

**UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT**

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| <b>GUARDIAN FLIGHT LLC, <i>et al.</i>,</b><br><br><i>Plaintiffs,</i><br><br><b>v.</b><br><br><b>AETNA LIFE INSURANCE</b><br><b>COMPANY, <i>et al.</i></b><br><br><i>Defendants.</i> | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | <b>Civil Action No. 3:24-cv-00680-MPS</b> |
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**AETNA’S REPLY IN SUPPORT OF ITS MOTION TO DISMISS**

In support of its motion to dismiss, Aetna respectfully shows as follows:

**I. IDR awards are not “enforceable” via the judiciary.**

Plaintiffs make two arguments concerning their alleged ability to “enforce” the IDR awards. First, Plaintiffs argue that the No Surprises Act (“NSA”) implicitly includes a private cause of action. As a fallback position, Plaintiffs argue they can enforce IDR awards under § 9 of the Federal Arbitration Act (“FAA”). Both arguments fail as a matter of law.

**A. There is no cause of action under the NSA to enforce IDR awards.**

Plaintiffs concede no express right of action exists under the NSA. They argue instead that “the NSA’s structure, terms and legal context all point to Congress’[s] intent to create [an implied] private right of action for payment of the [out-of-network] rate” for the services at issue. Dkt. 131 at 22. Plaintiffs argue further that Congress “separately evinced its intent because the [NSA] provides no alternative enforcement mechanism.” *Id.* at 18. Plaintiffs are wrong, for reasons United States District Judge Jane J. Boyle ably explained in a nearly identical case brought by many of the same Plaintiffs here, *Guardian Flight, LLC v. Health Care Servs. Corp.*, \_\_ F. Supp. 3d. \_\_, 2024 WL 2786913, at \*3–6 (N.D. Tex. May 30, 2024). *See* Dkt. 127 at 11–15 (discussing *Health Care Services*).

Plaintiffs do not directly address the substance of Judge Boyle’s well-reasoned decision (because they have no answer for it). Instead, they claim that *Health Care Services* merely creates a circuit split, citing *GPS of New Jersey, M.D., P.C. v. Horizon Blue Cross & Blue Shield*, 2023 WL 5815821 (D.N.J. Sept. 8, 2023), before concluding—without any analysis—that Judge Boyle’s decision “is simply wrong.” Dkt. 131 at 22. For reasons Aetna explained in its motion-to-stay briefing (which is incorporated by reference), Plaintiffs’ arguments regarding *GPS* and a supposed split in authority fall apart under the slightest scrutiny. *See* Dkt. 128 at 5–6. Judge Boyle is correct: there is no cause of action under the NSA, express or implied, to “enforce” IDR awards.

A cause of action requires two things—a right and a remedy. “The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy.” *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). “Statutory intent on this latter point is determinative.” *Id.* “Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.” *Id.* at 286–87. “Remedy,” as used in this context, refers to a procedural mechanism that enables a party to enforce its rights. *See id.* at 289–90.

Plaintiffs have not pointed—and cannot point—to any expression by Congress displaying an intent to provide a private right of action **and** remedy for providers, such as Plaintiffs, to “enforce” IDR awards. Rather, the NSA expressly limits judicial review of IDR awards to the four well-known grounds for vacatur under FAA § 10(a). *See* 42 U.S.C. § 300gg-111(c)(5)(E)(II). Absent one of those four grounds, the NSA does not offer a path of any kind into court, let alone an implied right of action or remedy relating to the payment of IDR awards.

Plaintiffs cursorily argue that “Defendants confuse the distinct concepts of ‘judicial review’ and ‘judicial enforcement.’” Dkt. 131 at 12; *see id.* (“[L]imiting the reasons that IDR awards can

be *challenged* in court is not the same as limiting *enforcement* in court.”). Aetna has not confused anything. Plaintiffs’ argument is one of semantics, not substance. Moreover, it is Plaintiffs’ burden to demonstrate that a private right of action exists, which they have unquestionably failed to meet.

By incorporating FAA § 10(a), Congress evinced a clear intent **not** to create a private right of action to enforce IDR awards. *See Bellikoff v. Eaton Vance Corp.*, 481 F.3d 110, 116 (2d Cir. 2007) (“Congress’s explicit provision of a private right of action to enforce one section of a statute suggests that omission of any explicit private right to enforce other sections was intentional.”) (quotation omitted). That is, “although Congress borrowed from § 10 of the FAA”—which establishes a procedural mechanism to vacate IDR awards—“it notably did not incorporate the FAA provision that enables parties to confirm arbitration awards, which further indicates that Congress did not intend to create a private cause of action under the NSA.” *Health Care Servs.*, 2024 WL 2786913, at \*4. As Judge Boyle explained:

The FAA expressly provides parties with a procedural mechanism to vacate, modify, or confirm arbitration awards in federal court. If Congress intended to create such a procedural mechanism under the NSA, it simply could have incorporated one more section of the FAA, yet Congress did not do so. The Court interprets this omission in the NSA to mean that Congress did not intend to create a remedy under the NSA. ***Therefore, not only is there no “statutory intent” to create a private remedy, but the NSA also includes language strongly suggesting that Congress did not intend to create a private remedy.***

*Id.* (emphasis added and citations omitted).

Plaintiffs argue that because the NSA creates a right to payment, it *must* also create a remedy. *See* Dkt. 131 at 18–22. As ostensible support, Plaintiffs identify three of the NSA’s provisions.<sup>1</sup> First, the NSA provides that a decision by an IDR entity “shall be binding.” 42 U.S.C.

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<sup>1</sup> Plaintiffs also identify *Maine Community Health v. United States*, 140 S. Ct. 1308 (2020). *See* Dkt. 131 at 19–20. But *Maine Community* did not involve an implied private right of action. The Supreme Court was tasked with

§ 300gg-111(c)(5)(E). Second, the NSA provides that group health plans or insurance issuers shall “pay a total plan or coverage payment” at the out-of-network rate. *Id.* § 300gg-112(a)(3)(B). Third, Plaintiffs point to the NSA’s directive that payment is due “not later than 30 days after the date on which such [IDR] determination is made.” *Id.* § 300gg-112(b)(6). “Taken together,” Plaintiffs argue, “these directives create a direct payment obligation between private parties that is binding on them and must be paid.” Dkt. 131 at 19. Plaintiffs’ argument is simply wrong.

“[E]ven where a statute is phrased in . . . explicit rights-creating terms, a plaintiff suing under an implied right of action still must show that the statute manifests an intent to create not just a private right but also a private remedy.” *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002) (quotation omitted). Here, the provisions Plaintiffs rely upon, at most, establish that the NSA creates a right to payment of IDR awards. They do not, however, suggest that Congress intended to create a procedural mechanism (i.e., a remedy) for providers to convert IDR awards into ***federal judgments***. See *Health Care Servs.*, 2024 WL 2786913, at \*4 (“[T]hese provisions only suggest that Congress created a right [to payment], but there is nothing to suggest that Congress also intended to confer a corresponding remedy.”).

Lastly, Plaintiffs argue the lack of an enforcement mechanism “would undermine the [NSA’s] statutory scheme.” Dkt. 131 at 22. This argument merits little discussion. The NSA was enacted to protect patients from out-of-network providers’ predatory billing practices. The absence of a private right for these same providers to “enforce” IDR awards does nothing to undermine this goal, particularly under a statute where the Departments are charged with regulatory authority. See Dkt. 127 at 14 n.17. In any event, without congressional intent, “a cause of action does not

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deciding whether Congress’s failure to appropriate funds to cover an Affordable Care Act program’s deficit implicitly repealed the government’s obligation to pay prior statutory obligations. *Maine Community* is irrelevant.

exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.” *Sandoval*, 532 U.S. at 286.

**B. Plaintiffs cannot enforce IDR awards under § 9 of the FAA.**

Plaintiffs’ second argument is that they can enforce IDR awards under § 9 of the FAA. *See* Dkt. 131 at 12–16. The argument is beyond disingenuous given that these Plaintiffs have strenuously opposed application of any FAA procedural requirements except those governing vacatur under § 10(a).<sup>2</sup> More importantly, the argument is without merit.

Plaintiffs contend the Administrative Dispute Resolution Act (“ADRA”) “extends a district court’s power under the FAA to enforce final awards in private arbitrations” and so provides a basis for enforcing IDR awards. *See* Dkt. 131 at 13. Plaintiffs further contend that “[t]his is essentially the same conclusion” the court reached in “a very similar context” in *Cheminova A/S v. Griffin, LLC*, 182 F. Supp. 2d 68 (D.D.C. 2002). *Id.* at 14. Plaintiffs’ contentions are nonsense. ADRA principally applies to disputes involving government agencies (e.g., procurement-contract disputes), and provides for arbitration “*where all parties consent*” and there is a *written agreement* between them. 5 U.S.C. § 575(a)(1), (2) (emphasis added). These same Plaintiffs have argued emphatically that the IDR process is not analogous to arbitration specifically because they did **not**

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<sup>2</sup> *See Reach Air Medical Servs., LLC, et al. v. Cigna Health and Life Ins. Co.*, No. 4:23-cv-00826 (S.D. Tex. 2023), Dkt. 29 at 12 (“[T]his case is governed by the NSA, which incorporates only a small piece of the FAA concerning the standard to challenge awards (§ 10(a)), **not the substantive and procedural requirements to enforce an awards** [sic] (§ 13).”) (emphasis added); *Guardian Flight LLC v. Aetna Health, Inc., et al.*, No. 4:22-cv-03805 (S.D. Tex. 2022), Dkt. 15 at 8 (“[T]he [NSA] adopted the legal standard applicable to one small part of a single section of the [FAA § 10(a)] because, otherwise, no part of the FAA would apply to IDR determinations.”); Dkt. 58 at 7 (“[T]he NSA only incorporates the four grounds for vacatur under the FAA. The rest of the FAA’s provisions are absent from the NSA, and therefore, the policy rationale underlying decisions to limit discovery challenges to arbitrations under the FAA simply do[es] not apply to IDR proceedings.”); *Med-Trans Corp. v. Capital Health Plan, Inc., et al.*, No. 3:22-cv-1077-TJC-JBT (M.D. Fla. 2022), Dkt. 40 at 1 (“Defendant CHP is under the mistaken presumption that this case arises under and is governed by the [FAA]. It is not. The [NSA], which incorporates by reference only one part of a single section of the FAA, governs this proceeding[.]”).

consent to participate and there is **no** written agreement.<sup>3</sup>

As to *Cheminova*, one court has already found it to be “distinguishable and unpersuasive” when analyzing claims to vacate IDR awards. *Med-Trans Corp. v. Cap. Health Plan, Inc.*, 700 F. Supp. 3d 1076, 1084 (M.D. Fla. 2023). *Cheminova* considered whether the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”) conferred federal jurisdiction to enforce arbitration awards.<sup>4</sup> 182 F. Supp. 2d at 70. Notably, FIFRA uses the term “arbitration” repeatedly, whereas the NSA never once refers to IDR proceedings as an “arbitration.” The court ultimately determined it “must assume that, absent a plain indication to the contrary, Congress intended the FIFRA arbitration scheme to fit within existing arbitration law.” *Id.* at 75. “Because the enforceability of arbitration agreements and awards was well-established in 1978,” when Congress amended FIFRA to create an arbitration mechanism, the *Cheminova* court held it was “not free to ignore the plain import of the terms ‘binding arbitration proceedings’ and ‘final and conclusive’” in FIFRA and confirmed the arbitration awards. *Id.*<sup>5</sup>

In stark contrast, the NSA’s text and structure conclusively demonstrate that Congress intentionally chose *not* to incorporate *any* procedural mechanism for providers to “enforce” IDR

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<sup>3</sup> See *Guardian Flight LLC v. Aetna Health, Inc. et al.*, No. 4:22-cv-03805 (S.D. Tex. 2022), Dkt. 16 at 1 (“The IDR process, which is nothing like a voluntary arbitration under the FAA, lacks the features and due process protections inherent in proceedings governed by an agreement of the parties.”); *Id.* at 12 (“In IDR proceedings, there is no arbitration agreement. Instead, the IDR entity’s authority derives from the NSA.”).

<sup>4</sup> Again, these Plaintiffs have repeatedly maintained that the NSA’s IDR process is distinguishable from arbitration.

<sup>5</sup> By way of background, pesticide manufacturers must register their products with the EPA before sale or distribution. To obtain a registration, an applicant must demonstrate, *inter alia*, that its pesticide will not cause “unreasonable adverse effects on the environment.” 7 U.S.C. § 136a(c)(5). A registrant can either submit its own test data or cite “data that appear in the public literature or that previously had been submitted” under FIFRA. *Id.* § 136a(c)(1)(F). Under the latter, the EPA may only consider a “follow-on” registrant’s reliance on already-submitted data “if the applicant has made an offer to compensate the original data submitter.” *Id.* § 136(c)(1)(F)(iii). If the original data submitter and follow-on registrant cannot reach a negotiated agreement, either party may initiate “binding arbitration proceedings.” *Id.* FIFRA further mandates that the arbitrator’s findings and determinations are “final and conclusive.” *Id.*

awards. Congress chose only to incorporate FAA § 10(a) in the NSA. This is “a plain indication” that Congress did not intend for providers to use the FAA’s procedural mechanism to “enforce” IDR awards. *See Med-Trans Corp.*, 700 F. Supp. 3d at 1084 (“Neither the NSA nor the FAA says that the FAA bears on the NSA outside the four explicitly incorporated paragraphs [in § 10(a)]. The Court will not assume otherwise.”); *Guardian Flight, LLC v. Aetna Health Inc.*, \_\_\_ F. Supp. 3d \_\_\_, 2024 WL 484561, at \*4 (S.D. Tex. Jan. 5, 2024) (“[N]one of the other provisions of the FAA, including its procedural rules, are applicable to interpretations of the NSA.”).

## **II. Plaintiffs Lack Standing Under ERISA to Sue for Payment of IDR Awards.<sup>6</sup>**

Plaintiffs argue they have derivative standing under ERISA to sue for IDR awards because they have valid assignments from their patients for “plan benefits.” Dkt. 131 at 22–28. IDR awards are not “plan benefits”—the awards arise under the IDR, not the plans. But even assuming IDR awards are plan benefits, Plaintiffs’ argument still fails.

An assignee “cannot recover under the assignment any more than the assignor could recover.” *CardioNet, Inc. v. Cigna Health Corp.*, 751 F.3d 165, 178 (3d Cir. 2014). Put differently, an assignee only “has standing to assert the injury in fact suffered by the assignor”—nothing more. *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 768 (2000). Here, the assignors (i.e., plan members) have not suffered an injury, nor is there an imminent threat of injury. The NSA prohibits air-ambulance providers from billing plan members for out-of-network services. *See* Dkt. 127 at 16–17. Because plan members “do not have to pay the IDR awards,” they

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<sup>6</sup> Some of the underlying health plans contain anti-assignment provisions, precluding Plaintiffs from pursuing ERISA claims via derivative standing. *See McCulloch Orthopaedic Surgical Servs., PLLC v. Aetna Inc.*, 857 F.3d 141, 147 (2d Cir. 2017) (holding that assignment to out-of-network provider was “a legal nullity” because of anti-assignment provision). Aetna is in the process of quantifying the underlying health plans with anti-assignment provisions.

have “suffered no concrete injury from [Aetna’s] allegedly failing to pay IDR awards to Plaintiffs.” *Health Care Servs.*, 2024 WL 2786913, at \*5; *see id.* at \*6 (“Plaintiffs lack standing to assert their ERISA claim because the [Aetna] beneficiaries did not suffer any concrete injury.”).

Plaintiffs respond that “insurance companies have been making a version of this [no injury] argument for years” to no avail. Dkt. 131 at 24–25 (citing cases). But Plaintiffs’ cases—which all predate the NSA—are failure-to-sue cases, not inability-to-sue cases. In each, the assignor legally *could* have sued the defendant directly in the future; thus, the assignor had an “actual or imminent” redressable injury that was assignable. *See, e.g., N. Cypress Med. Ctr. Operating Co. v. Cigna Healthcare*, 781 F.3d 182 (5th Cir. 2015) (“If the beneficiaries had sought payment directly from their Plans for treatment provided by [the provider], and if payment had been refused, they would have had an unquestioned right to bring suit for benefits.”). Here, however, the plan members have no legal right to seek payment of the IDR awards, nor could they bring a suit for unpaid benefits, because any claimed right to payment stems from the NSA, not the plan participants’ rights under ERISA. Thus, the alleged “assignments”—which purport to assign a right the plan members do not possess—cannot confer derivative standing for Plaintiffs to sue Defendants under ERISA.

### **III. Plaintiffs’ Equitable Relief Arguments Fail.**

Plaintiffs argue they are entitled to seek equitable relief under ERISA because such relief is within the scope of their patient assignments. *See* Dkt. 131 at 29–30. Plaintiffs are wrong again. Aetna’s motion to dismiss focuses on Plaintiffs’ claim for *prospective* equitable relief. *See* Dkt. 127 at 20–21; *see also* Dkt. 109 at 12 (“Plaintiffs further seek equitable relief enforcing prospectively Defendants’ obligation to pay awards within thirty days, and all other appropriate equitable relief to redress such violations[.]”). As a threshold matter, plan members could not sue

Aetna for prospective equitable relief to enforce payment of unrelated, yet-to-be-issued IDR awards. Thus, it is immaterial whether the assignments encompass claims for equitable relief.

Nonetheless, equitable relief is outside the assignments' scope. The exemplar assignment Plaintiffs attached to their response simply assigns all rights to "**payments**" for medical services:

[T]o the extent permitted, [the assignor] 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 in pursuing the claim and all rights, statutory or contractual, to any additional recovery such as treble damages, punitive damages, or penalties[.]

Dkt. 131-2 at 2 (emphasis added). Nothing in this assignment encompasses claims for equitable relief. Plaintiffs rely on the "all rights, statutory or contractual" language as supposed proof the assignments contemplate the full panoply of relief available under ERISA, including equitable relief.<sup>7</sup> However, this language cannot be divorced from its context. The "statutory or contractual" rights in the assignment concern additional money damages arising from a claim for payment (i.e., "additional recovery"), not equitable relief. This is confirmed by the examples of "additional" recoveries contemplated (e.g., treble or punitive damages). Equitable relief thus exceeds the assignment's scope. *See Biomed Pharms., Inc. v. Oxford Health Plans (NY), Inc.*, 775 F. Supp. 2d 730, 736 (S.D.N.Y. 2011) (finding that assignment did not afford the right to seek equitable relief because the assignment was limited to the right to pursue damages).

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<sup>7</sup> Plaintiffs also rely on "now or in the future" language, but this language precedes the actual assignment of any rights and simply directs payment for medical services provided to the patient. *See* Dkt. 131 at 31.

#### **IV. Plaintiffs' CUTPA claim is preempted.**

##### **A. The NSA preempts Plaintiffs' CUTPA claim.**

Plaintiffs argue the NSA does not preempt their CUTPA claim because both statutes can “consistently stand together,” with the CUTPA claim being “premised on [Aetna’s alleged] violations of the NSA” regarding the initial payment amount. Dkt. 131 at 32–33 (citing *Cenatiempo v. Bank of Am., N.A.*, 333 Conn. 769, 219 A.3d 767 (2019), for the proposition that “a CUTPA claim can be based on the violation of federal law”). But *Cenatiempo* did not involve the NSA or preemption issues. *See* 219 A.3d at 772–77 (holding that a loan servicer’s alleged violations of federal laws, a consent order, a national mortgage settlement, and state foreclosure mediation statutes were sufficient to satisfy the public policy criterion for determining whether alleged acts were unfair or deceptive under CUTPA). As alleged, Plaintiffs’ CUTPA claim cannot “consistently stand together” with the NSA. The NSA creates a comprehensive, specific process for resolving payment disputes. Plaintiffs’ CUTPA claim would frustrate and upset the balance struck by Congress by imposing restrictions and authorizing penalties over and above those authorized in the NSA program.

Specifically, Plaintiffs argue that “liability was reasonably clear from the day Plaintiffs sent Defendants their bills for each air-ambulance transport.” Dkt. 131 at 39. “Once liability is clear,” Plaintiffs continue, insurers have an obligation to attempt to settle the payment dispute in good faith, which begins with their initial claim payment. *See id.* at 40. However, the IDR process is designed to determine whether and to what extent an insurer’s initial claim payment adequately represents the median in-network rate for the medical services at issue. Thus, before an IDR award is issued, there must be a genuine dispute between the parties regarding the appropriate rate for

the medical services at issue. *See* Dkt. 127 at 30–31. Put differently, IDR awards only exist because the parties were unable to settle the payment dispute.

Under Plaintiffs’ theory, however, any time a provider does not agree with an insurer’s initial claim payment and, thus, invokes the NSA’s dispute-resolution process—both pre-IDR conduct (e.g., the 30-day open-negotiation period) and the IDR process itself—the provider could bring a parallel state-law unfair-settlement-practice claim if, at the end of the IDR process, the provider receives a favorable IDR award. This is an absurd result that would do remarkable violence to Congress’s carefully calibrated design, effectively punishing any insurer that participates in the IDR process. Such an outcome is both inconsistent with the statutory text and unsupported by its context or purpose. Plaintiffs try to avoid the conflict by arguing they “do not seek to ‘impose penalties based on an insurer’s initial payment determination.’” Dkt. 131 at 33. This is not true. Plaintiffs expressly allege that Aetna has violated CUTPA merely by “making low initial payments.” Dkt. 109 at 13.

Allowing an alternative, additional CUTPA enforcement regime would undermine Congress’s intent to vest exclusive dispute resolution in the IDR process. To hold otherwise would disrupt the uniformity intended by Congress and morph what was intended to be a specific and orderly mechanism to resolve payment disputes into a cudgel for out-of-network providers to shakedown insurers. Accordingly, the NSA preempts Plaintiffs’ CUTPA claim. *See Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 679 (2003) (Thomas, J., concurring) (“Obstacle pre-emption turns on whether the goals of the federal statute are frustrated by the effect of the state law.”).

**B. ERISA preempts Plaintiffs’ CUTPA claim.**

Plaintiffs argue that ERISA does not preempt their CUTPA claim “with respect to Aetna’s fully insured business, which is not governed by ERISA.” Dkt. 131 at 35. Plaintiffs are wrong. Just like self-funded plans, fully insured plans can be governed by ERISA. *See, e.g., Gannon v. Aetna Life Ins. Co.*, 2007 WL 2844869, at \*1 (S.D.N.Y. Sept. 28, 2007) (recognizing that Aetna plan “fully insured by Aetna” was governed by ERISA).

Plaintiffs also argue their CUTPA claim is not preempted by ERISA as to ERISA-governed plans because a federal district court in this district has held that ERISA does not preempt a CUTPA claim premised on a Connecticut surprise billing law. *See* Dkt. 131 at 37. But unlike the plaintiffs in that case, who could premise their CUTPA claim on the Connecticut law, Plaintiffs cannot premise their CUTPA claim on the NSA because such a claim is preempted. *See supra*.

Plaintiffs accuse Aetna of trying to “have it both ways” because Aetna argues that both lack of standing and ERISA preemption limit Plaintiffs’ remedy to the IDR process. *See* Dkt. 131 at 36. Notably, whereas Aetna argues that two doctrines both yield the same result (that Plaintiffs have one remedy, the IDR process), Plaintiffs actually do seek to have it both ways—they want both the NSA’s payment guarantee and to be able to bring state-law claims for more money on top. This Plaintiffs cannot do. *See* Dkt. 127 at 25–26.

**V. Plaintiffs Fail to State a CUTPA Claim.<sup>8</sup>**

Plaintiffs raise two types of CUTPA claims for: (1) conduct outside CUIPA; and (2) purported CUIPA violations. Dkt. 131 at 37. Plaintiffs’ CUTPA claim for conduct outside CUIPA should be dismissed because it is foreclosed by *NEMS, PLLC v. Harvard Pilgrim Health Care of*

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<sup>8</sup> If the “NSA is part of ERISA,” as Plaintiffs allege, *see* Dkt. 131 at 26, then Defendants are entitled to the benefit of ERISA’s express-preemption clause.

*Connecticut, Inc.*, \_\_ A.3d \_\_, 2024 WL 3892879 (Conn. Aug. 21, 2024). Plaintiffs’ CUTPA claim for purported CUIPA violations should be dismissed because Plaintiffs have not plausibly alleged a claim pursuant to the CUIPA provision on which they rely.

**A. A recent Connecticut Supreme Court decision bars Plaintiffs’ CUTPA claim for conduct outside CUIPA.**

In *NEMS* the Connecticut Supreme Court addressed, *inter alia*, the following certified question: “Under any interpretation of the [Connecticut] surprise billing law, can a plaintiff successfully maintain an action under CUTPA for actions that do not violate CUIPA but purport to violate the surprise billing law, because the surprise billing law regulates a specific type of insurance-related conduct, under *State v. Acordia, Inc.*” 2024 WL 3892879, at \*6. The Connecticut Supreme Court answered this question “no.”

By way of background, CUTPA is a broad consumer-protection statute<sup>9</sup> aimed at prohibiting unfair or deceptive acts in any trade or commerce. CUIPA, on the other hand, specifically regulates the insurance industry, identifying conduct that constitutes “unfair insurance practices.” The legislative intent behind this dual system is to create a distinct framework for identifying unfair practices within the insurance industry. Specifically, CUIPA provides a *comprehensive* list of unfair insurance practices. *See* Conn. Gen. Stat. § 38a-816. It also allows the insurance commissioner to define new unfair insurance practices. *See id.* §§ 38a-817 and 38a-818.

In *Mead v. Burns*, and reaffirmed in *Acordia*, the Connecticut Supreme Court emphasized that the Connecticut legislature intended CUIPA to be the exclusive vehicle for identifying unfair insurance practices. *See NEMS*, 2024 WL 3892879 at \*4–5. Thus, in the insurance context, only

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<sup>9</sup> Notably, Plaintiffs are not consumers and should not be allowed to weaponize a statute meant to protect the general public.

conduct expressly deemed unfair in General Statute § 38a-816 (or by the insurance commissioner) can form the basis of a CUTPA claim, thereby ensuring that the determination of what constitutes an unfair insurance practice is centralized and regulated, rather than subject to broader or inconsistent interpretations under CUTPA's general provisions. The *NEMS* court upheld this principle, holding that, even assuming *arguendo* statutes other than CUIPA might support a CUTPA claim for insurance conduct, Connecticut's "surprise billing law undoubtedly is not that sort of statute." *Id.* at \*6. The only two other "possible" statutes that might support a claim would be (1) a statute that defines conduct as an unfair insurance practice; or (2) a criminal insurance statute. *Id.* Connecticut's surprise billing law, *NEMS* held, was neither. So, the *NEMS* plaintiff could not base its CUTPA claim on it.

If the state surprise billing law cannot support a non-CUIPA CUTPA claim, then *a fortiori*, the federal surprise billing law (the NSA)—which is even further removed from CUIPA—cannot either. The NSA (1) does not define anything as an unfair insurance practice,<sup>10</sup> and (2) is not a criminal insurance statute. Thus, Plaintiffs' CUTPA claim premised on conduct outside CUIPA (i.e., Defendants' alleged violations of the NSA) must be dismissed.

**B. Plaintiffs' CUTPA claim for purported CUIPA violations should also be dismissed.**

As to the second of Plaintiffs' pleaded CUTPA theories, i.e., purportedly grounded in CUIPA, that too should be dismissed for a different reason. The sole CUIPA provision Plaintiffs

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<sup>10</sup> *NEMS*'s examination of congressional intent concerned the Connecticut legislature, as that is the body tasked with identifying unfair insurance practices for purposes of CUTPA. It is uncertain whether a federal statute could even fall within the narrow carveout for non-CUIPA statutes "that prohibit specific types of unfair insurance related conduct." *Id.* at \*5–6. Regardless, no genuine argument can be made that Congress intended for providers to be able to pursue state-law consumer-protection-oriented claims based upon alleged violations of the NSA. Nothing in the NSA's text or legislative history suggests that Congress envisioned—much less intended—violations to be actionable under any state or federal laws.

allege Defendants violated is General Statutes § 38a-816(6)(F). Plaintiffs have not plausibly alleged a claim pursuant to § 38a-816(6)(F).

Section 38a-816(6)(F) makes it an unfair insurance practice to “Commi[t] or perfor[m] with such frequency as to indicate a general business practice any of the following: . . . (F) not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear.” Dkt. 131 at 38. Plaintiffs allege three § 38a-816(6)(F) violations: (1) “making unreasonably low initial payments”; (2) “not making good faith settlement attempts during the open negotiation period”; and (3) “not paying the OON rate determined in IDR awards within 30 days as required by federal law

The first two alleged § 38a-816(6)(F) violations come too early in the IDR process for liability to have become “reasonably clear” as a matter of law. *See* Dkt. 127 at 30–31. Plaintiffs themselves acknowledge that “the *ineligible claims rate is high*” and that the dispute-resolution process depends, in part, on the parties’ respective compliance with various deadlines and duties *before* an IDR award is issued. Dkt. 131 at 3 (emphasis added). Liability is not clear while these parts are in motion. Plaintiffs cannot avoid the clear import of their own pleadings—Aetna retains a reasonable likelihood that it is not liable for any amount up until an adverse IDR award issues. As to the third alleged violation of § 38a-816(6)(F), this claim is preempted by the NSA, *see supra*, and inadequately pleaded for the reasons stated in Aetna’s motion to dismiss. *See* Dkt. 127 at 31.

### CONCLUSION

For the reasons set forth above, Aetna’s motion to dismiss should be granted.

By: s/ John B. Shely  
JOHN B. SHELBY  
*Admitted Pro Hac Vice*  
Texas State Bar No. 18215300

[jshely@hicks-thomas.com](mailto:jshely@hicks-thomas.com)

M. KATHERINE STRAHAN

*Admitted Pro Hac Vice*

Texas State Bar No. 24013584

[kstrahan@hicks-thomas.com](mailto:kstrahan@hicks-thomas.com)

DAVID HUGHES

*Admitted Pro Hac Vice*

Texas State Bar No. 24101941

[dhughes@hicks-thomas.com](mailto:dhughes@hicks-thomas.com)

HICKS THOMAS LLP

700 Louisiana St, Suite 2300

Houston, Texas 77002

Telephone: (713) 547-9100

Telecopier: (713) 547-9150

Kevin P. Daly (ct30380)

Adam J. Petitt

*Admitted Pro Hac Vice*

Robinson & Cole LLP

280 Trumbull Street

Harford, CT 06103

Tel. No.: (860) 275-8200

Fax No.: (860) 275-8299

Email: [kpdaly@rc.com](mailto:kpdaly@rc.com)

Email: [Apetitt@rc.com](mailto:Apetitt@rc.com)

**ATTORNEYS FOR DEFENDANTS**

**AETNA HEALTH INC., AETNA LIFE**

**INSURANCE COMPANY INC. AND**

**AETNA HEALTH AND LIFE**

**INSURANCE CO.**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was filed electronically on September 6, 2024. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt.

/s/ David Hughes

David Hughes