**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF FLORIDA**
**JACKSONVILLE DIVISION**

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| MED-TRANS CORPORATION,<br><br>Plaintiff,<br><br>v.<br><br>BLUE CROSS AND BLUE SHIELD OF FLORIDA, INC., d/b/a FLORIDA BLUE, and C2C INNOVATIVE SOLUTIONS, INC.,<br><br>Defendants. | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | CIVIL ACTION NO. 3:22-cv-1139-TJC-JBT |

**MED-TRANS'S RESPONSE IN OPPOSITION TO BLUE CROSS AND BLUE SHIELD OF FLORIDA'S MOTION TO DISMISS AND MOTION TO STRIKE ATTORNEY'S FEE CLAIM**

Plaintiff Med-Trans Corporation ("Med-Trans") responds to Defendant Blue Cross And Blue Shield of Florida Inc.'s ("BCBS") Motion to Dismiss Original Complaint, and Motion to Strike Demand for Attorney's Fees and would respectfully show the Court as follows:

## INTRODUCTION

Med-Trans seeks judicial review of an Independent Dispute Resolution ("IDR") decision obtained through undue means and misrepresentations under the No Surprises Act ("NSA"). The NSA, which took effect on January 1, 2022, establishes a dispute resolution process between payors and providers of air ambulance services, but did not specify how judicial review should be pursued

where a payor obtains the award through undue means, such as by misrepresenting its qualifying payment amount ("QPA"), or where the IDR entity adjudicating the dispute applies an illegal standard and violates due process by not providing a reasoned decision.

BCBS contends that this lawsuit is an improper burden-shifting exercise by Med-Trans, and that in reality Med-Trans is simply a disgruntled party seeking to vacate an arbitration subject to the Federal Arbitration Act ("FAA"). In reality, it is BCBS that is attempting to shift its high burden under Rule 12(b)(6) to establish that Plaintiff has failed to state a claim ***under the NSA*** (not the FAA).

The NSA, which incorporates by reference only one part of a single section of the FAA, governs this proceeding to vacate the Independent Dispute Resolution ("IDR") decision. And while BCBS tries to muddy the waters by calling the IDR process "arbitration," it is anything but. The mandatory IDR process under the NSA lacks the fundamental features and due process protections that serve as the foundation of voluntary arbitration case law and the FAA itself. There is no arbitration agreement, no agreement on the procedures to be used, and the parties have no input on the individual who will make the IDR determination. And unlike arbitrators, IDR entities are subject to specific rules and regulations that must be followed under federal law,

meaning they may not make "legal errors" by ignoring the requirements of the statutory scheme under which they operate.

Because the IDR process is nothing like a voluntary arbitration under the FAA and lacks the features and due process protections inherent to proceedings governed by agreement of the parties, FAA case law and the traditional presumption in favor of confirming awards simply does not apply here. And even under the FAA's procedure for vacatur, which also does not apply, dismissal would be inappropriate.

Due process requires this Court to adjudicate this dispute on a full record following discovery. BCBS is mistaken on the law and the facts, and its dismissal bid should be denied.

## LEGAL STANDARD

Motions to dismiss are "viewed with disfavor and rarely granted." *Trustees of Hotel Indus. Pension Fund v. Carol Mgmt. Corp.*, 880 F. Supp. 1548, 1552 (S.D. Fla. 1995). When a federal court reviews a complaint on a motion to dismiss, it must "'be mindful that the Federal Rules require only that the complaint contain a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Space Gateway Support v. Prieth*, 371 F. Supp. 2d 1364, 1367 (M.D. Fla. 2005)(quoting *U.S. v. Baxter Intern, Inc.*, 345 F.3d 866, 880 (11th Cir. 2003)).

The threshold to survive a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6) is exceedingly low. *Krehling v. Baron*, 900 F. Supp. 1574, 1577 (M.D. Fla. 1995) (citing *Quality Foods de Centro Am., S.A. v. Latin Am. Agribusiness Dev. Corp., S.A., et al.*, 711 F.2d 989, 998 (11th Cir. 1983)). The issue is not whether the plaintiff will ultimately prevail, but "whether the claimant is entitled ***to offer evidence to support the claims***." *Ship Const. & Funding Servs. (USA), Inc. v. Star Cruises PLC*, 174 F. Supp. 2d 1320, 1326 (S.D. Fla. 2001) (citing *Little v. City of N. Miami*, 805 F.2d 962, 965 (11th Cir. 1986)) (emphasis added). As long as the plaintiff makes a ***facially plausible claim*** against the defendant, the motion to dismiss must be denied. *L&R Structural Corp., Inc. v. Maxim Crane Works, L.P.*, 18-21527-CIV, 2018 WL 4208316 (S.D. Fla. 2018).

A complaint "should not be dismissed pursuant to Rule 12(b)(6) for failure to state a claim unless it appears ***beyond doubt*** that the plaintiff can prove no set of facts showing entitlement to relief." *Barrington v. Lockheed Martin*, 2006 WL 66720, at *3 (M.D. Fla. Jan. 11, 2006) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46, (1957)) (emphasis added). In reviewing for sufficiency under Rule 12(b)(6), "[a] court must accept a plaintiff's well pled facts as true and construe the complaint in the light most favorable to the plaintiff." *Sunpoint Sec., Inc. v. Porta*, 192 F.R.D. 716, 718 (M.D. Fla. 2000). The scope of the court's review is limited to the four corners of the complaint

and any attached exhibits. *See St. George v. Pinellas Cty.*, 285 F.3d 1334, 1337 (11th Cir. 2002).

## ARGUMENT

### I. IDR determinations are not arbitrations.

This Court should recognize as a threshold matter that not only are IDR vacaturs not governed by the FAA, but the IDR process is nothing like voluntary arbitration under the FAA.

The bedrock foundation of the American arbitration system is consent. *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002)(quoting *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 469 (1989)) ("Arbitration under the [FAA] is a matter of consent, not coercion."). An arbitrator derives his authority from the parties' agreement, which defines the scope of his decision making power. *Davis v. Chevy Chase Fin. Ltd.*, 667 F.2d 160, 165 (D.C. Cir. 1981)("Arbitration is, however, a matter of contract, and the contours of the arbitrator's authority in a given case are determined by reference to the arbitral agreement."). That is why in arbitrability disputes, the query turns on the scope of what the parties agreed to arbitrate. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (whether arbitrators or courts have primary power to decide whether parties agreed to arbitrate merits of dispute depends on whether parties agreed to submit question to arbitration); *Peabody Holding Co., LLC v. United Mine Workers of*

*Am., Intern. Union*, 665 F.3d 96, 103 (4th Cir. 2012) ("The twin pillars of consent and intent are the touchstones of arbitrability analysis."). Without agreement, the courthouse door remains wide open.

The hallmark features of arbitration are exemplified by arbitration rules such as those promulgated by the American Arbitration Association ("AAA") and the American Health Law Association ("AHLA"). Indeed, parties often select their preferred rules in their arbitration agreements. *See, e.g., Ninety Nine Physician Services, PLLC v. Murray,* No. 05-19-01216-CV, 2021 WL 711502, at *4 (Tex. App.—Dallas 2021, no pet.) (mem. op). (parties adopted the AAA Commercial Rules in their arbitration agreement); *City of Chesterfield v. Frederich Constr. Inc.,* 475 S.W.3d 708, 712 (Mo. Ct. App. 2015) (same). Under arbitration rules, the parties not only know the identity of their decision maker, they receive their resumes and determine who will serve through strikes and rankings. *See, e.g.,* AAA Commercial Rule 13 (requiring that at least ten "names of persons" be sent to the parties, who can then strike and rank the candidates); AHLA Rule 3.2 (allowing parties to select between 5 and 15 candidates, with each party receiving between 1 and 5 strikes and stating that the parties will receive "the profiles and resumes of all candidates").

Arbitrations resemble litigation, including the requirement that each party be served with copies of all filings, including briefs on the merits. *See, e.g.,* AAA Commercial Rule 4(b)(ii) (requiring service of the demand and any

supporting documents on the opposing party); AHLA Rule 2.2 (requiring service on opposing party). Most services now offer electronic case management systems similar to ECF, allowing all parties full access to the entire case file. *See, e.g.,* AAA Commercial Rule 4(b)(i)(a) (discussing access to the AAA's WebFile system); AHLA Rule 2.2(a) (discussing access to the electronic case management system).

Like a court, arbitrators preside over discovery, "safeguarding each party's opportunity to fairly present its claims and defenses." AAA Commercial Rule 23. Indeed, arbitrators "should permit discovery that is relevant to the claims and defenses at issue and is necessary for the fair resolution of a claim." AHLA Rule 5.5 (emphasis added). And like at the courthouse, parties who arbitrate have a chance to present their evidence and argue their case. *See, e.g.,* AAA Rule 25 (Date, Time, Place, and Method of Hearing); AHLA Rule 6 (Hearings). Notably, before an arbitration hearing, "the parties must exchange copies of all exhibits they intend to introduce at the hearing and furnish a list of all witnesses they intend to call." AHLA Rule 6.1 (Exchange of Information).

The IDR process is nothing like arbitration. First, it is mandatory. Compl. ¶ 2. The process itself is similarly devoid of the consent of the parties. IDR disputes are overseen by a list of only thirteen (eleven at the time of the Complaint) IDR entities. *Id.* ¶ 16. The parties do not know the identity of the

individual who renders the decision. *Id.* ¶ 18. They do not know the qualifications (or lack thereof) of that person. *Id.* The award is made without a hearing or exchange of written submissions between the parties, and so neither party is allowed the opportunity to respond to the other's submission. *Id.* There is no chance for either party to correct or address false representations (indeed, unless the false statements are repeated in the IDR determination, the opposing party will never know they were made).

Simply put, an IDR proceeding is not an arbitration at all, as it lacks the due process protections and bedrock principles on which arbitration is premised, as reflected in federal case law and standard arbitration rules. Accordingly, the presumptions associated with the FAA—including the presumption in favor of confirming arbitration awards—do not apply to IDR determinations under the NSA.

## II. The NSA adopted only the grounds for vacatur listed in the FAA—nothing more.

BCBS touts the significance of the FAA, stating that its "purpose" is "to relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that would be speedier and less costly than litigation." Doc. 15 at 7. But the FAA is largely immaterial here, as the NSA incorporates only a small piece of the statute, and because that statute hinges on consent, something absent in the IDR process.

Under well-established rules governing statutory construction, a court construing a statute "must begin, and often should end as well, with the language of the statute itself." *United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir. 1998)(en banc)(internal quotation and citation omitted). "If Congress has used clear statutory language, a court need not consider extrinsic materials, such as legislative history, and certainly should not derive from such materials a meaning that is inconsistent with the statute's plain meaning." *Gurzi v. Penn Credit, Corp.*, 449 F. Supp. 3d 1294, 1297 (M.D. Fla. 2020). This "plain meaning" principle extends to statutes that incorporate other statutes by reference. "Where one statute adopts the particular provisions of another by a specific and descriptive reference to the statute or provisions adopted, the effect is the same as though the statute or provisions adopted had been incorporated bodily into the adopting statute." *Hassett v. Welch*, 303 U.S. 303, 314 (1938); *see also Carriers Container Council, Inc. v. Mobile S.S. Ass'n, Inc., Intern. Longshoreman's Ass'n AFL-CIO Pension Plan & Tr.*, 948 F.2d 1219, 1225 (11th Cir. 1991). The adopting statute is not presumed to have incorporated other pieces of the adopted statute that are not mentioned. *See, e.g.*, *All Fam. Clinic of Daytona Beach Inc. v. State Farm Mut. Auto. Ins. Co.*, 685 F. Supp. 2d 1297, 1301–02 (S.D. Fla. 2010), aff'd, 448 Fed. Appx. 906 (11th Cir. 2011)("[T]his Court will not assume that the Florida

Legislature intended to incorporate all of the Medicare statute . . . where it chose to specifically reference only the participating physicians schedule").

The No Surprises Act adopted only the legal standard applicable to one part of a single section of the Federal Arbitration Act; otherwise, no part of the FAA would apply to IDR determinations. The FAA applies to contracts concerning maritime transactions or those involving interstate commerce. 9 U.S.C. § 2; *see also Klay v. All Defendants*, 389 F.3d 1191, 1200 n. 9 (11th Cir. 2004)("The FAA applies to any contract 'affecting' interstate commerce"). It provides the parties to those agreements a right (and procedure) to compel arbitration, when the parties agree to arbitrate a dispute. § 9 U.S.C. 4. If the parties have provided "in their agreement" that a judgment of the court may be entered on the award, such an award is subject to confirmation proceedings. 9 U.S.C. § 9. It is against the backdrop of a statute that applies to arbitrations based on voluntary agreements that Congress adopted ***the standard*** for vacating arbitration awards but none of the FAA's other terms. The NSA says:

> A determination of a certified IDR entity under subparagraph (A)—
>
> (I) shall be binding upon the parties involved, in the absence of a fraudulent claim or evidence of misrepresentation of facts presented to the IDR entity involved regarding such claim; and
>
> (II) shall not be subject to judicial review, ***except in a case described in any of paragraphs (1) through (4) of section 10(a) of title 9.***

42 U.S. Code § 300gg–111(c)(5)(E)(i) (emphasis added). These four paragraphs provide the substantive standard for vacating FAA awards.[1] If the standards are met, judicial review ***under the NSA*** is allowed. There is nothing more on how such judicial review will proceed, who the parties should be, or what relief the Court may provide. And no other part of the FAA, including the section requiring motions instead of complaints, were adopted for IDR challenges.

## III. Due process requires greater judicial scrutiny because the IDR process is compelled, not voluntary.

While the NSA adopted the legal standard for vacating an award under the FAA, it provided no guidance on the resulting judicial review. Even if the IDR process is considered an "involuntary arbitration," due process requires much greater judicial review than that afforded under the FAA.

There is a significant difference between the level of judicial scrutiny afforded private arbitrations under the FAA and that required when arbitration is compelled by statute. While "voluntary arbitration" is based on consent and "may be conducted using any procedure acceptable to the participants," "compulsory arbitration must comport with due process." *Bd. of Educ. of Carlsbad Mun. Schools v. Harrell*, 882 P.2d 511, 518 (N.M. 1994). Many courts have held that when arbitration is mandatory, "more due process

[1] Awards may be vacated under the FAA when secured through "undue means." The NSA specifically adopts the standard of "misrepresentation of facts" as a type of undue means that will support vacatur.

is required than when it is voluntary." *AT&T,* 86 F.Supp.2d at 966 (citation omitted). As one New York federal court has stated:

> The simple and ineradicable fact is that voluntary arbitration and compulsory arbitration are ***fundamentally different*** if only because one may, under our system, consent to almost any restriction upon or deprivation of a right, ***but similar restrictions or deprivations if compelled by government must accord with procedural and substantive due process***.

708 F. Supp. 95, 96–97 (S.D.N.Y. 1989) (emphasis added). When arbitration is compulsory, "the award must satisfy an additional layer of judicial scrutiny," "due process rights must be scrupulously protected," and the award must "be supported by adequate evidence; *i.e.*, there must be a 'rational basis [in the whole record] for the findings of fact.' *Caroli v. New York City Dep't of Educ.,* 132 N.Y.S.3d 517, 525 (N.Y. Sup. Ct. 2020) (citations omitted).

A fundamental requirement of procedural due process is a meaningful opportunity to be heard. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *Washington v. Kirksey*, 811 F.2d 561, 564 (11th Cir. 1987). For review to be meaningful, "the court must determine whether the litigant received a fair hearing before an impartial tribunal, whether the decision is supported by substantial evidence, and whether the decision is in accordance with law." *Bd. of Educ. of Carlsbad Mun. Schools v. Harrell*, 882 P.2d 511, 526 (N.M. 1994).

Substantive due process ordinarily requires that the court be provided "the full evidentiary basis" of decisions so it can conduct meaningful appellate review. *AT&T Commun. of the S.W., Inc. v. S.W. Bell Tel. Co.*, 86 F. Supp. 2d

932, 954 (W.D. Mo. 1999), judgment vacated sub nom. *AT&T Commun. of the S.W., Inc. v. S.W. Bell Tel. Co.*, 535 U.S. 1075 (2002).

Similarly, due process requires that a court know the legal and factual basis for a decision. As the Supreme Court of New Mexico explained:

> We agree that due process, together with separation of powers considerations, requires that parties to ***statutorily mandated arbitration*** be offered meaningful review of the arbitrator's decision. In order for review of the arbitrator's decision to be meaningful, ***the court must determine whether the litigant received a fair hearing before an impartial tribunal, whether the decision is supported by substantial evidence, and whether the decision is in accordance with law.***

*Bd. of Educ. of Carlsbad Mun. Schools v. Harrell*, 882 P.2d 511, 526 (N.M. 1994) (emphasis added).“Indeed, a court should vacate an award where an arbitrator fails to follow procedures established by law. *See Matter of Lancer Ins. Co.* (Great Am. Ins. Co.), 651 N.Y.S.2d 852, 855 (N.Y. Sup. Ct. 1996) (vacating award in compulsory arbitration where arbitrator failed “to follow the procedures established by law”). And judicial review cannot be precluded by failing to provide the basis for a decision since doing so would “effectively eliminate the roles of the . . . court in the decision-making and review processes.” *U.S. Lines, Inc. v. Federal Maritime Commission,* 584 F.2d at 533, 543 (D.C. Cir. 1978).

The Court must provide a greater level of scrutiny to the IDR process than it does to voluntary arbitration proceedings under the FAA. Because of

the way the Executive Branch has implemented the NSA, that can only take place after the parties have had an adequate opportunity to conduct discovery.

## IV. Complaints are the proper vehicle to challenge IDR determinations.

BCBS claims that "Med-Trans's Complaint is procedurally inappropriate," and that "[a]pplications to vacate arbitration awards must instead be made as motions in which the party seeking vacatur has the burden of setting forth sufficient grounds for vacatur in its moving papers." Doc. 15 at 3. But as explained above, IDR determinations are not arbitrations, and the NSA does not incorporate the FAA's procedures for motion practice. A complaint is not only an appropriate vehicle—it is ***the*** proper way to challenge IDR determinations.[2]

The FAA states that any "application to the court ***hereunder***" must be by motion. 9 U.S.C.§ 6 (emphasis added). As explained above, the FAA only applies to agreements between parties that involve interstate commerce or maritime activities. There is no such agreement at issue in this case. Accordingly, an IDR dispute must be brought under the NSA by complaint, as was done here.

[2] BCBS complains that Med-Trans may not seek declaratory relief because "it has failed to identify any substantive cause of action entitling it to bring suit" against BCBS. Doc. 15 at 6. But Med-Trans is not seeking declaratory relief based on the Declaratory Judgment Act alone. As BCBS concedes, the NSA provides that a party may seek judicial review in a case described in any of paragraphs (1) through (4) of section 10(a) of the FAA. Doc. 15 at 7.

The case law that BCBS cites likewise does not fit. In *O.R. Sec., Inc. v. Prof'l Planning Associates, Inc.*, the plaintiff argued that a complaint was proper when vacating an award under the FAA. 857 F.2d 742, 745 (11th Cir. 1988). The Eleventh Circuit disagreed, holding that the proper procedure was "to file a Motion to Vacate in the district court." *Id.* at 746. In so holding, the Circuit found that the "policy of expedited judicial action expressed in ***section 6 of the Federal Arbitration Act*** . . . would not be served by permitting parties who have lost in the arbitration process to file a new suit in federal court." *Id*.

Not only did the NSA not adopt section 6 of the FAA, but the policy rationale for *voluntary arbitrations* does not apply to IDR proceedings. *See id.* at 746 (noting the existence of an "arbitration transcript" clearly showing "that the panel heard evidence and argument on the merits of [plaintiff's] position"). And even if Section 6 applied, the Eleventh Circuit does not require motion practice. Doc. 15 at 4; *O.R. Sec.*, 857 F.2d at 746 (holding that "the district court did not err in considering the merits of [plaintiff's] request to vacate an arbitration award" brought by complaints). Indeed, courts should not prioritize form over substance. *Id.*; *see also Johnson v. Directory Assistants Inc.*, 797 F.3d 1294, 1299 (11th Cir. 2015)("[A]n erroneous nomenclature does not prevent the court from recognizing the true nature of a motion."). If this

Court decides that a complaint is not proper to seek judicial review under the NSA, it still retains the ability to rule on the substance of Med-Trans's claims.

Even under FAA motion practice, the Court may allow discovery to support the motion, including arbitrator depositions, where the facts warrant it. *See, e.g., University Commons-Urbana, Ltd. v. Universal Constructors Inc.*, 304 F.3d 1331, 1339 (11th Cir. 2002)(holding that remand was required so that district court could hold an evidentiary hearing in a vacatur proceeding with respect to whether an arbitrator acted with evident partiality); *Hoeft v. MVL Grp., Inc.*, 343 F.3d 57, 66-67 (2d Cir. 2003) (stating that in a vacatur proceeding, arbitrators may be deposed "regarding claims of bias or prejudice…"). Here, as discussed below in connection with the Rule 9(b) pleading standard, key evidence is solely within BCBS's possession.

To date, Med-Trans has not been allowed any of the discovery that parties are routinely allowed in voluntary arbitration proceedings. *See* AHLA Rule 5.5 (Arbitrators "should permit discovery that is relevant to the claims and defenses at issue and is necessary for the fair resolution of a claim"). And it only learned of BCBS's misrepresentation after the out-of-network payment decision had been made. Even if IDR determinations must be challenged by motion practice, Med-Trans should be allowed discovery in support of its challenge before the Court rules on it.

## V. Med-Trans states a claim.

BCBS is correct that "this is a case about a specific arbitral award," and "not a challenge to the constitutionality or general propriety of the NSA." Doc. At 15 at 9-10. Med-Trans is not asking this Court to hear "grievances about the statutory construct of the NSA and throw it out over the considered enactment by Congress." *Id.* Quite the opposite.

The Complaint is not, as BCBS proclaims, a "manifesto against the NSA" and its implementation." Doc. 15 at 9. Rather, Med-Trans seeks judicial review of a situation where the NSA has been abused. Often, the system works as expected—Med-Trans submits credible evidence, resulting in reasoned awards. Compl. ¶ 22. Sometimes Med-Trans loses the IDR determination, but more often it wins, based on the strength of its IDR submissions and the evidence therein. *Id.* Yet Med-Trans has lost *every single dispute* in front of C2C, prompting it to investigate. *Id.* ¶ 23.

Med-Trans and other healthcare providers are without other recourse where parties like BCBS win IDR awards through undue means and misrepresentations, and where IDR entities like C2C exceed their authority under the NSA by applying an illegal standard. Med-Trans is asking this Court to adjudicate its claim that BCBS secured an award by undue means through the type of misrepresentation the NSA specifically says invalidates an award. And it is asking this Court to require upon rehearing the due process

protections required by the Fifth Amendment to the U.S. Constitution. Med-Trans has stated a claim.

***A. C2C applied an illegal presumption***

The Departments originally jointly published an Interim Rule that compelled IDR entities to apply a rebuttable presumption that the Qualified Payment Amount ("QPA")[3] was the appropriate out of network ("OON") rate. Compl. ¶ 26. Arbitrators had to select the offer closest to the QPA unless a provider overcame the presumption with credible evidence. *Id.* The courts in *Texas Med. Association, et al. v. United States Department of Health and Human Services, et al.*, Case No. 6:21-cv-425 (E.D. Tex.) (February 23, 2022) ("TMA") and *LifeNet, Inc. v. United States Department of Health and Human Services, et al.*, Case No. 6:22-cv-162 (E.D. Tex.) (July 26, 2022) invalidated this "thumb on the scale" approach.

BCBS claims that "Med-Trans provides no reason to believe that C2C was unaware of th[ese] case[s], and no support for its contention that C2C applied such a presumption." Doc. 15 at 10. BCBS is contradicted by the IDR award issued by C2C, and in any event, its arguments only highlight that interpretation of the IDR award is not suitable at the motion-to-dismiss stage.

[3] A QPA is supposed to represent the median rate for contracted in-network services. Compl. ¶ 4. The QPA is defined in the NSA as the median of the contracted rates recognized by the plan or issuer for the same or a similar item or service offered in the same insurance market and in the same geographic region as of January 31, 2019, increased by the consumer price index. *Id.* ¶ 24.

The IDR award attached to BCBS's motion states that C2C was required by statute to consider (1) the QPA and (2) additional related and credible information relating to six circumstances. Doc. 15-1 at 1. It does not, in fact, state that C2C considered all of them equally. To the contrary, the award lists the out-of-network payment offers submitted by the parties ***as percentages of BCBS's purported QPA***. *See, e.g.,* Compl. ¶ 43 (Noting one offer was "205 percentage of the QPA"). It adds that "additional credible information related to certain circumstances was submitted by both parties. However, the information submitted ***did not support the allowance of payment at a higher OON rate***." Compl. ¶ 34; Doc. 15-1 at 2.

In other words, C2C determined the QPA should serve as the baseline payment amount, calculated the offers as a percentage of the QPA, and then picked the offer closest to the QPA as the Departments had originally instructed. That is precisely what is prohibited by *Texas Medical Association* and *LifeNet*. And notably, the Complaint alleges that Med-Trans has never won an IDR proceeding before C2C, further supporting the allegation that the illegal presumption was applied. Compl. ¶ 23.

BCBS declares in a conclusory manner that Med-Trans's "interpretation is baseless." Doc. 15 at 12. It attempts to explain away C2C's award language, guessing that "C2C's reference to a 'higher rate' was merely in reference to the higher OON rate between the two offers without any reference to the offers

relation to the QPA." Doc. 15 at 12. But BCBS is merely arguing its preferred interpretation of the award. But arguments over the award's meaning without the benefit of discovery from C2C is inappropriate at the motion-to-dismiss stage. *California Fin., LLC v. Perdido Land Dev. Co., Inc.*, 303 F. Supp. 3d 1306, 1310 (M.D. Fla. 2017) (quoting *Gullo v. Equifax Info. Servs. LLC*, No. 815CV01312EAKMAP, 2016 WL 3221735, at *3 (M.D. Fla. June 8, 2016)("Generally courts may not engage in contract interpretation at the motion to dismiss stage, as these arguments are more appropriate for summary judgment."). Accordingly, its motion should be denied.

***B. Med-Trans has met the required pleading standard.***

BCBS claims that "Med-Trans does not allege any fraud on the part of [it] or C2C, and certainly does not present clear and convincing evidence." Doc. 15 at 13. To the contrary, the Complaint meets the heightened standard for fraud under Rule 9(b).

Section 10(a)(1) of the FAA, which is incorporated by reference in the NSA, permits vacatur when an award was procured by corruption, fraud, or undue means. 9 U.S.C. § 10(a)(1). Courts of the Eleventh Circuit have held that in FAA cases, "[t]he term 'undue means' must be read in conjunction with the words 'fraud' and 'corruption' and thus requires proof of intentional

misconduct."[4] *Liberty Sec. Corp. v. Fetcho*, 114 F.Supp. 2d 1319, 1321 (S.D. Fla. 2000) (citing *Paine Webber Grp. Inc. v. Zinsmeyer Trusts Partnership*, 187 F.3d 988, 991 (8th Cir. 1999)) (citing in turn *Drayer v. Krasner*, 572 F.2d 348, 352 (2d Cir. 1978). Fed. R. Civ. P. 9(b) states: "[i]n alleging fraud or mistake, a party must state with particularity ***the circumstances*** constituting fraud or mistake." (emphasis added). When Rule 9(b) applies, "pleadings generally cannot be based on information and belief[.]" *United States v. Clausen*, 290 F.3d 1301, 1310 (11th Cir. 2002). This rule is relaxed "when specific 'factual information [about the fraud] ***is peculiarly within the defendant's knowledge or control***.'" *Hill v. Morehouse Med. Associates, Inc.*, 2003 WL 22019936 (11th Cir. 2003) (quoting *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Blue Cross Blue Shield of Ga., Inc.*, 755 F.Supp. 1040, 1052 (S.D. GA. Oct. 18, 1990)) (emphasis added). The more lenient standard is satisfied when "the complaint . . . set[s] forth a ***factual basis for such belief***." *U.S. ex rel. Clausen v. Laboratory Corp. of Am., Inc.*, 290 F.3d 1301, 1314 n.25 (11th Cir. 2002) (internal citations omitted) (emphasis added).

The allegations in the Complaint set forth the factual basis for why Med-Trans contends that BCBS misrepresented its QPA. First, the Departments

[4] The decisions on the meaning of "undue means" were all made prior to the enactment of the NSA which, as discussed below, broadened the concept of undue means to include misrepresentations to IDR entities. Accordingly, these cases are not controlling in judicial review of IDR determinations.

have acknowledged that several payors are not properly calculating the QPA in accordance with the regulations. Compl. ¶ 39. Med-Trans is well-acquainted with the market rate for its services, both as a provider and having contested and prevailed in a substantial majority of the disputes decided through the IDR process. *Id.* ¶ 22. Moreover, Med-Trans has contracted rates for air ambulance services in Florida. *Id.* ¶ 41. Its contracted rates are also much higher than the purported QPA. *Id.* BCBS did not disclose, despite Med-Trans's request, the in-network rates on which its QPA is purportedly based. *Id.* Based on all of these facts, Med-Trans contends that that BCBS misrepresented its QPA. *Id.* ¶ 42.

Under the relaxed standard promulgated in this Circuit, Med-Trans has satisfied the pleading standard under Rule 9(b). While Med-Trans ultimately bears the burden to prove one of the statutory grounds, BCBS may not avoid discovery into its misconduct by imposing an incorrect standard at this initial stage.

### *C. Applying an illegal standard in favor of insurers and always selecting their offers is evidence of evident partiality.*

"Evident partiality exists where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration . . ." *Park v. First Union Brokerage Services, Inc.*, 926 F. Supp. 1085, 1088 (M.D. Fla. 1996) (internal quotations omitted). Even if "the burden of proof for

vacating an arbitration award based upon alleged bias is a heavy one," as BCBS claims, it would not be appropriate to resolve Med-Trans's claim of evident partiality at this stage. Med-Trans has sufficiently alleged facts of evident partiality and further evidence is in the possession of Defendants. Given the black-box nature of the IDR process, as well as the fact that the parties do not select the person who makes the IDR decision, Med-Trans should be afforded the opportunity to conduct discovery in support of its claim.

### D. *By applying an illegal presumption, C2C committed misconduct and prejudiced Med-Trans's rights.*

Section 10 of the FAA provides that an award may be vacated

> where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; ***or of any other misbehavior by which the rights of any party have been prejudiced***.

9 U.S.C.A. § 10(a)(3)(emphasis added). BCBS claims that "Med-Trans does not allege or present evidence that C2C refused to postpone a hearing upon sufficient cause, refused to hear evidence pertinent and material to the controversy, or any other misbehavior by which Med-Trans's rights were prejudiced." Doc. 15 at 16. Applying an illegal presumption in favor of the QPA, resulting in the insurers' offer prevailing every time, prejudiced Med-Trans's rights. Compl. ¶ 51. As explained above, Med-Trans has sufficiently pled facts supporting this claim.

***E. C2C exceeded its authority under the NSA.***

Section 10 of the FAA provides for vacatur "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C.A. § 10(a)(3). BCBS asserts that even if C2C applied an illegal presumption in favor of the QPA, that is not "a cognizable basis for judicial review of an IDR award." Doc. 15 at 17. BCBS is wrong even under FAA case law, which was developed in the context of inapplicable voluntary arbitrations.

IDR entities like C2C are not allowed to violate the NSA in making their decisions. Even if IDR entities were considered arbitrators, arbitrators cannot exceed their powers or perform their duties contrary to the terms of the parties' arbitration agreement. If so, the award may be vacated. *See* 9 U.S.C. § 10(a)(4). For example, an arbitrator may not conduct a class arbitration where the agreement does not explicitly provide for it. S*tolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 672-73, (2010). Similarly, an arbitrator may not apply statutory grounds to remove a trustee where the grounds for removal are specified in the trust agreement. *Brown v. Brown-Thill*, 762 F.3d 814, 824-25 (8th Cir. 2014). As the Eleventh Circuit explains, "an arbitrator 'may not ignore the plain language of the contract.'" *Wiregrass Metal Trades Council AFL-CIO v. Shaw Envtl. & Infrastructure, Inc.*, 837 F.3d

1083, 1087 (11th Cir. 2016) (quoting *Warrior & Gulf Nav. Co. v. United Steelworkers of Am., AFL–CIO–CLC*, 996 F.2d 279, 281 (11th Cir. 1993).

In IDR proceedings, there is no arbitration agreement. Accordingly, an IDR entity exceeds its powers when it violates the requirements of the NSA. The suggestion that IDR entities can ignore the NSA and its regulations, make any decision it wants based on any criteria it desires, and that this is a protected "legal error" that the Court cannot review is fatally flawed, contrary to arbitration case law, and would eviscerate judicial review and due process.

The case of *PoolRe Ins. Corp. v. Organizational Strategies, Inc.*, is particularly instructive. 783 F.3d 256 (5th Cir. 2015). There, the parties had agreed to arbitrate under the arbitration rules of the International Chamber of Commerce ("ICC"). *Id.* at 265. However, the arbitrator decided to conduct the proceedings under AAA rules. *Id.* Noting that the rules to be applied is an "important" part of an arbitration agreement, the Fifth Circuit affirmed the district court's decision to vacate the award because the wrong rules had been applied to the dispute. *Id.* at 264-65.

Here, too, C2C applied the wrong rules (an illegal presumption) to the parties' dispute—a cognizable basis for judicial review and vacatur.

***F. Misrepresentation and fraud are undue means under the NSA.***

BCBS claims that "Med-Trans wishes to tack on a 'fifth' ground for judicial review of the award by alleging that [BCBS] made misrepresentations

to C2C." Doc. 15 at 18. Not so. Fraudulent claims and misrepresentation of facts qualify as undue means, and are grounds for vacatur under the NSA.

Courts interpreting a statute should do so in a way "so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009). Rendering a provision meaningless is "an interpretative no-no." *In re Hedrick*, 524 F.3d 1175, 1189 (11th Cir. 2008), amended on reh'g in part on other grounds, 529 F.3d 1026 (11th Cir. 2008). Courts will interpret the "statute in a manner consistent with the plain language of the statute," taking care to avoid "an absurd result." *United States v. Segarra*, 582 F.3d 1269, 1271 (11th Cir. 2009). As stated above, the NSA provides the following:

> A determination of a certified IDR entity under subparagraph (A)—
>
> (I) ***shall be binding*** upon the parties involved, ***in the absence of*** a fraudulent claim or ***evidence of misrepresentation of facts presented to the IDR entity*** involved regarding such claim; and
>
> (II) shall not be subject to judicial review, ***except in a case described in any of paragraphs (1) through (4) of section 10(a) of title 9.***

42 U.S. Code § 300gg–111(c)(5)(E)(i) (emphasis added).

BCBS's interpretation of the NSA both renders a provision of the statute meaningless and also leads to an absurd result. It argues that "if Congress intended fraud or misrepresentation of facts presented to the IDR entity to constitute an additional ground for judicial review it would have used such language or included it in subsection II." Doc. 15. at 18-19. Its explanation for

subsection I is that fraud and misrepresentation are "affirmative defenses to enforcement of an award" but provides no citation to support its contention. Doc. 15 at 19. And it should not be overlooked that BCBS's "affirmative defense only" argument would mean that payors can simply prevail in IDR proceedings by lying about the QPA and any other facts, leaving providers with no recourse to challenge such awards.

A more logical, common sense interpretation is that Congress specifically enumerated one of the situations in which an award is procured using "undue means," which is one of the four grounds for vacatur under the FAA. This gives meaning to all terms, does not lead to an absurd result, and promotes the public policy of IDR proceedings being free from misrepresentations.

And although BCBS cites the IDR Guidance for Certified IDR Entities to suggest that Med-Trans "could (and should) have notified the Departments that it was concerned the [QPA} calculation was improper," the guidance only reinforces Med-Trans's point. The guidance provides as follows:

> ***It is not the role of the certified IDR entity to determine whether the QPA has been calculated correctly*** by the plan, make determinations of medical necessity, or to review denials of coverage. NOTE: If the certified IDR entity or a party believes that the QPA has not been calculated correctly, the certified IDR entity or party is ***encouraged to notify*** the Departments through the Federal IDR portal, and the Departments ***may*** take action regarding the QPA's
> calculation.

*See* Depts. of Health & Human Servs., Labor, and the Treasury, Federal Independent Dispute Resolution (IDR) Process Guidance for Certified IDR

Entities (2022)[5] at 19. The guidance merely ***encourages*** parties to notify the Departments if they believe the QPA has not been calculated correctly, but it does not require it. And even if the Departments are notified, they are not obligated to take any action in response. Encouraging regulatory reporting hardly bars judicial review of IDR determinations secured by undue means.

Med-Trans is not asking to manufacture a "fifth" ground for judicial review—it is asking this Court to enforce the NSA after interpreting it according to well-established principles of statutory construction. BCBS's contention that payor fraud and misrepresentations of fact do not constitute securing an award through "undue means" speaks volumes as to the reason this matter is before the Court in the first place.

## VI. BCBS's Motion to Strike is Premature.

BCBS asks this Court strike to Med-Trans's request for attorneys' fees, but that is premature at this stage of the litigation. While it is true that under the "American Rule," each party generally bears its own attorney's fees absent a statute or contractual provision, there are well-established exceptions to this rule, including when a party acts in bad faith before and during litigation. *See, e.g., Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240 (1975); *Fitzgerald v. Hampton*, 545 F. Supp. 53, 57 (D.D.C. 1982)(fees warranted

[5] https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/Federal-Independent-Dispute-Resolution-Process-Guidance-for-Certified-IDR-Entities.pdf

where "a party, confronted with a clear statutory or judicially imposed duty towards another, is so recalcitrant in performing that duty that the injured party is forced to undertake otherwise unnecessary litigation to vindicate plain legal rights*"); American Hosp. Ass'n v. Sullivan*, 938 F.2d 216 (D.C. Cir. 1991); *Richardson v. Communications Workers of Am., AFL-CIO*, 530 F.2d 126 (8th Cir. 1976); *Thonen v. Jenkins*, 517 F.2d 3 (4th Cir. 1975). Med-Trans's request for fees preserves its right to such recovery as part of a final judgment, and accordingly it is improper to strike the request at before the parties have had the opportunity to litigate Med-Trans's claims.

## CONCLUSION

For all these reasons, Med-Trans asks this Court to deny BCBS's Motion to Dismiss. Or should the Court grant the Motion, Med-Trans requests that the dismissal be without prejudice and that it be granted an opportunity to amend.

Dated: December 23, 2022

Respectfully submitted,

SMITH HULSEY & BUSEY

By: *s/ Lanny Russell*
Lanny Russell

Florida Bar No. 303097
One Independent Drive, Suite 3300
Jacksonville, Florida 32202
(904) 359-7700
(904) 359-7708 (facsimile)
lrussell@smithhulsey.com

NORTON ROSE FULBRIGHT US LLP

*/s/ Adam T. Schramek*

Adam T. Schramek, Lead Counsel
Texas Bar No. 24033045
98 San Jacinto Boulevard
Suite 1100
Austin, TX 78701-4255
Telephone: (512) 474-5201
Facsimile: (512) 536-4598
adam.schramek@nortonrosefulbright.com
*Admitted Pro Hac Vice*

Abraham Chang
Texas Bar No. 24102827
1301 McKinney, Suite 5100
Houston, TX 77010-3095
Telephone: (713) 651-5151
Facsimile: (713) 651-5246
abraham.chang@nortonrosefulbright.com
*Admitted Pro Hac Vice*

*Attorneys for Med-Trans Corporation*

**CERTIFICATE OF SERVICE**

I certify that on the 23rd day of December 2022, a true and correct copy of the foregoing was served via the Court's ECF system on all counsel of record.

*/s/ Abraham Chang*
Abraham Chang