

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

**REACH AIR MEDICAL SERVICES
LLC, CALSTAR AIR MEDICAL
SERVICES, LLC, GUARDIAN
FLIGHT LLC, MED-TRANS
CORPORATION, and AIR EVAC
EMS, INC.**

Plaintiffs,

V.

**AETNA HEALTH, INC., AETNA LIFE
INSURANCE COMPANY and AETNA
HEALTH AND LIFE INSURANCE
COMPANY**

Defendants.

Civil Action No. 4:23-cv-00805
Hon. Alfred H. Bennett

JURY TRIAL DEMANDED

**PLAINTIFFS' RESPONSE IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' ORIGINAL COMPLAINT**

Plaintiffs REACH Air Medical Services (“REACH”), CALSTAR Air Medical Services, LLC (“CALSTAR”), Guardian Flight LLC (“Guardian”), Med-Trans Corporation (“Med-Trans”), and Air Evac EMS, Inc. (“Air Evac”) (collectively “Plaintiffs”) oppose Defendants Aetna Health, Inc.’s, Aetna Health and Life Insurance Company’s and Aetna Life Insurance Company’s (collectively “Aetna”) Motion to Dismiss Plaintiffs’ Original Complaint and would respectfully show the Court as follows:

INTRODUCTION

Aetna has done everything in its power to delay, deny, and underpay providers of emergency air ambulance services like Plaintiffs. First, with the power under the NSA to pay *any amount they want* for the service, it lowballs Plaintiffs, hoping they will go away or miss the deadline to challenge the payment under the Independent Dispute Resolution (“IDR”) process. Next, when the NSA is invoked, it refuses to negotiate a fair payment during the Open Negotiation

Period (“ONP”). Instead, it uses the ONP as its free 30-day delay on any further payment obligation. When Plaintiffs prevail in getting an award for higher payment from the IDR process, Aetna does not pay it within thirty days as required by federal law. And finally, adding insult to injury, when Plaintiffs are forced to sue to get the awards paid, Aetna claims emergency medical providers cannot sue to compel payment. As it has in other NSA-related proceedings, Aetna continues to argue that it is above the law. For the reasons stated below, it is not. And the Court should deny its motion to dismiss.

LEGAL STANDARD

I. Fed. R. Civ. P. 12(b)(1)

“It is extremely difficult to dismiss a claim for lack of subject matter jurisdiction.” *Santerre v. Agip Petroleum Co., Inc.*, 45 F. Supp. 2d 558, 566 (S.D. Tex. 1999) (quoting *Garcia v. Copenhaver, Bell & Assocs., M.D.’s, P.A.*, 104 F.3d 1256, 1260 (11th Cir. 1997)). “12(b)(1) challenges to subject matter jurisdiction come in two forms: ‘facial’ attacks and ‘factual’ attacks.” *A.W. v. Humble Indep. Sch. Dist.*, 25 F. Supp. 3d 973, 981 (S.D. Tex. 2014) *aff’d sub nom. King-White v. Humble Indep. Sch. Dist.*, 803 F.3d 754 (5th Cir. 2015) (citing *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981)). “A facial attack consists of a Rule 12(b)(1) motion unaccompanied by supporting evidence that challenges the court’s jurisdiction based solely on the pleadings.” *Id.* “A factual attack challenges the existence of subject matter jurisdiction in fact—irrespective of the pleadings—and matters outside the pleadings, such as testimony and affidavits, are considered.” *Id.*

II. Fed. R. Civ. P. 12(b)(3)

In considering an improper-venue motion under Fed. R. Civ. P. 12(b)(3), a “court views all facts in the light most favorable to the plaintiff, looking ‘beyond simply those facts alleged in the complaint and its proper attachments.’” *Halcyon Biomedical, Inc. v. Glatt Air Techniques*,

Inc., 2019 WL 2420232, at *7 (S.D. Tex. June 10, 2019) (Rosenthal, J.) (citing *Trois v. Apple Tree Auction Ctr., Inc.*, 882 F.3d 485, 493 (5th Cir. 2018) (quoting in turn *Ambraco, Inc. v. Bossclip B.V.*, 570 F.3d 233, 238 (5th Cir. 2009))). “Civil actions may be brought in a judicial district where a defendant resides, if all defendants reside in the same state; a district where a substantial part of the events or omissions giving rise to the claim occurred; or, if there is no district where an action may be brought, any judicial district where the defendant is subject to personal jurisdiction.” *Id.* (citing 28 U.S.C. § 1391(b)). Under Rule 12(b)(3), a “court is permitted to look at evidence in the record beyond simply those facts alleged in the complaint and its proper attachments.” *Ambraco, Inc.*, 570 F.3d at 238 (quoting *Ginter ex rel. Ballard v. Belcher, Prendergast & Laporte*, 536 F.3d 439, 449 (5th Cir. 2008) (citing in turn *Lane ex rel. Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008) (“[T]he court may find a plausible set of facts by considering any of the following: (1) the complaint alone; (2) the complaint supplemented by the undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court’s resolution of disputed facts.” (internal quotation marks omitted)))).

III. Fed. R. Civ. P. 12(b)(6)

Motions to dismiss for failure to state a claim are “viewed with disfavor and rarely granted.” *Lormand v. U.S. Unwired, Inc.*, 565 F.3d 228, 232 (5th Cir. 2009) (quoting *Test Masters Educ. Services, Inc. v. Singh*, 428 F.3d 559, 570 (5th Cir. 2005)). When a federal court reviews a complaint on a motion to dismiss, it must “accept ‘the well-pleaded factual allegations in the complaint as true.’” *Williams v. Fay Servicing, LLC*, 2023 WL 3011152, at *2 (S.D. Tex. Mar. 29, 2023) (Bennett, J.) (quoting *Chhim v. Univ. of Tex. at Austin*, 836 F.3d 467, 469 (5th Cir. 2016)). Moreover, “[t]he court’s inquiry should focus on the complaint as a whole, ‘regardless of how much of it is discussed in the motion to dismiss.’” *U.S. ex rel. Bias v. Tangipahoa Par. Sch. Bd.*, 816 F.3d 315, 321 (5th Cir. 2016) (quoting *Wilson v. Birnberg*, 667 F.3d 591, 595 (5th Cir. 2012)).

A plaintiff need not plead facts that would “probably” establish a violation; all that is required is that the factual allegations, taken as true, demonstrate “more than a sheer possibility that a defendant has acted unlawfully.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009).

ARGUMENT AND AUTHORITIES

I. Venue is Proper in the Southern District of Texas.

A. IDR awards, and the underlying transports, occurred in this District.

Venue is proper in the Southern District of Texas because a substantial part of the “events or omissions giving rise to” Plaintiffs’ claims occurred in this District. 28 U.S.C. § 1391(b). Aetna argues that the location where the award was issued is irrelevant to the venue analysis, instead claiming that the inquiry should be solely focused on where the alleged “omission”—nonpayment of the IDR awards—occurred. Aetna contends venue is only appropriate in Connecticut, where its headquarters is located. Dkt. 12 at 11. Aetna asks this Court to ignore the events giving rise to Plaintiffs’ claims, which Plaintiffs allege partially occurred in this district. *Compl.* ¶¶ 11, 16.

28 U.S.C. § 1391(b)(2) states that venue is proper in “a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred” In interpreting this provision, Courts have noted that “[s]ubstantiality” for venue purposes is more a qualitative than a quantitative inquiry, determined . . . not by simply adding up the number of contacts.” *Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 432-33 (2d Cir. 2005); *see also Andrade v. Chonjnacki*, 934 F. Supp. 817, 827 n. 18 (S.D. Tex. 1996) (noting that a district court should accept venue if the activities in the forum district were “not insubstantial.”); *Saferstein v. Paul, Mardinly, Durham, James, Flandreau & Rodger, P.C.*, 927 F. Supp. 731, 735 (S.D.N.Y. 1996) (“The fact that substantial activities may have taken place in other districts is not dispositive.”). Moreover, “there can be more than one district in which a substantial part of the events giving rise to the claim occurred[.]” meaning that venue can be proper in more than one district. *Globe Glass & Mirror*

Co. v. Brown, 888 F. Supp. 768, 770 (E.D. La. 1995) (quoting Wright & Miller, *Federal Practice and Procedure*: Civil 2d § 3806 (1994 supp.)); *Andrade*, 934 F. Supp. at 829 n. 24 (“Venue may be equally correct in two judicial districts under Section 1391(b).” (citing *Checki v. Webb*, 785 F.2d 534, 537-538 (5th Cir. 1986))).

The location of where the IDR awards were decided is a proper venue because that is the key event that gives rise to a prevailing IDR party’s claims.¹ Simply, without an award issued by an IDR entity, there is no claim. Plaintiffs’ claims to enforce unpaid IDR awards here only exist because of the mandatory IDR process required by the NSA. 42 U.S.C. §300gg-112(b)(1)(B) (mandating the IDR process where open negotiations fail). This compelled process gives Plaintiffs a right to payment upon securing an IDR award. *See* 42 U.S.C. § 300gg-112(a)(3)(A)-(B) (giving air ambulance providers a right to payment from payors).

Many of the IDR awards at issue were decided in Houston, Texas. *Compl.* ¶ 11.. The IDR award is what gives rise to Plaintiffs’ claims and is therefore enforceable in the same venue in which it was issued. And since the statutory dispute resolution process involves the submission of offers and position statements to the IDR entity, that means the parties here made submissions directed to Houston, Texas. That by itself shows that venue is proper here. *See, e.g., Mills v. Allied Tr. Ins. Co.*, 2022 WL 352123, at *2 (W.D. La. Feb. 4, 2022) (“for venue purposes interstate

¹ Plaintiffs’ do not argue that the this District is proper because the “FAA permits ‘a motion to confirm, vacate, or modify an arbitration award to be brought . . . where the award was made’” Dkt. 12 at 11 (citations omitted). That said, the FAA does confirm by statute that the place where the award is issued is where “a substantial part of the events or omissions giving rise to the claim occurred.” 28 U.S.C. § 1391(b). The statute heads off any argument that the place of arbitration is an improper venue to enforce the award. Here the act “giving rise to the claim” was the decision of the IDR entity to require Aetna to make an additional payment on the claim. Just like under the FAA, the location where that decision was made is where a substantial part of the events occurred that give rise to Plaintiffs’ claims to enforce the IDR entities’ awards.

communications can be deemed as having occurred in the state to which they were directed.” (citing *Trois*, 882 F.3d at 493-494)).

The claims in this lawsuit also arise from the underlying air ambulance transports themselves. Accordingly, the location of those transports also supports venue. Plaintiffs have alleged that some transports occurred in Texas. *Compl.* ¶ 11. Moreover, Plaintiffs Guardian Flight and Med-Trans both maintain their principal places of business in Texas, and as such receive payments from transports at their offices in Texas. *Compl.* ¶ 4, 5. Because some of the IDR awards at issue involve transports provided by Guardian and Med-Trans in Texas, the failure to pay for those transports occurred in Texas, and thus Plaintiffs have suffered harm in Texas. *See, e.g., U.S. v. Murphy*, 117 F.3d 137, 140 (4th Cir. 1997) (“[V]enue is [not] improper in the district for which those payments were ultimately destined.”). Venue is therefore proper in this District and Aetna’s motion should be denied.

B. Pendent venue is appropriate for IDR awards decided outside Texas.

This Court may hear claims arising from IDR awards decided outside Texas as “pendent claims” because those awards share a common nucleus of fact with the IDR awards decided in Texas and IDR awards involving transports that occurred in Texas.

Pendent venue is a doctrine which “allows a federal court to hear ‘pendent claims’ which arise out of the same nucleus of operative fact as a properly venued federal claim.” *Akurate Dynamics, LLC v. Carlisle Fluid Techs., Inc.*, 2021 WL 860006, at *2 (W.D. Tex. Mar. 8, 2021). The doctrine “developed as an analogy to the concept of supplemental jurisdiction whereby a state law claim that could not otherwise be heard in a federal court would be allowed if attached to a factually similar federal claim.” *Murungi v. Touro Infirmary*, 2011 WL 3206859, at *4 (W.D. La. Jun. 29, 2011), report and recommendation adopted, 2011 WL 3206847 (W.D. La. July 26, 2011). Application of pendent venue “is a discretionary decision, based on considerations of judicial

economy, convenience to the parties and the court, avoidance of piecemeal litigation, and fairness to the litigants.” *Id.*

Here, all the IDR awards at issue in this lawsuit share a common nucleus of fact—all involve transports of Aetna’s insureds and the later nonpayment of the IDR awards. Aside from this, confirming the underlying IDR awards in this Court is in the interest of judicial economy and fairness. All of the IDR awards could be tied to multiple states. For a single IDR award, the state where nonreceipt of the payment occurred, where the IDR award was decided, where the transport occurred, where the payor resides and where the provider operates could all differ, making venue potentially proper in multiple states. To avoid subjecting Aetna to suit in multiple states, where different courts could interpret novel issues under the NSA and arrive at different conclusions, Plaintiffs have aggregated the fifty-one IDR awards into a single suit in this District, where many have a connection. Requiring Plaintiffs to file a suit for every single IDR award across the country, or to aggregate IDR awards into smaller batches that all involve a common location (which a different court may not even find establishes venue) would be tremendously inefficient and burdensome. Both Plaintiffs and Defendant transact business in Texas and engaged in the IDR process in Texas. As such, requiring Aetna to litigate in this court is fair and convenient. For these reasons, this Court should exercise pendent venue over Plaintiffs’ claims for all IDR awards, and Aetna’s motion should be denied.

II. Plaintiffs State a Claim.

A. The NSA provides an implied right of action.

The NSA expressly provides that air ambulance providers are entitled to payment resulting from IDR awards no later than thirty days from the date of determination. 42 U.S.C. § 300gg-112(b)(6). Aetna argues, without any support, that despite the clear statutory language, there is no right of action due to the “NSA’s manifest lack of an ‘enforcement’ mechanism.” Dkt. 12 at 13.

To the contrary, NSA provides an implied right of action for private parties to enforce unpaid IDR awards. Any conclusion otherwise would render the statute meaningless.

The Supreme Court has stated that several factors are to be considered in “determining whether a private remedy is implicit in a statute not expressly providing one.” *Cort v. Ash*, 422 U.S. 66, 78 (1975). A court performing this analysis asks

First, is the plaintiff ‘one of the class for whose especial benefit the statute was enacted,’—that is, does the statute ***create a federal right in favor of the plaintiff?*** Second, is there any indication of ***legislative intent***, explicit or implicit, either to create such a remedy or to deny one? Third, is it ***consistent with the underlying purposes of the legislative scheme*** to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be ***inappropriate to infer a cause of action based solely on federal law?***

Id. (internal citations omitted) (emphasis added). Applying these factors, Plaintiffs may assert a private right of action to recover unpaid IDR awards under the NSA.

First air ambulance providers are clearly a group for whose benefit the statute was created. Indeed, Congress created a separate section in the NSA that applies just to air ambulance providers and § 300gg-112 explicitly applies to air ambulances bills. Next, as Defendant admits in its motion, “Congress specifically designed the IDR process to provide an ‘efficien[t]’ and streamlined means of dispute resolution at a minimal cost.” Dkt. 12 at 18. To carry out Congress’s will, a cause of action must exist for providers to enforce unpaid awards. Otherwise, payors will have no incentive to timely pay such awards, which would defeat efficiency and increase cost. Last, the cause of action implied in the NSA is one not traditionally relegated to state law because the IDR process is mandated by federal law and the awards are decided by federal contractors. In fact, states are prohibited from regulating the prices, routes or services of air ambulances under the Airline Deregulation Act. *See, e.g., Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 335 (5th Cir. 1995); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992). The NSA therefore carries an

implied right of action for air ambulance providers to confirm unpaid IDR awards and convert such awards into a federal judgment.

In addition, this Court has the inherent power under the NSA's statutory scheme to confirm IDR awards. While IDR proceedings are not arbitrations, the D.C. District Court's decision in *Cheminova A/S v. Griffin LLC* is instructive. 182 F.Supp.2d 68 (D.D.C. 2002). In *Cheminova*, the plaintiff moved to confirm an arbitration award under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). *Id.* at 71. Cheminova's request for judicial confirmation tasked the court with deciding for the first time whether it had jurisdiction to enforce an arbitration award under FIFRA. *Id.* at 73. In deciding that it did have jurisdiction, the court rejected Griffin LLC's argument that FIFRA only provided an administrative remedy. *Id.* The court reasoned that "[i]n light of FIFRA's unambiguous language and because judicial enforcement is necessary to effectuate the statute's express goals, it must be concluded that FIFRA confers jurisdiction on the judiciary to enforce arbitration awards." *Id.* The court also stated that "[the] terms 'binding' and 'final and conclusive' [in FIFRA] are understood to mean that an award will be enforceable in court" and that "purposes of the statute would be defeated if arbitration awards are not judicially enforceable." *Id.* at 73-74. Under FIFRA, awards may be challenged only if they were secured by misrepresentation, fraud or undue means. *Id.* at 77 ("FIFRA cabins the scope of judicial review of arbitration awards: a federal court can only overturn an arbitration panel decision on the basis of fraud, misconduct, or misrepresentation." (citing 7 U.S.C. § 136a(c)(1)(F)(iii))).

Here, the NSA's language requiring that payors pay IDR awards within thirty days is unambiguous. 42 U.S.C. § 300gg-112(b)(6). And like in *Cheminova* in which the court reasoned that the "purposes of the statute would be defeated if arbitration awards are not judicially enforceable[,]" the same is true of the NSA and IDR awards. 182 F. Supp. at 74. And so the NSA

gives this Court the ability to confirm IDR awards and convert them into a federal judgment and award Plaintiffs' pre and post-judgment interest in accordance with 28 U.S.C. § 1961.

Aetna also argues that "HHS, not the courts, ensure health plans make payment on duly authorized IDR awards" because "HHS has an online portal for providers to submit complaints . . . and has the authority to perform complaint-based audits to enforce the NSA's provisions." Doc. 12 at 12. But nowhere in the NSA are Plaintiffs required to pursue relief from the Departments for unpaid IDR awards. Indeed, the NSA does not provide any administrative remedy at all. As such, Aetna's implication—that Plaintiffs' sole administrative remedy is to complain to CMS because CMS has a right to audit Aetna's compliance with the NSA—is unfounded.

First, "to mandate exhaustion, a statute must contain '[s]weeping and direct' statutory language indicating that there is no federal jurisdiction prior to exhaustion, or the exhaustion requirement is treated as an element of the underlying claim." *Avocado Plus Inc. v. Veneman*, 370 F.3d 1243, 1248 (D.C. Cir. 2004) (quoting *Weinberger v. Salfi*, 422 U.S. 749, 757 (1975)). The NSA contains no such language. Second, CMS only has **the right** to audit payors, but there is **no obligation** that an audit be conducted upon receiving a complaint. After all, HHS has even stated that it "expects to conduct no more than 9 audits annually." See 86 Fed. Reg. 36935 (July 13, 2021). With more than six hundred payors participating in the IDR process during the first six months that it was available², Aetna's argument that Plaintiffs have an administrative remedy to recover unpaid IDR awards is nonsensical. Because of this, judicial enforcement is not only available; it is required to confirm and enforce unpaid IDR awards under the NSA.

² See Initial Report on the Independent Dispute Resolution (IDR) Process April 15 – September 30, 2022 at pp.16, 26, available at <https://www.cms.gov/files/document/initial-report-idr-april-15-september-30-2022.pdf>.

For these reasons, Aetna's motion to dismiss on the grounds that the NSA carries an administrative remedy and no private right of action is baseless, and it should be denied.

B. Plaintiffs received valid assignments and therefore maintain derivative standing to bring claims for benefits.

Aetna relies on two arguments to claim Plaintiffs lack standing to pursue a civil action for improper denial of benefits under ERISA. Both lack merit. First, Aetna makes a factual attack and argues that Plaintiffs lack derivative standing because "any claimed right to payment of the IDR awards stems from the NSA, not any plan participant's rights under ERISA." Dkt. 12 at 14. But the administration of the IDR process, including making required payments from group health accounts, is itself a plan benefit. Second, Aetna makes a facial attack and argues that "even if Plaintiffs could rely on derivative standing, the law requires that Plaintiffs' first demonstrate they have a valid assignment." *Id.* at 15. Here, Plaintiffs have valid assignments. *See* Ex. A

1. Plaintiffs' claim is not independent of Aetna's self-funded plans.

As to Aetna's first argument, the basis of Plaintiffs' suit is not "entirely independent" of the health plans covered under Aetna's self-insured ERISA business, and therefore derivative standing exists. *See Lone Star OB/GYN Assocs. v. Aetna Health, Inc.*, 579 F.3d 525, 529 n. 3 (5th Cir. 2009) (explaining that no standing exists where basis of suit is "entirely independent of the ERISA plan."). This is because NSA administration is itself a plan benefit for Aetna's insureds, and with that comes Aetna's responsibility to comply with the statute for the plans it administers. *Compl.* ¶ 25. Open negotiations, the IDR process, including submitting position statements, and paying the claim from plan funds is exactly what Aetna has agreed to do for plan beneficiaries in connection with administering their benefit plans. Thus, when Aetna violates the NSA through its nonpayment of IDR awards for air ambulance transports, it breaches its obligations to the self-

funded plans it administers and to the plan beneficiaries. Connecting the dots, Aetna’s failure to comply with the NSA improperly denies plan benefits, and thus states a claim under ERISA.

For example, in *Spring E.R., LLC v. Aetna Life Ins. Co.*, the court held that the healthcare card issued by Aetna to its insureds created an implied contract to healthcare providers to render emergency services in exchange for compensation, and that such a claim was not independent of the insured’s plan because the implied contract limited healthcare providers to the plan’s terms. 2010 WL 598748, at *5-6 (S.D. Tex. Feb. 17, 2010). Here, the NSA only applies to group health plans where the service is provided “*if such services would be covered* if provided by a participating provider. . . *with respect to such plan or coverage.*” 42 U.S. Code § 300gg–112(a). Far from being “entirely independent” of the ERISA health plan, the NSA payment obligations are tightly tethered to it. Similarly, the NSA addresses other ERISA health plan benefits, such as the way cost-sharing will be handled for air ambulance claims. *Id.* Plaintiffs have derivative standing to pursue its claim under ERISA because the basis of this lawsuit is not entirely independent of Aetna’s self-funded ERISA plans.

2. Plaintiffs received valid assignments.

As to Aetna’s second argument, its facial attack on Plaintiffs’ standing, here Plaintiffs have valid assignments as required to maintain derivative standing. Ex. A; *see also Tango Transp. v. Healthcare Fin. Services LLC*, 332 F.3d 888, 892 (5th Cir. 2003) (acknowledging that a valid assignment confers derivative standing to bring a cause of action under ERISA). As the attached declaration and exemplar document demonstrate, all of the Plaintiffs use the same assignment of benefits form and it is standard practice to obtain the patient or legal guardian’s signature for each transport. Ex. A. Those assignments include assignment of “all right to (and related or associate with)” payable benefits, including the right to file lawsuits, recover attorney’s fees, and “additional recovery such as treble damages, punitive damages, or penalties.” *Id.* Plaintiffs have obtained

valid, legally enforceable assignments of benefits and Aetna’s challenge on this ground should be denied.

C. Plaintiffs’ prompt pay claims are viable and not preempted by the NSA.

Aetna relies on a single argument to assert that Plaintiffs’ prompt pay claims are not viable in this Court—that they are preempted by the NSA. This is wrong. Instead, the NSA can co-exist with states’ prompt pay laws because compliance with both is possible and because state prompt pay laws do not frustrate Congress’s objectives in passing the NSA. Further, in support of its preemption contention, Aetna makes a number of sub-arguments for why IDR awards are not subject to state prompt pay laws. This fails as well because an IDR award qualifies as a clean claim that Aetna is required to timely pay.

1. The NSA and state prompt pay laws can coexist without frustrating Congress’s intent.

“[T]he purpose of Congress is the ultimate touchstone of preemption analysis. We start[] with the basic assumption that Congress did not intend to displace state law” *Aldridge v. Mississippi Dep’t of Corr.*, 990 F.3d 868, 875 (5th Cir. 2021) (citations and quotations omitted). Under conflict preemption, “a state claim is preempted where [1] Congressional intent to preempt is inferred from the existence of a pervasive regulatory scheme or . . . [2] state law conflicts with federal law or interferes with the achievement of federal objectives.” *Id.* at 874 (quoting *Witty v. Delta Airlines, Inc.*, 366 F.3d 380, 384 (5th Cir. 2004) (internal citations and quotations omitted)). In applying this test, the Fifth Circuit has stated that conflict preemption is “present when (1) ‘compliance with both state and federal law is impossible,’ or (2) state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” *Id.* at 875 (quoting *California v. ARC Am. Corp.*, 490 U.S. 93, 100-101 (1989) (internal citations and quotations omitted)).

For example, in *Lone Star OB/GYN Associates v. Aetna Health Inc.*, the court was posed with whether the Texas Prompt Pay Act conflicted with ERISA. 579 F.3d 525, 532 (5th Cir. 2009). In holding that there was no conflict where the prompt pay claim did not involve coverage disputes, the court reasoned that the prompt pay claim was not seeking relief that “duplicates” that provided by ERISA. *Id.* The court also reasoned that a “[Texas Prompt Payment Act] remedy only overlaps with the ERISA enforcement scheme if there is a dispute over whether a claim is ‘payable[,]’ but where ‘claims do not involve coverage determinations, but have already been deemed ‘payable,’ . . . the only remaining issues is whether they were paid at the proper contractual rate.’” *Id.*

Here, Plaintiffs’ state prompt pay claims do not conflict with the NSA because state prompt pay claims do not interfere with Congress’ objective “to provide an ‘efficien[t] and streamlined means of dispute resolution at a minimal cost. Dkt. 12 at 18. This is because the NSA provides for a dispute resolution process for out-of-network air ambulance transports, but state prompt pay laws provide interest and/or penalties for late payment of claims. The fact that “[n]othing in the NSA suggests an insurer is subject to penalties under state law if payment is not made within 30 days of an awards issuance” is not dispositive that preemption exists. Instead, it is this reason why both the NSA and state prompt pay laws can exist harmoniously—because Congress has not expressly preempted state prompt pay laws nor intended to occupy the entire legislative field.

Far from wanting to displace state law, the NSA in fact ties in to state laws in several parts. For example, the NSA defines “specified state law” to mean a “state law that provides for a method for determining the total amount payable under such a plan, coverage, or issuer,” which the NSA does not at all displace. *See* 42 U.S. Code § 300gg–111(a)(3)(I). The amount paid for out-of-network services is not even determined through IDR proceedings where an applicable state

procedure exists. *See* 42 U.S. Code § 300gg–111(a)(1)(c) (addressing payment of out-of-network rate); 42 U.S. Code § 300gg–111(a)(3)(K) (defining “out-of-network rate”).

Thus, Congress left ample room for states to supplement the NSA, including providing providers with a way to seek interest and/or penalties under state prompt pay laws for non-compliance with the NSA. Because of this, conflict preemption is not present here. *See West v. Mattel, Inc.*, 246 F. Supp. 640, 643-644 (S.D. Tex. 2003) (“If a statute does not contain an explicit congressional command, state law is preempted if it clearly conflicts with federal law or if federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it.” (internal citations and quotations omitted)).

2. Plaintiffs’ state prompt pay claims apply to IDR awards for Aetna’s fully insured business.

In arguing conflict preemption, Aetna claims that application of state prompt pay laws would “frustrate the NSA’s purpose and completely undermine the NSA’s dispute resolution framework by imposing punitive fines on insurers for their good faith participation.” Dkt. 12 at 18. But Plaintiffs do not contend that interest or penalties provided for in state prompt pay laws begin accruing at a payor’s initial denial (before open negotiations and the IDR process have occurred), but only when the IDR award is made. So Aetna’s frustration argument lacks merit.

Aetna correctly points out that under the Texas Prompt Pay Act, for example, within a statutorily specified time an insurer must either (1) pay the claim, (2) partially pay and partially deny the claim and notify the provider in writing of the reason for partial denial, or (3) deny the claim in full and notify the provider in writing of the reason for denial. *See generally* TEX. INS. CODE. § 1301.103(a). In addition, TEX INS. CODE § 1301.069 explicitly states that Texas Prompt Pay Act’s timely pay provisions apply to claims by out-of-network provider if the underlying

treatment involves “care related to an emergency or its attendant episode of care as required by state or federal law[.]”³

There is no dispute that IDR awards are payable, or that Plaintiffs have provided emergency services. *Compl.* ¶ 12; Dkt. 12 at 19 (“But Defendants do not deny that IDR awards are payable.”). Aetna’s contention, however, is that the prompt pay statutes only apply to denied claims that are later found to be payable. *Id.* But this is a misreading of the Texas statute. Instead, the statute explicitly states that “not later than . . . the 30th day after the date an insurer receives a clean claim from a preferred provider that is electronically submitted, the insurer shall make a determination of whether the claim is payable.” TEX. INS. CODE § 1301.103. Here, because Aetna does not deny that IDR awards are payable, it is required to pay the IDR award within 30 days in accordance with TEX. INS. CODE § 1301.103(1) (“if the insurer determines the entire claim is payable, pay the total amount of the claim . . .”). This deadline is consistent with the NSA.

Lastly, Aetna contends that an IDR award is not a “clean claim” because it is not one “submitted by a physician or provider[.]” but rather “issued by an IDR entity.” Dkt. 12 at 19. This distinction is immaterial since an IDR award can only result from a provider’s submission that is found to be the appropriate payment amount. The IDR award is merely the approval of the payor’s submitted price for the transport as the appropriate amount that the payor must pay within thirty days. Aetna cannot avoid paying IDR awards for its fully insured business on the grounds that the claim is not submitted by a physician or provider directly. Indeed, many providers use third party

³ Aetna claims that prompt-pay claims require contractual privity. Dkt. 12 at 19 n. 13. This is wrong. TEX. INS. CODE. § 1301.069 explicitly provides an exception and states that the Texas Prompt Pay Act provisions apply to out-of-network providers who provide emergency care.

billing companies that technically “submit” bills subject to the prompt pay act to insurers. Such a technicality is a distinction without a difference.⁴

Prompt pay laws do not conflict with, and are not preempted by, the NSA. The prompt pay statutes should be interpreted in a manner that both furthers the statutes’ objectives and allows those statutes to fill in the gaps that Congress intentionally left open when it passed the NSA. And the argument that an IDR award cannot qualify as a clean claim is incorrect. For these reasons, Aetna’s Motion should be denied.

CONCLUSION

For all these reasons, Plaintiffs respectfully requests that Aetna’s Motion to Dismiss Plaintiffs’ Original Complaint be denied. Should the Court grant the Motion, Plaintiffs request that the dismissal be without prejudice and that it be granted an opportunity to amend.

⁴ The IDR award creates a direct payment obligation between a provider and payor for a particular claim that is equivalent to contractual privity. In fact, the parties now have an implied Single Case Agreement (“SCA”). *See Hondo Oil & Gas Co. v. Texas Crude Operator, Inc.*, 970 F.2d 1433, 1436 (5th Cir. 1992) (implied contracts where “parties form a contract based upon their acts and conduct.”). An SCA is a contract between an out-of-network provider and an insurer for a single episode of care, such as an air ambulance transport.

Dated: May 31, 2023

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on May 31, 2023, a true and correct copy of the foregoing was served via the Court's ECF system on all counsel of record.

/s/ Adam T. Schramek

Adam T. Schramek

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

**REACH AIR MEDICAL SERVICES
LLC, CALSTAR AIR MEDICAL
SERVICES, LLC, GUARDIAN
FLIGHT LLC, MED-TRANS
CORPORATION, and AIR EVAC
EMS, INC.**

Plaintiffs,

V.

**AETNA HEALTH, INC., AETNA LIFE
INSURANCE COMPANY and AETNA
HEALTH AND LIFE INSURANCE
COMPANY**

Defendants.

Civil Action No. 4:23-cv-00805
Hon. Alfred H. Bennett

JURY TRIAL DEMANDED

DECLARATION OF ANGELA RICHMOND

I, Angela L. Richmond, am over the age of 18, am of sound mind, and based on personal knowledge state as follows:

1. I have been employed by Global Medical Response (“GMR”) since May 15, 2012 and hold the position of Vice President Revenue Cycle Operations. The facts contained in this Declaration are based on my own personal knowledge, including the knowledge I gained from reviewing the records of GMR. If called as a witness, I could and would testify competently to the facts stated herein.

2. GMR, through its operating subsidiaries, provides air ambulance services across the country. Plaintiffs in this proceeding are some of those operating subsidiaries. GMR utilizes a uniform set of forms for patient transports. These forms include an assignment by a patient being transported to the company conducting the transport. Attached as Exhibit "A" is a true and correct

copy of the assignment used for transporting the patient at issue in IDR proceeding DISP-04099. This form has been used since at least January 1, 2022 to present. It is standard practice across companies to obtain this assignment and the patient's or legal representative's signature on the form.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: May 31, 2023

Angela L. Richmond

Angela L. Richmond (May 31, 2023 12:03:11)

Angel L. Richmond

EXHIBIT A

EMS Agency Name: AE028-Effingham

Patient Name: H [REDACTED], Betty

Patient (B/C) Ambulance Billing Authorization Form (Revision date 10/2019)

Patient Last Name: [REDACTED]
 Supplier Means: AE028-Effingham

Header
 Patient First Name: Betty
 Transport Date: 02/20/2022 19:16:00

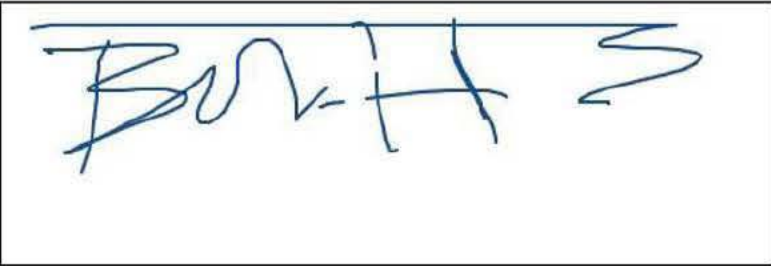
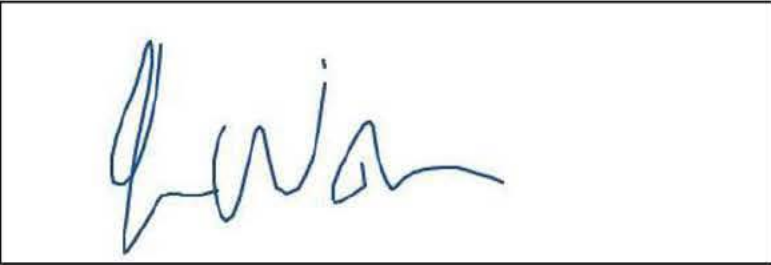
SECTION I

Question	Answer	Notes
	The person signing below in section I or II only, (for himself/herself as the patient or as the legal representative, or surrogate for consent to treatment, on behalf of the patient named above): (1) acknowledges that the medical care furnished to the patient was actually received and was limited solely to emergency treatment and transportation; (2) authorizes such medical treatment and transportation as being medically necessary; (3) authorizes the submission of a claim for payment to Medicare, Medicaid or any other payer for any services provided by the Supplier, now or in the past or in the future and authorizes any holder of medical information or documentation, to include city, county and state accident or incident reports about the patient to release such information to Supplier, its billing agents, CMS, its carriers and agents and/or any other payers or insurers as may be appropriate to determine any benefits payable for these or any other medical services provided to the patient by Supplier now or in the future; (4) requests that payment of authorized Medicare, Medicaid or any other insurance benefits be made on the patient's behalf directly to Supplier for any medical services provided to the patient by Supplier now or in the future, and, to the extent permitted, assigns all rights to (and related or associated with) such payments to Supplier, including but not limited to the right to file appeals, grievances, complaints, litigation, or arbitration relating to a claim for payment, as well as all rights to recover expenses or fees incurred for pursuing the claim and all rights, statutory or contractual, to any additional recovery such as treble damages, punitive damages, or penalties; (5) authorizes any law firm appointed by Supplier to file the appeals, grievances, complaints, litigation, or arbitration referred to in point (4); (6) agrees that the patient is financially responsible for, and obligated to pay, the amount charged by Supplier for the medical services, including any amount that is not paid by any applicable insurance (unless Supplier is a contracted network provider for such applicable insurance, in which case any applicable co-pay, coinsurance, or deductible is owed); (7) agrees to use his/her best efforts to cooperate with, and to assist, Supplier in receiving payment in full for the medical services rendered to patient, including immediately remitting to Supplier any payments received directly from an insurer or any source whatsoever for the medical services provided to the patient by Supplier; (8) designates Supplier to act as patient's "authorized representative" under 29 C.F.R. §2560.503-1(b)(4) and the Employee Retirement Income Security Act of 1974 (and any other applicable statutory or common law, rule or regulation), with respect to all aspects of patient's claim (Claim) for benefits under any applicable benefit or welfare plan for payment of the medical services rendered to patient by Supplier; directs patient's benefit or welfare plan and those who administer it, or those who communicate with participants and beneficiaries regarding claims for benefits, to communicate directly with Supplier regarding the Claim and payment of benefits relating to the Claim; and agrees that, as an integral part of pursuing the Claim (or an appeal of an adverse benefit determination) to its conclusion, Supplier shall receive any and all original information and notices, including without limitation checks or other forms of payment which are made to or on behalf of patient, or to which patient is entitled, with respect to the Claim (only copies may be sent to patient); (9) agrees that Supplier is not liable for any personal items that are lost or damaged during patient transport; (10) agrees that if collection proceedings take place, all Supplier legal costs (including attorney fees) are the responsibility of the patient; (11) agrees that the provisions of this agreement are severable; and (12) agrees that a copy of this document is valid as an original for all purposes.	

Authorization to Contact

Question	Answer	Notes
	You may be contacted to obtain information to facilitate the billing process for your transport. I expressly authorize above, its related corporate entities, associates, agents, servicers, debt collectors and independent contractors, to contact me or any responsible party at any telephone number (including numbers assigned to any paging, cellular, or mobile service, or any service which charges for the call) mailing address, e-mail address, or any other electronic address used by, or associated with, me or any responsible party and obtained through any source (including any telephone number I, any responsible party, or any party accompanying me at the time of service, have provided previously or may provide in the future) for the purpose of resolving any unpaid balances or any other pertinent issues regarding this account. I expressly agree any such contact by above Company, its related corporate entities, associates, agents, servicers, debt collectors and independent contractors, may be through any means (including a dialer, automatic telephone dialing system, predictive dialer, interactive voice recognition system, pre-recorded or artificial voice, pre-set email messages, or any pre-set electronic messages delivered by any other electronic messaging or text messaging system). Patient or Guarantor agrees and acknowledges any e-mail address or any other electronic address Patient or Guarantor provides to above Company is Patient's or Guarantor's private address, is not owned or furnished by their employer and cannot be accessed by unauthorized third parties.	

SECTION I - PATIENT SIGNATURE

Question	Answer	Notes
PATIENT SIGNATURE	Patient must sign here unless physically or mentally incapable of signing. If patient signs with an "X" or other mark, it is recommended that someone sign below as a witness. 	
Witness Signature		
Witness Printed Name	Jess	
Witness Title	RN	

Unit Notified: 02/20/2022 18:33:49
 CAD #: 0122019817A

Patient Name: H [REDACTED], Betty

Date Printed: 02/20/2022 21:32
 Call #: 0122019817A

General Information

Case Name	Guardian Flight LLC et al v. AETNA Life Insurance Company Inc et al
Court	U.S. District Court for the District of Connecticut
Date Filed	Thu Apr 11 00:00:00 EDT 2024
Judge(s)	Michael P. Shea
Federal Nature of Suit	Statutes: Other Statutory Actions [890]
Docket Number	3:24-cv-00680
Parties	AETNA Life Insurance Company Inc; Global Medical Response, Inc.; REACH Air Medical Services, LLC; CVS Pharmacy, Inc.; Cigna Health and Life Insurance Co.; Reach Air Medical Services LLC; Aetna Health Inc; Aetna Health and Life Insurance Company; CVS Health Corporation; Calstar Air Medical Services, LLC; Med-Trans Corporation; Air Evac EMS, Inc.; Guardian Flight LLC; AirMed International, LLC