UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

REACH AIR MEDICAL SERVICES LLC,

Plaintiff,

v.

Civil Action No. 3:22-cv-01153-TJC-JBT

KAISER FOUNDATION HEALTH PLAN INC. and C2C INNOVATIVE SOLUTIONS, INC.,

Defendants.

REACH AIR MEDICAL SERVICES LLC'S RESPONSE IN OPPOSITION TO KAISER FOUNDATION HEALTH PLAN INC.'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT AND MOTION TO STRIKE CLAIM FOR ATTORNEY'S FEES

Plaintiff Reach Air Medical Services LLC ("REACH") files this Response in Opposition to Defendant Kaiser Foundation Health Plan Inc.'s ("Kaiser") Motion to Dismiss Plaintiff's Complaint[1] and Motion to Strike Claim for Attorney's Fees and would respectfully show the Court as follows[2]:

INTRODUCTION

The No Surprises Act (NSA), which took effect on January 1, 2022, establishes an independent dispute resolution (IDR) process between payors

[1] We note at the outset that Kaiser's motion far exceeds the page limits under Local Rule 3.01.

[2] This is one of three related cases seeking review of an out-of-network payment determination by C2C concerning three different transports and three different payors (Capital Health, Blue Cross Blue Shield of Florida, and Kaiser).

and providers of air ambulance services, but did not specify how judicial review should proceed where a payor obtains the award through undue means, such as by misrepresenting its qualifying payment amount ("QPA"), or where the IDR entity adjudicating the dispute applies an illegal standard.

REACH seeks through this lawsuit to establish the judicial review available under the NSA where a party prevails through misrepresentations and undue means, or an IDR entity applies an illegal standard in making its determination. It does not, as Kaiser proclaims, seek to topple the entire process. In filing suit, REACH and its affiliates selected specific instances where, after investigation, it contends a party secured an IDR award through the types of misrepresentations, bad-faith conduct, and improper behavior that are explicitly addressed in the statute. This explains why, as Kaiser notes, REACH and its affiliates assert similar theories in the cases filed—they all involve the same types of misconduct.

And despite Kaiser's contention, REACH properly brought ***this*** lawsuit as a complaint rather than a motion to vacate because IDR determinations are not arbitrations subject to the FAA (which only applies to arbitration agreements in maritime contracts or those involving interstate commerce). The NSA, which governs this dispute, incorporates by reference only one small part of a single section of the FAA. Moreover, judicial review of the mandatory IDR process cannot be governed by the FAA when IDR proceedings lack the

fundamental features and due process protections that serve as the foundation of voluntary arbitration case law and the FAA itself.

REACH's complaint also meets the heightened pleading standard required by Rule 9(b), as it pleads with particularity the circumstances of the fraud and undue means, even if certain facts regarding Kaiser's misconduct are solely in Kaiser's possession. The complaint also demonstrates how vacatur is appropriate under any of the FAA's four narrow exceptions given Kaiser's misrepresentations and C2C's improper application of an illegal presumption.

In sum, Kaiser exaggerates. REACH is not attempting "to rewrite [a] statute" because it is "[d]issatisfied with its losses in IDR arbitrations." Dkt. 30 at 3, 8. Rather, REACH is asking this Court to determine the bounds of the statute and how judicial review will proceed thereunder. Kaiser would have this Court ignore due process and the plain language of the statute in favor of "finality." That cannot be so, and Kaiser's motion to dismiss should be denied.

LEGAL STANDARD

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) (citation omitted). 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) (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).

ARGUMENT

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

Kaiser claims that the complaint is "procedurally defective" and that "[t]he FAA clearly requires that a party who seeks to challenge an arbitration award to file a motion to vacate rather than a complaint." Doc. 30 at 10. But IDR determinations are not FAA arbitrations, and the NSA does not incorporate the FAA's procedures for motion practice. A complaint is not only ***an*** appropriate vehicle—it is ***the only*** proper way to challenge IDR determinations.

The NSA is largely silent as to how judicial review of an IDR determination should proceed. The statute provides only that an IDR determination

> (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.C. § 300gg-lll(c)(5)(E)(i)(I-II). Notably, the statute ***does not*** incorporate 9 U.S.C. § 6, which serves as the basis for Kaiser's contention that challenges to IDR determinations should be made by motion. Simply, there is nothing in the NSA to support Kaiser's position.

Nor can Kaiser look to the FAA itself for support. The statute states that any "application to the court ***hereunder***" must be by motion. 9 U.S.C.§ 6 (emphasis added). But notably, the FAA only applies to agreements between parties that involve interstate commerce or maritime activities. 9 U.S.C. § 2; *see also Klay v. All Defendants*, 389 F.3d 1191, 1200 n.9 (11th Cir. 2004). There is no such agreement at issue in this case. Accordingly, an IDR dispute must be brought under the NSA by complaint, as was done here.

The out-of-Circuit case that Kaiser cites, *Kruse v. Sands Bros. & Co., Ltd.*, is far from "instructive." Doc. 30 at 17. There, the petitioner moved to confirm an arbitration award issued by the National Association of Securities Dealers. 226 F. Supp.2d 484, 485 (S.D.N.Y. 2002). The respondent's response included a Counter-Petition to Vacate, which was "nine short paragraphs in length," with the "paragraphs relevant to the petition's substance contain[ing] only conclusory statements" and being "on the whole devoid of any argument or legal or factual support." *Id*. at 486. *Id.*

That is hardly the case here. First, and as further explained below, the NSA does not incorporate the section of the FAA requiring that vacatur be

brought by motion. This makes sense given the fact IDR entities may provide varying levels of detail in their determinations (or as this Court noted, hardly any detail at all). Hence, unlike arbitrations under the FAA, the parties will not have the type of full evidentiary record that would allow motion practice over complaints and discovery. Second, arbitrations—including those under the NASD—rely on consent, which is absent under the NSA.[3] Moreover, REACH's pleadings set forth detailed legal and factual bases for which it seeks vacatur of the IDR determination, not nine short paragraphs containing conclusory statements wholly devoid of any argument or legal or factual support.

Kaiser also relies on *O.R. Sec., Inc. v. Prof'l Planning Associates, Inc.*, 857 F.2d 742 (11th Cir. 1988). There, the plaintiff argued that a complaint was proper when vacating an award under the FAA. *Id.* at 745. The Eleventh Circuit disagreed, holding that the proper procedure was "to file a Motion to Vacate in the district court." *Id.* at 746. But, in so holding, the Circuit found

[3] Kaiser's case is inapposite because the NASD was a voluntary securities association that provided industry self-regulation as an alternative to direct regulation by the SEC. *Zandford v. Nat'l Ass'n of Sec. Dealers, Inc.*, 30 F. Supp. 2d 1, 5 (D.D.C. 1998), aff'd, 221 F.3d 197 (D.C. Cir. 2000) (citing *Ross v. Bolton*, 106 F.R.D. 22, 24 n. 1 (S.D.N.Y. 1985)). While members could explicitly agree to arbitration, in limited instances courts found that the NASD bylaws themselves served as an arbitration agreement, as participation in the organization was voluntary. *See, e.g., Vestax Sec. Corp. v. McWood*, 116 F. Supp. 2d 865, 868 (E.D. Mich. 2000), aff'd, 280 F.3d 1078 (6th Cir. 2002). Unlike compelled IDR proceedings under the NSA, NASD arbitrations were predicated on consent.

that the "policy of expedited judicial action expressed in ***section 6 of the Federal Arbitration Act*** . . . would not be served by permitting parties who have lost in the arbitration process to file a new suit in federal court." *Id.* (emphasis added)

Not only did the NSA not adopt section 6 of the FAA, but the policy rationale for *voluntary arbitrations* does not apply to IDR proceedings. *See id.* at 746 (noting the existence of an "arbitration transcript" clearly showing "that the panel heard evidence and argument on the merits of [plaintiff's] position."). And even if Section 6 applied, the Eleventh Circuit does not require motion practice. Doc. 30 at 12; *O.R. Sec.*, 857 F.2d at 746 (holding that "the district court did not err in considering the merits of [plaintiff's] request to vacate an arbitration award" brought by complaints). Indeed, courts should not prioritize form over substance. *Id.* If this Court decides that a complaint is not proper to seek judicial review under the NSA, it still retains the ability to rule on the substance of REACH's claims, a decision that will bring clarity to providers across the country dealing with the IDR process on a daily basis.

Even under FAA motion practice, the Court may allow discovery to support the motion, including arbitrator depositions, where the facts warrant it. *See, e.g., University Commons-Urbana, Ltd. v. Universal Constructors Inc.*, 304 F.3d 1331, 1339 (11th Cir. 2002); *Hoeft v. MVL Grp., Inc.*, 343 F.3d 57, 66-

67 (2d Cir. 2003). Here, as discussed below in connection with the Rule 9(b) pleading standard, key evidence is solely within Kaiser's and C2C's possession.

To date, REACH has not been allowed any of the discovery that parties are routinely allowed in voluntary arbitration proceedings. *See* AHLA Rule 5.5 (Arbitrators "should permit discovery that is relevant to the claims and defenses at issue and is necessary for the fair resolution of a claim"). And it only learned of Kaiser's misrepresentation and C2C's application of an illegal standard after the out-of-network payment decision had been made. Even if IDR determinations must be challenged by motion practice, REACH should be allowed discovery in support of its challenge before the Court rules on it.

II. REACH has met the required pleading standard.

Kaiser claims that "REACH provides no plausible basis for its conclusory allegation that Kaiser used actionable 'misrepresentations and undue means.'" Doc. 30 at 13. To the contrary, the Complaint presents specific allegations and circumstances that meet the heightened standard for fraud under Rule 9(b).

Section 10(a)(1) of the FAA, which is incorporated by reference in the NSA, permits vacatur when an award was procured by corruption, fraud, or undue means. 9 U.S.C. § 10(a)(1). Courts of the Eleventh Circuit have held that in FAA cases, "[t]he term 'undue means' must be read in conjunction with the words 'fraud' and 'corruption' and thus requires proof of intentional misconduct." *Liberty Sec. Corp. v. Fetcho*, 114 F.Supp. 2d 1319, 1321 (S.D. Fla.

2000) (citations omitted). 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[.]" *U.S. ex rel. Clausen v. Laboratory Corp. of Am., Inc.*, 290 F.3d 1301, 1314 n.25 (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) (internal quotations omitted) (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*, 290 F.3d at 1314 n.25 (internal citations omitted)(emphasis added).

Kaiser asserts that vacatur based on "undue means" requires a party to demonstrate "intentional misconduct that 'measures equal in gravity to bribery, corruption, or physical threat to an arbitrator.'" Doc. 30 at 20. Under Kaiser's theory, misrepresentations of the QPA or other information during the IDR process are not grounds for vacating an IDR award—in fact, ***they are not even subject to judicial review***. Doc. 30 at 23 ("REACH is attempting to litigate an issue that not even an IDR arbitrator can consider, ***let alone this court***.").

But the decisions Kaiser cites interpreting "undue means" pre-date the NSA and ignore the plain language of the statute. The statute includes misrepresentations to IDR entities as a form of "undue means," and so those cases do not apply to judicial review of IDR determinations. And moreover, under Kaiser's theory, courts are powerless even when parties lie in their IDR submissions. This interpretation of the statute would render judicial review under the NSA worthless and cannot be reconciled with the plain language of the statute.

Additionally, the allegations in the Complaint set forth the factual basis for REACH's contention that Kaiser misrepresented its QPA. First and foremost, Kaiser submitted ***a different, lower*** QPA to the IDR Entity when it filed its still-secret position statement than the QPA it provided to REACH when it made its initial payment on the claim. *Compare* Compl. at ¶ 28 with ¶ 30. This alone supports the Rule 9(b) pleading standard since one of the representations had to be false. Second, the Departments themselves have acknowledged and reported that payors are not properly calculating the QPA in accordance with the regulations (with Kaiser apparently having two different ways to do the math). Compl. ¶ 31. Third, REACH 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. Fourth, Kaiser refused to disclose the in-network rates

on which the QPA listed on its EOB was purportedly calculated. *Id.* ¶ 5. And it never disclosed to REACH the ***second, lower*** QPA it submitted to C2C. *Id.* The only reason REACH learned about the second QPA is because the IDR entity happened to list it in its decision. These facts clearly support an allegation that C2C was misled into believing that Kaiser had offered to pay more than its QPA and that REACH was duped into basing its offer and submitting briefing based on a higher QPA than the one Kaiser submitted to C2C. *Id.*

Kaiser attempts to trivialize its misrepresentations as "inadvertent error." Doc. 30 at 21. But this is the pleading stage, and the Court cannot adjudicate the facts or Kaiser's intent based on its lawyers' briefing seeking dismissal. Kaiser's calculation of two QPAs, and the determination of which of the two was correct, and Kaiser's intent when it misrepresented the QPA can only be ascertained after discovery. Kaiser's self-serving, unsupported statements regarding its misrepresentations should be disregarded at this stage of litigation.

REACH has satisfied the heightened pleading standard under Rule 9(b). While there are crucial facts—such as Kaiser's intent in misrepresenting the QPA and why it calculated it two different ways—that are solely in Kaiser's possession, the Complaint meets this Circuit's standard by setting forth the

factual basis for why REACH believes Kaiser has engaged in misrepresentations and fraudulent behavior.[4]

While REACH ultimately bears the burden to prove one of the statutory grounds, Kaiser may not avoid discovery into its misconduct at this initial stage, and its motion to dismiss should be denied.

III. Evident partiality is a sufficient basis for vacatur under the NSA.

"Evident partiality exists where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration . . ." *Park v. First Union Brokerage Services, Inc.*, 926 F. Supp. 1085, 1088 (M.D. Fla. 1996) (internal quotations omitted). Even if the burden of proof for vacating an arbitration award based upon alleged bias is "heavy," as Kaiser claims, it would not be appropriate to resolve REACH's claim of evident partiality at this stage. REACH has sufficiently alleged facts of evident partiality and further evidence is in the possession of Defendants. Given the black-box nature of the IDR process, as well as the fact that the parties do not

[4] For a motion that so loudly disparages allegations that are "baseless" and "wholly unsupported by evidence," Kaiser's brief certainly makes its fair share. Doc. 30 at 8, 14. As it very well knows, Kaiser's bald assertion that "REACH chose not to conduct any pre-suit investigation because it is not actually interested in addressing Kaiser's mistake" is patently false. Doc. 30 at 23. REACH has asked how Kaiser calculates its QPA, but has never received a satisfactory response. Nonetheless, such facts are not appropriately set before this Court at the motion to dismiss stage, and can only be proven or disproven in discovery.

select the person who makes the IDR decision, REACH should be afforded the opportunity to conduct discovery in support of its claim.

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

Under the Departments' original guidance that compelled IDR entities to apply a rebuttable presumption that the Qualified Payment Amount ("QPA") was the appropriate out of network ("OON") rate, arbitrators had to select the offer closest to the QPA unless a provider overcame the presumption with credible evidence. Compl. ¶ 23. The courts in *Texas Med. Association, et al. v. United States Department of Health and Human Services, et al.*, Case No. 6:21-cv-425 (E.D. Tex.)(February 23, 2022) ("TMA") and *LifeNet, Inc. v. United States Department of Health and Human Services, et al.*, Case No. 6:22-cv-162 (E.D. Tex.) (July 26, 2022) ("LifeNet") invalidated this "thumb on the scale" approach. REACH contends that C2C applied this rebuttable presumption in favor of the QPA submitted by Kaiser.

Kaiser argues (without any evidence) that C2C did not apply this presumption, but that even if it did, that is still not grounds for vacatur under the NSA. Doc. 30 at 28. Kaiser is wrong on both counts.

A. C2C applied an illegal presumption.

The exhibit Kaiser attaches to its motion to dismiss shows that C2C applied the very "thumb on the scale" approach invalidated by the courts in *TMA* and *LifeNet*.

The IDR Determination letter attached to Kaiser'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. 31-1. It does not, in fact, state that C2C 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***." *Id.*; 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. Indeed, that is why it calculated each party's offers ***as a percentage of the QPA*** in its decision. That is precisely the type of rebuttable presumption in favor of the QPA that was overturned in *TMA* and *LifeNet*. And notably, REACH also alleged that neither it nor its affiliates have won an IDR proceeding before C2C, further supporting its allegation that an illegal presumption was being applied. Compl. ¶ 20.

B. C2C's illegal presumption is a basis for vacatur under the NSA.

Kaiser argues that "[e]ven assuming C2C purportedly applied an 'illegal presumption," "the misapplication of the law is still not a valid basis for vacating the arbitration award." Doc. 30 at 27. While an arbitrator may misapply the law in traditional arbitrations, C2C may not do so here, as its authority derives from the NSA rather than consent of the parties.

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 also Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 672-73 (2010); *see also Brown v. Brown-Thill*, 762 F.3d 814, 824-25 (8th Cir. 2014).

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.

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.

C2C 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. ¶ 38. REACH has properly alleged facts supporting vacatur under the NSA, and Kaiser's motion to dismiss should be denied.

V. Pre-NSA market data is evidence that Kaiser has fraudulently calculated or otherwise misrepresented its QPA.

Kaiser asserts that "payment below pre-NSA market rates is not a permissible factor in IDR determinations, let alone a basis for vacatur." Doc. 30 at 29. However, Kaiser confuses the issues. REACH offers pre-NSA market rates as additional evidence for why it contends Kaiser misrepresented its QPA. And it should not be overlooked that Kaiser does not contest that it calculated two QPAs for the same claim, with the lower one being submitted in the position statement it knew REACH would never see.

Kaiser takes the position that even if it calculated the QPA fraudulently, this Court "is not responsible for assessing the accuracy of Kaiser's QPA calculation or methodology." To reiterate—Kaiser contends that his Court is powerless to do anything where it miscalculates (and thus misrepresents) or intentionally lies about its QPA in a statutorily mandated dispute resolution proceeding. Instead, it argues that the responsibility of policing Kaiser's QPA calculation "rests exclusively with 'the Departments' or 'applicable State authorities.'" Doc. 30 at 28.

Putting aside the fact that Kaiser cites no binding authority, statute or regulation to support its position that it can commit fraud freely and that this Court can do nothing about it, the sole basis for its legal argument does not even support its position. Kaiser's purported support is a statement in an informal guidance document that it selectively quotes. Below is a larger excerpt from this informal publication:

> ***It is not the role of the certified IDR entity*** to determine whether the QPA has been calculated correctly by the plan, make determinations of medical necessity, or to review denials of coverage. NOTE: If the certified IDR entity or a party believes that the QPA has not been calculated correctly, the certified IDR entity or party ***is encouraged to notify*** the Departments through the Federal IDR portal, and the Departments ***may take action*** regarding the QPA's calculation.[5]

This informal guidance does nothing more than encourage parties to notify the Departments if they believe the QPA has not been calculated correctly. And even if the Departments are notified, they are not obligated to take any action in response. In other words, Kaiser asks this Court to defer to the Departments and State authorities when there is no requirement there will be any investigation or enforcement at all. All the while, Kaiser can continue submitting one QPA to the IDR entity, and another to providers, and Kaiser contends this Court can do nothing about it. While it is understandable why Kaiser wants to escape this Court's scrutiny, it has cited no legal basis for that

[5] Depts. of Health & Human Servs., Labor, and the Treasury, Federal Independent Dispute Resolution (IDR) Process Guidance for Certified IDR Entities (2022)[5] at 19 (emphasis added).

result. Kaiser's motion to dismiss should be denied and this matter proceed to discovery.

VI. Kaiser's Motion to Strike is Premature.

Finally, Kaiser asks this Court to strike REACH's request for attorneys' fees, but that is premature at this stage of the litigation. While it is true that under the "American Rule," each party generally bears its own attorney's fees absent a statute or contractual provision, there are well-established exceptions to this rule, including when a party acts in bad faith before and during litigation. *See, e.g., Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240 (1975); *Fitzgerald v. Hampton*, 545 F. Supp. 53, 57 (D.D.C. 1982); *American Hosp. Ass'n v. Sullivan*, 938 F.2d 216 (D.C. Cir. 1991); *Richardson v. Communications Workers of Am., AFL-CIO*, 530 F.2d 126 (8th Cir. 1976); *Thonen v. Jenkins*, 517 F.2d 3 (4th Cir. 1975). REACH's request for fees preserves its right to such recovery as part of a final judgment, and accordingly it is improper to strike the request before the parties have had the opportunity to litigate REACH's claims.

CONCLUSION

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

Dated: February 3, 2023

Respectfully submitted,

SMITH HULSEY & BUSEY

By: *s/ Lanny Russell*
Lanny Russell

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

NORTON ROSE FULBRIGHT US LLP

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

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

Attorneys for Reach Air Medical Services LLC

CERTIFICATE OF SERVICE

I certify that on February 3, 2023, 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