UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

MED-TRANS CORPORATION, Plaintiff, v. CAPITAL HEALTH PLAN, INC. and C2C INNOVATIVE SOLUTIONS, INC., Defendants.	§ § § § § § § § § § §	CIVIL ACTION NO. 3:22-cv-1077-TJC-JBT

MED-TRANS'S RESPONSE IN OPPOSITION TO C2C'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT AND MOTION TO STRIKE DEMAND FOR ATTORNEY'S FEES

Plaintiff Med-Trans Corporation ("Med-Trans") files this Response in Opposition to Defendant, C2C Innovative Solutions, Inc.'s ("C2C") Motion to Dismiss Plaintiff's Complaint and Motion to Strike Demand for Attorney's Fees and would respectfully show the Court as follows[1]:

INTRODUCTION

The mandatory IDR process under the No Surprises Act ("NSA") is not a traditional arbitration and lacks the fundamental due process protections that are the basis of arbitration case law and the Federal Arbitration Act itself. To put an IDR proceeding in context, imagine a courthouse the parties are not

[1] This is one of three cases seeking review of an out-of-network payment determination by C2C, which has filed motions to dismiss each asserting the same grounds. Plaintiff's responses are likewise substantively identical.

allowed to enter and at which no hearings occur. At this courthouse, the federal government has appointed a secret judge to adjudicate all claims. A plaintiff can file a claim, but it gets no discovery and is prohibited from seeing the defendant's answer, pleadings or evidence. The secret judge is not required to provide a reasoned opinion, and instead merely designates the "winner" in an unsigned judgment. That is what happens in IDR proceedings, and the secret judge is now asking this Court to declare him immune from scrutiny by the federal judiciary.

C2C asks this Court to blindly apply "arbitrator immunity" when in fact it does not qualify as an arbitrator under federal law, and the IDR process provides none of the due process protections upon which arbitrator immunity case law is premised. Most importantly, there is no agreement of the parties to arbitrate their dispute, no agreement on the procedures to be used, and the parties have no input on the individual who will actually decide their dispute. And unlike arbitrators, IDR entities are subject to specific rules and regulations that ***must*** be followed under federal law, meaning they are not permitted to make decisions in violation of the statutory scheme under which they operate. The NSA does not provide immunity to certified IDR entities, or even mention the word arbitration. Because C2C has not established as a matter of law that IDR entities under the NSA are entitled to arbitrator immunity, its motion must be denied.

In addition, the factual allegations in the complaint clearly establish that there is a case or controversy between C2C and Med-Trans, and thus Article III standing exists. Importantly, without C2C as a party, Med-Trans would be unable to obtain the relief it seeks, a rehearing with due process protections, because the NSA leaves to judicial review such matters and provides no statutory or regulatory mechanism to obtain a rehearing after an award is invalidated, other than a court order. This Court should deny C2C's Motion to Dismiss.

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).

As for motions to dismiss under Fed. R. Civ. P. 12(b)(1), the Eleventh Circuit has long held "it is extremely difficult to dismiss a claim for lack of

subject matter jurisdiction." *Garcia v. Copenhaver, Bell & Assocs., M.D.'s, P.A.*, 104 F.3d 1256, 1260 (11th Cir. 1997) (internal citations omitted). "Attacks on subject matter jurisdiction under Fed.R.Civ.P. 12(b)(1) come in two forms: 'facial attacks' and 'factual attacks.'" *Id.* at 1261. Facial attacks on the complaint "require[] the court merely to look and see if [the] plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in his complaint are taken as true for the purposes of the motion." *Id.* "Factual attacks', challenge "the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered."' *Id.*

ARGUMENT

I. C2C is not entitled to immunity because the IDR process is not arbitration and C2C is not an arbitrator.

C2C claims that Med-Trans's claims should be dismissed because "C2C is entitled to arbitrator's immunity for its decision under the NSA." Doc. 24 at 4. In support, it asserts that "[i]n recognition of the rule of an arbitrator, federal common law has created arbitrator immunity to protect the judicial-like functions of an arbitrator." *Id.* at 6. But C2C is an IDR entity, not an arbitrator, and the IDR process is not arbitration—far from it.

A. IDR determinations are not actually arbitrations as they lack the key features of arbitration.

C2C tries to shield itself by claiming that it is an "arbitrator" under the NSA. But the IDR process created by the NSA bears no resemblance to any traditional form of arbitration. Moreover, C2C's interpretation of the NSA ignores the rules of statutory construction.

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 if parties agreed to arbitrate merits of dispute depends on whether parties agreed to submit questions 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."). Absent 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 have many similarities to 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, thus 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 the opportunity 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, prior to 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.[2] 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

[2] C2C cites a voluminous body of case law supporting the existence of arbitral immunity. Doc. 24 at 6. However, notably, these cases all involved consensual arbitrations utilizing agreed procedures.

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 bedrock principles upon which arbitration is premised as reflected in federal case law and standard arbitration rules. And merely referring to a process as "arbitration" does not make it so. For instance, in *Illinois Bell Tel. Co. v. Box*, Judge Easterbrook, ruling on a dispute between phone companies under the Telecommunications Act of 1996, noted that the statute "provides that, when phone companies cannot agree on the answer to questions such as these, state public-utility commissions may decide." 526 F.3d 1069, 1070 (7th Cir. 2008). He also noted that "[t]he statute misleadingly calls this process 'arbitration,' but it bears none of the features—such as voluntary consent, a privately chosen adjudicator, and finality—that marks normal arbitration." *Id.* "The state commission's decisions don't implement private agreements; they subject unwilling [phone companies] to public commands." *Id.*

In other words, although the statute referred to the dispute resolution process in the Telecommunications Act of 1996 as "arbitration," that term was misleading and inaccurate because the process bore none of the features or protections of arbitration. So too here. The IDR process lacks the most fundamental aspect of arbitration—consent of the parties—and so IDR entities should not receive the same protections as arbitrators, including arbitral immunity under federal common law.

B. The No Surprises Act does not use the term arbitration.

With the Telecommunications Act of 1996 (and the Railway Labor Act cited by C2C), the statute expressly used the term "arbitrator" and "arbitration" to describe the process being created. The NSA does not.

"There are several canons of statutory construction that guide [a court's] interpretation of [a] statute. The starting point for all statutory interpretation is the language of the statute itself." *United States v. DBB, Inc.*, 180 F.3d 1277, 1281 (11th Cir. 1999). Courts "assume that Congress used the words in a statute as they are commonly and ordinarily understood, and [] read the statute to give full effect to each of its provisions." *United States v. McLymont*, 45 F.3d 400, 401 (11th Cir.1995) (per curiam). They do not look at one word or term in isolation, but look to the entire statutory context. *United States v. McLemore*, 28 F.3d 1160, 1162 (11th Cir. 1994) (citation omitted). Courts will only look beyond the plain language of a statute at extrinsic materials to

determine the congressional intent if: (1) the statute's language is ambiguous; (2) applying it according to its plain meaning would lead to an absurd result; or (3) there is clear evidence of contrary legislative intent. *See Consol. Bank, N.A. v. Office of Comptroller of Currency*, 118 F.3d 1461, 1463–64 (11th Cir. 1997).

The NSA does not refer to entities such as C2C as "arbitrators."[3] Under the statute, the Secretary of Health and Human Services, in consultation with the Secretary of Labor and Secretary of the Treasury, was directed to "establish a process to certify (including to recertify) entities." 42 U.S.C.A. § 300gg-111(c)(4)(A). The Departments, following the statute's mandate, created a list of only thirteen approved IDR entities to make IDR determinations. Compl. ¶ 2.[4] Parties to a dispute covered by the NSA must pick an IDR entity from the list for their dispute; otherwise, the Departments appoint one for them. Compl. ¶ 16. The actual person at the IDR entity assigned to actually make the decision is never disclosed.

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[3] Neither do the Centers for Medicare & Medicaid Services ("CMS"). CMS refers to the process created by the NSA as the "Federal Independent Dispute Resolution system." *See, e.g.*, Notice of the Federal Independent Dispute Resolution (IDR) Team Technical Assistance to Certified Independent Dispute Resolution Entities (IDREs) in the Dispute Eligibility Determination Process, Centers for Medicare & Medicaid Services (November 21, 2022), available at https://www.cms.gov/files/document/idre-eligibility-support-guidance-11212022-final-updated.pdf.

[4] At the time the Complaint was filed, there were eleven certified IDR entities, with one not accepting disputes. There are currently thirteen IDR entities, with two not accepting disputes. List of certified independent dispute resolution entities, Centers for Medicare & Medicaid Services, available at https://www.cms.gov/nosurprises/help-resolve-payment-disputes/certified-idre-list.

The statute provides that for the dispute, the "entity selected . . . to make a determination . . . shall be referred to in this subsection as the 'certified IDR entity' with respect to such determination." 42 U.S.C.A. § 300gg-111(c)(4)(F). Nowhere does the NSA mention an "arbitrator" or "arbitration," nor does it confer immunity on IDR entities.

C2C states that "other federal statutes provide for mandatory, binding arbitration of disputes," but it fails to substantively address those statutes, as Judge Easterbrook did in the *Illinois Bell Tel. Co.* case discussed above. And the one federal statue they do cite does not support their position here. C2C cites the Railway Labor Act ("RLA"), stating that "[r]esearch revealed no cases under the Railway Labor Act naming the arbitrator as a defendant." A review of the statute shows why. Section 157 of the Railway Labor Act is titled "Arbitration" and creates a framework for parties to settle their disputes. 45 U.S.C.A. § 157. In particular, the statute declares:

> Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation . . . ***such controversy may, by agreement of the parties*** to such controversy, ***be submitted to the arbitration of a board of three*** (or, if the parties to the controversy so stipulate, of six) persons: Provided, however, That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this chapter or otherwise.

Id. (emphasis added). Parties who ***agree to arbitrate*** under the RLA may do so by stipulating in writing to the terms of the arbitration, including "whether

the board of arbitration is to consist of three or of six members," the "period from the beginning of the hearings within which the said board shall make and file its award," and "the questions to be submitted to the said board for decision." *Id.* In other words, the RLA created a framework for dispute resolution by expressly incorporating language referring to arbitration and providing the standard due process protections inherent in an arbitration process such as consent, a hearing, and input of the parties on the process.[5] Far from supporting C2C's position, the RLA proves Med-Trans's point.

C2C also claims immunity under Florida state law, citing Fla. Stat. §44.107(1) to support its claim that "Florida statutorily provides an arbitrator with 'judicial immunity in the same manner and to the same extent as a judge.'" Doc. 24 at 6, n. 5. That theory, too, is misplaced. The statute in question provides:

> ***Arbitrators serving under s. 44.103 or s. 44.104***, mediators serving under s. 44.102, and trainees fulfilling the mentorship requirements for certification by the Supreme Court as a mediator ***shall have judicial immunity*** in the same manner and to the same extent as a judge.

[5] Congress has mandated arbitration in other contexts, such as the Randolph Sheppard Act, which governs vending facilities for the blind in federal buildings, as well as certain ERISA disputes. In those cases, it uses the term "arbitration" and proceedings are judicial-like in nature. *See, e.g.*, 20 U.S.C.A. § 107d-1 ("If [a] blind licensee is dissatisfied with any action taken or decision rendered as a result of such hearing, he may file a complaint with the Secretary who shall ***convene a panel to arbitrate the dispute*** pursuant to section 107d-2 of this title"); 29 U.S.C.A. § 1401 ("Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 1381 through 1399 of this title shall be ***resolved through arbitration.***").

Fla. Stat. §44.107(1) (emphasis added). Section 44.103 applies to "[c]ourt-ordered, ***nonbinding*** arbitration." Fla. Stat. § 44.103 (emphasis added). And Section 44.104 applies only to "***voluntary*** binding arbitration" or "***voluntary*** trial resolution." Fla. Stat. § 44.104 (emphasis added). Neither applies here, where Congress has created a statutorily mandated dispute resolution process. Not only does the Florida statute not support arbitrator immunity in a compelled governmental process like IDR proceedings, it reflects how a legislative body grants judicial immunity, which Congress did not do here for IDR entities.

Finally, the No Surprises Act adopted the legal standard applicable in one small part of a single section of the Federal Arbitration Act because, 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. It provides the parties to those agreements a right (and procedure) to compel arbitration. 9 U.S.C. § 4 (providing procedure applicable to party seeking to compel arbitration "under a written agreement for arbitration"). 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 this backdrop – of a statute that applies to arbitrations based on voluntary agreements by the parties – that Congress decided to adopt ***the standard*** for vacating arbitration

awards but none of the other terms or procedures of the FAA. In particular, the NSA states:

> 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.[6] In other words, if the standards in paragraphs (1) through (4) are met, judicial review is allowed. The NSA provides no further details on how such judicial review will proceed, who the parties should be, or what relief the Court may provide. And none of the other terms or procedures of the FAA, including the use of motions instead of complaints (9 U.S.C. § 6), were adopted for challenges to IDR determinations.[7]

According to the plain language of the No Surprises Act, C2C is not entitled to arbitral immunity because it is not an arbitrator at all. Moreover,

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[6] 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.

[7] 9 U.S.C. § 6 states that any "application to the court hereunder" shall be by motion. As explained above, the FAA only applies to agreements between parties that involve interstate commerce or maritime activities. An IDR dispute does not meet these requirements. Accordingly, an IDR dispute must be brought under the NSA, as was done here.

the IDR process does not otherwise qualify as an arbitration under the FAA, which premises arbitration on the consent of the parties and the scope of their agreement to arbitrate. C2C has not established as a matter of law that IDR entities are entitled to immunity.

C. IDR Determinations lack the due process protections of voluntary arbitrations.

Another reason that IDR entities should not be afforded immunity is because the IDR process lacks the due process protections of voluntary arbitration proceedings. Voluntary arbitration is based on consent and "may be conducted using any procedure acceptable to the participants . . . ." *Bd. of Educ. of Carlsbad Mun. Schools v. Harrell*, 882 P.2d 511, 518 (N.M. 1994). "The simple and ineradicable fact is that voluntary arbitration and compulsory arbitration are ***fundamentally different***" from one another. *United States v. American Society of Composers, Authors, and Publishers*, 708 F. Supp. 95, 96–97 (S.D.N.Y. 1989) (emphasis added). Accordingly, meaningful judicial review is required when, as here, an IDR entity is alleged to have exceeded its authority under the NSA by applying an illegal standard of review.

Med-Trans did not agree to arbitrate its payment dispute—the IDR process is required by law. Compl. ¶ 40. It did not select C2C as the IDR entity or have the chance to strike it from the list of possible assignments. *Id.* Med-Trans similarly did not select the individual at C2C reviewing the parties'

submissions—in fact, the individual remains anonymous to this day. *Id.* The parties were not afforded the opportunity exchange written submissions or briefs, meaning that Med-Trans had no chance of refuting any false statements in Capital Health's submission. *Id.* Med-Trans also had no opportunity to conduct discovery. *Id.*

This Court should decline to extend arbitral immunity, which protects the integrity of a voluntary arbitration process based on agreed rules and procedures, to the IDR process, which is mandatory and devoid of due process protections. This case should be adjudicated on the merits, and C2C's Motion to Dismiss should be denied.

D. IDR entities cannot violate the NSA in determining the appropriate OON rate

C2C is not allowed to violate the NSA in making its decisions. Even if C2C were considered an arbitrator, 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) (stating awards may be vacated "where the arbitrators exceeded their powers"). 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 then is immune from suit because arbitrators may make "legal errors" is fatally flawed, contrary to arbitration case law, and would eviscerate judicial review completely.

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. Similarly here, C2C applied the wrong

rules (an illegal presumption) to the parties' dispute and its award should be vacated.

There are also practical and historical reasons as to why IDR entities should not be immune from their decisions, particularly where statutory violations are alleged as in this proceeding. Congress delegated to regulators the task of recruiting and certifying companies to act as IDR entities. The Departments[8] created the certification rules at the same time they created the substantive regulations on the decisions the IDR entities would be making. *See* 42 U.S.C.A. § 300gg-111(c)(4). The Departments ultimately came up with a procedure whereby the IDR entities would ***presume*** the payment offer that was closest to the insurer's qualifying payment amount ("QPA") was the proper payment for the transport *unless* the air ambulance company could overcome that presumption with *clear* evidence to the contrary. *See* 45 C.F.R. § 149.510 (c)(4)(ii)(A) (2021). Since picking the offer closest to the QPA was a simple task (meaning the insurer would nearly always prevail), the Departments allowed the IDR entities a very low rate for this service. In this proceeding, that rate paid was $349. Compl. ¶ 18.

[8] The NSA amended the Internal Revenue Code, the Employee Retirement Income Security Act (ERISA), and the Public Health Service Act (PHS Act). All three statutory amendments are substantively identical. Accordingly, for sake of brevity, citations to NSA requirements are to the PHS Act, 42 U.S.C. §§ 300gg et seq.).

Unfortunately for IDR entities, the Departments' presumption in favor of the QPA was invalidated. *Tex. Med. Ass'n v. United States Dep't of Health & Human Services*, 587 F. Supp. 3d 528, 549 (E.D. Tex. 2022), appeal dismissed, No. 22-40264, 2022 WL 15174345 (5th Cir. Oct. 24, 2022); *LifeNet, Inc. v. United States Dep't of Health & Human Services*, No. 6:22-CV-162-JDK, 2022 WL 2959715, at *10 (E.D. Tex. July 26, 2022). Instead, the Court ruled that the IDR entities must fairly and equally weigh all of the evidence presented to them so long as it was not prohibited by the NSA. *LifeNet*, 2022 WL 2959715, at *8 ("Nothing in the Act instructs arbitrators to weigh any one factor or circumstance more heavily than the others").

While the rules for making decisions were invalidated, IDR entities remained subject to the same charges per claim. That means that IDR entities have an incentive to make decisions as quickly as possible in order to maximize their profits. This is very different than a traditional arbitration, where the arbitrator is paid by the hour and may spend the time necessary to consider the evidence and arguments, deliberate and draft a reasoned decision. *See, e.g., Mora v. Am. Equity Mortg., Inc.*, No. 609-CV-637-ORL-31KRS, 2009 WL 1607747, at *2 (M.D. Fla. June 9, 2009) (noting AAA's initial filing fees and arbitrator's hourly fees). Such an arbitrator is committed to getting the decision right in accordance with the procedures voluntarily agreed upon by the parties.

As further proof that IDR proceedings are not arbitrations and IDR entities are not arbitrators, not a single national arbitration service (such as the AAA, AHLA or JAMS) is an IDR entity. And at least some IDR entities consider themselves as extensions of federal agencies, not independent arbitrators selected by the parties to govern their private disputes. As IDR entity Maximus Federal Services, Inc. states on its website:

> We are a ***trusted partner to government***. Our customers have extraordinary missions that demand extraordinary results. With more than 40 years of experience we are on the frontlines, ***working with federal agencies to move their mission.***

https://maximus.com/federal (last visited 12/9/22).

It is against this backdrop, of no traditional arbitration services being IDR entities, the original rules being invalidated ("which offer is closest to the QPA?"), and an economic incentive to minimize the amount of time spent on each case that Plaintiff Med-Trans has brought this challenge to C2C's determination. Simply stated, C2C exceeded its powers under the NSA by applying an illegal presumption in favor of the QPA and thus maximizing its profitability on air ambulance claims. C2C is not immune from making determinations in accordance with the requirements of the NSA, just as arbitrators are not immune from making determinations in accordance with the requirements of private parties' arbitration agreements.

E. The Eleventh Circuit has not extended arbitral immunity beyond claims for monetary relief.

Even if C2C qualified for arbitrator immunity, its motion nevertheless should be denied because Med-Trans does not seek monetary relief from C2C. In *Brandon, Jones, Sandall, Zeide, Kohn, Chalal & Musso, P.A. v. MedPartners, Inc.*, 312 F.3d 1349 (11th Cir. 2002), the district court dissolved an injunction prohibiting an arbitration organization from conducting an arbitration. The Eleventh Circuit found that the district court correctly dissolved the injunction because it "was improperly entered and ripe to be dissolved . . ." *Id.* at 1359. In doing so, the Eleventh Circuit specifically left open whether arbitral immunity extended to claims other than monetary relief:

> MedPartners mainly argues that the district court erred by relying on the idea that arbitral immunity protects arbitrators from suit for injunctive, as well as monetary, relief. No need exists, however, to decide whether arbitral immunity protects arbitrators from suits seeking only injunctive relief.

Id. (emphasis added).

The Eleventh Circuit's holding makes sense when considering that arbitral immunity emerged as an outgrowth of judicial immunity. The circuits that recognize the doctrine have done so by functionally comparing an arbitrator to a judge. *New England Cleaning Services, Inc. v. American Arbitration Ass'n*, 199 F.3d 542, 544 (1st Cir. 1999)(When "an arbitrator's role is functionally equivalent to a judge's role, courts have extended judicial

immunity to arbitrators"); *Cahn v. International Ladies' Garment Union*, 311 F.2d 113 (3rd Cir. 1962) (arbitrator performing "quasi-judicial duties is clothed with an immunity analogous to judicial immunity). While C2C's role is not functionally equivalent to that of a judge, even judges who abuse their discretion are subject to mandamus proceedings in which their decisions are subject to review. In some state courts, mandamus proceedings are actually filed against the judge and bear his or her name. *See, e.g., Dade County v. Turnbull,* 572 So.2d 540 (Fla. Dist. Ct. App. 1990) (Mandamus action filed against state judge to review orders granting motions for recusal).

In C2C's view, it could have its staff flip coins to decide winners and losers and this Court would be powerless to do anything about it. This cannot be the case. From a due process standpoint, C2C's argument puts the final nail in the coffin. This Court should decline to grant arbitral immunity to C2C, and deny its Motion to Dismiss.

II. C2C is a necessary party because it is needed to provide relief under the NSA and U.S. Constitution.

Finally, putting immunity aside, C2C is a proper party to this lawsuit because it is needed for this Court to be able provide full relief to Plaintiff under the NSA and the U.S. Constitution. As explained above, IDR entities are not actual arbitrators. There is no reason for an arbitrator to be a party in a proceeding challenging an arbitration award because the arbitration

requirement exists ***in a contract between the Plaintiff and Defendant***. Arbitration services will open a proceeding to whomever shows up with such an agreement and pays the filing fee. *See, e.g.* AAA R-4(a) (Filling Procedures and Requirements). Moreover, the services will open a proceeding ***in response to a court order.*** *Id.* at R-4(b) (requiring the filing of the court order when initiating an arbitration pursuant to court order). Here, neither the NSA nor its implementing regulations have any similar procedures or requirements for IDR entities to initiate IDR proceedings pursuant to court order. Unless and until Congress or the Departments create such a requirement, IDR entities are necessary parties to IDR challenges.

Absent a statutory or regulatory requirement to initiate a new IDR proceeding in compliance with a court order, IDR entities remain governed by the initiation requirements of the NSA and current regulations. Those requirements include filing deadlines timed from the date the initial payment is received. *See* 42 U.S.C. § 300gg–111 (c)(1-2). Here, those deadlines have long expired because Med-Tran is seeking a rehearing *after* the initial award is vacated. There is nothing in the NSA or its regulations requiring an IDR entity to rehear an award that is vacated. Accordingly, the IDR entity must be a party and subject to this Court's order compelling a rehearing.[9]

[9] The necessity of the IDR entity's participation here is similar to the requirement under the Federal Rules that it be a party to any case seeking injunctive relief. Federal Rule of

Furthermore, Med-Trans has asked the Court to require C2C, upon rehearing, to apply due process protections required by the Fifth Amendment to the U.S. Constitution. Compl. ¶ 43. Those protections are more than merely directing C2C to "follow the law" as it suggests. It includes requiring C2C to provide "the full evidentiary basis" of its determination in a reasoned decision. *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). The Court can only do so if C2C is a party subject to its orders.

III. Med-Trans has pled facts establishing Article III standing.

C2C also asserts that the complaint against it should be dismissed under 12(b)(1) because Med-Trans failed to plead facts sufficient to establish Article III standing. In fact, Med-Trans has unquestionably cleared this low hurdle.

Article III of the Constitution limits the jurisdiction of federal courts to the consideration of "Cases" and "Controversies." U.S. Const Art. III § 2. The "triad of injury in fact, causation, and redressability constitutes the core of Article III's case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence." *Parker v. Scrap*

Civil Procedure 65(d)(2) states that an injunction is only binding on "(A) the parties; (B) the parties' officers, agents, servants, employees, and attorneys; and (C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or(B)." An IDR entity would only qualify for category "A."

Metal Processors, Inc., 386 F.3d 993, 1003 (11th Cir. 2004) (citation omitted). "[F]irst and foremost, there must be alleged . . . an injury in fact—a harm suffered by the plaintiff that is concrete and actual or imminent, not conjectural or hypothetical." *Id.* A motion to dismiss for lack of standing is treated as a motion for lack of subject-matter jurisdiction under Fed. R. Civ. P. 12(b)(1). *Stalley ex. Rel. United States v. Orlando Regl' Healthcare Sys.*, Inc., 524 F.3d 1229, 1232 (11th Cir. 2008). A party can move to dismiss the complaint for lack of subject matter jurisdiction by mounting a facial attack on the complaint. *Id.* When moving to dismiss a complaint based on the inadequacy of the allegations in the complaint, the court is merely required to determine whether the plaintiff has sufficiently alleged a basis for subject matter jurisdiction and the allegations in the plaintiff's complaint are taken as true for purposes of the motion. Id.

To show standing under Article III, a plaintiff need meet only three requirements. *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993 (11th Cir. 2004). First, a plaintiff must allege an injury in fact, meaning a harm suffered by the plaintiff that is concrete and actual or imminent, not conjectural or hypothetical. *Id.* Economic or financial harm satisfies this first requirement. *Wilding v. DNC Services Corp.*, 941 F.3d 1116, 1125 (11th Cir. 2019).

Second, a plaintiff must allege causation, meaning a fairly traceable connection between the plaintiff's injury and the complained-of conduct by the

defendant. *Parker*, 386 at 993. This does not require the plaintiff to show proximate cause. *Wilding*, 941 F.3d at 1125. "Even harms that flow indirectly from the action in question can be said to be 'fairly traceable' to that action for standing purposes." *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1273 (11th Cir. 2003).

Finally, there must be redressability—that is, a likelihood that the requested relief will redress the alleged injury. *Parker*, 386 F.3d 993; *see also Made in the USA Found. v. United States*, 242 F.3d 1300, 1310-11 (11th Cir. 2001) (explaining that partial relief is enough to establish redressability).

In its Motion to Dismiss, C2C challenges Med-Trans's Article III standing by claiming that it is not "adverse to [Med-Trans]" because it "has no stake in the outcome of the litigation . . . " Doc. 24 at 10, PageID 70.[10] This argument is unsupported by the factual allegations or binding authority and ignores this Circuit's analysis for determining whether a case or controversy exists under Article III.

Med-Trans alleges injury-in-fact. It has suffered economic and financial harm—losing the IDR dispute at issue and thus not being paid the amount it sought in the IDR proceeding. Compl. ¶ 20. This economic harm, which is actual, imminent, concrete, and particularized, satisfies the first prong of

[10] It is notable that, after being accused of improperly adjudicating numerous claims by applying an illegal standard, C2C has not even attempted to refute those allegations. Instead, it claims that it is not adverse to Med-Trans and "has no stake" in this case.

Article III standing as stated in *Wilding*. Med-Trans alleges further real, imminent harm when it notes that "Med-Trans and its affiliates have lost every dispute the Departments have submitted to C2C." *Id.* Each dispute Med-Trans has lost—and will lose—due to C2C's reliance on an illegal presumption has caused and will financially harm Med-Trans because it is not paid a fair value for the air ambulance services it provides.

Med-Trans has also sufficiently alleged that its injury is traceable to C2C's conduct. The Complaint states that a presumption in favor of choosing the purported QPA is illegal. *Id.* at ¶ 23. It explains that C2C relied on that illegal presumption when it selected Capital Health's offer, which was 100% of the purported QPA. *Id.* at ¶ 34. Med-Trans has alleged that its financial harm was caused by C2C's application of an illegal presumption.

Last, Med-Trans has sufficiently alleged that its harm may be redressed by this Court. This Court is empowered to vacate C2C's award under numerous possible grounds, including where undue means were used to secure the award or a misrepresentation of fact occurred to the IDR entity. Compl. at ¶ 35 (citing 42 U.S.C. § 300gg–111 (c)(5)(E)(1)). By vacating C2C's award and directing C2C to rehear the dispute while applying the appropriate standard, this Court would be addressing Med-Trans's financial harm, as contemplated by the NSA, because a rehearing can result in a higher payment. *Id.*

C2C mischaracterizes the relief that Med-Trans seeks when it states that "an injunction requiring C2C to follow the law is improper." Doc. 24 at 10. Med-Trans does not only ask this Court to require C2C to follow the law—it asks this Court to order C2C to re-adjudicate the dispute in accordance with the law in effect at the time the original decision was made and with proper due process protections. Even if C2C claims it will stop its illegal practices without the Court's order, it "is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Friends of Earth, Inc. v. Laidlaw Envtl. Serv., Inc.*, 528 U.S. 167, 189 (2000).

Med-Trans has met the low pleading standard to establish Article III standing, and C2C's motion to dismiss under Rule 12(b)(1) should be denied.

IV. C2C's Motion to Strike is premature.

C2C 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 Service Co. v. Wilderness Society*, 421 U.S. 240 (1975); *Fitzgerald v. Hampton*, 545 F. Supp. 53, 57 (D.D.C. 1982); *American Hosp. Ass'n v. Sullivan*, 938 F.2d 216 (D.C. Cir. 1991); *Richardson v.*

Communications Workers of America, 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 merely preserves its right to such recovery as part of a final judgment, and accordingly it is improper to strike the request 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 C2C'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 22, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 22nd 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
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