [the Providers'] claim"). But the Providers withdrew that request based on the Insurer Defendants' representations that they had no interest in defending the IDR award against claims that MET applied an illegal presumption and would participate in a new IDR process on remand if the Providers prevailed without their participation. ROA.24-20204.1932–1933; ROA.24-20204.1942, ROA.24-20204.1949; ROA.24-20204.1958. The Insurer Defendants thus waived any and all defense to the claim. *Supra* n.3. If this Court determines that MET is not a proper party, it should remand to the district court for consideration of how the "exceeds authority" claim should proceed.

Cir. 1982) (cleaned up). Estoppel under any other circumstances would "run[] up against the 'deep-rooted historic tradition that everyone should have his own day in court.'" *Taylor v. Sturgell*, 553 U.S. 880, 892–93 (2008) (citation omitted).

The "general[]" rule against precluding nonparty claims comes with narrow exceptions, *id.* at 893–96, including when the nonparty was in "privity" with a party to the original suit who litigated the claims, *see Richards v. Jefferson Cnty., Ala.*, 517 U.S. 793, 798 (1996). As relevant, privity is characterized by a party's "control[]" over or "adequate" "represent[ation]" in the original litigation. *Texas v. Dep't of Lab.*, 929 F.3d 205, 211 (5th Cir. 2019) (quotation omitted).

Here, the district court held that REACH (a party to the parallel litigation) was estopped from pursuing similar claims against Kaiser and MET in this case, but it determined that claims brought by Guardian Flight and CALSTAR (not parties to the parallel litigation) were not precluded because Kaiser and MET "failed to show" that those entities are in privity with REACH. ROA.24-20204.1876. On appeal, without citing *any* support, MET simply recites (at 34) the same facts considered by the district court—the Providers are air-ambulance companies, subsidiaries of the same parent, and represented by the same counsel—and then wonders (at 36) why REACH is estopped "when Guardian and Calstar are not."[20]

[20] MET offers two irrelevant citations (at 34–35) having to do with nonmutual issue preclusion in which the *same* party who previously litigated is estopped from pursuing a claim *against* a nonparty. *See Wehling v. Columbia Broad. Sys.*, 721 F.2d

MET's query is not an argument. And its failure to develop a meaningful privity argument constitutes abandonment of that issue. *See Procter & Gamble Co. v. Amway Corp.*, 376 F.3d 496, 499 n.1 (5th Cir. 2004) (party who asserted but did not develop an estoppel argument "waived" it).

In any event, MET's collateral-estoppel argument would fail on the merits. As an initial matter, it is not clear that REACH is properly estopped, especially as to MET. As MET emphasizes (at 37), the question whether IDR entities are proper parties is a legal question. And "there is an exception to nonmutual issue preclusion for pure issues of law." *In re Westmoreland Coal Co*., 968 F.3d 526, 532 (5th Cir. 2020). Thus, REACH likely should not have been estopped, at least as to MET. And if REACH is not properly estopped, neither are Guardian Flight and CALSTAR.

Even if REACH were properly estopped, the district court correctly held that Guardian Flight and CALSTAR are not. Again, Guardian Flight and CALSTAR were not parties to that litigation, and so "generally," as a matter of due process, cannot be estopped from bringing their own claims. *Sturgell*, 553 U.S. at 893. Again, MET failed to demonstrate—or even argue in any serious way—that there is a reason break from that well-established practice here. *See Campbell v. City of Indianola*, 117 F. Supp. 3d 854, 864 (N.D. Miss. 2015) ("the party asserting

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506 (5th Cir. 1983); *Harmon v. Bayer Bus.*, 2016 WL 397684 (S.D. Tex. Jan. 29, 2016). That has nothing to do with establishing privity.

collateral estoppel bears the burden of establishing the doctrine's requirements"). The corporate relationships MET gestures at do not show that Guardian Flight and CALSTAR controlled REACH's earlier litigation or that REACH adequately represented them in that litigation. *See Texas*, 929 F.3d at 211. Establishing privity "requires more than a showing of parallel interests or, even, a use of the same attorney in both suits." *Freeman v. Lester Coggins Trucking, Inc.*, 771 F.2d 860, 864 (5th Cir. 1985). Likewise, a "parent-subsidiary relationship does not of itself establish privity." 18A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4460 (3d ed.); *see also, e.g.*, *Marine Office of Am. Corp. v. Vulcan MV*, 921 F. Supp. 368, 372 (E.D. La. 1996); *In re Regions Morgan Keegan Sec., Derivative & Erisa Litig*., 166 F. Supp. 3d 948, 964 (W.D. Tenn. 2014). So there is no reason to think that a co-subsidiary relationship would necessarily establish privity. *Cf. Midwest Operating Eng'rs v. Dredge*, 147 F. Supp. 3d 724, 739 (N.D. Ill. 2015) ("The Funds do not explain how the interests of the subsidiaries are similar enough to warrant imposition of privity"), *aff'd sub nom. Midwest Operating Eng'rs Welfare Fund v. Cleveland Quarry*, 844 F.3d 627 (7th Cir. 2016).

Thus, if the Court reaches the issue, it should affirm the district court's holding that collateral estoppel does not bar claims by Guardian Flight and CALSTAR.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's judgments with respect to the Insurer Defendants. The Court should affirm the district court's denial of immunity as to MET or hold that remand to MET would flow automatically from the district court's vacatur of an IDR award.

November 6, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November 6, 2024, I served a copy of the foregoing on all counsel of record by CM/ECF.

Dated: November 6, 2024

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CERTIFICATE OF COMPLIANCE

I certify that this document complies with the type-volume, typeface, and type-style requirements of Federal Rule of Appellate Procedure 28.1(e)(2) and 32(a)(5)–(6), and Fifth Circuit Rule 32.1 & 32.2. The brief contains 12,946 words and was prepared using Microsoft Word and produced in Times New Roman 14-point font.

I further 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.

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