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 CAPITAL HEALTH'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT AND MOTION TO STRIKE DEMAND FOR ATTORNEYS' FEES

Plaintiff Med-Trans Corporation ("Med-Trans") opposes Defendant Capital Health Plan, Inc.'s ("CHP") Motion to Dismiss Plaintiff's Complaint and Joinder in C2C's Motion to Strike Plaintiff's Demand for Attorneys' Fees and would respectfully show the Court as follows:

INTRODUCTION

Defendant CHP is under the mistaken presumption that this case arises under and is governed by the Federal Arbitration Act ("FAA"). It is not. The No Surprises Act ("NSA"), which incorporates by reference only one part of a single section of the FAA, governs this proceeding to vacate an Independent

Dispute Resolution ("IDR") decision. The NSA is silent on the procedures this Court should apply in determining whether an award was secured by misrepresentations, and it specifically *did not incorporate* the part of the FAA requiring motion practice. The NSA is likewise silent on who the proper parties are to such a proceeding, which has vastly different considerations than challenges to private arbitration awards.

CHP sidesteps the issue and simply calls the IDR process "arbitration." It is anything but. The mandatory IDR process under the NSA lacks the fundamental features and due process protections that are the basis of arbitration case law and the FAA itself. 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 make the IDR determination. And unlike arbitrators, IDR entities are government contractors subject to specific rules and regulations that must be followed under federal law, meaning they may not make legal errors in applying the statutory scheme on behalf of the federal agencies they serve.

Because the IDR process is nothing like a traditional arbitration and lacks the features and protections inherent in proceedings governed by agreement of the parties, the FAA case law and presumption in favor of confirming awards simply does not apply here. And even under the FAA's

standard of review for vacatur, which also does not control here, Med-Trans has alleged enough in its Complaint to defeat CHP's bid for dismissal.

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

STANDARD OF REVIEW

CHP states that the standard of review for vacatur of an arbitration award by an IDR entity is the same as under the FAA. Doc. 26 at 4-5. But this case is not governed by the FAA and, for reasons detailed below, Med-Trans has filed a Complaint in this District—not a motion to vacate.

CHP's standard of review is not correct. For instance, while it is true that Med-Trans ultimately "bears the burden to prove one of the statutory grounds," Doc. 26 at 5, that is not the standard at the motion-to-dismiss stage, before the parties have had the opportunity to engage in discovery and Med-Trans has had the opportunity to develop additional support for its claims.

Accordingly, a "motion to dismiss" that fails to cite the Federal Rules of Civil Procedure is improper, and Med-Trans responds to CHP's motion as a motion to dismiss under Fed. R. Civ. P. 12(b)(6).[1]

[1] We note that counsel in *Med-Trans Corporation v. Blue Cross and Blue Shield of Florinda, Inc. and C2C Innovative Solutions, Inc.*, 3:22-cv-1139, a related case in front of this Court, filed a motion to dismiss under 12(b)(6) alleging some of the same grounds for dismissal.

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. The procedural requirements of the FAA do not apply here.

CHP declares that "[t]he Court should deny Plaintiff's request outright, without consideration of the merits, because Plaintiff failed to follow the appropriate procedures for making a motion to vacate as set forth in the FAA." Doc. 26 at 7. But this case is not governed by the FAA, and the IDR process is not arbitration—far from it.

A. The IDR process is nothing like arbitration.

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 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, 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 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.

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

CHP is correct that Med-Trans "has ignored a fundamental procedural requirement of the FAA in failing to request vacatur by motion." That is because this dispute is not governed by the FAA, but the NSA, which incorporated only a small piece of the FAA.

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 (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.[2] In other words, if the standards in paragraphs (1) through (4) are met, judicial review is

[2] 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.

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, were adopted for challenges to IDR determinations.

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

As discussed above, the FAA does not apply to this lawsuit. And while the NSA adopted the legal standard for vacating an award under the FAA, it provided no further guidance on the scope of such judicial review or how it would proceed in a federal court. As seen in federal case law, a much greater level of judicial scrutiny is required in IDR appeals to satisfy due process.

While the IDR process bears little resemblance to arbitration, 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 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 the opportunity to be heard in a "meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (emphasis added). A hearing does not satisfy due process if it "is totally devoid of a meaningful opportunity to be heard." *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); *see also State ex rel. Ormet Corp. v. Indus. Commn. of Ohio*, 561 N.E.2d 920, 925 (Ohio 1990) (due process demands a meaningful evidentiary review by commission members).

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 acknowledged he failed to review certain submissions before arbitration hearing, stating that "the rights of a party [were] prejudiced due to the arbitrator's failure to follow the procedures established by law").

In *U.S. Lines, Inc. v. Federal Maritime Commission, the U.S.* Court of Appeals for the District of Columbia remanded a federal agency's decision

where the agency "made critical findings on the basis of data which was not included in the record" and "unknown to the parties and to th[e] court." 584 F.2d at 533, 543.[3] The court held that because "the data relied on by the Commission in reaching its decision [wa]s not included in the administrative record," the agency's reliance on unknown information to support its decision "preclude[d] effective judicial review in th[e] case" and "effectively eliminate[d] the roles of the . . . court in the decision-making and review processes." *Id.*

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. Accordingly, proceeding by complaint under the normal rules of procedure is required.

D. Complaints are the proper vehicle to challenge IDR determinations.

The FAA states that any "application to the court ***hereunder***" shall 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. An IDR dispute does not meet these requirements.

[3] While the federal government has outsourced the IDR process, due process cannot be evaded through federal contractors. It is the process that must comport with due process. Accordingly, case law on due process protections required of agency decision making applies equally to IDR determinations.

Accordingly, an IDR dispute must be brought under the NSA, as was done here.

The NSA does not incorporate by reference the FAA's procedures for moving to vacate an arbitration award. Rather, it is silent on how judicial review should proceed, so a complaint is not only an appropriate vehicle—it is ***the*** proper way to challenge IDR determinations.

Neither the FAA, the Federal Rules of Civil Procedure, nor the Local Rules of this Court contain any express provision for commencing a civil matter in federal district court by motion, without any other initiating document. Accordingly, to seek judicial review pursuant to the NSA and consistent with Fed. R. Civ. P. 7(a), Med-Trans initiated this lawsuit by filing a complaint.

Moreover, courts in this Circuit have recognized that a court should not prioritize form over substance. *O.R. Securities, Inc. v. Professional Planning Associates, Inc.*, 857 F.2d 742, 746 (11th Cir. 1988); *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 the proper vehicle to seek judicial review under the NSA, it still retains the ability to rule on the substance of Med-Trans's claims.

However, even under FAA motion practice, the Court may allow discovery to support the motion 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). Indeed, courts have required arbitrators to testify in connection with proceedings to vacate awards under the FAA. *See, e.g., Hoeft v. MVL Group, 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 CHP's possession. To date, Med-Trans has not been allowed any of the types of discovery into the merits of the underlying dispute that parties are routinely allowed in 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"). Even if IDR determinations must be challenged by motion practice, Med-Trans should be allowed discovery in support of its challenge prior to the Court's final ruling on it. CHP's motion to dismiss should be denied.

D. Unlike the FAA, the NSA does not set a deadline for challenges.

After seeking dismissal of the Complaint because it was not brought as a motion, CHP then tries to foreclose Med-Trans from bringing any motion at

all because it "would be untimely." Doc. 26 at 10. The procedural defenses asserted by CHP are simply another instance of the Defendants exploiting the lack of due process protections in IDR proceedings.

As stated above, Med-Trans chose the appropriate vehicle to seek judicial review of the IDR determination. Moreover, IDR determinations are not subject to the procedural requirements of the FAA, and the NSA does not provide a deadline by which a party seeking judicial review of an IDR determination must make its challenge. In any event, Med-Trans initiated this action within the 3-month period prescribed by the FAA.

Courts in this Circuit have held that equitable tolling is allowed under the FAA. *Valencia v. ETRADE Sec.*, LLC 2021 WL 9385892, at *4 (N.D. GA., Oct. 22, 2021) ("It is undisputed that equitable tolling is permissible under the FAA."). Equitable tolling is the doctrine "under which plaintiffs may sue after the statutory time period has expired if they have been prevented from doing so due to inequitable circumstances." *Ellis v. General Motors Acceptance Corp.*, 160 F.3d 703, 706 (11th Cir. 1998). Med-Trans timely filed its Complaint even if the three-month period required by the FAA applied. Given that the NSA is silent on how judicial review should be sought for IDR determinations, equitable tolling would apply if the Court were to decide motion practice is required.

For all these reasons, CHP's assertion on the untimeliness of a vacatur motion lacks merit, and its motion to dismiss on these grounds should be denied.

II. Med-Trans has alleged facts sufficient to survive a motion to dismiss.

CHP states that "Plaintiff's Complaint appears to allege that three bases exist to vacate the Arbitration Award." Doc. 26 at 10. Not so. The NSA allows a district court to vacate an arbitration award in the four circumstances set forth in the NSA, including procuring an award through "undue means." Compl. ¶ 35. The NSA specifically states that an IDR decision is not binding on a party where there is evidence of misrepresentation of facts presented to an IDR entity regarding the claim, such as an improperly calculated QPA. *Id.* This would be a form of "undue means" under the FAA. Med-Trans has alleged facts sufficient to establish that the IDR award in favor of Capital Health should be vacated under all five of these grounds, and so CHP's motion to dismiss must be denied.

A. Only Capital Health knows how it calculates the QPA, and in any event Med-Trans has pled facts sufficient to survive dismissal.

CHP first argues that the Complaint should be dismissed because Med-Trans has presented "no evidence of any inaccuracy in CHP's calculation," and that it has failed to meet its burden of proving one of the statutory grounds for

vacating an award, having alleged the inaccuracy of CHP's calculation "on information and belief." Doc. 26 at 12. The allegations, however, can be made on information and belief because the facts alleged are uniquely in CHP's knowledge and control.

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 a factual basis for why Med-Trans contends that CHP misrepresented its QPA. First, the Departments have acknowledged that several payors are not properly calculating the QPA in accordance with the regulations. Compl. ¶ 32. 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.* ¶ 19. Based on its knowledge of the market, it does not believe that CHP's purported QPA is in fact its QPA. *Id.* ¶¶ 29, 34.

Furthermore, Capital Health operates in seven Florida counties as an independent licensee of Blue Cross and Blue Shield. *Id.* ¶ 33. The Blues issue licenses on a geographic basis, meaning that each licensee generally has exclusivity in its territory and is excluded from operating in another licensee's territory. *Id.* Because CHP operates in a relatively small geographic area, it is implausible that CHP has at least three fixed wing, in-network contracts from which it could calculate a QPA for the flight in dispute. But that proof is solely in the possession and control of CHP.

If CHP indeed does not have at least three fixed wing, in-network contracts from which it could calculate a QPA under the NSA, that would mean that it made a fraudulent misrepresentation to C2C and Med-Trans—one that resulted in an IDR determination in its favor. Med-Trans has requested this information and been rejected, and has no other way of obtaining this information, except through discovery. Under the relaxed standard promulgated in this Circuit, Med-Trans has satisfied the pleading standard under Rule 9(b).

CHP next argues that "[e]ven if the resultant QPA calculation had been inaccurate, grounds would not exist to vacate the Arbitration Award" because "[n]either erroneous legal conclusions nor unsubstantiated factual findings justify federal court review of an arbitral award under the [FAA]." Doc. 26 at 12-13. CHP apparently believes that if it had calculated the QPA fraudulently or incorrectly, that would not be grounds for the award to be vacated. Setting aside the obvious due process and fairness concerns raised by CHP's position, Med-Trans has met the standard for undue means. As CHP acknowledges, "[c]ourts of the Eleventh Circuit have held that [t]he term 'undue means' must be read in conjunction with the words 'fraud' and 'corruption' and thus requires proof of intentional misconduct." Doc. 26 at 13 (internal quotations omitted). As described above, Med-Trans has properly met the standard required to plead fraud-type claims under Rule 9(b). If CHP obtained the IDR award through undue means by inventing or otherwise improperly calculating the QPA, that would be grounds for vacatur.

Med-Trans initiated this suit by filing a Complaint for the reasons explained above. IDR determinations are not arbitrations under the FAA, and there has been no opportunity during the IDR process to develop evidence of CHP's misconduct. While Med-Trans ultimately bears the burden to prove one of the statutory grounds, CHP may not avoid discovery into its misconduct by asking Med-Trans to "prove" its grounds at this initial stage. Med-Trans has

alleged enough to meet the pleading standard under the Federal Rules of Civil Procedure, and CHP's motion to dismiss should be denied.

B. C2C revealed evident partiality, committed prejudicial misbehavior, and exceeded its powers under the NSA by applying an illegal standard of review.

CHP claims that no evidence supports Med-Trans's claim that C2C revealed evident partiality, committed prejudicial misbehavior, and exceeded its powers such that a final, definite award on the subject matter was not made. Doc. 26 at 14-15. But the facts Med-Trans alleges establish that this is not true.

Under traditional arbitrations, arbitrators may make "legal errors" in adjudicating disputes without their awards being invalidated. *See, e.g., United Paperworkers Intern. Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987). That said, an arbitrator cannot exceed his powers or perform his duties contrary to the terms of the parties' arbitration agreement. *See* 9 U.S.C. 10(a)(4) (stating awards may be vacated "where the arbitrators exceeded their powers"). *See Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 672-73, (2010)(holding that an arbitration panel exceed its powers under § 9 U.S.C. 10(a)(4) where the panel concluded that the arbitration agreement allowed for class arbitration despite the agreement being silent with respect to this issue.); *see also Brown v. Brown-Thill*, 762 F.3d 814, 824-25 (8th Cir. 2014)(holding that an arbitrator exceeded authority under § 9 U.S.C. 10(a)(4)

where a trustee removal dispute was governed by the arbitration and trust agreements, but the removal decision was made on statutory grounds which were outside those agreements).

In this Circuit, courts deciding whether an arbitrator has exceeded its powers are guided by two principles. First, a court must "defer entirely to the arbitrator's interpretation of the underlying contract no matter how wrong [it] think[s] that interpretation is." *Wiregrass Metal Trades Council AFL-CIO v. Shaw Envtl. & Infrastructure, Inc.*, 837 F.3d 1083, 1087 (11th Cir. 2016). Second, ""an arbitrator 'may not ignore the plain language of the contract.'" *Id.* (quoting *Warrior & Gulf Nav. Co. v. United Steelworkers of Am., AFL–CIO–CLC*, 996 F.2d 279, 281 (11th Cir. 1993).

As discussed above, in IDR proceedings, there is no arbitration agreement. Accordingly, an IDR entity exceeds its powers when it fails to decide disputes in accordance with the rules in 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 flawed, contrary to arbitration case law, and would eviscerate judicial review completely.

For example, the case of *PoolRe Ins. Corp. v. Organizational Strategies, Inc.*, is 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.

CHP appears not to grasp the limitations placed on IDR decision-making following *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) 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). It states that "the considerations listed as considered by the arbitrator conform with the current state of law and regulations implementing the NSA" and therefore C2C "cannot be said to have committed any of the sorts of misconduct discussed in FAA Section 10(a)(3-4)." Doc. 26 at 17. CHP is contradicted by the very exhibit it attaches.

The Arbitration Award attached to CHP's motion states only that C2C was required by statute to consider (1) the QPA and (2) additional related and credible information relating to six circumstances. Doc. 26 at 16. It does not, in fact, state that CHP considered all of them equally. To the contrary, the

Award states 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.

In other words, C2C determined the QPA should serve as the baseline amount, with additional related information submitted by the parties being weighed to assess whether payment should be allowed at a higher OON rate. That is precisely the type of rebuttable presumption in favor of the QPA that was overturned in *Texas Medical Association* and *LifeNet*. And notably, Med-Trans also alleged that it has never won an IDR proceeding before C2C, further supporting its allegation that an illegal presumption was applied. Compl. ¶ 20.

C2C therefore revealed evident partiality, committed prejudicial misbehavior, and exceeded its powers under the NSA when it applied an illegal presumption in favor of the QPA. Compl. ¶ 37. That is what Med-Trans has alleged, and what it has supported with evidence. Its allegations are far from "conclusory" and "without factual support," as CHP claims. Doc. 26 at 15. Med-Trans has properly alleged facts supporting vacatur under the NSA, and so CHP's motion to dismiss must be denied.

C. Vacatur is permitted for misrepresentation of facts.

CHP claims "[n]o independent ground for vacatur exists for evidence of misrepresentation of the facts presented to an IDR Entity." Doc. 26 at 17. It is wrong.

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).[4]

[4] 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.). CHP cites to 26 U.S.C. § 9816(c)(5)(E), which is found in the Internal Revenue Code.

CHP's interpretation of the NSA both renders a provision of the statute meaningless and also leads to an absurd result. It claims that "[t]he 'and' joining subparts (I) and (II) in subsection (i) requires that the two subparts be read conjunctively," but does not explain what the statute means under CHP's reading. Doc. 26 at 18. Instead, CHP simply states that fraudulent claims and evidence of misrepresentation of facts are not grounds for vacatur. But if fraud and misrepresentation of facts are not grounds for vacatur, why are they expressly mentioned in the statute? And from a practical perspective, is CHP suggesting that payors can simply lie about the QPA, with providers having no recourse to vacate the fraudulently obtained award? Presumably not. In any event, CHP does not bother to explain.

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 and does not lead to an absurd result. CHP's interpretation of the statute does not make sense and contradicts basic principles of statutory construction, and so its motion to dismiss on these grounds should be denied.

III. Capital Health's Motion to Strike is Premature.

CHP joins in C2C's request asking this Court strike to Med-Trans's request for attorneys' fees. For the same reasons set forth in Med-Trans's

response to C2C's motion—that relief is appropriate in some cases and striking the request for fees would be premature at this time—Med-Trans asks this Court to deny CHP's request.

CONCLUSION

For all these reasons, Med-Trans asks this Court to deny Capital Health'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

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

Respectfully submitted,

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