UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

MED-TRANS CORPORATION,

Plaintiff,

v. CASE NO.: 3:22-cv-1139-TJC-JBT

BLUE CROSS AND BLUE SHIELD OF FLORIDA, INC., d/b/a FLORIDA BLUE; and C2C INNOVATIVE SOLUTIONS, INC.,

Defendants.
_____/

DEFENDANT BLUE CROSS AND BLUE SHIELD OF FLORIDA, INC.'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS ORIGINAL COMPLAINT, AND TO STRIKE ATTORNEY'S FEE CLAIM

Defendant, Blue Cross and Blue Shield of Florida, Inc. ("Florida Blue"), files this Reply to Plaintiff's Response in Opposition to Blue Cross and Blue Shield of Florida's Motion to Dismiss and Motion to Strike Attorney's Fee Claim (Doc. 27; "Response") to address Plaintiff's arguments that: (1) an Independent Dispute Resolution ("IDR") proceeding under the No Surprises Act ("NSA") "is not an arbitration at all;"(2) Plaintiff is not required to file a motion because the NSA does not adopt the entirety of the Federal Arbitration Act ("FAA"); (3) due process requires greater judicial review than that under the FAA; and (4) the Court should apply a "relaxed" pleading standard for fraud under Rule 9(b), Federal Rules of Civil Procedure ("Rule(s)"), that disregards the rule's particularity requirement. As discussed in more detail below, Plaintiff's arguments are without merit.

Plaintiff's contention that IDR proceedings "are not arbitration at all" is inconsistent with the language of the NSA.

Plaintiff's argument that the IDR proceeding at issue here "is not arbitration at all" is contradicted by the language of the NSA, which adopts a portion of the FAA, and the NSA's implementing regulations that refer to the process as arbitration. Throughout the regulation governing the resolution of payment disputes, the IDR process is compared with or equated to arbitration and incorporates various arbitration rules and guidelines. *See generally* 45 C.F.R. § 149.510.[1]

In addition to expressly adopting the grounds for judicial review from the FAA, personnel employed by an IDR entity are considered to have the requisite training to conduct payment determinations if they have "completed arbitration training by the American Arbitration Association." 45 C.F.R. § 149.510(e)(2)(iii). Further, this same regulation requires IDR entities to possess sufficient **arbitration expertise** to make payment determinations under the NSA. 45 C.F.R. § 149.510(e)(2)(i)(emphasis added). And finally, in listing the circumstances for revocation of a certified IDR entity's certification, the NSA includes a circumstance where "[t]he certified IDR entity lacks the financial viability to **provide arbitration under the Federal IDR process**." 45

[1]*See also* H.R. REP. 116-615, 56 (Dec. 2, 2020) ("A key element of any solution to address surprise billing comprehensively is the payment rate, which is the amount that payers must remit to providers for out-of-network items and services. Two payment rate options have emerged as the predominant contenders to correct the market failure associated with surprise billing: (1) the benchmark rate model, and (2) **the IDR process, also referred to as arbitration**.") (emphasis added). Courts have additionally referred to the IDR process as arbitration. *See* Texas Med. Ass'n v. United States Dep't of Health & Hum. Servs., 587 F. Supp. 3d 528, 533 (E.D. Tex. 2022), *appeal dismissed*, No. 22-40264, 2022 WL 15174345 (5th Cir. Oct. 24, 2022) (citing 42 U.S.C. § 300gg-111(c)(1)(B)) ("If the parties cannot resolve the dispute through negotiation, the parties may then proceed to **IDR arbitration**.") (emphasis added); *see also* LifeNet, Inc. v. United States Dep't of Health & Hum. Servs., No. 6:22-CV-162-JDK, 2022 WL 2959715, at *2 (E.D. Tex. July 26, 2022) (citing 42 U.S.C. § 300gg-112(c)(5)(D)) ("The arbitrator's selection of a payment amount is binding on the parties and is not subject to judicial review, except under the circumstances described in the Federal Arbitration Act.").

C.F.R. § 149.510 (e)(6)(ii)(E) (emphasis added). Florida Blue is merely using the same terminology used in the NSA's regulations, rather than "muddy[ing] the waters" as suggested by Plaintiff.

Importantly, the IDR process is intended to serve the same function as arbitration: quick resolution of disputes in an efficient manner that preserves judicial time and resources. There is no private cause of action provided in the NSA. To the contrary, an IDR entity's determination "shall be binding upon the parties involved . . . and shall not be subject to judicial review" except in certain very limited circumstances. *See,* 29 U.S.C. § 1185e(c)(5)(E) [Section 716 of ERISA], applicable to air ambulance disputes pursuant to 29 U.S.C. § 1185f(b)(5)(D) [Section 717 of ERISA]. It is clear from the NSA and its implementing regulations that the IDR process is not intended as a practice session or warm-up to full blown litigation, which would be the result of Plaintiff's arguments.

Accordingly, the authority addressing the purpose of arbitration, the judicial deference afforded arbitrators, and the authority interpreting the grounds for judicial review expressly incorporated into the NSA are all applicable here.

Plaintiff's argument that the NSA does not incorporate the FAA in its entirety ignores Florida Blue's assertion under the Rules.

Florida Blue's argument that Plaintiff's Complaint is procedurally improper and that any relief requested by Plaintiff should be in the form of a motion is based upon the Federal Rules of Civil Procedure, not the FAA. The Eleventh Circuit's decision in *O.R. Secs. v. Pro. Planning Ass'n*, 857 F.2d 742, 748 (11th Cir. 1988) regarding the proper procedure for challenging an arbitration award relies on the Federal Rules of Civil Procedure, not the FAA. Med-Trans is seeking an order from the Court vacating the IDR award, which under governing Eleventh Circuit precedent should be filed as a motion

under Fed. R. Civ. P. 7(b), not through an entirely new litigation. *See also Belz v. Morgan Stanley Smith Barney, LLC*, No. 3:13-CV-636-J-34MCR, 2014 WL 897048, at *2 (M.D. Fla. Mar. 6, 2014) (holding that a request to vacate an arbitration award "must be made in the form of a motion as provided in Rule 7(b), Federal Rules of Civil Procedure (Rule(s)") (citation and internal quotations omitted).

As discussed above, the IDR process is analogous to arbitration and as such, authority analyzing the FAA is instructive here, particularly when courts have not yet had the occasion to previously address these issues in the context of the NSA. Notwithstanding the relevance of authority interpreting the FAA, Florida Blue's position that Plaintiff's request for an order vacating the IDR award be made in the form a motion is based on the Rules, not the FAA.

Plaintiff's greater judicial scrutiny argument relies on irrelevant authority, mischaracterizes the decisions of the state courts, and is nebulous.

Plaintiff fails to actually set out the parameters or criteria for judicial review of an IDR decision under the NSA that would satisfy its version of due process. In actuality, it is clear that Plaintiff intends to fully litigate (1) how Florida Blue determined its Qualifying Payment Amount ("QPA"), (2) C2C's training of its arbitrators, and (3) how the arbitrator weighed the evidence presented by the parties. That sort of litigation conflicts with provisions of the NSA and with ERISA, which governs the plan at issue here. Under ERISA, claims for benefits are not entitled to jury trials and are limited to judicial review for abuse of discretion, based upon an administrative record.

Furthermore, the NSA specifically provides that the federal departments are to audit plans and issuers to ensure the accuracy of QPA calculation methodology. As stated

by the Department of Treasury, Department of Labor, and the Department of Health and Human Services in their October 25, 2022 final rulemaking:

> The Departments note that the statute places the responsibility for monitoring the accuracy of plans' and issuers' QPA calculation methodologies with the Departments (and applicable state authorities) by requiring audits of plans' and issuers' QPA calculation methodologies, and the Departments have committed to conducting audits. The Departments also stress that payment determinations in the Federal IDR process should center on a determination of a total payment amount for a particular item or service based on the facts and circumstances of the dispute at issue, rather than an examination of a plan's or issuer's QPA methodology.

Requirements Related to Surprise Billing, 87 Fed. Reg. 52626, 52627 n. 31 (Aug. 26, 2022) (to be codified at 45 C.F.R. pt. 149).

Plaintiff's reliance on state court cases interpreting New Mexico and New York law is misguided. The decisions relied on by Plaintiff do not apply "greater scrutiny" to the grounds for review, contrary to Plaintiff's suggestion. Indeed, in *Caroli v. New York City Dep't of Educ.*, the court explained, notwithstanding the compulsory nature of the arbitration, that:

> Judicial review of an arbitrator's findings is extremely limited and an award may only be vacated on a showing of "misconduct, bias, excess of power or procedural defects." A court may vacate an award pursuant to CPLR 7511(b)(1)(iii), only if it violates "a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power."

132 N.Y.S.3d 517, 525 (N.Y. Sup. Ct. 2020) (internal citations omitted). Even in cases of compulsory arbitration, New York courts additionally review the arbitrator's decision for evidentiary support and to ensure it was not arbitrary and capricious. *Id.* Yet, the court noted that "the arbitrator's findings of fact and determinations of credibility are afforded very broad deference, even where there is conflicting evidence and room for choice exists." *Id.* This deference is inconsistent with Plaintiff's arguments here. And while New York

courts have established additional grounds for judicial review of awards obtained through compulsory arbitration, those cases are not binding here and do not generally require heightened scrutiny from the Court.

Plaintiff also relies on *Matter of Lancer Ins. Co. (Great Am. Ins. Co.)*, 651 N.Y.S.2d 852, 855 (Sup. Ct. 1996), in which the court applied the enumerated grounds for judicial review of an arbitral award under New York law, which are similar to those provided for in the FAA as incorporated by the NSA.[2] At the outset, the court found that the existence of a prior inconsistent award did not warrant vacating the award because it was not one of the enumerated grounds for review. *Id.* at 854. As to the impact of the compulsory nature of the arbitration, the court merely noted that where parties can contract away their rights in voluntary arbitration, arbitration compelled by the government must comply with procedural and substantive due process. *Id.* at 855. Thus, the court explained that New York state courts have found that in compulsory arbitration, "if the arbitrator fails to follow the statutory standards, the award should be vacated for exceeding the legislative grant of authority." *Id.* (citations omitted). The court then vacated the award because the arbitrator admitted to having failed to comply with one of the procedural requirements under New York law. *Id.* The judicial review in *Lancer* simply does not support Plaintiff's quest to engage in *de novo* litigation here.

Finally, Plaintiff relies on *Bd. of Educ. of Carlsbad Mun. Sch. v. Harrell*, in which the plaintiff appealed a decision to confirm an unfavorable arbitration award and argued

[2] An arbitration award may be vacated under New York law if the court finds that the rights of a party were prejudiced by: (i) corruption, fraud or misconduct in procuring the award; or (ii) partiality of an arbitrator appointed as a neutral, . . . ; or (iii) an arbitrator . . . exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or (iv) failure to follow the procedure of this article . . . ." CPLR 7511(b).

that "the statute unconstitutionally limit[ed] judicial review of the arbitrator's decision." 1994-NMSC-096, ¶ 8, 118 N.M. 470, 474, 882 P.2d 511, 515. Here, Plaintiff claims that it does not challenge the constitutionality of the NSA. Thus, the New Mexico Supreme Court's analysis of the constitutionality of a state statute has no bearing on the level of "scrutiny" this Court should apply to a challenge to a specific IDR award. In sum, Plaintiff's vague and unsupported contention that "due process requires much greater judicial review than that afforded under the FAA," cannot relieve Plaintiff of its obligations to plead particular facts warranting judicial review under the grounds provided for in the NSA.

The "relaxed" pleading standard proposed by Plaintiff would render Rule 9(b)'s particularity requirement meaningless.

Rule 9's particularity requirement applies to mistake, fraud, and all cases where the gravamen of the claim is fraud, even if not technically termed fraud. *Toner v. Allstate Ins. Co.*, 821 F. Sup. 276 (D. Del. 1993). Plaintiff concedes that it must meet Rule 9's particularity requirement, but then argues a "relaxed" pleading standard that would eviscerate the protections of Rule 9(b)'s particularity requirement. *See In re U.S. Office Prods. Co. Secs. Lit.*, 251 F. Supp. 2d 77, 100 (D. D.C. 2003) ("Rule 9(b) is intended to prevent the filing of complaints as a 'pretext for the discovery of unknown wrongs.'"). Rule 9's particularity requirement serves four purposes:

> Four reasons exist for the heightened pleading standard required in fraud cases. First, it protects defendant from frivolous suits. Second, it puts defendant on notice as to the conduct complained of so defendant will have information adequate to form a defense. Third, it prevents fraud actions in which all the facts are learned after the complaint is filed by way of the discovery process. Finally, it serves to protect defendant from damage to its reputation and goodwill.

Toner v. Allstate Ins. Co., 821 F. Sup. 276 (D. Del. 1993); *Doyle v. Hasbro, Inc.*, 103 F.3d

186 (1st Cir. 1996). Plaintiff conclusorily asserts that Florida Blue committed fraud by misrepresenting its QPA,[3] but does not allege any facts to support such an assertion. *See Sun Co. v. Badger Design & Constructors, Inc.*, 939 F. Supp. 365, 369 (E.D. Pa. 1999) (""Plaintiff may not simply point to a bad result and allege fraud. Rather, plaintiff must ... inject precision and some measure of substantiation into [the] allegations [of fraud].... who, what, when, where, and how: the first paragraph of a newspaper story would satisfy the particularity requirements.").

In the end, Plaintiff simply does not agree with Florida Blue's QPA calculation. Therefore, Plaintiff concludes that the QPA calculation must be fraudulent. But Plaintiff's incredulity does not support a conclusion that the QPA *must* be fraudulently calculated. As pled by Plaintiff, there are actually two other, equally plausible, possibilities: (1) other air ambulance providers have indeed contracted with Florida Blue for the rates implicated in its QPA; or (2) the QPA is not correct because of a legitimate error and absent fraudulent intent (as supported by Plaintiff's citation to reports that many other payors are miscalculating their QPAs). As in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-57 (2007), merely alleging the *possibility* of illegal conduct does not meet the standard of *plausibility of entitlement to relief* when legal conduct is just as (or even more) possible as illegal conduct. Thus, even under Rule 8 pleading standards, Plaintiff fails to state a claim for relief.

That being the case, Plaintiff's bare allegations certainly do not meet the particularity requirements of Rule 9. Under plaintiff's argument, because the "evidence

[3] As noted above, there is no private right of action for a provider to enforce the "correct" procedures for calculating the QPA, as the federal departments are charged with auditing plans and issuers to ensure compliance.

of fraud" would be in Florida Blue's possession, all plaintiff must do is allege "fraud" and the gates are opened to expensive and time-consuming discovery. *See Twombly*, 550 U.S. at 559 (noting the "potentially enormous expense of discovery"). That is simply not the Rule 9 standard. *See, e.g. Fearrington v. Boston Scientific Corp.*, 410 F. sup. 3d 784, 807 (S.D. Tex. 2019) (holding that allegations that defendant made misrepresentations without further specificity failed to meet Rule 9's standard). Plaintiff essentially "relaxes" Rule 9's particularity requirement out of existence.

Hill v. Morehouse Med. Associates, Inc., 2003 WL 22019936 (11th Cir. 2003) is not to the contrary. In that case, to support her claims for fraud under the False Claims Act, the plaintiff alleged that she worked in the specific department where the purportedly fraudulent billing schemes were occurring, that she had firsthand knowledge of the internal billing practices and manner in which the scheme was implemented, she observed billers, coders, and physicians alter CPT and diagnosis codes over seven months and submit false claims to the government, and she identified the confidential documents within the defendant's exclusive possession that contained further evidence of the fraud. *Id.* at *4. In addition, she included facts describing the defendant's billing process, the specific codes that were altered for each of the five fraudulent schemes, the frequency with which the false claims were submitted, the names of employees responsible for the fraudulent changes to the codes, and the clinics where the fraud occurred. *Id.*

The specificity of pleading in the *Hill* case stands in sharp contrast to what is alleged here. Plaintiff's purported allegations of fraud, as reiterated by Plaintiff in its Response, are that: (1) payors other than Florida Blue have improperly calculated the

QPA; (2) Plaintiff is familiar with the market rate[4] for its services; (3) Plaintiff has contracted rates for air ambulance services in Florida which are higher than the purported QPA; and (4) Florida Blue did not provide Plaintiff its in-network rates when Plaintiff asked. Response at 21-22. None of these assertions amount to the specific factual allegations of fraud alleged in *Hill* that ultimately relieved the plaintiff of the requirement to *further* identify the specific false claims submitted.

CONCLUSION

For the foregoing reasons, Defendant Blue Cross and Blue Shield of Florida, Inc., respectfully requests the entry of an Order (i) dismissing Plaintiff's Original Complaint, or alternatively, denying the relief requested therein, and (ii) striking Plaintiff's request for an award of attorney's fees.

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[4] The NSA prohibits consideration of billed or charged rates, often referred to as market rates, because they are usually extremely high and not tethered to the amounts actually paid for the services. *See* Adler, Loren, et al., *Understanding the No Surprises Act*, USC-Brookings Schaeffer Initiative on Health Policy (Feb. 4, 2021) at (unnumbered page) 6 (noting that "the arbitrator is prohibited from considering the provider's billed charges (a unilaterally set list price, which tends to be extremely high), [and] usual, customary, and reasonable rate benchmarks (which tend to be based on charges) . . . ."); 29 U.S.C. § 1185f (b)(5)(C)(iii) [ERISA § 717(b)(5)(C)(iii)] (prohibiting consideration of "usual and customary charges, the amount that would have been billed by such provider with respect to such services . . . ").

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 13, 2023, the foregoing was filed using the CM/ECF filing system, which will provide copies *via* electronic mail to the following recipients:

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