IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ASSOCIATION OF AIR MEDICAL SERVICES, Plaintiff, v. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*, Defendants.	)	No. 1:21-cv-03031-RJL Consolidated with No. 1:21-cv-03231-RJL

DEFENDANTS' NOTICE OF RELATED CASE AND OF MOTION TO TRANSFER TO THIS COURT

The Defendants respectfully notify the Court of a related case filed in the U.S. District Court for the Eastern District of Texas, *LifeNet, Inc. v. U.S. Department of Health and Human Services*, No. 6:22-cv-00162-JDK (E.D. Tex.). The plaintiff in *LifeNet, Inc.* is an air ambulance service provider that provides medical transports under a partnership with Air Methods Corporation. Air Methods, for its part, is a member of the Association of Air Medical Services, and has actively participated in this litigation. The plaintiffs in both actions seek the same relief, namely, the vacatur of portions of the Defendants' rulemaking addressing the procedures for the arbitration of payment disputes involving air ambulance services.

In view of the overlap of the parties and the claims in the two actions, the Defendants have moved to transfer *LifeNet, Inc.* to this Court under the first-to-file rule, so that this Court may determine whether that case should be consolidated with this action. Copies of the complaint in *LifeNet, Inc.* and of the Defendants' motion to transfer are attached for the Court's reference.

Dated: May 12, 2022

Respectfully submitted,

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Exhibit A

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

LIFENET, INC. Plaintiff, v. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, U.S. DEPARTMENT OF LABOR, U.S. DEPARTMENT OF THE TREASURY, OFFICE OF PERSONNEL MANAGEMENT, and the CURRENT HEADS OF THOSE AGENCIES IN THEIR OFFICIAL CAPACITIES, Defendants.	Case No. __________ **ORIGINAL COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

ORIGINAL COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

This is an action by LifeNet, Inc. ("LifeNet") challenging, under the Administrative Procedure Act (APA), various regulations that implement the "No Surprises Act" of 2020, Pub. L. 116-260, div. BB, tit. I (Dec. 27, 2020).

This action is closely related to another action pending before this Court: *Texas Medical Association, et al. v. U.S. Dep't Health & Hum. Serv'cs, et al.*, 21-cv-00425, Dkt. 113, 2022 WL 542879 (Feb. 23, 2022) (Kernodle, J.) (the "*TMA* Decision"). Plaintiff respectfully requests assignment of this matter to Judge Kernodle, who authored the *TMA* Decision.

INTRODUCTION

1. Plaintiff LifeNet is an air ambulance company. LifeNet's planes and helicopters transport hundreds of patients each year—many of whom are suffering medical emergencies and would risk death or further serious injury without LifeNet's services. Defendants are the agencies charged with implementing the No Surprises Act, and the heads of those agencies in their official capacities.

2. The No Surprises Act, as relevant here, creates an "Independent Dispute Resolution" (IDR) process, in which out-of-network providers of emergency medical services, such as LifeNet, can obtain an order, from an IDR entity, directing the patient's health plan or health insurer to pay the provider a certain amount for the services provided to the patient. IDR proceedings are already beginning across the country.

3. This Court's *TMA* Decision struck down those parts of Defendants' implementing regulations that imposed a "QPA Presumption" on the IDR Process. The "QPA," or "qualifying payment amount," is "generally" the median in-network rate for the service at issue as agreed to by the specific payor (health plan or insurer). *See TMA*, 2022 WL 542879, at *2. The regulations' QPA Presumption "places its thumb on the scale for the QPA, requiring arbitrators [i.e., the IDR entities] to presume the correctness of the QPA and then imposing a heightened burden on the remaining statutory factors to overcome that presumption." *Id.* at *8. This Court set aside the regulations' QPA Presumption for two independent reasons: first, it "rewrites clear statutory terms" of the No Surprises Act, *id.,* and second, it was promulgated without the notice-and-comment procedure that the APA requires, *id.* at *14.

4. Despite this Court's holding in *TMA*, the Defendants continue to apply the QPA Presumption to air ambulance providers including LifeNet—making this lawsuit necessary. Defendants are apparently relying on one sentence in their regulations, which was not expressly

struck down by *TMA*. LifeNet requests that this Court act swiftly to vacate this sentence, as well, and for the same reasons as in *TMA*.

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PARTIES

5. LifeNet, Inc. is a corporation that operates one fixed-wing and two rotor-wing air ambulances from three airbases. LifeNet's air ambulances routinely transport emergency patients located in this District, in Arkansas, and in Louisiana. LifeNet's headquarters are in Texarkana, Texas.

6. Defendant U.S. Department of Health and Human Services is an executive department of the United States headquartered in Washington, D.C.

7. Defendant Xavier Becerra is the Secretary of Health and Human Services. He is sued only in his official capacity.

8. Defendant U.S. Department of the Treasury is an executive department of the United States headquartered in Washington, D.C.

9. Defendant Janet Yellen is the Secretary of the Treasury. She is sued only in her official capacity.

10. Defendant U.S. Department of Labor is an executive department of the United States headquartered in Washington, D.C.

11. Defendant Martin J. Walsh is the Secretary of Labor. He is sued only in his official capacity.

12. Defendant U.S. Office of Personnel Management (OPM) is an executive agency of the United States headquartered in Washington, D.C.

13. Defendant Kiran Ahuja is the Director of OPM. He is sued only in his official capacity.

JURISDICTION AND VENUE

14. The Court has subject-matter jurisdiction over this action under 28 U.S.C. § 1331 and 28 U.S.C. § 1346(a).

15. LifeNet's causes of action are provided by the Administrative Procedure Act, 5 U.S.C. §§ 702-706, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202.

16. Venue is proper in this judicial district under 28 U.S.C. § 1391(e). This is an action against the United States and various of its Departments and Department Officials in their official capacities. Plaintiff resides in this District, and a substantial part of the events or omissions giving rise to Plaintiff's claims occurred in this District.

FACTUAL BACKGROUND

I. The No Surprises Act Created the IDR Process Without Any "QPA Presumption"

17. The No Surprises Act was enacted on December 27, 2020, as part of the Consolidated Appropriations Act, 2021. Pub. L. 116-260, 134 Stat. 1182, div. BB, tit. I (2020). Its relevant requirements went into effect on January 1, 2022. For convenience and simplicity, this Complaint cites the No Surprises Act as codified in the Public Health Service ("PHS") Act, 42 U.S.C. §§ 300gg-111 *et seq.*[1]

18. The provisions of the Act at issue here are: 42 U.S.C. § 300gg-111, which governs all emergency medical services, and 42 U.S.C. § 300gg-112, which makes certain modifications for air ambulance service providers.

19. The IDR Process is similar to "binding final offer arbitration," also referred to as "baseball-style" arbitration. Each party—the provider and the insurer—submits an "offer" of the payment amount. The IDR entity then picks one of the two offers.

[1] The NSA made parallel amendments to provisions of the PHS Act, which is enforced by the Department of Health and Human Services ("HHS"); to the Employee Retirement Income Security Act ("ERISA"), which is enforced by the Department of Labor; and to the Internal Revenue Code ("IRC"), which is enforced by the Department of the Treasury. These other provisions, enacted into ERISA and the IRC, are the same in all material respects as the codification in the PHS Act, which is cited in this Complaint.

20. In an air ambulance IDR, the No Surprises Act requires that the IDR entity "shall . . . tak[e] into account" a list of nine "considerations" specified in the statute. 42 U.S.C. § 300gg-112(b)(5)(A). These nine "considerations" are:

a. The "qualifying payment amount" (QPA). 42 U.S.C. § 300gg-112(b)(5)(C)(i)(I). The QPA is generally the median of the rates that the specific payor (health plan or insurer) agreed to pay for air ambulance services in 2019 in the geographic area in which the services at issue were provided.[2] The statutory definition of the QPA is the same, for air ambulance services, as it is for all other items and services. *Compare id. to* 42 U.S.C. § 300gg-111(a)(3)(E).

b. "The quality and outcomes measurements of the provider that furnished such services." 42 U.S.C. § 300gg-112(b)(5)(C)(ii).

c. "The acuity of the individual receiving such services or the complexity of furnishing such services to such individual." *Id.*

d. "The training, experience, and quality of the medical personnel that furnished such services." *Id.*

e. The "[a]mbulance vehicle type, including the clinical capability level of such vehicle." *Id.*

f. The "[p]opulation density of the pick up location (such as urban, suburban, rural, or frontier)." *Id.*

g. "Demonstrations of good faith efforts (or lack of good faith efforts) made by the nonparticipating provider or nonparticipating facility or the plan or issuer to enter into

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[2] If the insurer did not have sufficient agreements, in 2019, to calculate a median rate (i.e., the insurer had fewer than three such rates) then the insurer is permitted to instead consult a public "database." 42 U.S.C. § 300gg-111(a)(3)(E)(iii)(I).

network agreements and, if applicable, contracted rates between the provider and the plan or issuer, as applicable, during the previous 4 plan years." *Id.*

h. Any information the IDR entity requests from the parties to the IDR proceeding. *Id.* (B)(5)(C)(i)(II).

i. Any additional information submitted by either party relating to its offer. *Id.*

II. The Agencies Created One IDR Process in IFR Part II, With Only Slight Differences Between Air Ambulance IDRs and All Other IDRs

21. Congress instructed the Departments to promulgate implementing regulations to govern the IDR Process. Congress actually gave two identical versions of the same instruction: By December 27, 2021 (i.e., within one year of enactment), the Departments were to "establish by regulation" an "IDR process" for "air ambulance services," 42 U.S.C. § 300gg-112(b)(2)(A), and an "IDR process" for all other "item[s] or service[s]," *id.* § 300gg-111(c)(2)(A).

22. On October 7, 2021, the Departments published an Interim Final Rule entitled *Requirements Related to Surprise Billing; Part II*, 86 Fed. Reg. 55,980 (Oct. 7, 2021) ("IFR Part II"). IFR Part II contains rules for conducting the IDR Process, including the QPA Presumption.

23. The principal provisions of IFR Part II relating to the IDR Process are codified in 45 C.F.R. § 149.510.[3] Section 149.510 applies, in full, to any IDR that is *not* an air ambulance IDR.

[3] The Departments also codified these regulations under titles 26 and 29 of the Code of Federal Regulations, which concern ERISA and the Internal Revenue Service. These other codifications are the same, in all material respects, as the codifications in 45 C.F.R. Part 149, which are cited in this Complaint.

24. A second section—Section 149.*520*—applies to air ambulance IDRs. This section simply incorporates, by reference, nearly all of Section 149.510. *See* 45 C.F.R. § 149.520(b)(1).[4]

25. According to the statute, the only difference between air ambulance IDRs and all other IDRs is the list of "additional circumstances" that the IDR entity is to consider when choosing which offer to select. Some of these "additional circumstances" are different, in an air ambulance IDR—for example, the "population density" at the patient's "pick up location," and the "ambulance vehicle type." 42 U.S.C. § 300gg-112(b)(5)(C)(ii).

26. The regulation—Section 149.520(b)(2)—directs the IDR entity to consider these different "additional circumstances" in air ambulance IDRs. Otherwise, air ambulance IDRs are to follow the procedures set forth in Section 149.510, which apply to all other IDRs. *See* 45 C.F.R. § 149.520(b)(1).

III. IFR Part II's QPA Presumption Clearly Rewrites the Statute

27. The Departments' QPA Presumption is codified in five parts of 45 C.F.R § 149.510 and in one sentence of 45 C.F.R. § 149.520, as shown in the following chart. The five parts of Section 149.510 (shown in the first five rows of the chart) were expressly vacated by the *TMA* decision. The one sentence from Section 149.520 (shown in the sixth and final row of the chart) was not expressly vacated by *TMA*:

[4] 45 C.F.R. § 149.520(b)(1) states: "Except as provided in paragraphs (b)(2) and (3) of this section, in determining the out-of-network rate to be paid by group health plans and health insurance issuers offering group or individual health insurance coverage for out-of-network air ambulance services, plans and issuers must comply with the requirements of § 149.510, except that references in § 149.510 to the additional circumstances in § 149.510(c)(4)(iii)(C) shall be understood to refer to paragraph (b)(2) of this section."

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Regulatory Text (bold language contains the QPA Presumption)	Citation
"(viii) Material difference means a substantial likelihood that a reasonable person with the training and qualifications of a certified IDR entity making a payment determination would consider the submitted information significant in determining the out-of-network rate and would view the information as showing that the qualifying payment amount is not the appropriate out-of-network rate."	45 C.F.R. § 149.510(a)(2)(viii)
ii) Payment determination and notification. Not later than 30 business days after the selection of the certified IDR entity, the certified IDR entity must: (A) Select as the out-of-network rate for the qualified IDR item or service one of the offers submitted under paragraph (c)(4)(i) of this section, taking into account the considerations specified in paragraph (c)(4)(iii) of this section (as applied to the information provided by the parties pursuant to paragraph (c)(4)(i) of this section**). The certified IDR entity must select the offer closest to the qualifying payment amount unless the certified IDR entity determines that credible information submitted by either party under paragraph (c)(4)(i) clearly demonstrates that the qualifying payment amount is materially different from the appropriate out-of-network rate, or if the offers are equally distant from the qualifying payment amount but in opposing directions.**	45 C.F.R. § 149.510(c)(4)(ii)(A)
(iii) Considerations in determination. In determining which offer to select, the certified IDR entity must consider: … (C) Additional information submitted by a party, provided the information is credible and relates to the circumstances described in paragraphs (c)(4)(iii)(C)(1) through (5) of this section, with respect to a qualified IDR item or service of a nonparticipating provider, facility, group health plan, or health insurance issuer of group or individual health insurance coverage that is the subject of a payment determination. **This information must also clearly demonstrate that the qualifying payment amount is materially different from the appropriate out-of-network rate.**	45 C.F.R. § 149.510(c)(4)(iii)(C)
(iv) Examples. The rules of paragraph (c)(4)(iii) of this section are illustrated by the following examples: … [four examples illustrating the QPA Presumption]."	45 C.F.R. § 149.510(c)(4)(iv)

Regulatory Text (bold language contains the QPA Presumption)	Citation
(B) If the certified IDR entity does not choose the offer closest to the qualifying payment amount, the certified IDR entity's written decision must include an explanation of the credible information that the certified IDR entity determined demonstrated that the qualifying payment amount was materially different from the appropriate out-of-network rate, based on the considerations allowed under paragraph (c)(4)(iii)(B) through (D) of this section, with respect to the qualified IDR item or service.	45 C.F.R. § 149.510(c)(4)(vi)(B)
(b) Determination of out-of-network rates to be paid by health plans and health insurance issuers; independent dispute resolution process— . . . . (2) Additional information. Additional information submitted by a party, provided the information is credible, relates to the circumstances described in paragraphs (b)(2)(i) through (vi) of this section, with respect to a qualified IDR service of a nonparticipating provider of air ambulance services or health insurance issuer of group or individual health insurance coverage that is the subject of a payment determination. **This information must also clearly demonstrate that the qualifying payment amount is materially different from the appropriate out-of-network rate.**	45 C.F.R. § 149.520(b)(2)

28. The QPA Presumption requires the IDR entity to "begin with the presumption that the amount closest to the QPA is the appropriate out-of-network rate." *IFR Part II*, 86 Fed. Reg. at 55,999. The QPA is to be the "presumptive factor." *Id.* at 55,996-97. The IDR entity *must* select the "offer" closest to the QPA unless the IDR entity "determines that *credible information* submitted by either party . . . *clearly demonstrates* that the [QPA] is *materially different* from the appropriate out-of-network rate." 45 C.F.R § 149.510(c)(4)(ii)(A) (emphases added).

29. The QPA Presumption deviates from the statute. The No Surprises Act provides that the IDR entity, conducting an air ambulance IDR, "shall . . . tak[e] into account" a list of *nine* "considerations" specified in the statute. 42 U.S.C. § 300gg-112(b)(5)(A). Only *one* of those

considerations is the QPA. The plain text of the statute does *not* give the QPA any greater weight than the other eight factors that the IDR entity "shall take into account."

30. The Departments lacked any statutory authority to impose the QPA Presumption. Congress instructed the Departments to "establish by regulation one independent dispute resolution process under which . . . a certified IDR entity . . . determines . . . *in accordance with the succeeding provisions of this subsection* . . . the amount of payment." *Id.* (b)(2)(A) (emphasis added). Those "succeeding provisions of this subsection" included the other *eight* considerations that the Congress required that the IDR entity "shall take into account." Congress did not authorize the Departments to instruct the IDR entities to give presumptive weight to the QPA.

31. In their rulemaking, the Departments did not identify any gap or ambiguity in the No Surprises Act's description of how an IDR entity should select an appropriate out-of-network rate.

IV. The Departments' QPA Presumption Was Issued Without Notice and Comment

32. IFR Part II took effect immediately—*i.e.*, on October 7, 2021—and is, in general, applicable with respect to plan, policy, or contract years beginning January 1, 2022.

33. IFR Part II represented the end of the Departments' collective decision-making process.

34. Although the Departments placed language in IFR Part II, indicating that they invite comments on certain aspects of the published regulations, that language does not create a formal legal obligation on the Departments to review and consider such comments, much less to revise the rules based on any comments received.

35. The Administrative Procedure Act (APA) required the Departments to provide public notice of the proposed regulations and an opportunity for comment, unless the Departments "for good cause" found that notice and comment "are impracticable, unnecessary, or contrary to

the public interest." 5 U.S.C. § 553(b)(B). The Departments would then have been required to provide a meaningful response to substantive comments received.

36. The No Surprises Act does not contain any express permission for the Departments to depart from the APA's notice-and-comment requirement.

37. The Departments could have complied with the APA and provided the public with notice and an opportunity to comment on IFR Part II.

38. "[I]f the Departments had provided notice and comment," then LifeNet and other affected air ambulance providers "could have submitted the specific reasons and authorities for why they believed the Rule is inconsistent with the Act, how the Rule would impact them as providers, and how the Rule could be drafted to track the statutory text more closely." *TMA*, 2022 WL 542879, at *13.

39. The Department's excuses for not allowing notice and comment on the IFR Part II regulations do not suffice to show "good cause." *See id.* at *12 ("the Court finds that the Departments lacked good cause to bypass notice and comment").

V. Defendants Continue to Apply the QPA Presumption to Air Ambulance IDRs, Despite this Court's Opinion and Order in *TMA*

40. This Court's *TMA* Decision struck down all five aspects of the QPA Presumption that are found in Section 149.510.

41. None of the *TMA* plaintiffs specifically requested that the Court strike down the one sentence in Section 149.520 that refers to the QPA Presumption. That sentence reads: "This [additional] information must also clearly demonstrate that the qualifying payment amount is materially different from the appropriate out-of-network rate." 45 C.F.R. § 149.520(b)(2).

42. However, the *TMA* decision did strike down a sentence in Section 149.510 that is *identical* to this sentence in Section 149.520. The two sentences are shown in the chart below:

45 C.F.R. § 149.510(c)(4)(iii)(C) (bold language vacated by *TMA*)	45 C.F.R. § 149.520(b)(2) (not expressly vacated by *TMA*)
Additional information submitted by a party, provided the information is credible and relates to the circumstances described in paragraphs (c)(4)(iii)(C)(1) through (5) of this section, with respect to a qualified IDR item or service of a nonparticipating provider, facility, group health plan, or health insurance issuer of group or individual health insurance coverage that is the subject of a payment determination. **This information must also clearly demonstrate that the qualifying payment amount is materially different from the appropriate out-of-network rate.**	Additional information. Additional information submitted by a party, provided the information is credible, relates to the circumstances described in paragraphs (b)(2)(i) through (vi) of this section, with respect to a qualified IDR service of a nonparticipating provider of air ambulance services or health insurance issuer of group or individual health insurance coverage that is the subject of a payment determination. **This information must also clearly demonstrate that the qualifying payment amount is materially different from the appropriate out-of-network rate.**

43. On April 12, 2022, Defendants issued updated "guidance" to IDR entities. That guidance instructs IDR entities to continue to apply the QPA Presumption to air ambulance IDRs:

> ***6.4.1. When and How to Apply the QPA for Disputes Involving Air Ambulance Qualified IDR Services***
>
> For **air ambulance qualified IDR services,** in determining which payment offer to select, the certified IDR entity should consider **credible information** submitted by either party in relation to the offer to the extent that the information **clearly demonstrates** that the QPA is **materially different** from the appropriate OON rate for the qualified air ambulance service, based on the additional circumstances described in Section 6.4.2.
>
> In cases where credible information clearly demonstrates that the QPA is materially different from the appropriate OON rate, or when the offers are equally distant from the QPA but in opposing directions, the certified IDR entity must select the offer that the certified IDR entity determines best represents the value of the air ambulance qualified IDR items or services, which could be either offer submitted.

Federal Independent Dispute Resolution (IDR) Process Guidance for Certified IDR Entities, at 22 (Apr. 12, 2022), *available at* https://www.cms.gov/sites/default/files/2022-04/Revised-IDR-Process-Guidance-Certified-IDREs.pdf.

44. Applying the QPA Presumption only to air ambulance IDRs is arbitrary, irrational, and deviates from the statute. The statutory text indicates that the QPA should be used in the same way in air ambulance IDRs as in all other IDRs, *i.e.*, as one factor among many to be considered.

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The relevant statutory text, regarding the consideration to be given to the QPA by the IDR entity, is *identical* for all IDRs:

42 U.S.C. § 300gg-111(c)(5)(C) (IDRs for all other items and services, besides air ambulances)	**42 U.S.C. § 300gg-112(b)(5)(C) (air ambulance IDRs)**
(C) Considerations in determination (i) In general In determining which offer is the payment to be applied pursuant to this paragraph, the certified IDR entity, with respect to the determination for a qualified IDR item or service shall consider-- (I) the qualifying payment amounts (as defined in subsection (a)(3)(E)) for the applicable year for items or services that are comparable to the qualified IDR item or service and that are furnished in the same geographic region (as defined by the Secretary for purposes of such subsection) as such qualified IDR item or service; and … [additional circumstances].	(C) Considerations in determination (i) In general In determining which offer is the payment to be applied pursuant to this paragraph, the certified IDR entity, with respect to the determination for a qualified IDR air ambulance service shall consider-- (I) the qualifying payment amounts (as defined in section 300gg-111(a)(3)(E) of this title) for the applicable year for items or services that are comparable to the qualified IDR air ambulance service and that are furnished in the same geographic region (as defined by the Secretary for purposes of such subsection) as such qualified IDR air ambulance service; and … [additional circumstances].

VI. The QPA Presumption Is Harming and Will Continue to Harm LifeNet

45. By "put[ting] a thumb on the scale in favor of the QPA," the QPA Presumption causes a procedural injury to LifeNet. *TMA*, 2022 WL 542879, at *4. The QPA Presumption deprives LifeNet of "the arbitration process established by the Act," a "procedural right" that is designed to "protect [LifeNet's] concrete interests" in receiving compensation for its services. *Id.*

46. The QPA Presumption also causes economic injury to LifeNet. In calendar year 2021, LifeNet conducted many emergency flights transporting patients who were insured by a commercial (i.e., non-Medicare, non-Medicaid) health plan or health insurer, for which LifeNet was an "out-of-network" provider. LifeNet expects it will conduct many such flights in 2022, as well. LifeNet's right to compensation from the plan or insurer, for many of those 2022 emergency flights, will be governed by the No Surprises Act and by the QPA Presumption challenged in this

action. LifeNet reasonably expects that some and perhaps all of these services will soon be the subject of IDR proceedings. The application of the QPA Presumption in these IDR proceedings will "systematically reduce out-of-network reimbursement compared to an IDR process without such a presumption," *TMA,* 2022 WL 542879 at *5, which will cause LifeNet significant economic injury over the long term because the QPA Presumption will "drive out-of-network reimbursement rates to the QPA as a de facto benchmark." *Id.*

CLAIMS FOR RELIEF

I. COUNT I: The QPA Presumption Contained in 45 C.F.R. § 149.510 and § 149.520 Should Be Set Aside, Under the APA, Because It Is Arbitrary, Capricious, and Contrary to the Statute

(5 U.S.C. § 706)

47. Plaintiff incorporates and re-alleges all of the foregoing paragraphs. Plaintiff also incorporates all of this Court's findings and holding in the *TMA* decision.

48. The regulations that govern the IDR Process—45 C.F.R. §§ 149.510 and 149.520—are final agency action subject to review under the APA. 5 U.S.C. § 704. These regulations were published as an Interim Final Rule. That publication marks the consummation of the Departments' collective decision-making, establishes the rights and obligations of air ambulance providers, group health plans, and issuers, and is a regulation from which legal consequences will flow.

49. Under Section 706 of the APA, a district court shall "hold unlawful and set aside agency action . . . found to be" either "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A), (C).

50. The QPA Presumption is contained in the six provisions listed above in paragraph 27.

51. The QPA Presumption is "in excess of statutory jurisdiction, authority, or limitations," 5 U.S.C. § 706, because it deviates from Congress's clear direction that the QPA is just one of nine factors that the IDR entity "shall consider" when "determining which offer is the payment to be applied." 42 U.S.C. § 300gg-112(b)(5)(C)(i).

52. By tying the IDR entity's hands in this way, the QPA Presumption abrogates the discretion that Congress deliberately granted to the IDR entity (and not to the Departments). Congress provided that the IDR entity—not the Departments—would have the power to "determine[] . . . in accordance with the succeeding provisions of this subsection, the amount of payment . . . for such services." 42 U.S.C. § 300gg-112(b)(2)(A). By selecting in advance one factor (the QPA) that "must" be given presumptive effect, and by requiring a heightened explanation whenever the IDR entity deviates from the QPA presumption, the regulations usurp the discretion that Congress granted to the IDR entity.

53. For these reasons, LifeNet respectfully requests that this Court (i) set aside and vacate the QPA Presumption, (ii) issue a declaratory judgment instructing IDR entities not to follow the QPA Presumption in any IDR Proceedings, and (iii) issue a declaratory judgment that IDR decisions, in which the IDR entity applied the QPA Presumption when determining which offer to select, are void and without effect and must be re-opened and started anew.

II. COUNT II: The QPA Presumption Should Be Set Aside Because the Agencies Failed to Follow Notice-and-Comment Procedures

(5 U.S.C. §§ 553, 706)

54. Plaintiff incorporates and re-alleges all of the foregoing paragraphs. Plaintiff also incorporates all of this Court's findings and holding in the *TMA* decision.

55. The APA requires federal agencies to provide public notice of proposed rulemakings and an opportunity for comment, unless the agencies "for good cause" find that notice

and comment "are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B). This bedrock procedural protection of the APA is designed to ensure that members of the public have notice of proposed regulations that might affect their interests and an opportunity to present their views to the agency, both to inform and improve the agency's decision-making and to promote public confidence in the administrative process.

56. Agencies may dispense with notice-and-comment rulemaking only if "the agency for good cause finds … that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." *Id.* § 553(b)(B); *see id.* § 553(d)(3). Otherwise, the APA requires the Departments to provide public notice of proposed rulemakings, and they must allow and consider public comments.

57. In promulgating IFR Part II, the Departments failed to follow notice-and-comment rulemaking.

58. The Departments did not satisfy the high bar necessary to establish good cause.

59. The Departments had sufficient time to formulate proposed rules and provide notice and opportunity for comment.

60. For these reasons, LifeNet respectfully requests that this Court (i) set aside and vacate the QPA Presumption, (ii) issue a declaratory judgment instructing IDR entities not to follow the QPA Presumption in any IDR Proceedings, and (iii) issue a declaratory judgment that IDR decisions, in which the IDR entity applied the QPA Presumption when determining which offer to select, are void and without effect and must be re-opened and started anew.

PRAYER FOR RELIEF

For the foregoing reasons, LifeNet respectfully requests that the Court provide the declaratory and injunctive relief set forth in each Count above, and summarized as follows:

A. A judgment vacating the QPA Presumption (specifically, the six regulatory provisions identified, in bold, in the chart appearing at paragraph 27);

B. A judgment declaring that the QPA Presumption is arbitrary and capricious; is in excess of statutory authority and limits; and was issued without the required notice-and-comment procedure;

C. A judgment declaring that IDR entities should not apply the QPA Presumption in any IDRs;

D. A judgment declaring that air ambulance IDR decisions, in which the IDR entity applied the QPA Presumption when determining which offer to select, are void and without effect and must be re-opened and started anew; and

E. Any other relief the Court determines to be just and proper.

Dated: April 27, 2022

BY:

____*/s/ Stephen Shackelford, Jr.*_________

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Exhibit B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

LIFENET, INC., Plaintiff, v. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*, Defendants.	Civil Action No. 22-cv-00162-JDK

DEFENDANTS' MOTION TO TRANSFER AND SUPPORTING MEMORANDUM

INTRODUCTION

Plaintiff urges the Court to decide—on an emergency basis—claims that are virtually identical to those in a suit that has been pending in the U.S. District Court for the District of Columbia for nearly six months. The plaintiff in the earlier-filed case is a trade association that brought suit on behalf of 93% of the U.S. air ambulance industry—including a company that is not only business partners with Plaintiff here, but that may well have the principal financial stake in this case. Indeed, that company has submitted declarations in support of both summary judgment in the earlier-filed case and Plaintiff's motion for expedition here. And the parties in both cases seek the same relief: vacatur of the challenged regulation. To prevent the unnecessary expenditure of judicial resources, avoid wasteful and duplicative litigation, and avert the possibility of inconsistent judgments, Defendants respectfully move the Court, under the first-to-file rule, to transfer this case to the U.S. District Court for the District of Columbia.

At issue in both cases is an interim final rule that implements the arbitration provisions of the No Surprises Act of 2020 as they pertain to air ambulance service providers. Pub. L. No. 116-

260, div. BB, tit. I (Dec. 27, 2020). The Act contains one set of statutory provisions governing the arbitration of payment disputes between physicians or other health care providers and group health plans or health insurance issuers, *see* 42 U.S.C. § 300gg-111, and a second set of statutory provisions addressing the arbitration of payment disputes between air ambulance service providers and plans or issuers, *see id.* § 300gg-112. Defendants have implemented these statutory provisions by issuing separate regulations in October 2021 that address each type of payment dispute. *See* 45 C.F.R. § 149.510, 149.520.[1]

In November 2021, the Association of Air Medical Services—an international trade association that represents over 93% of air ambulance service providers in the United States, including Plaintiff's partner and affiliate, Air Methods Corporation—brought suit in the U.S. District Court for the District of Columbia on behalf of its members, challenging the regulations promulgated under the No Surprises Act that relate to the arbitration of payment disputes involving air ambulance service providers. *See Ass'n of Air Med. Servs. v. U.S. Dep't of Health & Human Servs.*, No. 1:21-cv-03031-RJL (D.D.C.). In that case, the parties have fully briefed cross-motions for summary judgment, and the Honorable Richard J. Leon heard argument on March 21, 2022.

On April 27, 2022, over a month after oral argument in *Association of Air Medical Services*, Plaintiff filed this essentially duplicative case. The claims in the two cases challenging the air-ambulance regulations are virtually identical. The Plaintiff here, LifeNet, Inc., is business partners with Air Methods, one of the companies on whose behalf the plaintiff in *Association of Air Medical*

[1] The statute sets forth parallel amendments to the Public Health Service Act (PHSA), the Employee Retirement Income Security Act, and the Internal Revenue Code, and the interim final rules set forth parallel regulations implemented by HHS, the Department of Labor, and the Department of the Treasury. For ease of reference, except where otherwise noted, this brief cites only to the PHSA and to the HHS regulations.

Services is suing.[2] Air Methods has submitted declarations in both cases. And the administrative record in the earlier suit is fully developed and includes all the relevant material that pertains to the air ambulance regulations that Plaintiff challenges here.

"'Considerations of comity and orderly administration of justice dictate that two courts of equal authority should not hear the same case simultaneously.'" *West Gulf Maritime Ass'n v. Int'l Longshoremen's Ass'n*, 751 F.2d 721, 729 (5th Cir. 1985) (citation omitted). Thus, under the "first-to-file" rule, when a subsequent suit raises issues that are "substantially similar" to those raised by an earlier one, the second suit may be "dismissed, stayed, or transferred and consolidated" with the first. *Sutter Corp. v. P&P Indus., Inc.*, 125 F.3d 914, 920 (5th Cir. 1997). Which course is appropriate is generally for "the court initially seized of a controversy . . . to decide." *Mann Mfrg. Inc. v. Hortex*, 439 F.2d 403, 407 (5th Cir. 1971). Accordingly, the role of the court hearing a later-filed case, such as this one, is limited to weighing whether there is a "likelihood of substantial overlap" with the earlier-filed one and, if so, transferring the later-filed case to the court where the earlier-filed one is being heard. *Id*. at 408 & n.6.

The issues in this case are, at a minimum, "substantially similar" to those in *Association of Air Medical Services*. Considerations of comity and the orderly administration of justice thus counsel in favor of a transfer of this action to the U.S. District Court for the District of Columbia, so that that court may determine whether this case should be consolidated with its predecessor.

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[2] Defendants do not yet know, at the outset of this litigation, whether Plaintiff is itself a member of the association.

RELEVANT BACKGROUND

A. The No Surprises Act

This case is about an interim final rule promulgated to implement portions of the No Surprises Act (NSA or the Act) by Defendants—the Department of Health and Human Services (HHS), the Department of Labor, and the Department of the Treasury (together, the Departments), along with the Office of Personnel Management (OPM). The principal aim of the NSA, enacted in late December 2020, is to address the phenomenon of surprise medical bills that result when a patient (particularly in an emergency) is unable to choose to receive care from an in-network provider. The NSA limits a patient's share of the cost of emergency services delivered by out-of-network providers, including air ambulance providers, and prohibits the practice of "balance billing." *See* 42 U.S.C. § 300gg-112(a)(2). The Act also addresses how a payment dispute in these situations between an out-of-network health care provider and a group health plan or health insurance issuer will be resolved. *See id*. § 300gg-112(b)(1)(A)-(B). The Act creates an arbitration mechanism ("independent dispute resolution" or "IDR" process) whereby each party will submit its proposed payment amount and an independent, private arbitrator, known as a "certified IDR entity," will select between the two offers. *Id*. § 300gg-112(b)(5)(A)(i). Congress also directed the Departments to create rules to establish this arbitration process, and to do so within one year of the NSA's enactment. *Id*. § 300gg-112(b)(2)(A).

Congress was particularly concerned with the problem of surprise billing in the air ambulance industry, and so the NSA contained several provisions specifically addressing the problem of surprise billing from air ambulance services. *See* 42 U.S.C. § 300gg-112 ("Ending surprise air ambulance bills"). The Act includes one set of statutory provisions addressing the arbitration of payment disputes involving physicians or other health care providers, *see id.*

§ 300gg-111, and a separate set of provisions addressing payment disputes involving air ambulance service providers, *see id.* § 300gg-112. The air ambulance provisions lay out factors unique to that industry for arbitrators to consider when deciding on a payment amount. *Id*. § 300gg-112(b)(5)(C)(ii).

Defendants issued interim final rules addressing both sets of statutory provisions. In one set of rules, Defendants established regulations governing the arbitration of payment disputes between physicians and other health care providers and plans or issuers. *See* 45 C.F.R. § 149.510. This Court vacated certain provisions of those regulations in a decision issued earlier this year. *Tex. Med. Ass'n v. HHS*, 6:21-cv-00425, 2022 WL 542879 (E.D. Tex. Feb. 23, 2022). Defendants also established a second set of regulations governing payment disputes involving air ambulance service providers. *See* 45 C.F.R. § 149.520. Those regulations were not at issue in *Texas Medical Association*, as no plaintiff in that action was an air ambulance service provider.

Defendants are preparing a set of final rules that they anticipate will supersede the portions of 45 C.F.R. § 149.510 that this Court has vacated, as well as portions of the separate regulation under 45 C.F.R. § 149.520 involving the arbitration of air ambulance payment disputes. Defendants anticipate that these rules will be published by early summer. Defendants have filed a notice of appeal to the Fifth Circuit of the judgment in *Texas Medical Association*. In light of the forthcoming rulemaking, Defendants filed an unopposed motion to hold that appeal in abeyance, and the Fifth Circuit granted that motion on May 3, 2022.

B. Proceedings in *Association of Air Medical Services*

In November 2021, the Association of Air Medical Services filed a two-count complaint in the U.S. District Court for the District of Columbia challenging the regulations concerning air ambulance service providers. Compl., *Ass'n of Air Med. Servs. v. HHS.*, No. 1:21-cv-03031

(D.D.C.), ECF No. 1 (attached as Exhibit A), *consolidated with Am. Med. Ass'n v. HHS*, No. 1:21-cv-03231 (D.D.C). There, the Association of Air Medical Services described itself as the international trade association that represents over 93% of air ambulance providers in the United States. Compl. ¶ 20 *Ass'n of Air Med. Servs*., No. 1:21-cv-03031 (D.D.C.), ECF No. 1. The Association supported its claim to standing in that action by alleging that its members, Air Methods Corporation, PHI Health, LLC, and Global Medical Response, Inc., would suffer a loss of revenue under the rule. *Id.* ¶ 123; *see also Ass'n of Air Med. Servs.*, No. 1:21-cv-03031 (D.D.C.), ECF 1-5 (Decl. of Grayson Michael Foster, Chief Financial Officer of PHI Health, LLC), ECF No. 1-6 (Decl. of Michael Preissler, Chief Financial Officer of Global Medical Response, Inc.), ECF No. 1-7 (Decl. of David Portugal, Chief Financial Officer of Air Methods Corporation).

The parties in *Association of Air Medical Services* have fully briefed cross-motions for summary judgment, based on an administrative record that spans more than 6,000 pages and that includes a broader range of supporting materials and comments from stakeholders than what was included in the administrative record in the *Texas Medical Association* action. *See Ass'n of Air Med. Servs.*, No. 1:21-cv-03031 (D.D.C.), ECF Nos. 5, 10, 11, 31, 44 (parties' briefs); *id.*, ECF No. 12-1 (index to administrative record). Numerous amici have filed briefs in the *Association of Air Medical Services* action, including amici asserting interests unique to the context of surprise billing by air ambulance service providers. *Id.,* ECF Nos. 17, 20, 21, 24, 27, 33, 34, 35, 36, 37 (amicus briefs). Judge Richard J. Leon held oral argument on March 21, 2022, and the summary judgment motions remain pending. *See id.*, (minute entry Mar. 21, 2022); *id.*, ECF No. 57 (transcript of proceedings).

C. This Case

On April 27, 2022—over five months after the complaint in *Association of Air Medical Services* was filed, and over a month after oral argument was held in that case—Plaintiff filed a two-count complaint in this Court challenging the same regulatory provisions that are at issue in the action pending before Judge Leon. ECF No. 1.

Plaintiff is business partners with Air Methods Corporation, which—as noted above—is a member of the Association of Air Medical Services. *See, e.g.*, LifeNet, About LifeNet: The LifeNet Story, https://www.lifenetems.org/ ("Through a partnership with Air Methods, LifeNet has helicopters at both the Texarkana and Hot Springs Regional Airports."). Air Methods, for its part, describes its business relationship with LifeNet as one following its "alternative delivery model." *See* Air Methods, Explore Our Healthcare Partners: LifeNet EMS, https://www.airmethods.com/air-medical/healthcare-partners/. As Air Methods has explained, under the "alternative delivery model," it provides aviation, fuel, maintenance, licensure, and assumes the responsibility for billing for air ambulance services. *See* Air Methods, No Surprises Act: Implementation of Air Ambulance Services: Meeting with Air Methods (Apr. 27, 2021) (page 5,817 of the administrative record in the District of Columbia action) (attached as Exhibit B).

The "alternative delivery model" is a term of art in the air ambulance industry. Under the "alternative delivery model," a national entity such as Air Methods handles the billing and realizes all profits or losses from medical billing, while a local partner is paid a fixed fee; in contrast, under the "traditional model," the local partner handles billing, and retains both the risk and the potential profit from billing for air ambulance services, while the national entity is instead paid a fixed fee. *See* Air Medical Insights, *Choosing an Air Medical Delivery Model* (Jan. 20, 2020), http://airmedicalinsights.com/2020/01/air-medical-transport-delivery-model/; see also Air

Medical Insights, *Making the Switch: from ADM to Traditional*, at 4 http://airmedicalinsights.com/adm-to-traditional-lp/ (explaining that under the alternate delivery model, the local partner "no longer exercise[s] control over pricing, billing or collections practices associated with its air ambulance program."). In other words, under the partnership between LifeNet and Air Methods, LifeNet is paid a flat fee for its services, but Air Methods apparently retains all interest in patient billing, meaning that it has a clear financial interest—and perhaps the primary (or even the only) stake—in the resolution of payment disputes involving air ambulance transports performed under the LifeNet-Air Methods partnership.[3]

In this action, Plaintiff seeks the same relief that the national association and Air Methods have sought in the *Association of Air Medical Services* action, namely, the vacatur of portions of the regulation addressing the arbitration of air ambulance payment disputes. What is more, Plaintiff here seeks unjustifiably expedited briefing in support of a summary judgment motion with respect to these claims, even though the rule Plaintiff challenges was issued in October 2021, over six months ago, and briefing in the related case concluded several months ago. Indeed, it is telling that, in support of its motion for expedited briefing, Plaintiff submits declarations from other air ambulance service providers that are members of the Association of Air Medical Services, ECF Nos. 19-1, 19-2, 19-3, as those companies have been active participants in *Association of Air Medical Services* from the outset of that litigation. *See Ass'n of Air Med. Servs.*, No. 1:21-cv-03031 (D.D.C.), ECF No. 1-7 (Decl. of David Portugal, Chief Financial Officer of Air Methods), ECF

[3] The precise nature of the partnership between LifeNet, Inc. and Air Methods is unclear to Defendants at this early stage of the litigation. If information is developed in this litigation that reveals that Air Methods alone retains a financial interest in billing for air medical services, this would call into question LifeNet's standing to bring this action.

No. 1-5 (Decl. of Grayson Michael Foster, Jr., Chief Financial Officer of PHI Health, LLC), ECF No. 1-6 (Decl. of Michael Preissler, Chief Financial Officer of Global Medical Response, Inc.).[4]

Despite the overlap of affiliated parties and claims between this case and *Association of Air Medical Services*, Plaintiffs have not filed a notice of related case. *See* ECF No. 1-1 (civil cover sheet); E.D. Tex. Local R. CV-42(a) ("Duty to Notify Court of Collateral Proceedings and Re-filed Cases. Whenever a civil matter commenced in or removed to the court involves subject matter that either comprises all or a material part of the subject matter or operative facts of another action, whether civil or criminal, then pending before this or another court or administrative agency, or previously dismissed or decided by this court, counsel for the filing party shall identify the collateral proceedings and/or re-filed case(s) on the civil cover sheet filed in this court."). Instead, they cite only *Texas Medical Association* case as a related case, even though that case does not involve the portions of the statute or regulations that specifically apply to air ambulance services. Because the *Texas Medical Association* case did not involve the statutory or regulatory provisions that apply to air ambulance services, this Court has not received full briefing or the full administrative record on the rulemaking process for the air ambulance regulations, as Judge Leon has in the *Association of Air Medical Services* case.

[4] Counsel for Plaintiff in this case also represents PHI Health, LLC in an action filed two days after this one in the Eastern District of Kentucky bringing similar challenges to the regulations promulgated under the No Surprises Act. *See* Compl. *PHI Health, LLC and Empact Midwest, LLC v. HHS*, No. 6:22-cv-00095-REW (E.D. Ky. Apr. 29, 2022), ECF No. 1.

ARGUMENT

This Case Should Be Transferred to the U.S. District Court for the District of Columbia under the First-to-File Rule

The issues in this case are, at a bare minimum, substantially similar to the issues that have been fully briefed and argued in *Association of Air Medical Services*, and Plaintiff here seeks the same relief sought in that case.[5] The Court should therefore transfer this action to the U.S. District Court for the District of Columbia under the first-to-file rule, so that that court may determine whether this case should be consolidated with its predecessor. And Defendants respectfully submit that the Court should resolve this motion before embarking on the precipitous summary judgment proceedings that Plaintiff requests. "Although district courts have discretion as to how to handle their dockets, once a party files a transfer motion, disposing of that motion should unquestionably take top priority." *In re Apple Inc*., 979 F.3d 1332, 1337 (Fed. Cir. 2020). *Accord, In re Horseshoe Ent.*, 337 F.3d 429, 433 (5th Cir. 2003) ("disposition of that [transfer] motion should have taken a top priority"); *E. Texas Boot Co., LLC v. Nike, Inc*., No. 2:16-CV-0290-JRG-RSP, 2017 WL 2859065, at *2 (E.D. Tex. Feb. 15, 2017) (same). "Judicial economy requires that another district court should not burden itself with the merits of the action until it is decided [whether] a transfer should be effected." *In re Apple Inc*., 979 F.3d at 1337 (quoting *McDonnell Douglas Corp. v. Polin*, 429 F.2d 30, 30 (3d Cir. 1970)).[6]

The "first-to-file rule is grounded in principles of comity and sound judicial administration." *Save Power Ltd. v. Syntek Fin. Corp.*, 121 F.3d 947, 950 (5th Cir. 1997). As the

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[5] The Departments have explained that, even if the national association were to prevail in the *Association of Air Medical Services* action, any relief should be limited to the national association, or its identified association members. *Ass'n of Air Med. Servs*., No. 1:21-cv-03031, ECF No. 44, at 27. For similar reasons, if Plaintiff were to prevail here, any relief should be appropriately limited.

Fifth Circuit has emphasized, the "federal courts long have recognized that the principle of comity requires federal district courts—courts of coordinate jurisdiction and equal rank—to exercise care to avoid interference with each other's affairs." *Id.* (citation omitted). "The concern manifestly is to avoid the waste of duplication, to avoid rulings which may trench upon the authority of sister courts, and to avoid piecemeal resolution of issues that call for a uniform result." *Id.* "This concern applies where related cases are pending between two judges in the same district . . . as well as where related cases have been filed in different districts." *Id.*

Under the first-to-file rule, when a subsequent suit raises issues that are "substantially similar" to those raised by an earlier one, the second suit may be "dismissed, stayed, or transferred and consolidated" with the first. *Sutter Corp.*, 125 F.3d at 920. As a procedural matter, the "Fifth Circuit adheres to the general rule that the court in which an action is first filed is the appropriate court to determine whether subsequently filed cases involving substantially similar issues should proceed." *Save Power*, 121 F.3d at 950. Thus, "[o]nce the *likelihood* of substantial overlap between the two suits ha[s] been demonstrated, it [i]s no longer up to the [second-filed court] to resolve the question of whether both should be allowed to proceed." *Mann*, 439 F.2d at 408 (emphasis added). Rather, "the ultimate determination of whether there *actually* [i]s a substantial overlap . . . belong[s] to the [first-filed court]," *id.*, which "may decide whether the second suit filed must be dismissed, stayed, or transferred and consolidated," *Sutter Corp.*, 125 F.3d at 920.[7]

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[6] Defendants requested Plaintiff's position on this motion via email on May 5. Plaintiff did not respond. Instead, on May 11, Plaintiff moved for expedition of this case, stating in its brief that it does not believe that transfer was appropriate.

[7] Earlier Fifth Circuit cases suggest that the second-filed court also has the discretion, in appropriate circumstances, to dismiss or stay the second-filed action. *See, e.g.*, *West Gulf*, 751 F.2d at 729 & n.1 (while "a district court may dismiss an action where the issues presented can be resolved in an earlier-filed action pending in another district court," in "addition to outright

Thus, a "second-filed court plays a limited role when presented with a motion to transfer or stay based on the first-to-file rule." *Platt v. Nash*, No. 16-294, 2016 WL 6037856, at *1 (E.D. Tex. Oct. 14, 2016). That role is to decide whether the movant has shown a "*likelihood* of substantial overlap" between the two suits. *Mann*, 439 F.2d at 408 (emphasis added); *accord Cadle Co. v. Whataburger of Alice, Inc.*, 174 F.3d 599, 606 (5th Cir. 1999) (second-filed court should determine only whether "the issues *might* substantially overlap") (emphasis added). If the movant makes this showing, then "the second-filed court allows the first-filed court to 'resolve the question of whether both [cases] should be allowed to proceed.'" *Platt*, 2016 WL 6037856, at *1 (citation omitted). The factors relevant to the substantial overlap inquiry "include whether 'the core issue' in each case is the same and whether 'much of the proof adduced . . . would likely be identical.'" *Marshall v. Chevron U.S.A. Inc.*, No. MO:19-cv-00273-DC-RCG, 2020 WL 9813023, at *2 (W.D. Tex. Dec. 10, 2020), *report and recommendation adopted*, No. MO:19-cv-273-DC, 2021 WL 2181148 (W.D. Tex. Jan. 6, 2021) (citation omitted).

This case has a "likelihood of substantial overlap" with the *Association of Air Medical Services* case already pending in the U.S. District Court for the District of Columbia. *Mann*, 439 F.2d at 408. As noted, Plaintiff here is business partners with Air Methods, which is a member of the Association of Air Medical Services, the plaintiff in the District of Columbia action, and Air Methods holds (at a minimum) a substantial financial interest in the billing for air medical services

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dismissal, it sometimes may be appropriate to transfer the action or to stay it"); *id*. at 730 ("Our holding and discussion in *Mann* make plain that in this [second-filed] case the district court should have stayed, dismissed, or transferred [the plaintiff's] action."). Although those cases do not appear to have been overturned, later Fifth Circuit cases indicate that "once the [second-filed] court f[i]nd[s] that the issues might substantially overlap, the proper course of action [i]s for the court to transfer the case to the [first-filed] court to determine which case should, in the interests of sound judicial administration and economy, proceed." *Cadle Co. v. Whataburger of Alice, Inc.*, 174 F.3d 599, 606 (5th Cir. 1999).

performed under the Air Methods-LifeNet partnership. *See supra* at 6-7. Plaintiff's claims are substantially similar to those raised in *Association of Air Medical Services*, and unlike in *Texas Medical Association*, the claims specifically relate to the regulation governing air ambulance services. *See supra* at 8. And this suit was filed just a month after a hearing on the merits in *Association of Air Medical Services*. *See supra* at 8. The Association of Air Medical Services represents 93% of air ambulance providers, and complying with inconsistent judgments in that case (which could impact 93% of the industry) and this one (impacting a single plaintiff) could be particularly burdensome on both the air ambulance and health insurance industries. If ever there were a need "to avoid the waste of duplication" and "to avoid rulings which may trench on the authority of other courts," *Save Power*, 121 F.3d at 950, it is here.

That the parties here are not formally identical to those in *Association of Air Medical Services* is no barrier to transfer. Under the first-to-file rule, "[c]omplete identity of parties is not required for dismissal or transfer of a case filed subsequently to a substantially related action." *Id.* at 951. The Fifth Circuit has explained that an "incomplete identity of parties does not mandate that two 'essentially identical' actions remain pending simultaneously where," as here, any "missing parties probably could be made parties" to the first-filed case. *Id*. (citing *West Gulf*, 751 F.2d at 731 n.5). Further, the Fifth Circuit has repeatedly noted that the first-to-file rule may be applied to "dismiss[] a second-filed action without prejudice even though it involved different plaintiffs than the first-filed action." *Id*. (citation omitted); *accord West Gulf*, 751 F.2d at 731 n.5.

The Seventh Circuit's decision in *National Health Federation v. Weinberger*, 518 F.2d 711 (7th Cir. 1975)—which the Fifth Circuit cited with approval in *Save Power* and *West Gulf*—is instructive. There, much like here, after one organization challenged a pair of regulations in the Southern District of New York, another organization challenged the same regulations in the

Northern District of Illinois. *Id*. at 712. The Seventh Circuit held that the district court should have dismissed the second-filed suit because the two cases raised the same issues—an outcome that was "particularly appropriate" given that the first-filed suit was at a more "advanced stage" and involved review of a "voluminous" administrative record. *Id*. at 712-13 & n.2. That the plaintiffs in the second-filed case differed from those in the first worked no inequity, the court explained, since the "dismissal would operate without prejudice." *Id*. at 713-14. Moreover, observing that "counsel for plaintiffs, prior to filing the [second] suit here, were aware of the [first-filed] suit" in the Southern District of New York, and "could have . . . as easily brought" their claims "in that district, which might then have led to a consolidation of the suits," the court suggested that "the filing of the [second] complaint here smacks of gamesmanship." *Id*. at 714.

Such concerns are even more pronounced in this case, given that Plaintiff here, as a business partner of a member of the Association of Air Medical Services, would presumably argue that it should benefit from a judgment in *Association of Air Medical Services* in its favor, *see* Compl. ¶ 20, *Ass'n of Air Med. Servs.* (invoking the interests of Association of Air Medical Services members, who make up "93% of air ambulance providers in the United States" and who represent "every emergency air ambulance care model"), a prospect that would pose a particularly acute risk of inconsistent judgments were this suit, concerning identical issues, to proceed in a separate forum. *Cf. West Gulf*, 731 F.2d at 731 n.5 (noting that the "local union defendants are in privity with the ILA and working in concert with the ILA and could be bound by any injunction the [first-filed] court . . . might issue"). Indeed, while the first-to-file rule does not require analysis of the potential res judicata effect of an earlier suit on a later one, *see Cadle*, 174 F.3d at 603-05, it is well established that a final judgment in a suit brought by an organization on behalf of its members can bind the members. *See, e.g.*, *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l*

Planning Agency, 322 F.3d 1064, 1083-84 (9th Cir. 2003) (plaintiffs' "membership in and close relationship with the Association is sufficient to bind them as parties in privity for res judicata purposes"). Given that a judgment in the *Association of Air Medical Services* suit could potentially bind up to 93% of the air ambulance service providers, the practical effects of navigating inconsistent judgments could be particularly burdensome for all involved.

Regardless, even if the potential res judicata effect of a judgment in *Association of Air Medical Services* were less clear, an in-depth analysis of this issue goes well beyond the "limited role" that the "second-filed court plays . . . when presented with a motion to transfer or stay based on the first-to-file rule." *Platt*, 2016 WL 6037856, at *1. Here, given the similarity of parties and claims, there is at least a "*likelihood* of substantial overlap" between this case and *Association of Air Medical Services*, *Mann*, 439 F.2d at 408 (emphasis added), and this Court need go no further to resolve this motion.

CONCLUSION

For the foregoing reasons, the Court should transfer this case to the U.S. District Court for the District of Columbia so that that court may determine whether it should be consolidated with *Association of Air Medical Services*.

Dated: May 12, 2022

Respectfully submitted,

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Counsel for Defendants

CERTIFICATE OF CONFERENCE

I hereby certify that counsel for the Defendants has complied with the meet and confer requirements of Local Rule CV-7. On May 5, 2022, counsel for the Defendants emailed counsel for the Plaintiff to state that the Defendants intended to file this motion to transfer, and asked counsel for the Plaintiff to state their position with respect to a transfer. Counsel for the Plaintiff did not respond to that email, but instead filed a motion for expedited summary judgment briefing which states the Plaintiff's opposition to a transfer.

/s/ Anna Deffebach
ANNA DEFFEBACH

CERTIFICATE OF SERVICE

I hereby certify on this 12th day of May, 2022, a true and correct copy of this document was served electronically by the Court's CM/ECF system to all counsel of record.

/s/ Anna Deffebach
ANNA DFFFEBACH