IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

ANTHEM HEALTH PLANS OF VIRGINIA, INC. D/B/A ANTHEM BLUE CROSS AND BLUE SHIELD and HEALTHKEEPERS, INC., **Plaintiffs,** **v.** **AGS HEALTH, INC., THE SCHUMACHER GROUP OF LOUISIANA, INC. D/B/A SCP HEALTH, THE SCHUMACHER GROUP OF VIRGINIA, INC., INGLESIDE EMERGENCY GROUP, LLC, KINGSFORD EMERGENCY GROUP, LLC, LAKE SPRING EMERGENCY GROUP, LLC, WESTERN VIRGINIA REGIONAL EMERGENCY PHYSICIANS, LLC, and WILDWOOD EMERGENCY GROUP, LLC,** **Defendants.**	**Civil Action No. 7:25-cv-00804** **District Judge: Robert S. Ballou** **Magistrate Judge: Joel C. Hoppe**

DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION TO STAY DISCOVERY

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INTRODUCTION

Defendants' Motion to Stay Discovery illustrates that a brief pause of discovery until the Court rules on Defendants' dispositive motions is appropriate. This case involves more than 16,000 individual IDR awards, eight defendant entities, and claims spanning RICO, ERISA, common law, and the No Surprises Act ("NSA"). It is not—to state the obvious—just "any case." Opp. 4. Discovery in a case of this magnitude would require individualized inquiry into thousands of proceedings—each with its own set of communications, eligibility determinations, arbitrator decisions, and party-specific circumstances—which must be collected, screened for PHI and HIPAA protections, and produced in discoverable format. That extraordinary burden is precisely why courts stay discovery when, as here, pending dispositive motions raise purely legal challenges that would terminate the entire action.

The strength of Defendants' dispositive motions only reinforces the case for a stay. Defendants' motions to dismiss present threshold jurisdictional and statutory challenges that do not depend on any facts or discovery. And just this month, another district court dismissed substantively identical claims brought by Anthem's own affiliate—represented by the same counsel—on the grounds that the NSA bars the court from exercising subject matter jurisdiction over claims seeking review of IDRE determinations—the same argument for dismissal Defendants make here. *See Anthem Blue Cross Life and Health Ins. Co. v. HaloMD LLC*, 2026 WL 982629 (C.D. Cal. Apr. 9, 2026). Forcing the parties and this Court to undertake massive discovery while these threshold motions remain pending would be a waste of judicial and party resources alike.

Rather than address these realities, Anthem's opposition cherry-picks among the factors courts consider, seeks to disregard those that cut against it, and repeatedly contradicts its own positions. Anthem cannot simultaneously argue that the case is not complex enough to warrant a stay while touting its own allegations of a "multi-party fraud case involving coordinated conduct

across multiple entities." Opp. 9. And Anthem's push for immediate discovery because the parties continue to have disputes in IDR arbitrations conflates federal court discovery with injunctive relief—a remedy Anthem has not obtained.

A holistic assessment of the relevant factors, including the dispositive nature of the pending motions and the extraordinary complexity and scale of anticipated discovery, overwhelmingly supports a stay. This Court should grant Defendants' motion.

ARGUMENT

I. Anthem's Cherry-Picking of Relevant Factors is Contrary to Law and Undermined By Its Own Cases.

At the outset, Anthem muddles the standard applicable to Defendants' motion to stay discovery. As Anthem's own authorities recognize, "[t]here is no singular test in determining whether to grant a stay of discovery." *Zinski v. Liberty Univ., Inc.*, 761 F. Supp. 3d 916, 919 (W.D. Va. 2025) (cited at Opp. 1–3, 5–6); *see also Oakley v. Coast Professional, Inc.*, 2021 WL 3520539, at *1 (S.D.W. Va. Aug. 10, 2021) ("The context of each case bears upon whether to grant a stay of discovery.") (cited at Opp. 7–8). Indeed, courts routinely consider a wide variety of factors related to the pending motion to dismiss, the nature of the case as a whole, and the current posture of the litigation and anticipated next steps in discovery. *See, e.g.*, *Zinski*, 761 F. Supp. 3d at 919 (listing factors); *Oakley*, 2021 WL 3520539, at *1 (same).

Rather than abide by these elementary principles, Anthem instead contradicts itself. It initially concedes—as it must—that a host of factors must be considered when determining whether to stay discovery. *See* Opp. 2 (citing *Zinski*). Anthem then, however, attempts to cherry-pick certain considerations related to judicial economy, hardship, and prejudice, *see id.*—and posits that the remaining considerations are categorically "not necessary to evaluate as part of

Defendants' Motion." Opp. 7. As Anthem's own cases make clear—that is not the law.[1] *See Zinski*, 761 F. Supp. 3d at 919; *Oakley*, 2021 WL 3520539, at *1. Indeed, this Court has granted stays based upon some of these very factors. *See, e.g.*, *Rivers v. U.S.*, 2020 WL 1469475, at *1 (W.D. Va. Jan. 24, 2020) (Hoppe, J.). It should decline Anthem's invitation to disregard the factors regularly relied upon when evaluating discovery stays, *see id.*, merely because they cut against Anthem's position. Instead, as laid out in Defendants' motion, a wider "case-by-case analysis is required." *Oakley*, 2021 WL 3520539, at *1.

II. The Factors, On Balance, Overwhelmingly Support a Discovery Stay.

Engaging in a holistic analysis, the factors plainly support staying discovery pending resolution of Defendants' motions to dismiss. Anthem fails to show otherwise.

A. Defendants' Motions to Dismiss Raise Purely Legal Challenges That Would Wholly Dispose of the Case.

Defendants' motions to dismiss "raise pure legal arguments which will be dispositive if accepted." *Oakley*, 2021 WL 3520539, at *2. And courts routinely grant discovery stays under such circumstances. *See, e.g.*, *id.*; *Rowe v. Citibank N.A.*, 2015 WL 1781559, at *2 (S.D.W. Va. Apr. 17, 2015); *cf. Chaudhry v. Mobil Oil Corp.*, 186 F.3d 502, 505 (4th Cir. 1999) (affirming discovery stay pending resolution of motion to dismiss).

[1] Anthem cites to *BAE Systems Ordnance Systems, Inc. v. Fluor Federal Solutions, LLC*, in an attempt to limit this Court's review only to consideration of judicial economy, hardship and equity, and prejudice. 2021 WL 6134685 (W.D. Va. Dec. 29, 2021). Opp. 7. But Anthem's reliance on *BAE Systems* is misplaced. First, *BAE Systems*—and the cases it relies upon—all involved either requests to stay proceedings as a whole or bifurcation of the case. *See id.* at *1 n.1 (seeking bifurcation); *Maryland v. Universal Elections, Inc.*, 729 F.3d 370, 375 (4th Cir. 2013) (seeking to stay proceedings pending resolution of state criminal investigations); *Stinnie v. Holcomb*, 396 F. Supp. 3d 653, 656 (W.D. Va. 2019) (seeking to stay proceedings pending Virginia General Assembly session). Whereas here, Defendants seek only a discovery stay pending the near-term resolution of their dispositive motions. Moreover, *BAE Systems* merely acknowledged that "[f]actors *include*" judicial economy, hardship and equity, and prejudice. 2021 WL 6134685, at *1 (emphasis added). This hardly supports Anthem's sweeping contention that any other factors are "not necessary to evaluate" the present Motion. *See* Opp. 7.

As this Court has repeatedly emphasized, "[i]n determining whether to issue a stay" of discovery, courts consider "the potential for the dispositive motion to terminate all the claims in the case or all the claims against particular defendants, strong support for the dispositive motion on the merits, and irrelevancy of the discovery at issue in the dispositive motion." *White v. Clarke*, 2022 WL 5265160, at *1 (W.D. Va. Oct. 6, 2022) (Hoppe, J.); *Drayton v. Newman*, 2023 WL 2405590, at *2 (W.D. Va. Mar. 8, 2023) (Hoppe, J.). Discovery stays are "particularly warranted" where, as here, "lack of subject matter jurisdiction" arguments are raised that "do[] not depend upon any facts or discovery."[2] *Sheehan v. U.S.*, 2012 WL 1142709, at *2 (N.D.W. Va. Apr. 4, 2012); *see also* Mot. at 4–5 (citing cases).

The NSA's bar on judicial review of IDR awards is precisely the kind of purely legal, jurisdictional argument that courts—including the Fifth Circuit in *Guardian Flight I* and *Guardian Flight II*—have recognized as dispositive. *See Guardian Flight, L.L.C. v. Health Care Serv. Corp.*, 140 F.4th 271, 275 (5th Cir. 2025) ("*Guardian Flight I*"); *Guardian Flight, L.L.C. v. Med. Evaluators of Tex. ASO, L.L.C.*, 140 F.4th 613, 620 (5th Cir. 2025) ("*Guardian Flight II*").

Here, Defendants' dispositive motions have more than the "potential" to end this case—just this month, another district court dismissed substantively *identical claims* brought by Anthem's affiliate, involving the *same counsel* representing Anthem in this case, and rejecting the *same arguments* Anthem now makes here. *See Anthem Blue Cross Life and Health Ins. Co. v. HaloMD LLC*, 2026 WL 982629 (C.D. Cal. Apr. 9, 2026). Notably, the California district court agreed that the No Surprises Act ("NSA") "bar[red] the Court from exercising subject matter jurisdiction over [Anthem's] [] claims . . . seek[ing] review of IDRE determinations[.]" *Id.* at 9.

[2] Anthem does not dispute that the threshold jurisdictional arguments raised in Defendants' motions to dismiss "do[] not depend upon any facts or discovery." Mot. at 4.

Even setting aside Defendants' own motions, this ruling alone demonstrates "strong support for the dispositive motion[s] on the merits," and thus, "the potential for the dispositive motion[s] to terminate all the claims in the case" warrants a stay of discovery. *White*, 2022 WL 5265160, at *1; *Drayton*, 2023 WL 2405590, at *2. Conducting massive discovery before resolving the threshold jurisdictional question would be the very definition of waste.

Anthem's responses are red herrings. Anthem first suggests that because Defendants' jurisdictional arguments will result in "dismissal of *most* claims"—namely, every claim except for one vacatur claim—discovery must proceed. Opp. 8 (emphasis in original). But Anthem's own cases make clear that is not the law: "it is sufficient . . . that defendants raise *some* purely legal arguments that would be dispositive." *Oakley*, 2021 WL 3520539, at *3 (emphasis in original). This Court has emphasized that the proper inquiry is whether "the *dispositive motion* [might] terminate all the claims in the case"—not whether a "singular threshold legal argument [is] applicable to all claims." *White*, 2022 WL 5265160, at *1 (emphasis added); *Drayton*, 2023 WL 2405590, at *2 (emphasis added); Opp. 7. Forcing the parties and this Court to engage in massive discovery before resolving questions that will, as the California district court has already confirmed, "entirely eliminate the need for [] discovery" would be a waste of the parties' and judicial resources alike. *Zinski*, 761 F. Supp. 3d at 919; *see also Rivers*, 2020 WL 1469475, at *1.

In any event, Anthem's vacatur claim (like the rest of its claims) is meritless. At oral argument last month in the substantively-identical California district court action brought by Anthem's affiliate, Anthem's counsel conceded this point: "I know that we pled 'vacatur' in the alternative . . . **But we don't actually believe that this case implicates the vacatur provision in the No Surprises Act.**" Exhibit 1, Tr. 46:8-13 (Mar. 10, 2026). That was correct. As explained in Defendants' motions to dismiss here, Anthem's vacatur claim is entirely defective—both for

substantively failing to implicate any of the FAA's narrow and rigorous vacatur requirements, as well as for failing to do so with Rule 9(b) particularity and instead improperly seeking a blanket vacatur en masse of "thousands" of IDR awards. *See* Doc. 38 at 31–33; Doc. 41 at 16–19. Anthem's hasty attempt to backtrack and use their meritless vacatur claim as a savings clause to move discovery forward should not be entertained.[3]

B. The Nature and Complexity of the Action and Expected Extent of Discovery Support Granting a Stay.

The nature and complexity of this action, and the expected extent of discovery, further compel a stay. Anthem does not dispute the case's complexity: it challenges "[m]ore than 16,000" IDR awards, involves eight defendant entities, and asserts claims under RICO, ERISA, common law, and the NSA. Compl., ¶ 10; *see* Mot. at 7. Courts within the Fourth Circuit have stayed discovery in far less complex cases. *See, e.g.*, *Blankenship v. Trump*, 2020 WL 748874, at *3 (S.D.W. Va. Feb. 13, 2020); *Blankenship v. Napolitano*, 2019 WL 6173530, at *3–4 (S.D.W. Va. Nov. 19, 2019). This Court should do the same.

Anthem's arguments are unavailing.[4] First, Anthem asserts that Defendants "conflate volume with complexity." Opp. 4 n.3. Yet Anthem contradicts itself just pages later, asserting that the "complexity weighs against a stay" because of "the complex web among Defendants" and

[3] Anthem suggests that Defendants' vacatur arguments weigh against a stay because they are based on the "sufficiency of the allegations." Opp. 8. As explained, however, the proper inquiry is whether "the dispositive motion [might] terminate all the claims in the case." *White*, 2022 WL 5265160, at *1; *Drayton*, 2023 WL 2405590, at *2. Indeed, courts within this circuit have expressly rejected Anthem's argument, recognizing that where a dispositive motion "tests the *sufficiency of plaintiffs' claims*, a finding in defendant's favor could completely resolve the case without any need for discovery"—thus making a "stay of discovery pending resolution of [the] potentially dispositive motion [] appropriate." *Rowe*, 2015 WL 1781559, at *2 (emphasis added).

[4] Anthem claims that complexity weighs against a stay because "the absence of a complex web of factual issues to untangle makes discovery less urgent." Opp. 8 (citing *Oakley*, 2021 WL 3520539, at *3). Yet *Oakley* also expressly acknowledged that non-complex cases "[o]rdinarily [] counsels against a stay because discovery will not be hard to coordinate." *Oakley*, 2021 WL 3520539, at *3. Other cases similarly find that the complex nature of a case tilts in favor of a stay. *See, e.g.*, *Trump*, 2020 WL 748874, at *3; *Napolitano*, 2019 WL 6173530, at *4.

nature of the "multi-party fraud case involving coordinated conduct across multiple entities." Opp. 8–9. Although Anthem contends that "discovery is likely to be structurally repetitive," Opp. 4 n.3, it ignores the reality of what discovery would entail: detailed inquiry into thousands of separate IDR proceedings, each with its own set of communications, eligibility determinations, arbitrator decisions, and party-specific circumstances.[5] *Cf. Zinski*, 761 F. Supp. 3d at 923 ("This case involves a single plaintiff, a single defendant, and a single claim.") (cited by Anthem).

Anthem next cites two cases from outside of this circuit regarding "generic arguments" of undue burden—both are inapposite here. First, Anthem references *Hoxie v. Livingston Cnty.*, where a party merely asserted one sentence in a reply brief claiming the possibility of "voluminous information." 2010 WL 822401, at *1 (E.D. Mich. Mar. 4, 2010). Id., at *2 . By contrast, the undue burden here is set forth in detail in Defendants' briefing, *see* Mot. 7–8, and in any event, is apparent from the sheer scale of the Complaint's allegations.[6] Moreover, unlike the present case, *Hoxie* did not involve any threshold jurisdictional immunities. *See Davis v. United States Army Rsrv. Through 321st Sustainment Brigade*, 2019 WL 5777387, at *2 n.23 (M.D. La. Nov. 5, 2019) (distinguishing *Hoxie*). As for *Standard Bank PLC v. Vero Ins. Ltd.*, 2009 WL 82494 (D. Colo. Jan. 13, 2009), the order cited by Anthem was overturned—the magistrate judge's denial of a discovery stay was immediately appealed, and the district court **subsequently reversed and**

[5] Anthem posits that "[a] stay would not alleviate any attendant hardship" because "the amount of discoverable information will only increase with time." Opp. 3. But Anthem fails to weigh the minimal duration of the stay—particularly given the Court indicating at the scheduling conference its intent to rule on the motions to dismiss shortly after the hearing—against the likelihood that "the dispositive motion[s] [will] terminate all the claims in the case." *White*, 2022 WL 5265160, at *1; *Drayton*, 2023 WL 2405590, at *2. Anthem also asserts that the "volume of discovery . . . is a direct consequence of the scale of Defendants' own misconduct," Opp. 3, but there has been no finding to this effect—Anthem cannot treat its own allegations as established facts for purposes of a discovery stay analysis.

[6] Anthem does not dispute that it challenges "[m]ore than 16,000" IDR awards, involving eight defendant entities, and asserts claims under RICO, ERISA, common law, and the NSA. Compl., ¶ 10; see Mot. at 7.

stayed all discovery in the case. *See Standard Bank PLC*, No. 1:08-CV-02127, ECF No. 55 (D. Colo. Jan. 21, 2009); *id.*, ECF No. 65 (D. Colo. Jan. 29, 2009).

Anthem's spoliation concerns are likewise speculative and unsupported. Anthem offers no evidence that any data is at risk of destruction. And Anthem fails to appreciate the critical distinction between implementing a litigation hold to preserve documents, *see* Opp. 5–6, and conducting a targeted review for specific discoverable information across tens of thousands of arbitrations—each with their own unique set of determinations, communications, and documentation—all of which must be collected, screened for PHI and HIPAA protections, and produced in a discoverable format. Contrary to Anthem's belief, the latter is not "an obligation that exists irrespective of whether discovery is stayed." Opp. 6. Finally, Anthem submits that "witnesses' recollections could fade" (a concern that has not stopped this court from discovery stays in other cases)—yet simultaneously claims that the "NSA Scheme is ongoing." Opp. 6. In Anthem's view, then, witnesses' recollections are necessarily fresh—not fading. "[A] short delay should not jeopardize the availability of the evidence" here. *Oakley*, 2021 WL 3520539, at *3; *see also Rivers*, 2020 WL 1469475, at *1.

In sum, the nature and complexity of the case and anticipated scope of discovery compel a stay.

C. Anthem Cannot Deem Unfavorable Factors "Immaterial."

Significantly, Anthem does not refute the lack of counterclaims, joinder of all Defendants in the request for stay, or the early stage of litigation. *See* Opp. 9–10. Each of these factors is a relevant consideration supporting a discovery stay. *See Oakley*, 2021 WL 3520539, at *2.

Perhaps recognizing that these factors indisputably cut against its position, Anthem instead tries to recast every unfavorable point as "immaterial." Opp. 9. For instance, Anthem asserts that it is "hardly surprising" that all Defendants joined in the request for a stay. *Id.* That is not the

legal standard. *See Oakley*, 2021 WL 3520539, at *2. Joinder of defendants is relevant to the discovery stay analysis because it dictates whether discovery will be bifurcated for different parties—that remains true regardless of Anthem's speculated theories as to the Defendants' filing of their motion.

Anthem's arguments regarding the "early stage of litigation" are similarly unavailing. According to Anthem, if the "early stage . . . alone warranted a stay, discovery would be stayed as a matter of course[.]" Opp. 9. Anthem is correct to note that the early stage of litigation is only *one* of many factors—all of which, here, *on balance*, warrant a stay of discovery. *See supra*; *Oakley*, 2021 WL 3520539, at *2. And as Anthem's own authority recognizes, a discovery stay is appropriate where "very little written discovery has been conducted" and "no depositions have been taken." Opp. 9–10 (citing *NAS Nalle Automation Sys. LLC v. DJS Sys. Inc.*, 2016 WL 7209807, at *2 (D.S.C. Aug. 8, 2016)). Likewise here, no discovery has yet occurred.[7]

D. Anthem's Arguments Regarding the Allegedly "Ongoing" Scheme Have No Bearing on the Discovery Stay Analysis.

Finally, Anthem asserts that a discovery stay is unwarranted because, according to Anthem, the alleged conduct remains "ongoing" (i.e., the parties may continue to have disputes in NSA IDR proceedings)—but that argument cannot hold the weight Anthem places on it. First, it is speculative—whether or not additional proceedings are filed in the future depends on a host of factors, including Anthem's payments. Second, it misses the point—whether or not discovery proceeds here does not change whether the parties continue participating in the IDR process—a

[7] Anthem claims that a stay of discovery may "cause case management problems as the case progresses." Opp. 1. Such concerns are unfounded where, as here, the case is in its early stages and the Court has indicated its intent to rule on the dispositive motions shortly after the hearing.

process governed by federal statute and regulations and administered by certified IDREs.[8] Anthem's argument merely confirms that it is attempting to have this Court micromanage the administrative process Congress established in a way that, respectfully, Congress never intended. In short, Anthem seeks to use discovery as a substitute for an injunction it has not obtained.

Anthem's lone case on this point is distinguishable. *See Gibbs v. Plain Green, LLC*, 331 F. Supp. 3d 518 (E.D. Va. 2018). In *Gibbs*, the plaintiff alleged that defendants were continuing to collect interest on loans at a severely inflated rate. *Id.* at 528–29. The defendants moved for a stay of all proceedings—notably, not merely a discovery stay—and plaintiffs argued that a total stay would require them to continue making unlawful payments. *Id.* at 522, 528–29. In other words, the plaintiffs in *Gibbs* faced concrete, ongoing financial harm that would have been exacerbated by a total stay of the proceedings. By contrast, Defendants here seek only a discovery stay pending the Court's ruling on the motions to dismiss, and Anthem's claims of harm based on speculation about *future* actions, such as newly initiated federal IDR that Anthem disagrees with, are not relevant to Defendants' current request.

In sum, Anthem's argument is merely an attempt to manipulate the discovery process into a form of injunctive relief. It provides no basis to deny a stay.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court stay all discovery pending the Court's resolution of all motions to dismiss filed in this case.

[8] Further, Anthem has immediate administrative remedies available through the NSA's regulatory framework, including challenging each submission's eligibility with the IDR entities themselves and/or re-opening closed proceedings for "jurisdictional errors" like unsupported eligibility determinations.

Respectfully submitted,

Dated: May 4, 2026

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 4, 2026, a true and accurate copy of the foregoing was filed through the Court's CM/ECF system and will be sent electronically to the registered participants.

/s/ B. Kurt Copper
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EXHIBIT 1

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION - SANTA ANA

ANTHEM BLUE CROSS LIFE AND HEALTH INSURANCE COMPANY, ET AL, Plaintiff, vs. HALO MD, LLC, ET AL, Defendants.	CASE NO: 8:25-cv-01467-KES CIVIL Santa Ana, California Tuesday, March 10, 2026 (10:11 a.m. to 12:01 p.m.)

HEARING RE: MOTIONS TO DISMISS / MOTIONS TO STRIKE
[DKT.NOS.68,69,72,73,76-78]

BEFORE THE HONORABLE KAREN E. SCOTT,
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:	SEE PAGE 2
Court Reporter:	Recorded; CourtSmart
Courtroom Deputy:	Jazmin Dorado
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Santa Ana, California; Tuesday, March 10, 2026; 10:11 a.m.

(Call to Order)

THE CLERK: Calling case #8:25-CV-1467-(KES), Anthem Blue Cross Life and Health Insurance Company, et al. versus HaloMD, LLC, et al.

Counsel, please state your appearances for the record.

MR. MAYER: Good morning, Your Honor. Jason Mayer and Josh Robbins on behalf of the Plaintiffs.

THE COURT: Good morning.

MR. RETZINGER: Good morning, Your Honor. Jonah Retzinger for Defendant, HaloMD, and Alla LaRoque and Scott LaRoque.

MR. KNOWLES: Good morning, Your Honor. Matthew Knowles with Erica Lang, who is with me as well. I represent Sound Physicians Emergency Medicine and Sound Physicians Anesthesia, the two Sound Defendants.

MR. COPPER: Good morning, Your Honor. I'm Kurt Copper, here along with my colleague, David DeVito. We're here on behalf of the MPOWER Defendants, MPOWER Practice Management, LLC, Bruin Neurophysiology, PC, iNeurology, PC, N Express, PC, and North American Neurological Associates, PC.

THE COURT: Good morning.

MR. RETZINGER: May I also just add, Your Honor, I'm here with my colleagues, Chris Grigg and April Yang, also of

Nixon Peabody.

THE COURT: All right. Very good. I'll just note that you've probably already seen that we don't have a traditional Court reporter in this Courtroom. We rely on an audio recording system to make an accurate record. So if everyone addresses the Court could make sure that they're speaking into a microphone, that will help us get a clear record. You can either speak at counsel table or speak at the podium. Either way is fine. But what's really important is that we speak into a microphone.

Let me start by noting that there are a number of different motions we're here to address, Motions to Dismiss the Complaint, Motions to Strike the Complaint as an {sic} Strategic Lawsuit Against Public Participation. As a threshold matter, I wanted to note that among the filings, I saw a Request for Judicial Notice at Docket 76.2. That is asking the Court to take judicial notice of some publications that are on a government website that talks about how the IDR process is supposed to work. It has guidance for people who might be using that process and some FAQs and that kind of thing.

Does any party object to the Court taking judicial notice of those materials as requested?

MR. MAYER: Your Honor, I think we objected to relevance. But to the extent that the Court wants to consider them for a Request for Judicial Notice, we don't have an

objection there.

THE COURT: Okay. Then let me start by just asking a few questions about how the IDE {sic} process works to make sure that I'm clear on that. There was a lot of other law in the briefs, which was really easy to research. But the actual process itself is something a little bit novel. So I'll let Plaintiff's counsel response, since we're taking his version of the facts in the complaint as true. And if counsel on the other side think that there's something inaccurate that's been said or want to weigh in, they can certainly do so.

So my understanding is that when an IDR request is initiated, that your client, Blue Cross, would get an electronic notice of that, and then they would have a certain amount of time -- I think it was 30 days -- to upload their response to that request. Is that right?

MR. MAYER: That is -- there's an open negotiations period, and then there's an IDR-initiation period. The IDR-initiation period, Your Honor, I believe that my client has four days to object and to file -- I believe it's called an IDR-Entity Form. So, yeah. I'm not sure if that answers Your Honor's question.

THE COURT: Okay.

MR. MAYER: Yeah.

THE COURT: I was meaning to distinguish those two periods, but I think I had the time duration. So it's a 30-day

discussion period. And then after, that fails, and the IDR is initiated, and you get notice of it. You've got four days to upload your response.

MR. MAYER: There's four days to object and to file, I believe, in an IDR-Entity Form, as I understand it. So there's a process for, essentially, selecting the IDRE. There's -- you know, there's -- responding parties are permitted to object to the eligibility within four days. And then, subsequent to that, the parties will submit blind payment offers to the IDRE for the selection of the payment determination, presuming that the IDRE does not report and dismiss the case due to ineligibility.

THE COURT: Okay. So that actually answers my next question, which is that the eligibility and the merits are somewhat separated in this process, in that you first object to the merits -- I'm sorry. You first object to eligibility. And then if that doesn't result in dismissal, then you go forward and submit your number for the baseball-style arbitration?

MR. MAYER: Yes, that's my understanding, Your Honor.

THE COURT: Okay. And with regard to the fees, when the process is initiated, you get assessed a $200 administrative fee?

MR. MAYER: Maybe $115, but it's a non-refundable administrative fee that is, essentially, due as soon as the case is initiated. That's correct, Your Honor.

THE COURT: And if the IDRE determines that a claim is not eligible, what happens with that administrative fee?

MR. MAYER: My understanding is that it's non-refundable.

THE COURT: So the other side doesn't pay you back? You just (indiscern.) the administrative fee?

MR. MAYER: Correct, Your Honor.

THE COURT: Is there something in the No Surprises Act that requires IDR submissions to be truthful? I'm thinking of either the language of the attestation or something kind of comparable to Rule 11 in federal court?

MR. MAYER: Your Honor, if the -- if I'm understanding your question correctly, if you're asking whether there are, for instance, penalties of perjury, I am not aware of any within the IDR process.

THE COURT: And the lawyers don't have to -- they have to attest that what they're saying is truthful. But as far as you're aware, there's not a penalty or a consequence if it's later determined that that attestation was false?

MR. MAYER: That's my understanding, Your Honor. And I do want to clarify. Attorneys are not required to be involved and typically are not involved. In fact, as we allege in the complaint, a lot of times, it's artificial intelligence that is being used to make these submissions. And it's companies often that are making the attestations. So, for

instance, you know, in a lot of the dispute examples we have in the complaint, it was actually "HaloMD" was the name of the party that was making the attestation.

THE COURT: I think I saw something in the No Surprises Act that talked about the ability of the overseeing governmental department to assess civil penalties for certain kinds of violations. Is that something that would apply if they determine that someone had submitted a false attestation?

MR. MAYER: I don't believe so, Your Honor. You know, the section that discusses the IDR process, the Government's enforcement authority is as to health plans within that section. There's a separate section that apples to providers. I believe it's Subchapter E that states that providers cannot balance bill patients, for instance. The Government does have enforcement authority over that. I do not believe that the Government has enforcement authority as against providers for Subchapter D, which is what we're talking about, which is where the IDR process is codified in the statute.

THE COURT: There were some screenshots in the complaint and some of the other documents that showed what you would encounter if you were going through the process of submitting an IDR request. And one of them asked for information about when the informal discussion period began, when it ended, and whether or not the Request for IDR was being

submitted late. And, if so, there were some buttons you could click to explain why. Does the IDRE have discretion to excuse a late filing? For example, if a provider said, "Well, I'm filing this late, and I admit it. But, you know, I sprained my ankle last week. I was in the hospital," you know, some -- the kind of excuses we get at Court, right, something that they say, you know, "There's a good cause for me to be late." Is that something that the IDRE can consider, or are they supposed to say, "No. You filed outside the window. The claim is now statutorily ineligible?"

MR. MAYER: Your Honor, we're stretching the bounds of my knowledge --

THE COURT: Okay.

MR. MAYER: -- but I'll answer it to the best that I can. So the portal requires parties to, essentially, implement a date to -- for when the open negotiation period started. If the open-negotiation period -- if the provider is -- or the agent is attempting to file too early, they cannot do that. The system does not allow for it. I believe that there is a process within the IDR portal where there is room for exceptions that the portal will accept. I apologize. I don't know exactly how they work. So -- but there are very specific exceptions that the portal, essentially, will or will not accept.

As far as what the IDREs consider, you know, as we point

out, the regulations only state that they need to look at the initiation form to determine eligibility. In terms of what discretion they have, you know, Your Honor, I don't know if that's clear from the regulations or even necessarily the technical guidance.

THE COURT: Okay. So before we move on to the substance of the motions, was there anything in that summary that the folks on the right side of the room would like to comment on?

MR. RETZINGER: Yes. Many things, Your Honor.

THE COURT: Okay.

MR. RETZINGER: So Jonah Retzinger, counsel for HaloMD. The first thing I'll say is, you know, your initial question about the Request for Judicial Notice, right? They objected based on relevancy. I think that was their position. I don't quite understand that. This whole -- this entire case is about the IDR process, nor do I understand how someone could proceed with a fraud claim, by counsel's own admission, doesn't quite understand how the process works.

So the reason that we offered the guidance documents into the record for the Court's consideration on the Motions to Dismiss is so the Court can understand how the process actually works. And so we offered -- really, it's five documents, Your Honor. There's the Notice of IDR Initiation Form that is explicitly referenced in the pleading. There are two

authoritative sets of guidance documents that are issued by CMS and the federal agencies, right, to parties that participate in the process. One of them is directed to disputing parties. The other one is directed to the arbitrators, the IDREs themselves.

The fourth guidance document that we offered was technical guidance that was issued in 2022, but it's effectively 10 pages of if/and statements that give direction to the IDREs when they're evaluating eligibility objections, how the IDREs should proceed.

And then the fifth document that we offered relates to a new process that CMS created this past summer, which related to -- it's a {sic} error resolution process or reconsideration process, pursuant to which any party, right, to a proceeding can ultimately ask to reopen the proceeding, given that the IDREs do sometimes make errors.

THE COURT: So, for example, if you received a Notice of Determination where the IDRE had picked a number that was not submitted by either party and seemed to have made some kind of error of confusion, you could activate that process and ask the IDRE to review it?

MR. RETZINGER: Yeah. Absolutely, Your Honor. So that fifth guidance document talks about the different types of errors that the IDRE can make. But that provides that if one of those errors or other errors -- it's not sort of an

exhaustive list -- become apparent to the parties, that they can go back to the IDREs and, ultimately, reopen and vacate the (inaudible), right?

THE COURT: Okay.

MR. RETZINGER: That is the process as it exists. Your Honor had a couple of questions about, I think, sort of the timing obligations. And I did want to point out I'm looking at it right now, Your Honor. But it's one of the guidance documents, but it's sort of a helpful flowchart. It's --

THE COURT: Can you just give me the Docket and page number from the blue text at the top?

MR. RETZINGER: Yeah. It's Document 76.6 -- or {dash} 6, Page 10 of 45. It is Page 62 of Exhibit-C to the Retzinger declaration --

THE COURT: Okay.

MR. RETZINGER: -- Your Honor. But the process is incredibly complex. And, actually, you know, much of -- I'm happy that Your Honor decided to start here because the deck that we have prepared that is on the screen right now really addresses, I think, some of the critical questions here about how the process works because the Court is not obligated right now just to take their word with respect to how the -- the legal authorities with respect to how the process works. Certainly, at the Motion to Dismiss stage, the Court is

obligated to take all material facts, right, that they are alleging as true. Not going to dispute that.

But to the extent that they are characterizing the process as something other than what the process actually is, the Court is not obligated at this stage to just take them at their word. And they have framed in their pleading, right, and in their opposition briefing that the IDR process is an honor system. It is not in any respect. And I'll start actually -- and you can see -- so this is, I think, Page -- and I'll submit these to the Court, Your Honor. We did not have a paper copy, unfortunately.

THE COURT: Okay.

MR. RETZINGER: But we can submit this after the hearing. But these go through the guidance documents that we have offered to the Court. What you're seeing right now is, on the left side, that is a graphic of the pleading itself, the first amended complaint, where they reference the Notice of IDR Initiation Form. On the right is that link, right, which is the first guidance document that we have offered to the Court. That is actually the document that contains the attestation that is central to this case. And you'll see -- I know it's a very, very small font, Your Honor, and I really apologize for that.

But it's an attestation. It is not a certification of eligibility. What it is is an attestation that an initiating

party, to the best of its belief, right, believes that a dispute is eligible for the IDR process. And that's a really, really important distinction because what Anthem is contending in this case is that this attestation is functionally equivalent to something like a certification that is contained in -- I don't know if Your Honor is familiar with, like, a CMS 1500 Form. So this jurisdiction, this venue, deals with the highest volumes of False Claims Act cases, right, in the entire country, right, year to year. That's often the case.

And in the False Claims Act context, right, there is a specific certification that healthcare providers make where they certify things like medical necessity of a service. This is not that. And, I think, one of the obvious examples for why this is not that is because, in this context, in the IDR-process context, the arbitrator reviews eligibility every single time. They are mandated by federal agencies to determine eligibility every single time.

So just to give the Court some context, the second slide right here, this is actually the definition of "qualified IDR item of service," right? And I think both amici that are both supporting Plaintiff in this case, as well as, frankly, Plaintiffs themselves, have framed the IDR process as something that lawyers shouldn't need to navigate, right, that this is something that was designed so that, you know, healthcare providers without representation could go through this process.

Just looking at this regulatory definition, Your Honor, I can tell you it doesn't get any easier the deeper you go into the cross references with respect to whether something is a qualified item or service or not. It actually is sort of a tremendously confusing thing. And federal agencies have acknowledged that there's an information asymmetry between people like -- between healthcare providers and commercial healthcare insurers, which is why they designed the process to do two things.

Yes, the initiating party does make that initial attestation, Your Honor. But the burden is then on the non-initiating party, in this case, the healthcare insurer, to provide information demonstrating ineligibility. That is -- by regulation, they are obligated to do that. So, in some respects, this is an attempt, right? It's sort of masquerading as a fraud action, right? But this is an attempt to otherwise shift what is otherwise their regulatory burden to provide information demonstrating ineligibility.

THE COURT: And how much time do they have to do that? I remember one of the arguments they made was, "Well, we get hit with 200 of these a day, and, you know, to research and contest eligibility is difficult."

MR. RETZINGER: Yeah. So I just I flashed it up for you right now, Your Honor.

THE COURT: Okay.

MR. RETZINGER: But this is from the guidance that's directed to the disputing parties as to when they must actually do that by, right? There is a temporal scope to it, right? There is a period. You know, and if they don't do it, you know, that can have repercussions. But federal agencies have created a process. And pursuant to that process, they have said, "If you think that a case is ineligible, you have an obligation, right, to provide that information demonstrating ineligibility to the IDRE."

Now, the next -- both this guidance document, Your Honor, and the next guidance document that we offer, right, both go through in explicit detail that the IDRE must decide eligibility in every single circumstance. And that demonstrates that this is not a certification of eligibility in any respect. If you -- the first form, Your Honor, and I'll go back to it, that actually contains the attestation, right, at the bottom, if you actually go through that form, which is Exhibit-1 in the Request for Judicial Notice, that form contemplates that a provider can check things off like "unknown" because they simply do not have the information.

So I think the first point that we would want to make, Your Honor, is that this is not the honor system that has been described. It's a very self-interested way of describing it. But it reflects what is the real agenda of this lawsuit, which is to chill the use of the process. And there are things

Anthem alleges in their pleading that commercial healthcare insurers, like Anthem, are losing 85% of the time in this process. I don't need any discovery on that. They plead as much.

But that's what this case is ultimately about. There's a paradigm shift, right, in the healthcare marketplace. Providers have more market power. And so what this lawsuit is designed to do is to chill the use of the IDR process in general to restrict people from accessing that process that Congress created to resolve this disputes. That is functionally what this lawsuit is. It's masquerading as a fraud action. But, ultimately, it's a challenge to rulemaking, and it's a prohibited administrative appeal. I know I deviated a little at the end there, and I apologize for that, Your Honor. But I do think the guidance documents are very helpful in explaining how the process works.

MR. COPPER: Your Honor, if I may briefly?

THE COURT: Okay.

MR. COPPER: I want to clarify what our objection is to the Request for Judicial Notice. We do not have an issue with the Court reviewing the guidance documents. I think what our issue is the Court taking those for the truth of the matter asserted, that that's actually how the process works in practice. These are guidance documents. I agree that if the process worked appropriately, independent of Defendant's

fraudulent scheme, as we've alleged in the amended complaint, that is how the process is supposed to work.

But that is not how it works in practice, and we look for -- you know, we have a presentation to talk about the background facts, which we'll share with Your Honor. But we do have an objection to Your Honor taking the Request for Judicial Notice as evidence of how the process works in practice. We understand that that's how the departments intended it to work and that that is the guidance that the Government has provided for parties to make it work. But as was clear from the technical assistance even, the Government was admonishing IDREs because they made grave errors.

There's been -- there's the amici briefs in support of Plaintiff's position that explain how this process is going completely off the rails from fraudulent and exploitative conduct from Defendants like those in this case. And so, Your Honor, we do object to taking those guidance documents as gospel for what actually happens in the IDR process over what Anthem's allegations are. We believe that that is inappropriate.

THE COURT: I understand. I think we had told the parties before the hearing that we were going to give everybody about two hours from 10:00 to 12:00. And I know I see a PowerPoint from one side. I hear there's a presentation on the other side. And so, you know, I'm happy with we want to start

with the moving parties. That's what we usually do and let them present what they want to present to the Court and then have some response from the party who was opposing the motions. And rather than having me, you know, go through a series of questions, I'll just ask questions as they arise in the course of the parties' presentations.

I will say it would -- you know, there are subject-matter jurisdiction challenges here, challenges that argue that the Court simply lacks the ability to adjudicate this dispute based on the limitations on judicial review that are found in the No Surprises Act. And since that's a very big threshold issue that, if the parties want to, you know, focus on that or talk about that, that's probably going to be time better spent then, you know, what is the proper test for unfair competition under the (indiscern.), etc.

So I'll let the folks on the right side of the room decide how they want to divide up their time, and they can lead us off.

MR. KNOWLES: So, Your Honor, good morning again. I represent the two Sound Defendants. And I do have some arguments to make at the appropriate point about my clients in particular, but I'm not going to make those here because I want to start with your first question about subject-matter jurisdiction, and that's an argument, I think, applies to all the parties uniformly. So let me bracket, I think, some

important things I do want to share about the allegations (indiscern.) my clients and set those aside because if there's no subject matter jurisdiction, there's no subject-matter jurisdiction, period.

And so the reason we've argued there is no subject-matter jurisdiction is the plain language of the statute, right? So it says, "An -- IDREs, the arbitrator's decision, is not subject to judicial review, unless the -- these" -- I'll call them the "four factors" under the FAA, these four ways you can get judicial review -- "unless one of those is met." That's the core reason that we would say there's no subject-matter jurisdiction because that's the law. And then those -- none of those four things is present here.

THE COURT: And if I understand your argument correctly, I know that language talks about the determination of the arbitrator under Section A, something of that nature. Your position is that that's whatever determination the arbitrator makes. Whether they find it eligible or ineligible, whether they award money or they don't award money, it's the concluding determination of the arbitrator that's being referenced there?

MR. KNOWLES: That is our position. And the Plaintiff's position is different. The Plaintiff is arguing that the eligibility decision isn't part of that. I think they would concede, as I understand it, that the decision about

which payment is selected is. So they would have to meet the FAA test. Our position is that the plain language of the law controls, that there is no -- so it's Subparagraph A of Section 111 in the hospital section. That's what it talks about what the IDREs do.

There's no Subparagraph B that talks separately about eligibility determinations, and that's removed from the jurisdiction strip. There's the IDRE's function, and it's all baked into that. And I think it's important to be clear up front. No Court has ever held that this distinction exists. So if you did -- if you ruled that there was subject-matter jurisdiction to reanalyze eligibility decisions, that would be the first ruling to say that. And one of the problems with that, in addition to what the law says, is there's really no -- there's no bound or limiting principle from there.

So we know as to the payment decision, at a minimum, you would apply this FAA test, and there's a bunch of law around that that, you know, every court confronts all the time when there's an arbitration award being challenged. I believe the Plaintiff's position, as I read it, is that as to eligibility, it's sort of unlimited de novo review of that decision with no limits. I don't believe that's right in addition to just what the plain language of the law says and the structure of it.

I think there are a few other ways you get to that. One of them is that when you read the full statute -- so there's

multiple sections -- it indicates that that jurisdiction strip applies to the notification, which is the request for arbitration, it applies to the parties, and it applies to the decision. Now, that language appears in 112, which is the section about air ambulance claims. But when you read it -- and if it's helpful to look at these, I have a copy of them I could hand up to look at them altogether. Would that -- is that useful or --

THE COURT: I -- however you --

MR. KNOWLES: Okay.

THE COURT: -- prefer.

MR. KNOWLES: This is nothing more than the statutory text.

THE COURT: You can come into the well if you need to, either way.

MR. MAYER: And, Your Honor, I'll --

THE COURT: We're not in criminal court, so I'm a little less worried about it today.

(Laughter)

MR. MAYER: Your Honor, I'll just object to relevance. I'll note that this is the -- there's portions here that are referencing the air ambulance statute, which we're happy to address.

MR. KNOWLES: That's true, and I'll explain exactly why it's relevant. This is all from the statute, not from

regulations or anything else. So --

THE COURT: Okay.

MR. KNOWLES: -- the first paragraph is prefatory. It explains what a "notification" is. The second paragraph is the jurisdiction strip in 111, which is the hospital claims that are at issue as to my clients. That's the language the Court has looked at. And then the third paragraph is the jurisdiction strip that is in the air ambulance section, 112. And so rather than just reciting the same language, what Congress said there is that the provisions of 111(c)(5)(e), the jurisdiction strip in the second paragraph, shall apply with respect to the determination of a certified IDR entity under Subparagraph A, the notification, the parties, to the same extent they apply under 111.

So, in other words, Congress is saying here, under both 111 and 112, the jurisdiction strip in 111 applies to the notification, the parties. It applies to everyone. That's a clear expression of congressional intent.

There's a fourth factor here, though, which is, even if Anthem were right on all of this, that the jurisdiction strip only applied to the payment decision, the selection of the two payment offers, there is controlling law from the Ninth Circuit that would say that they -- the same analysis would follow under the FAA. So we've cited the Sander case, which bars these sort of collateral attacks on arbitration awards by

invoking other statutes, the same way it does without a jurisdiction strip. So anyone who invokes RICO or a securities fraud claim to try and attack their loss in arbitration has to wrestle with this precedent from Sander.

What the Ninth Circuit said in the Sander case, and it's Sander vs. Weyerhaeuser, 966 F.2d at 501. I believe all the parties have cited it. The Court said -- and I'm going to quote from the Ninth Circuit's opinion. It says, "This Court has been extremely unwilling to upset the streamlined nature of arbitration by permitting the launching of collateral attacks." Anthem's point -- as I understand it, the only response on this is, "IDRE arbitration is very streamlined." The Court took that into account in Sander where it said, "You can't evoke securities fraud law" -- here, it's RICO -- "to attack an arbitration award, unless you can prevail on that FAA test."

So that's our view as to the scope of the jurisdiction strip. We all agree that if they could meet the FAA test, then there would be review. So the second question is, "Do they meet that?" Anthem relies on two of the four prongs, as I understand it. They rely on fraud, and they rely on an argument that the arbitrators exceeded their authority. So let me start with "fraud" because the word "fraud" in the context of an FAA review is used in a -- I would say a narrower and a more restrictive or more rigorous way than it is in the False Claims Act or in a fraud claim or a RICO claim.

What the Ninth Circuit says is that you have to show fraud, first, by clear and convincing evidence, second, you have to show that the fraud was not -- and I'm quoting from the Pacific & Arctic Railway case, "Not discoverable upon the exercise of due diligence prior or during the arbitration." That's where Anthem has pleaded itself out of Court because as to all of the IDREs it points to, certainly as to the four points to -- as to my clients, it has said, "We believe these claims were ineligible. We objected. We lost. The arbitrator ruled against us." That cannot be fraud, at least for the purposes of this FAA analysis.

If you know about it at the time, you raise it with the arbitrator and you lose, it is, by definition, not fraud. What the Ninth Circuit said in A.G. Edwards was, "If fraud is {quote} 'discovered and brought to the attention of the arbitrators,' a disappointed party will not be given a second bite at the apple." That's the reason there is no fraud review under the FAA here just based on the facts in the complaint.

As to exceeding authority -- so as I understand Anthem's arguments, essentially, that it's the arbitrators erred on eligibility. They said it's eligible, and it's not. Therefore, everything they did later, like, deciding between the two payment offers, they had no authority to do. The problem is that's not the test for exceeding authority, right? There's -- it's commonplace. I'd say it's, like, the millrun

of arbitration cases. The arbitrator decides arbitrability. Obviously, one side disagrees. They lose. They go to arbitration. They lose. They can't come back to Court and say, "The arbitrator made that threshold decision wrong, so everything that came later, there was -- that arbitrator had no authority to do, so we start over."

THE COURT: In that context, typically, the Court would construe, like, an arbitration contract to see if it indeed granted authority to determine arbitrability to the arbitrator. If we were making an analogy from that situation to this situation, it would be the Court looking at the No Surprises Act and the implementing regulations and seeing if they grant authority to the IDRE to determine eligibility, right?

MR. KNOWLES: I think that's exactly right. And the answer is, first, if they do, Anthem loses. It can't meet that "exceeds-authority test." And, second, it does. So in -- first, we've cited the CMS regulations that establish the Rules. They expressly require -- and this is 45-CFR-149.510(c)(1) {Roman} at (v), "The certified IDR entity must -- selected must review the information submitted in the Notice of IDR Arbitration to determine whether the federal IDR process applies. If the federal IDR process does not apply, the certified IDR entity must notify the secretary and the parties." And it's not a Loper Bright situation where we would

be concerned, "Did they have authority to do that?" because the statute itself -- and this is in 111(c)(2)(a) -- says, "The secretary shall establish, by regulation, this process." So they were expressly authorized to make those rules.

THE COURT: Is it problematic that the regulation tells the IDRE to look at the information in the Notice and not information that may have been submitted by the other party disputing what's in the Notice?

MR. KNOWLES: It certainly doesn't strip the IDRE of the ability to make -- or the right to make that decision. Obviously, I don't think there's a dispute that the opposing party has the opportunity to make its own submission. And the question whether Congress should structure that process differently is a question for Congress and maybe a question for CMS and its regulations. But as a matter of law, the IDRE has the authority to make the decision on eligibility. And therefore, whether it's right or wrong, it's not subject to judicial review under the FAA.

THE COURT: And the IDREs do, in fact, dismiss some of these based on a finding that they're not eligible?

MR. KNOWLES: They do. They do. I'm sorry. One of my co-counsel (inaudible).

MR. RETZINGER: I apologize.

MR. KNOWLES: Yeah.

MR. RETZINGER: Your question, Your Honor, about the

regulatory language, I just want to point you to -- and I can pull it up right now. But the guidance documents themselves provide that the IDRE is to review the information, not just in the Notice of IDRE Initiation Form but also all of the information that's submitted by the parties. And I don't think it's material at all that one of the requirements is in the regulation versus one of the requirements being in the guidance document, nor do I know, frankly, why Anthem would take the position that the agency itself did not have the authority to set forth in a guidance document what the obligations were on the part of the IDRE.

I don't think they would assert that type of APA challenge because, presumably, they want the IDRE, right, to be doing this. I think the, you know, less than -- I became aware of this over the weekend, Your Honor. But I think less than three months ago, the Court dealt -- in Savalia, right, with -- also with this judicial review prohibition in the NSA. And Anthem was on our side, right, of the table, where a provider at sought to compel Anthem, right, to ultimately pay the IDR award.

And I think the Court looked at it in the right way, consistent with how every other Court has looked at the judicial review prohibition around the country. But it -- I just -- I don't see the argument as to why the guidance document alone -- like, why the requirements set forth in the

guidance document otherwise is material at all.

MR. KNOWLES: So I think I should stop here, Your Honor, because this is the reason that we -- essentially, we think the Court should reach this conclusion and stop for a lack of subject-matter jurisdiction and give our colleagues a chance to respond because our position is, if there's no review under this FAA prong, there's no vacatur because they failed. They don't succeed on any of those four parts, right? They don't go any further, and they can't use collateral attacks per Sander to get around the FAA and plead using, whether it's RICO, ERISA, state law claims, what have you. That's the end of the review. So I think I should stop there and give the other side a chance to respond, unless you have any more questions on this issue.

THE COURT: No. I think that sounds like a good plan.

MR. KNOWLES: Thank you.

MR. MAYER: Your Honor, if I may, we prepared a presentation that discussed the facts of this case. I have never litigated a Motion to Dismiss where I've had so many disputes over the facts and requests to dismiss the case to, basically, ignore the facts that are pled in the pleading. And so, Your Honor, I'm happy to address the -- our position on the judicial review provision. But also, you know, we did prepare a presentation about what this case is actually about. And I

don't know if Your Honor wants us to provide that now, if Your Honor is not interested in it. But I think it's certainly relevant to Your Honor's consideration of the motions.

THE COURT: I'm happy to hear what counsel thinks is important for me to hear. My only concern is that we try and divide time fairly. So I don't know how long you're talking about spending on the facts. But you can try and keep your remarks to about the same time the other side used, maybe we can kind of keep some parody here in terms of time. That's my only concern.

MR. MAYER: Okay. Our factual presentation was going to be about 15 minutes. So --

(Pause in proceedings)

THE COURT: If you want to maybe try and breeze through that in 10 minutes and maybe spend --

MR. MAYER: Sure.

THE COURT: -- spend some, you know, 10 minutes then on jurisdiction?

MR. MAYER: Sure.

THE COURT: Okay.

MR. MAYER: Yeah. That works, Your Honor. Thank you. Okay.

(Pause in proceedings)

MR. MAYER: Your Honor, Anthem filed this action to seek damages and declaratory and injunctive relief due to the

Defendants' NSA scheme. Next slide. Their NSA scheme involves three components. First, the Defendants commit fraud by making false attestations and representations of eligibility that they know are ineligible for the IDRE process. These --

THE COURT: And the reason that you think they know that is because, A, you've told them, and, B, you think, in some of these instances, like, where the California law applies, the Knox-Cortese Act -- I think I'm saying that right -- or Knox-Keene Act, that that should be so clear that it's really not something that reasonable people could dispute?

MR. MAYER: Could we go to the next slide real quick? This is how the Defendants know, Your Honor.

THE COURT: Okay.

MR. MAYER: The IDR process is only available for a qualified IDR item or service. Your Honor, there's been a lot of rhetoric about that there's going to -- this is going to somehow chill the access to the IDR process. The Government expected that parties would seldomly use IDR. And only as a matter of last resort, it imposed very strict procedural requirements, specific deadlines, and limits on the types of plans and services that are eligible for IDR. The Government estimated that there would only be 22,000 disputes nationally. There's more than a hundred times those.

Here's how Defendants know that services are eligible or ineligible for IDR. They know from the explanations of

payment. And, Your Honor, we have up there disclosure that is required by regulation to be included when an item or service is eligible for IDR. It notifies the party of the 30-day open negotiation period. It provides an e-mail address for the party to reach out to initiate open negotiations. And, Your Honor, if there are questions about whether or not a plan is eligible, the provider can certainly reach out. This is the key language to informing the providers whether or not a dispute is eligible.

If this language is noted in the explanation of payment, it's eligible. The plan and the service is eligible. If this language is not there, the item or service is not eligible. It's very simple.

THE COURT: Well, I mean, if you're on the other side, though, and you get one of these explanations of payments and you think that the insurance network or health plan just made a mistake. They have to -- you know, they have to do thousands and thousands of these, and somehow, they made a mistake, do they have some opportunity? You were saying that they should reach out to you in the 30-day -- even though you didn't give them this notice?

MR. MAYER: Yes.

THE COURT: Okay.

MR. MAYER: Yes. And the regulations, I believe, also require the plans to, essentially, invite the outreach if

there are questions about how the claim was processed. But this is the key to notifying parties whether or not an item or service is eligible. If this is in the EOP for the service, then it's eligible. That type of plan, that type of service, is eligible. If it's not, it is not eligible. Or, again, as Your Honor pointed out, the provider can follow up if they have questions.

The second reason that Defendants know about whether or not a dispute is eligible is during the open negotiations period. Parties will initiate open negotiations. And when a party -- when a provider or an agent incorrectly sends an open-negotiation notice to Anthem seeking to negotiate an ineligible service, Anthem will typically respond by notifying the provider that the service isn't eligible for IDR. That happened in every single dispute example from our complaint.

THE COURT: Every single one?

MR. MAYER: Yes.

THE COURT: Okay.

MR. MAYER: Except for -- I apologize, except for one, because our client did not have a record of open negotiations for that originally because the provider submitted 88 -- they sought to {quote} {unquote} "negotiate" 88 items and services all at once. That is -- I believe that's the only one. That was a Medicaid claim. So -- and that's part of the second part of the scheme, which we'll talk about in a moment,

which is how they conceal their fraud.

The third reason that Defendants know --

THE COURT: And just before we go on, I'm looking at the screen, and I see the little green check in the box saying the claim is not governed by the federal No Surprises Act. Is that the only information that's given? If you've made a determination that it's a Medicare claim or that it's governed by the Knox-Keene Act, do you tell them that?

MR. MAYER: In most instances, yes. They will -- there are different boxes that are to be checked where, if there's a Medicare or Medicaid claim, there's a box for that. There's a box for -- and this also applies to their objections, too. There's a box that they didn't negotiate the 30-day open negotiation period. There's a box that it's subject to specified state law. You know, sometimes, there's a response like this that's a little bit more generic. But there are boxes that are specific to each circumstance as well.

THE COURT: Okay.

MR. MAYER: And then the third reason that Defendants know that the services, whether or not they're eligible, is through the IDR portal. Next slide. The IDR portal is designed to notify initiating parties of ineligible disputes, and we allege all of this in the complaint. Providers and their agents have to answer qualifications questions. And at the end of the qualifications questions, the providers and/or

their agents submit and affirmative attestation that the dispute is over qualified items and/or services within the scope of the IDR process.

Now, there's been a lot of talk about what this attestation means. There's a reason why the Government put in these qualifications questions and required parties who are initiating disputes to affirmatively attest to eligibility. They need to do their due diligence. With this affirmative attestation requirement, providers and their agents have the duty and the responsibility to confirm eligibility before initiating the IDR process. This is the check that the departments put in place to control what has become an overwhelming amount of volume of disputes. Again, they only estimated that there would be one percent of the amount of disputes that were actually filed here.

And the Defendants here, when they knowingly initiate the IDR process for ineligible items and services, they commit fraud. And they know from Anthem's explanations of payment their responses to the ineligible open negotiation notices and the IDR portal when disputes are eligible and when they are not.

THE COURT: And it's fraud on your client or fraud on the IDRE or both?

MR. MAYER: I would argue it's fraud on the Government. I would argue on the IDREs. You know, again, the

Government acts in a ministerial capacity here. They are not actually exercising discretion. They have set up this system to, essentially, police whether or not disputes are going to go through to the IDR process. And by lying to the system, they are defrauding -- we would argue that they're defrauding the Government and the Government's system, the system that the Government set up.

THE COURT: I --

MR. MAYER: So --

THE COURT: -- I can understand the portal, through which you input information, is not exercising discretion. It's a computer program, and it's acting in the manner in which it was programmed to act. But once a person receives the information that is entered into the portal, is it your position that they don't exercise discretion either?

MR. MAYER: Well, Your Honor, our position is that the IDREs -- that that's part of the problem with the system. So -- and I'm happy to sort of jump to that, I guess, real briefly. Let's go to next slide, next slide, next slide, sorry, next slide, next slide, next slide.

So, Your Honor, we go through the different ineligible claims here. I want to note, for the open negotiations, the Defendants would've had to put in a fake date and upload fictitious documentation to bypass the qualifications questions and initiate IDR. Again, that's fraud.

THE COURT: And let me ask about that. Supposing that there was never any open negotiation, the provider would know that because --

MR. MAYER: Yes.

THE COURT: -- they'd be a party to the open negotiation. And when you say that they have to upload false documentation, what is the documentation that is requested? Is it, like, some sort of e-mail exchange where you say, "Look, this is when I e-mailed them and initiated the discussion period for 30 days" but, in fact, no such e-mail was ever sent?

MR. MAYER: Yes. And you could -- I believe -- my understanding is you can upload any documentation. So you can upload a blank Word document and proceed. But you have to upload something.

THE COURT: Okay.

MR. MAYER: This is an ineligible Medicaid claim. There is no realm in which anybody would think that a Medicaid claim is eligible for IDR. It says "Medi-Cal," which is California's Medicaid claim in three different places on the face of the explanation of payment that we highlight. This, obviously, did not have the disclosure that stated that the item or service is eligible for IDR because it's a Medicaid claim. It's not eligible. Let's go to the next slide. Let's go to Slide 15 because this goes to Your Honor's question.

And, Your Honor, this really gets to why their fraudulent

schemes are so successful. The first reason is volume, and that is a key component of their scheme. They submit an avalanche of disputes, strategically all at once, to overwhelm the system. They're overwhelming Anthem, and they're overwhelming the IDR system and the IDREs that are tasked with making these eligibility nominally and payment determinations.

The second reason is that IDR is a limited, informal, highly streamlined process that lacks procedural safeguards to detect and prevent fraud. Congress designed IDR to resolve relatively low-value disputes based on the submission of blind offers. IDR has no discovery, no evidentiary requirements, no hearings, no testimony. There's nothing submitted under penalty of perjury, and no procedures to view, much less rebut, the other side's evidence. So when the parties are submitting evidence of eligibility, they don't get to see -- I -- my understanding is they don't get to see what the other side submits.

THE COURT: Let me just ask. You know, I'm familiar with private arbitration firms. And if the parties engaged JAMS or Judicate West and they had a terrible experience with an arbitrator, right, they could potentially complain to the company that hires them. If the person is a lawyer, they could potentially complain to the state bar, and they could complain to professional colleagues that they might network with at the Bar Association. And I suspect that that arbitrator would then

have difficulty getting new work.

In this setting, is there some mechanism by which someone could complain to someone who oversees the IDREs or the Government agencies involved that are supposed to be exercising oversight here if -- you know, and, again, you may not be able to compel them to do anything. But is there some mechanism for raising complaints if you really think that an IDRE is not engaging with the facts and making reasonable determinations?

MR. MAYER: If -- parties may submit a petition to decertify an individual IDRE, yes. There's a mechanism for that. But the problem, Your Honor, is that this is largely a system-wide problem. And --

THE COURT: But you couldn't write a letter to the Medicaid services offices, for example, and say, "We had a terrible experience with IDR Smith. We're urging you to investigate, and don't assign any more cases to him or her?"

MR. MAYER: I -- if you're asking whether or not a party can do that, I'm sure that they can, yes. There's a process for submitting complaints.

THE COURT: Okay.

MR. MAYER: Yes. But the issue here is that it's the nature of the process but also the fact that IDREs have a direct financial stake in the eligibility decisions. They are not paid unless they issue a payment determination. And I want to be clear about something. This is not like a judge who is

paid on a salary or an arbitrator who gets paid for the actual work that they do. Even an arbitrator, if there's an objection to the arbitration, the arbitrator is going to get paid for every minute that the arbitrator spends evaluating whether or not that arbitration is eligible up to the point of dismissal.

IDREs do not get paid for doing these eligibility decisions. They don't get paid anything. They only get paid if they proceed to a payment determination. So the only way that a dispute is going to be dismissed is if the IDRE spends uncompensated time to dig in and really understand whether or not the dispute is eligible and makes the decision to forgo any compensation for its work whatsoever. It gets paid nothing.

THE COURT: Well, I understand opposing counsel to be saying, "That's true, but that's how Congress designed the system. And if someone's going to change it, it needs to be Congress." How would you respond to that?

MR. MAYER: That is not how Congress designed the system respectfully, Your Honor.

THE COURT: Okay.

MR. MAYER: Congress did not state in any statute that IDREs should be reviewing eligibility decisions. They didn't decide that. That wasn't a decision by Congress. So, respectfully, there's nothing that suggests that Congress intended for this sort of perverse incentive to, you know, infect eligibility decisions. It was the departments that did

that, the same departments who set up the IDR portal as sort of -- as we explained, the honor system to -- and the gate-keeping function to determining whether or not eligible disputes would move forward. Congress did not decide this.

THE COURT: So when you used the term "honor system," what you mean by that is that Congress expected that people would, for the most part, provide accurate and truthful information about eligibility in the portal?

MR. MAYER: I think that's what the departments expected, yes.

THE COURT: Okay.

MR. MAYER: Right. Yeah. So -- but just Congress did not design this -- a system where IDREs were making eligibility determinations and were not going to be compensated for them whatsoever. There's nothing in the statute that says that or supports it. I want to turn, I think, now -- and I apologize for bearing the lead -- to the judicial review provision. So can we go to the next two slides?

So, Your Honor, there's several reasons why the judicial review provision does not apply here. And I was actually the one who argued the Savalia case before Your Honor. That was Blue Shield. That involved an effort to seek judicial review of a payment determination, as Your Honor may recall. This is not that case. This is about a fraudulent scheme to exploit the IDR process through the submission of ineligible disputes.

The standard of review counsels against the Defendants' position, as we'll go talk about in a minute. The NSA itself does not support the Defendants' position. The NSA's regulations actually refute the Defendants' position, and Congress' legislation in other contexts, which I know Your Honor referenced in the Savalia case, refutes Defendants' position here as well. Next slide.

Your Honor, just a few notes that I think are really critical about the standard of review here. There is -- and this is from the Supreme Court. There is a strong presumption in favor of judicial review, which can only be overcome by clear and convincing indications that Congress meant to foreclose judicial review. If there is ambiguity, the Court must resolve the ambiguity in favor of providing for judicial review. And even where a statute expressly precludes judicial review, the preclusion must be read narrowly. Next slide.

So this is what the NSA states, Your Honor. It states, "A determination of a certified IDR entity under Subparagraph A shall not be subject to judicial review, except in a case described in any of Paragraphs 1 through 4 of Section 10(a) of Title 9." The Defendants conspicuously omitted that under Subparagraph A in their briefing. I believe the MPOWERHealth Defendants did.

If you look at Subparagraph A, which we also have on the screen, it states, "The only determination that is contemplated

in Subparagraph A is the payment determination in which the IDRE selects one of the parties' offers as the payment determination. Thus, the NSA limits judicial review of the IDRE selection of one of the two offers as the payment determination, except in one of the circumstances provided in the FAA."

And, Your Honor, there's a lot of talk about the different cases that have come up in the context of trying to enforce payment determinations or vacate payment determinations. All of those cases pertain to the IDRE's actual payment determination, not an issue that dealt with fraudulent -- the fraudulent submission of ineligible disputes, which does not go to the payment determination. Next slide.

The NSA regulations also refute the Defendants' position. Now, the NSA regulations are what delegate eligibility to decisions to the IDREs. And if you look at the regulations, they specifically follow the statute and cabin the prohibition on judicial review to the payment determination. It states, "A determination made by a certified IDR entity under Paragraph(c)(4)(2)." And then we have (c)(4)(2) below it, which mirrors the language in the statute about selecting one of the offers as the payment determination. Eligibility is discussed in an entirely different provision of the regulations. It's in (c)(1)(5). Next slide.

And, Your Honor, Congress' legislation and other conducts

-- in other contexts also refutes the Defendants' position. So we have a comparison here on the left is the No Surprises Act. There's a limit of judicial review for a determination of a certified IDR entity under Subparagraph A. And then some of the cases that the Sound Defendants cited cited to this statute on the right, the Congressional Review Act, which says, "No determination, finding, action, or omission under this chapter shall be subject to judicial review." Congress could've used that language. It did not. It specifically cabined the limit on judicial review to payment determinations. Next slide.

And we provided another comparison here as well. You know, there was an argument by the Defendants that there's some implicit intention by Congress to also include things that happened prior to the payment determination. That's completely unsupported, but we think that this comparison provides an apt example as well. The Veterans' Judicial Review Act, this states, "The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or dependents or survivors of veterans.

Subject to Subsection B, the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action or the nature of mandamus, or otherwise." This is the language that Congress uses when it tends to preclude any

decision by the Secretary or an IDR entity. It is noticeably absent here. And the standards of review counsel that the Court must review the judicial review provision narrowly. And so it doesn't apply to this scheme because this scheme is not about payment determinations.

THE COURT: If the IDRE came back and said, "The payment due is zero," would the parties have some understanding about whether that was an eligibility determination or a determination about the reasonable value of the services provided? How would you know in that situation what kind of a determination that was if the availability of judicial review turns on it being an eligibility determination versus a payment determination?

MR. MAYER: Sure. I think Your Honor is talking about the Avraham case.

THE COURT: I was just imagining a hypothetical.

MR. MAYER: Okay. Well, there was a case that discussed that.

THE COURT: Okay.

MR. MAYER: That's the Avraham case out in New York. And that was an instance where the provider specifically sought vacatur of the payment determination of $0. So I think that if there's a question that the IDRE -- I mean, I'm not sure who would bring that kind of an action, frankly, Your Honor. The provider may dispute the actual payment determination itself,

which is what happened in the Avraham case. I'm not sure that the plan would bring a dispute, and I'm not sure that the provider would argue that the dispute is ineligible because the provider brought that dispute in the first instance. But certainly, if a party is seeking to vacate that payment determination of $0, then I think that that would implicate the judicial review provision, yes.

And so I know that we pled "vacatur" in the alternative. That was in the event that the Court decides to read the judicial review provision very broadly, which, again, we don't believe is supported by the standards of review or the statute itself. But we don't actually believe that this case implicates the vacatur provision in the No Surprises Act.

Just briefly on collateral attack, "collateral attack" is a doctrine that prevents parties from circumventing exclusive remedies for challenging a judgment or an arbitrability award. So it happens with courts. You cannot collaterally attack a final and binding judgment. You have to appeal it. It happens as was in the cases from -- cited by the Defendants with FAA arbitrations. You cannot collaterally attack a final and binding arbitration award subject to the FAA. You have to use the FAA's procedures.

This case does not implicate -- it doesn't limit judicial review of their fraudulent scheme. And so this doctrine does not apply. It is also known as an "exclusive-remedy

provision." If there is an exclusive remedy for challenging something, then it applies. And that is clear from the cases that were set forth. The Sander case that the Sound -- Mr. Knowles cited, that contained the language -- that was about an FAA arbitrage that said the three-month limitation is meaningless if a party to the arbitration proceedings may bring an independent direct action asserting such claims outside of the statutory period. So it was about not bringing a claim for -- that was a collateral attack on an FAA arbitration award that was subject to the FAA's procedures.

This case does not implicate the judicial review provision. There's nothing limiting judicial review, so it cannot be a collateral attack. But as we also explained, the NSA does not provide procedures for even challenging individual payment determinations. And that was set forth in the Med-Trans Corp. case. So for the reasons -- for those reasons and the reasons we discussed in the brief, we don't believe that that doctrine applies here.

THE COURT: If the Court did find that it applied and was looking to see if these claims, nevertheless, were qualified for vacatur, you've heard the argument that the fraud has to be, you know, discovered and brought up to the arbitrator in order to qualify under that provision. Do you disagree that that's the test, or do you agree that that's the test and argue that you meet it?

MR. MAYER: Are you -- Your Honor, are you talking specifically about 10(a)(4)?

THE COURT: Yes.

MR. MAYER: Well, the --

THE COURT: Well, I guess 10(a)(1) or (4).

MR. MAYER: Sure. I'll start with 10(a)(4), I guess. The test -- and this is in the EHM Products, Inc., case. And, again, I do want to make clear, we don't think that this is applicable to this case. But it is whether an entity is purporting to exercise powers that parties did not intend them to possess. Congress only intended by statute that IDREs would issue payment determinations for qualified IDR items or services. That's clear in Subsection 5(a). Now, the departments have also sort of foisted on this eligibility determination. But Congress was clear in the statute that IDREs do not have the authority to issue payment determinations for non-qualified IDR items or services.

And, Your Honor, there's not even a close question about whether any of the dispute examples in the complaint are qualified IDR items or services. We're talking about Medicaid claims. We're talking about claims that are clearly subject to specified state laws. We're talking about claims where there's no actual proof of open negotiations. It never happened. So there's not even an arguable -- I don't think that the Defendants could even argue that taking those facts as true

that an IDRE had the authority to issue a payment determination in those situations.

So if you look at -- so if Your Honor were to look at what Congress stated and what Congress limited, we think that it's clear that they did exceed their authority by issuing payment determinations on those.

THE COURT: Okay.

MR. MAYER: And the other point I would say in terms of 10(a)(1), and we explained this in our brief, 10(a)(1) can apply where there's, essentially, no indication that the arbitrator -- or, here, the IDRE -- meaningfully considered the evidence and the objection. There is no way that an IDRE would've meaningfully considered Anthem's evidence and found that these dispute examples are qualified and can -- and that there can be a payment determination issued on that. And so, for that reason, we also believe that it's subject to -- it could be subject to vacatur under Section 10(a)(1).

THE COURT: Okay. All right, thank you.

MR. MAYER: Thank you.

MR. RETZINGER: Your Honor, a couple of preliminary comments. I'm going to quote Your Honor in Savalia when you said, "Courts should avoid writing something into a statute which Congress so plainly left out. Congress says in a statute what it means and means in a statute what it says there." That was from the Savalia decision three months ago.

The judicial review prohibition in the NSA is very, very clear. There is no bifurcation of eligibility versus payment determinations. No court around the country has ever said that that is okay. It is an unreasonable reading of the statute. It would undermine the entire NSA statutory and regulatory framework. It's not supported by the textual language. It is -- it's -- I don't know how to frame it other than it is somewhat nonsensical.

THE COURT: Well, how would you respond? I hear the other side arguing, "Look, you got to interpret limitations on judicial review narrowly." And, here, they could've just said, "No determination by the IDRE is subject to review." And, instead, they said, "No determination by the IDRE under Subparagraph A." And is there some meaning that I should subscribe to the -- under Subparagraph A that's just different from any determination?

MR. RETZINGER: I think it's -- I think you framed it in Savalia. It's plain language, Your Honor.

THE COURT: Okay.

MR. RETZINGER: Right? That's what it is. And we -- I can pull up -- we have a slide, right, that actually has the language of it.

THE COURT: I think it's on the screen right now, even if that's not your slide.

MR. RETZINGER: I can't see it. The font is very

tiny.

(Laughter)

THE COURT: It's a little small. All right.

MR. RETZINGER: But it's very plain language. There's nothing in the NSA regulations that bifurcate -- right, that -- and say that judicial review is ultimately okay. The other practical reality of something like that is the judiciary would be absolutely overwhelmed. You have amici. You have Anthem who have talked all about volume here and how volume is, apparently, a problem.

What they are effectively advocating is that the judiciary now has -- statutorily is able to review an eligibility determination in which the IDR makes in every single IDR proceeding, right? So I think I'll -- just on the eligibility front, I just think it's not supported by the language of the statute to begin with.

But I think Your Honor made a very, very good point a couple moments ago when you asked about -- we had taken the position in our papers that this is not Capitol Hill, right? And much of what counsel just argued was his dissatisfaction. It is indisputable that, I think, Anthem is unhappy, right, with both the legislation and the rulemaking, right, that have implemented the IDR process. But your points about legislation applies equally to regulation. The guidance documents and the regulations themselves impose that eligibility determination

upon the IDRE.

And Anthem -- if Anthem thinks that otherwise has created some substantive legal standard that is otherwise incompatible with the No Surprises Act, there are many channels and avenues that Anthem can pursue to try to make that claim via the Administrative Procedure Act or otherwise. This is not -- this is a RICO action, Your Honor. This is a fraud action. And so simply because they dislike the process or that they otherwise think that federal agencies aren't doing a good job does not mean that they can plausibly assert a fraud claim.

MR. KNOWLES: I think -- Your Honor, I agree with -- excuse me. I agree with all that. And I would only note, too, that in the spirit of taking the allegations in the complaint as true, to the extent they're factual, and we have to look at what Anthem actually says. I mean, the first page of Anthem's brief and opposition to our Motion to Dismiss, in the first paragraph, it says {quote} that -- I'm sorry. Before I quote, they say that Anthem {quote} "'seeks to hold Defendants liable' {close quote} for among other things {quote} 'requesting payment at rates vastly beyond what the market provides'" {close quote}. That's Docket 93, the first paragraph of the first page.

So, clearly, payment is part of it. And I think what we have to understand is that you can't tease these things apart. They're two sides of the same coin. You can't tease the

analysis, or put differently, you couldn't get to do the analysis that we would have to do if we went to discovery and summary judgment and trial here without looking at both things. What is it they request in damages? It's the damages from the awards that they disagree with, the payments they say that we asked for too much, the IDRE erred in agreeing that our offer was more reasonable. It doesn't work to bifurcate them.

And then I think the second point I emphasize is, if we did bifurcate them, what's the standard? Is it -- would it be unlimited judicial de novo review of every -- of thousands or hundreds of thousands or maybe even millions of IDREs? That cannot possibly be consistent with Congress' scheme and its plain words -- plain language.

I would -- if this is a right point, I have about five minutes of, you know -- specific to my two clients that I think are important because we're being accused of fraud here. My colleague on the other side notes they pleaded a complaint. We have to accept the factual allegations as true. We certainly do. Here are the factual allegations as to the two Sound Defendants. So one is Sound Physicians, does physician services in hospitals. Sound Anesthesia does anesthesia services. The first thing the complaint says is that we are big. So we have over 4,000 providers. We're about 6% of all acute medical hospitalizations. That's Paragraph 25 of the amended complaint.

Anthem is also very large. Paragraph 30 notes that they processed tens of millions of healthcare claims annually. So Sound submits thousands and thousands of claims, thousands of IDRs. Why does that matter here? Well, the reason it matters here is that what's pleaded in the complaint as to Sound Anesthesia is one IDR that they say is ineligible, one. As to Sound Physicians, it's three. The Sound Anesthesia one is under the -- they say it should've been under the California statute. Obviously, I don't, in any way, concede that we made a mistake, but we have to accept the factual allegation here as true that it should -- that it was a state law claim.

Under Twombly and Iqbal, the Plaintiffs have to plead facts that rule out a plausible legal explanation for the conduct. If you have thousands and thousands of claims, thousands of IDRs, and one example where they -- where it was ineligible and it went through, that is entirely consistent with a mistake. And I'm not conceding there was a mistake, but that's entirely consistent with a mistake. They haven't pleaded facts that give rise to fraud.

I think the other thing that's important to emphasize is what's not pleaded. So my clients, as alleged in the complaint at Paragraph 8 and 88, we used HaloMD to process these IDR claims for a period of time. There's no allegation here that our relationship with HaloMD was anything more than arm's-length commercial contractual -- in other words, as to sound,

no allegations about shared directors or shared websites or overlap and then no allegations about a connection between sound and the other two Defendants or the other Defendants.

This all, of course, ties to 9(b), Your Honor, and we've raised a 9(b) argument. The Ninth Circuit has held that in certain instances of very complex fraud schemes, 9(b) is relaxed when the facts are in the exclusive possession of the Defendant. So the common example is a qui tam relator who just doesn't have access to all the claims and says, you know, "Here's what I know. These are enough facts to show fraud. That's why it survived the Motion to Dismiss. But I can't list every claim for you because I just don't know. They know." This is the opposite of that case.

I think it is fair to say that Anthem knows better than anyone what kind of health insurance plan each of their members have. And in this back and forth of large batched claims and thousands of claims flowing back and forth, they know. There's no reason they couldn't. I also can't tell you which IDRs are in dispute here because I don't know. They haven't listed them. They of course know that it started as thousands, it became hundreds in the amended complaint. They know what they are, I don't. They pointed to one. That does not comply with a 9(b). There is no basis under Ninth Circuit law to relax 9(b) in that way in these circumstances.

THE COURT: So the vision would be if they amended

the complaint that they should attach like a spreadsheet that lists all of the IDR numbers that they contend fall into what they're calling the scheme.

MR. KNOWLES: So if we got there, if the Court had jurisdiction --

THE COURT: Right.

MR. KNOWLES: -- which, you know, again --

THE COURT: Right.

MR. KNOWLES: -- we would disagree with, but they also would fail under 9(b). They would have to plead facts that are consistent. If you assume the facts to be true, only consistent with fraud. And they'd have to identify the claims and they have to satisfy 9(b) as to why each of them is fraud. The last point from me, Your Honor, is on this open negotiation issue. So there were allegations in the initial complaint, the first complaint, Docket #1, that my client committed fraud because it requested IDR without completing open negotiations. We sent a Rule 11 letter to the other side, said here's the emails. They properly amended their complaint to correct, because those allegations were wrong. But I think it highlights the broader point here that this is a big, complex system with a lot of claims flowing back and forth. There are mistakes along the way; that doesn't make them fraud. That doesn't give -- that doesn't mean that RICO is the right remedy to correct them. There are no open negotiations allegations

against my clients. So I'll stop there, Your Honor.

THE COURT: All right.

MR. RETZINGER: Could I just say two more comments --

THE COURT: Sure.

MR. RETZINGER: -- Your Honor?

THE COURT: Sure.

MR. RETZINGER: The first is when the Court held recently that there was no express or implied private right of action, right, in the No Surprises Act, it referenced the existing enforcement regime, right, for the agencies. What the agencies -- essentially penalty positions that they can do. And I think you had asked counsel, right, that question, to the extent that a initiating party does something wrong, right, can CMS otherwise take some sort of enforcement action against them. We certainly would say that they could. But independent of that, you also just had counsel argue that fraud, right, that this is fraud upon the Government. There are many, many authorities, right, that the Government could otherwise leverage to the extent that it believes that it has been defrauded in any way. So I don't know how, you know, Plaintiff could take the position that otherwise there isn't an existing enforcement regime or mechanism that the agency could rely upon.

And then just very quickly, Your Honor, on the 9(b) argument, there is certain case law and precedent in the Ninth

Circuit that provides that in the context of a fraud claim, sometimes representative pleading is okay. But that's in the context, usually, of when a Plaintiff is not in possession of the information, right, and the specific information that needs to be pleaded with particularity is exclusively in the possession of the Defendant. This type of argument comes up all the time in the False Claims Act context, right. Here we have the opposite circumstance. Presumably the only party that actually knows why it -- why Anthem is contending that a particular claim is ineligible is Anthem. So I don't think representative pleadings should be -- to the extent that any claim survives, and I don't -- certainly don't think that any claim should, but certainly they would have the obligation to plead each, you know, one of the alleged IDR proceedings that they sought to vacate, right, with particularity.

One -- just one more point. In the Avraham decision that Counsel referenced on Anthem's side shortly ago, there were 108 proceedings that were at issue in that case, and Counsel took the position on the behalf Blue Cross Blue Shield Association that those 108 claims should be severed into separate actions, right. Whereas --

MR. MAYER: That was not the position that we took.

MR. RETZINGER: That's the position that they took. I've read the briefs.

MR. MAYER: I know what the position we took.

THE COURT: Okay.

MR. RETZINGER: But so I think it's somewhat disingenuous, right, to claim in this other action that 108 claims should be severed, yet there is an indeterminable number of IDR proceedings here that are at issue. There's no parameters surrounding it, but they think that they can proceed, right, with respect to vacatur for those unspecified actions.

THE COURT: So we've got about a half hour left so I'm going to give you --

MR. MAYER: Okay.

THE COURT: -- 15 minutes, and since you're the moving parties, you can have the last word with the last 15 minutes.

MR. MAYER: Your Honor, briefly, we're not asking this Court to review eligibility on any claim. We're asking the Court -- our position is that the NSA's judicial review provision does not limit Anthem's action which is seeking to hold Defendants liable for a fraudulent scheme that's actionable under RICO. This is not going to open up the flood gates to a party petitioning the Court and saying hey, this particular example is wrong. We are just stating that the NSA's judicial review provision does not limit this action or the relief that is being sought. Anthem is seeking a declaration, it's seeking an injunction, and it's seeking

damages for the harm. There is no reason for the Court to have to actually revisit any of the IDRE's selection of any of the payment offers.

THE COURT: Well, the injunction provision, if I remember right, asked the Court to enjoin them from submitting ineligible claims to the IDRE process. And so if I sort of play that out, if I entered that injunction and then you thought they had submitted an ineligible claim, right, you would come back to me and say, Your Honor, they violated your injunction; this claim is really not eligible, and then I would have to decide eligibility, right?

MR. MAYER: Well, I guess in that hypothetical scenario that -- to enforce the Court's order, yes. But again, there is nothing about the NSA's judicial review provision that limits that. And certainly the Court can fashion whatever order it believes would be appropriate to end this fraudulent scheme.

There were questions -- I want -- there has been a conflation in the briefing about relaxed pleadings standards. That pertains to pleading the who, what, when, where, why, and that is when the information is not in the parties' possession. We pled a 371-paragraph complaint. I'm not sure if the Defendants are asking us to plead every single dispute example and show every single one that's fraud. I don't believe that that is necessary under the pleading rules. They also want a

list, that certainly that they can request in discovery. And this actually came up in the context of the ERISA arguments. They -- you know, they stated that we needed to identify the specific health plans. You know, the Courts that have dealt with those questions have stated that, you know, the party can just produce the relevant documents in the normal course of discovery. That's the UnitedHealthCare Services vs. Team Health case from the Eastern District of Tennessee that we cite. It's also the Nutrishare, Inc. vs. Connecticut General Life Insurance Company case out of the Eastern District of California. We have met -- our position is that we have met the requirements under Rule 9(b) to plead a fraudulent scheme with specific representative examples. That is all that Rule 9(b) requires. And these questions about, well, we need a spreadsheet, or we need to have more dispute examples, if Your Honor believes that, that's fine, but we don't believe that it's necessary under the Federal Rules of Civil Procedure.

THE COURT: Yeah, I did understand their arguments as making a distinction between identifying the particular IDRE determinations that are alleged to be the product of fraud versus -- you know, we recognized it on your side, if you see that someone using a particular username or email address entered data into the portal, you don't know the person behind that, and that's fine, you wouldn't know that.

MR. MAYER: Your Honor, I sort of want to -- you

know, I want to use my time wisely. I'm curious about what questions you have.

THE COURT: Let me ask, you mentioned the ERISA claim, and there was an argument in the other side's brief that said, look, the portions of ERISA under which you're trying to get equitable relief are just portions of ERISA that were added by the No Surprises Act, and so the same jurisdiction-stripping statutes -- you know, the same provisions within the No Surprises Act should apply to some claim for equitable relief under ERISA, that's one argument that I'd be interested in hearing your response to.

MR. MAYER: Sure.

THE COURT: The other was, you argue that you're a fiduciary under ERISA because of certain self-funded plans, but then there was no allegation that those self-funded plans were among the plans that lost money as a result of the fraud scheme that is alleged here, and so the other side is saying there's a link missing in your allegations of causation.

MR. MAYER: Sure, both great questions. So first, as we've explained, the judicial review provision does not apply to this action. And §1132(a)(3) broadly authorizes any action to address conduct that violates any provision of the subchapter, and we identified them in our brief. There are no exceptions to that authorization. And so there is no rational basis, from Anthem's position, for -- to suggest that Congress

intended to limit actionable ERISA claims, especially for prospective injunctive relief that is not available in IDR proceedings. I'll also note, Your Honor, that the judicial review provision -- again, it's about decisions under subparagraph (a). That's the IDRE's payment determination. That's retrospective, so that's looking at what happened in the past. (a)(3) is about prospective relief, and so there's nothing that limits a party in -- from Congress' legislation, from seeking prospective relief. Even if the Court were to determine that the judicial review provision somehow applied to this entire action with respect to retrospective relief that Anthem is seeking.

As to the plans, I'll just quote paragraph 30. We plead Anthem {quote} "is authorized to undertake efforts to safeguard and protect itself, its members and insureds, and the various employer group health plans it administers, from fraud, waste and abuse, like the fraud Defendants are perpetuating here." I think this is a very nit-picky reading of this argument, but Your Honor, if Your Honor believes that it seems ambiguous, and after construing all of the allegations in Anthem's favor that we either need to identify the specific plans or state that those specific plans were the ones that delegated the authority that's discussed in the complaint, we can certainly do that on a re-pleading. So again, we think that the inferences -- we believe the inferences make that clear, but we can allege that

more specifically as well, if Your Honor would like.

THE COURT: With regard to the claims for -- at the very end of the complaint there's just a claim for declaratory relief, injunctive relief, I think it's kind of a free-standing claim --

MR. MAYER: Sure.

THE COURT: -- is that something that is alleged under Federal law or State law?

MR. MAYER: Federal law.

THE COURT: Okay. I can look at my notes and see if I have any other --

MR. MAYER: Sure.

THE COURT: -- questions.

MR. MAYER: I do have one more point that I do want to raise for Your Honor --

THE COURT: Okay.

MR. MAYER: -- about the Litigation Activities Doctrine, and maybe one brief point on Noerr-Pennington and RICO. But I do want to answer Your Honor's questions first.

THE COURT: Well, I think that's fair. If the Court does get to RICO, there's been arguments that the type of wire fraud and mail fraud alleged here can't be predicate acts because they are really petitioning activity, and so if you -- or either that or they fall into the sham litigation exception. So if you want to address either of those, that would be fine.

MR. MAYER: Sure, so that's Noerr-Pennington, I believe, Your Honor. Defendants are not engaged in First Amendment petitioning activity when they commit -- when they engage in a fraudulent scheme to flood the IDR process with knowingly ineligible disputes. We explained first that it's inappropriate to make these factual decisions at the motion to dismiss stage, and we believe that we've adequately pled and argued that this is a purely private process. And Noerr-Pennington immunity does not apply to IDR proceedings, which are purely private commercial disputes. They do not apply to disputes before private organizations. That's what IDR is. IDRs are payment disputes that proceed before private entities. The entire process is closed -- private and closed to the public. The public cannot view or scrutinize the evidence or representations of the parties. The public cannot view or scrutinize the decision making of the IDREs. There is no publicly available opinions or precedent. We explain that the Government's role is ministerial. Again, it's -- they don't actually engage in any decision making. All of the decision making for these disputes is made by the IDREs. So there's no indication of Government action or Government discretion that is implicated as part of the IDR process disputes. Private IDREs have the authority to issue binding payment determinations with no agency review or Government input. IDR does not have any of the characteristics of Government action.

It's an entirely private process.

There's a -- there were questions about the sham exception which deals with misrepresentations, which is what we raised for Your Honor. I think the argument was that these misrepresentations do not deprive the proceedings of their legitimacy. This fraud goes to jurisdiction. It is essentially a fraud that is committed to bypass the gate-keeping that the Government has set up to police and ensure that disputes that go through are eligible disputes. And this scheme pushes patently ineligible disputes to payment determinations where the IDRE clearly has no jurisdiction under the statute. There's -- there were questions about reliance. We believe that the case law shows that the Government does rely on these false attestations, even though they're not acting by way of the system that they say that's set off. There is an indirect reliance. The IDREs are also relying on the Defendants' false attestations of eligibility, and we believe that that's clear from the complaint. By regulation, they can solely rely on the IDR initiation form. They're not compensated for evaluating eligibility. And the IDREs in these dispute examples had to have relied on the fraud from the Defendants. Otherwise how would these determinations, these disputes had gone to a payment determination in spite of Anthem's objection? Of course they were relying on the Defendants' fraud. So we think that it's very clear that that

question should not be decided on a motion to dismiss. IDR is a purely private process that does not implicate petitioning activity, and their misrepresentations also render Noerr-Pennington inapplicable.

And just briefly on litigation activities, this is a policy-based doctrine. The Courts are very clear that they apply it on a case-by-case basis, based on the policies of the cases. Koziol made that very clear when it declined to apply the doctrine because {quote} "the policy concerns asserted in these cases" -- which had applied the doctrine -- "are not implicated. The policy reasons behind the Litigation Activities Doctrine is that Courts have time-tested procedures to produce reliable results, separating validity from invalidity, honesty from dishonesty." That's the Pendergraft case from the Eleventh Circuit. Courts -- there's attorney representation, there's rules of procedure, there's rules of evidence, there's penalty of perjury, there's the right to cross-examine. There's public proceedings, there's written and reasoned opinions, there's a right to appeal, there's malicious prosecution claims, there's the right to issue sanctions, and there's res judicata and collateral estoppel which, as we explained, do not apply.

IDR has none of these time-tested procedures. There's no requirement of attorney involvement. IDR is often initiated anonymously, including through AI. Attestations of eligibility

are not subject to penalties of perjury. IDR does not provide any opportunity for discovery or cross-examination. IDREs are not mutual parties when it comes to eligibility decisions. IDREs cannot issue sanctions. IDR cannot serve as a basis for malicious prosecution. Res judicata, collateral estoppel do not apply. And IDR is unreliable and it's been riddled with errors, and the Government has said that in the technical assistance as well. And so all of the reasons for Courts adopting that exception on a case-by-case basis with respect to civil litigation, none of those policy reasons are implicated in this case.

THE COURT: All right, thank you, Counsel.

MR. COPPER: Thank you, Your Honor. Just a few comments in response, particularly on the Noerr-Pennington Doctrine. And again, I'm Kurt Copper on behalf of the MPOWER Defendants. Earlier when asked who is defrauded under Anthem's theory of the case, Counsel answered, the Government, among other things. And yet now, when discussing Noerr-Pennington, it becomes we're going to characterize this process as purely a private process that doesn't involve the Government. That's -- there's a clear tension there in their position, and the reason is because this is not a purely private matter, when the only reason that Anthem is coming into arbitration is because the Government set up the arbitration process. The process was established via the No Surprises Act and is -- this is, in

fact, core petitioning activity to the Government when healthcare providers are pursuing their rights under the statute to try to seek recourse for what they believe to be under-payments. If Anthem is unhappy with that, they have a -- have multiple remedies that have been discussed thus far. Counsel tried -- argued that this is not suitable for adjudication at the motion to dismiss stage on the pleadings. We would cite the Court to -- or direct the Court to the B&G Foods case that we cited in the briefing, or the Ninth Circuit addressed Noerr-Pennington arguments on a motion to dismiss and granted a motion to dismiss.

I also would just point the Court more broadly to the statement and the recent decision from the Central District of California in the Ford vs. Knight case, where there was an attempt to try to hold the Defendants liable for supposed misstatements in petitions that were submitted, and --

THE COURT: The Lemon Law cases that we all know and love.

MR. COPPER: Indeed, indeed, Your Honor, yes. And there the Court recognized that one of the -- that the ultimate purpose of the Noerr-Pennington Doctrine is to {quote} "over protect potentially baseless petitions" {unquote}. And so the doctrine itself is there to try to protect against chilling of petitioning activity. These are, in fact, core litigation activities. The opposition from Anthem concedes that Courts

don't generally allow litigation activities to serve as a basis for predicate acts under RICO. Obviously this has been briefed heavily and I don't want to belabor the points, but happy to address any particular questions that the Court might have.

THE COURT: I appreciate those comments. I don't think I have any further questions specifically about Noerr-Pennington.

MR. COPPER: Okay, thank you.

MR. KNOWLES: And Your Honor, I'm going to address very briefly the injunction and declaratory relief point, and I -- in response to the floodgate concern, I heard a concession from the other side that I think may well substantially resolve or maybe completely resolve the issue. My colleague on the other side said that his client is not asking the Court to review eligibility in any IDR. They're just -- and I'm not quoting, you know, said something -- we won't address the fraud. We don't want to -- we are not asking the Court to review eligibility in any IDR. That's the end of the story here, because without showing that an IDR got something wrong on one of these, there's no claim here. There's no dispute, there's no violation, there's no standing, there's no harm other than the fact that they went to IDR. That would be an essential component of every part of the relief they seek, including the injunctive relief. So they would ask for injunction under -- sounds like it's a Federal injunction claim

under one of the statutes they have invoked. The problem is, there's got to be -- you can't just go to the Court and say hey, we have this other entity, we do a lot of business, we want you to enter a follow-the-law injunction so that they have to follow the law, and if they don't follow the law we'll come and we'll say it's contempt. There has to be an injunction that springs from a violation. In other words, they can't get to the injunction without showing that there has been all of the things they alleged to be true in the complaint. You don't get to go there. So if they're not going to review the outcome of eligibility or damages, they never get there.

The second problem with the injunction theory is there's just no support for it, Your Honor. They point you to a case from the Fifth Circuit, Gulf Petro Training, it's 512 F.3d 742. That case is squarely against them. It says that you cannot use this injunction approach to avoid all of the bars and obstacles we've talked about today, unless the injunction issue is "analytically different" -- that's a quote from the case -- from the things that were fought about. Here it would be in the IDR or in the arbitration. That's exactly the case. The reason they are asking the Court for an injunction is they are saying that the -- we -- that my clients asked the IDREs and they did something in arbitration that was wrong, and they're saying you have to do it differently in the future. The Court cannot -- there's no way to get there without doing exactly the

re-examination that is prohibited under those provisions. Thank you.

MR. RETZINGER: Am I the last one, Your Honor?

THE COURT: I think so. I might have one more question that I'll give both sides to talk about, and that question would be there was a discussion in the briefing that if the Court does find that these jurisdiction stripping statutes apply and that the Court doesn't have jurisdiction over the Federal claims, that the Court could exercise its discretion then to not exercise supplemental jurisdiction over the State law claims at which point the anti-SLAPP motions, which are only directed at the State law claims, would not need to be decided by the Court, and it seemed that the parties were agreeing that the Court had discretion to go either way on that, and so if the parties want to -- maybe after you've completed, the parties want to end by giving me your best pitch on why I should exercise discretion to either consider or not consider those motions if I find that there's otherwise a lack of jurisdiction.

MR. RETZINGER: Thank you, Your Honor. And I can just say very briefly in response to the question you just asked, our position is you do have discretion, but ultimately the anti-SLAPP law in California is designed to prevent litigation just like this. But with that said, the only other thing I would like to raise for the Court is -- because I think

it's indicative of what this case really is all about, and I really do appreciate the Court holding a hearing on this. We cited the number of other cases that Anthem's affiliates have brought around the country in other Districts, you know, that are going to be decided on the papers, but we appreciate the opportunity to actually be heard. But there -- we've talked about, I think, from our side at least, some of the things that we think are very egregious about the pleading. And counsel talked about, you know, the Rule 11 letter that was sent, you know, with respect to the first complaint that was filed, and the factual misrepresentations that were in that first complaint. You know, to the extent there is one thing in this case, Your Honor, that I think is particularly egregious, I represent not just HaloMD, but I represent Alla LaRoque and I represent Scott LaRoque, two individuals. The allegations in the pleading with respect to those individuals are they're married, they live in Texas, they founded and directed their companies. That's it. And upon just those allegations, you had Crowell & Moring and you had Anthem ultimately elect to name them as Defendants in a RICO lawsuit, right, RICO ultimately passed in the 1970s to dismantle organized crime syndicates. I think this is the exact -- we just talked about the anti-SLAPP and when that's applicable and what's that designed to prevent. I think this is exactly -- with respect to the LaRoques in their individual capacities, this is exactly

the type of circumstance. This is why Rule 8 and Rule 9(b) exist, right. Because you should not just be able to plead a RICO action or plead a claim sounding in fraud against an individual just because you feel like it will get you leverage, which is all that this is. There is no individualized particularized allegations against the individuals. They were lumped in with all of the other Defendants just because -- you know, I can only speculate why, Your Honor, right. But to the extent there's something egregious, I think it's that. Thank you.

THE COURT: Do you want to address the discretionary point? I'll let you do that and I'll let them conclude since it's their motions.

MR. MAYER: Sure. And Your Honor, just on the LaRoques, I'll point Your Honor to the Reves vs. Ernst & Young case, 507 U.S. 170 (1993). Defendant may be liable in a RICO enterprise if it had "some part" {quote} in directing the enterprise's affairs. Defendants who participate in the operation or management of the enterprise itself. And that case also says even lower rung participants in the enterprise may be liable if they played {quote} "some part" {end quote} in operating or management -- managing the affairs of the enterprise. We clearly pled that. And I'm happy to go through the allegations about Mr. and Ms. LaRoque, but Your Honor can review them in the pleading.

Do you want to take the -- yeah.

MR. ROBBINS: Okay. Your Honor, as to the -- I think the last question that you've raised, are you more interested in hearing about the question of whether to exercise discretion to hear the -- or to address the State law claims, or whether or not the State law -- the anti-SLAPP is appropriate and the State law claims can survive in light of that, because --

THE COURT: I think it was just -- there was a point that was raised that said if the Court finds that none of the Federal claims go forward, you know, in, for example, a civil rights case, if none of the §1983 claims survive, the Court is probably going to decline to exercise jurisdiction over, you know, an assault and battery State law claim that might be a tenet to that. So here, you know, that would, by analogy, be -- if the Court decides it simply isn't going to exercise supplemental jurisdiction over the State law claims, the other side has argued, well, I should nevertheless consider the anti-SLAPP motions and award them attorneys' fees because, as they contend, that would fulfill the purposes of the anti-SLAPP litigation. And I understand your side is saying that that would not be an appropriate exercise of discretion. And so the factors that cause you to feel that way, this is a chance for you to tell me those.

MR. ROBBINS: Yes, Your Honor. And to be candid, I think we had planned to address the substance of the anti-SLAPP

motions as opposed to that. I think the briefing does address some of the case law that says that in that -- in the scenario you're describing where the Federal claims are out and all that's left is State -- are State law claims, that it is not proper or not a good idea to exercise discretion to address the arguments about those State claims, if there is nothing left and if -- of jurisdiction with respect to those claims, just for purposes of hearing a motion to strike. So that -- I'd refer you back to the brief -- what we submitted on that in the briefing. I'm happy to address the substance of the motion to strike, but I'm conscious that I have five minutes and you may not want to hear that.

THE COURT: I'll -- you can use five minutes however you think best.

MR. ROBBINS: I'll use my five minutes, Your Honor -- well, I supposed 2.5 minutes, to be fair. Can we go to 41?

MR. MAYER: Yeah.

MR. ROBBINS: I'm just going to -- we're just going to focus on one point.

THE COURT: Okay.

MR. ROBBINS: I think that's all we have time for. Which is that this was actually at the end -- addressed at the end of our opposition at the end of their reply, and this is the point that anti-SLAPP -- after the Supreme's Court decision in January in Berk vs. Choy, anti-SLAPP can no longer be

addressed in Federal Court. I'm going to -- we cite the Miller vs. Gammie case, which is the Ninth Circuit case that says if there is an intervening decision of the Supreme Court that is clearly irreconcilable in its reasoning with existing Ninth Circuit precedent, then the District Court, this Court, has to follow the Supreme Court's reasoning and not that of the Ninth Circuit. The Ninth Circuit precedent really goes back to the Newsham case which is where they said that they were allowing anti-SLAPP motions to be brought in Federal Court. Go on to the next slide. So in Berk vs. Choy, as -- I assume you've read the case that it's -- it was a State -- it was a Delaware State law that said when you plead a malpractice case, you have to attach an affidavit in support -- I believe it's an affidavit from a doctor -- in support of that, and that's part of what's required or else the pleading doesn't survive. And what the Supreme Court said in January was -- well, the general rule is if there is a Federal Rule of Civil Procedure that answers the disputed question, then that governs, unless it exceeds statutory authorization or Congress' rule-making power, and there is no claim in this case, I think, that Rule 12 or Rule 8 exceed Congress' power or statutory authorization. What the Supreme Court said in that case, the disputed question was what information -- what the Plaintiff had to provide with their claim, with their complaint, in order to survive a pleading challenge, and that that issue was controlled directly

by Rules 8 and Rule 12. And in light of that, there was nothing left for -- there was no room for the State law to address that same issue, so it was displaced. The argument that the -- I guess the Defendants had made in that case was that you could simply just rewrite the statute, just take away the parts of the Delaware law that were not consistent with Rules 8 and 12 and save the statute that way, and the Supreme Court in Berk said no, that doesn't work, the statute is just displaced. We can go to the next slide. So in this case, if we go to the anti-SLAPP statute, subsection (b)(1), step 2 of anti-SLAPP that I know the Court is quite familiar with, the test that it uses is it puts the burden on the Plaintiff to show a probability of prevailing. Well, in the Twombly case that we all know about 12(b)(6), it expressly said there is no probability requirement; it's a plausibility requirement. So it specifically said that when you're deciding a pleading challenge on the face of the pleading, you don't look at -- you don't consider whether it's probable that the Plaintiff will prevail, it's just plausibility. So that's -- that is what's directly on point. That answers the question that we're addressing -- that is being addressed here, which is whether or not the anti -- the pleading is sufficient to survive the anti-SLAPP motion. The Ninth Circuit has, in the past, before Berk, has addressed that in the Planned Parenthood case by saying, well, we'll just use the 12(b)(6) standard instead of the anti-

SLAPP standard when it's an anti-SLAPP case in Federal Court, and that's how we'll reconcile them. But what Berk made clear is you can't do that. You can't just say, well, we'll have a modified version of the State law, in this case the anti-SLAPP law, and use that when it's in Federal Court, and then in State Court it will use the regular version. No, if you have a Rule of Federal Procedure -- sorry, Federal Rule of Civil Procedure that answers the question directly, which is what do you need to plead to survive a pleading challenge, then that's what applies, period. And so that is not reconcilable with the prior Ninth Circuit case law under Planned Parenthood and in other cases. And so in light of Berk vs. Choy, and Miller vs. Gammie, the Court really needs to follow the Supreme Court's directive from January on that point. So we think that's a really important threshold issue on the entire anti-SLAPP. I'd love to talk about more, but I don't think that would be allowed at this point.

THE COURT: All right, thank you. Is there anything further from the right side of the room?

MR. KNOWLES: I should just -- there's just a subtle issue, so let me just say -- put our point on the record clearly on this. So if the Court dismisses the Federal claims for want of jurisdiction, the Court has discretion as to whether to hear the State claims under supplemental jurisdiction. We agree with that, the Sound Defendants agree

with that. If the Court proceeds to consider the State law claims, we believe the Court is actually required to do the anti-SLAPP analysis if it does.

Could I impose on you, could you put your slide 42 back up, please? So it's the last part of this is -- if you reach anti-SLAPP, Your Honor, it's the last paragraph here is what we disagree with. This case, Berk, does not hold that Courts cannot rewrite the statute as a work-around. They say if you rewrite the statute as a work-around, you still have to comply with the Federal Rules. We agree with that. Our entire anti-SLAPP motion is premised on Rule 12(b)(6), the same analysis. So if you reach it, that would be the frame to apply. But that's it, and we thank you, Your Honor, for all your time.

THE COURT: All right, well, thank you, Counsel. I will say I read through the briefing and these were excellent briefs. The Court really appreciates that, and if it was counsel here or counsel back in the office who was working on that brief writing, if you can share that with them, it's very helpful to the Court who's trying to understand the law, understand the facts, apply the law to the facts correctly to get briefs where they're well organized and they are concise and easy-to-follow, and so I do appreciate the time that was spent on that briefing. The Court will take the matter under submission and will issue a written ruling.

ALL: Thank you, Your Honor.

THE CLERK: This Court is now adjourned.

(Proceeding adjourned at 12:01 p.m.)

CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

Signed **March 15, 2026**

Dated

TONI HUDSON, TRANSCRIBER