UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

REACH Air Medical Services, LLC, Plaintiff, v. Kaiser Foundation Health Plan Inc., et al., Defendants.	Case No. 3:22-cv-01153-TJC-JBT **DEFENDANT KAISER FOUNDATION HEALTH PLAN INC.'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS AND TO STRIKE**

I. INTRODUCTION

REACH's complaint seeking to undermine the IDR process crafted by Congress fails. It is procedurally defective because REACH did not file a supported motion as required by the Federal Arbitration Act ("FAA"), and REACH fails to show that any of the FAA's four narrow exceptions for vacatur applies. Rather than address the law that dooms its case, REACH asks the Court to ignore Congress and craft a more lenient standard for judicial review, disregarding the heightened pleading requirements under Federal Rule of Civil Procedure 9(b). Capital Health, Florida Blue, and C2C correctly explain why REACH's arguments do not prevent dismissal. They also explain that REACH's arguments are no more than a disguised challenge to the NSA. Kaiser incorporates those arguments, and does not repeat them. Instead, Kaiser files this reply to underscore three points:

First, the FAA standard of judicial review governs. Federal courts have repeatedly confirmed that Congress can mandate arbitration with limited—or no—judicial review without offending the Constitution.

Second, the FAA applies in its entirety because courts presume that Congress intended statutorily mandated arbitration to fit within existing arbitration law. Indeed, the FAA applies even when the underlying statute does not mention the FAA.

Third, REACH cannot satisfy its heightened pleading standard under Rule 9(b) or the FAA's stringent standard for establishing fraud or undue means.

II. LEGAL ARGUMENT

A. REACH's challenge to the FAA standard for judicial review fails.

Congress made clear in the NSA that "[a] determination of a certified IDR entity . . . shall not be subject to judicial review, except in a case described in [the four paragraphs of section 10(a) of the FAA]." 42 U.S.C. § 300gg-111(c)(5)(E)(i). Under settled law applying section 10(a) of the FAA, judicial review is "among the narrowest known to the law." *Bamberger Rosenheim, Ltd. (Isr.) v. OA Dev., Inc. (U.S.)*, 862 F.3d 1284, 1286 (11th Cir. 2017). Not even errors of law satisfy this standard. *Scott v. Prudential Sec., Inc.*, 141 F.3d 1007, 1014 (11th Cir. 1998). And "[i]t is well established that an arbitration panel need not state ***any*** basis for its award." *Rosati v. Bekhor*, 167 F. Supp. 2d 1340, 1345 (M.D. Fla. 2001) (emphasis added).

Despite Congress' express adoption of section 10(a) into the NSA, REACH contends that the Court should ignore cases that have applied section 10(a) because the NSA requires arbitration, and thus a more lenient standard of review is appropriate. (Opp'n at 3.) Federal courts have repeatedly rejected this same argument. When Congress creates a new statutory right—as it did in the NSA—Congress has the

authority to decide the method for protecting that right.

In *Thomas v. Union Carbide*, the Supreme Court upheld a statutory scheme in the Federal Insecticide Fungicide and Rodenticide Act ("FIFRA") that created a right to compensation for sharing data among private parties, and required that compensation disputes be decided by arbitration. 473 U.S. 568, 573 (1985). The arbitrations were subject to judicial review only for "fraud, misrepresentation, or other misconduct." *Id.* The petitioners in *Thomas* challenged the limitation on judicial review as unconstitutional, as REACH does here. *Id.* at 582. The Supreme Court rejected the challenge. It explained that Congress "may create a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." *Id.* at 594. "To hold otherwise," the Court emphasized, "would be to erect a rigid and formalistic restraint on the ability of Congress to adopt innovative measures such as negotiation and arbitration with respect to rights created by a regulatory scheme." *Id.*

The court in *In re Motors Liquidation Co.*, reached the same result. No. M-47, 2010 WL 4449425 (S.D.N.Y. Oct. 29, 2010). Following the bankruptcy of General Motors, Congress enacted the Dealer Arbitration Act to create an expedited, mandatory arbitration process for affected car dealers to pursue reinstatement of franchise agreements. *Id.* at *5. Congress did not allow for ***any*** judicial review of Dealer Arbitration Act arbitration decisions. *Id.* Still, the court rejected the due process argument raised in *In re Motors Liquidation* over the lack of judicial review. *Id.*

It explained that "where Congress creates a new statutory right, Congress has the authority to decide the method for the protection of that right." *Id.* Since Congress created a new statutory right in Dealer Arbitration Act, Congress was free to mandate arbitration of the right and *completely proscribe* judicial review of arbitration decisions. *Id.*; *Switchmen's Union of N. Am. v. Nat'l Mediation Bd.*, 320 U.S. 297, 301 (1943) (similar result under Railway Labor Act).

As in these cases, this court should reject REACH's argument that it is entitled to a different form of judicial review than that available under FAA section 10(a). Congress created a right to payment for data under FIFRA and the right to seek reinstatement of franchise agreements under the Dealer Arbitration Act. So, too, Congress created a new statutory right in the NSA permitting providers to seek payment directly from health plans. *Haller v. U.S. Dep't of Health & Hum. Servs.*, 2022 WL 3228262, at *7 (E.D.N.Y. Aug. 10, 2022) ("When Congress enacted the No Surprises Act, it permitted health care providers to recover payment directly from insurers for out-of-network services, which is a new public right."). Thus, Congress was free to "decide the method for the protection of that right." *In re Motors Liquidation Co.*, 2010 WL 4449425, at *5. As *Thomas*, *In re Motors Liquidation*, and *Switchmen* make clear, this means that Congress can mandate arbitration of disputes under the NSA, and adopt FAA standards to govern review. REACH's due process argument fails.[1]

[1] REACH relies on dated state law cases. But none deals with statutorily compelled arbitration of a new statutory right created by Congress. Federal courts that have considered the issue have rejected REACH's theory.

B. The FAA in its entirety applies to IDR arbitrations.

Drawing from its flawed argument that IDR proceedings are not arbitrations,[2] REACH argues that only FAA section 10(a)—and no other provision of the FAA—applies to its case seeking to vacate the IDR arbitration award. This argument fails.

Decisions applying the FAA to cases challenging arbitration awards under statutory schemes mandating arbitration squarely contravene REACH's argument. As set forth above, the NSA is not the only statute that mandates arbitration. Another example is FIFRA. 7 U.S.C. § 136a(c)(1)(F)(iii). Significantly, however, FIFRA does not adopt (or even mention) the FAA. *Id.* Nonetheless, courts still apply the FAA standard when parties seek review of FIFRA arbitration awards. *Spray Drift Task Force v. Burlington Bio-Med. Corp.*, 429 F. Supp. 2d 49 (D.D.C. 2006) is illustrative. There, in rejecting a challenge to a FIFRA arbitration award, the court applied the three-month limit under 9 U.S.C. § 12 for challenging an arbitration award, and found that the petitioner had failed to satisfy it. *Id.* at 50. The reason for this is simple. As one court explained, "[t]his Court must assume that, absent a plain indication to the contrary, Congress intended the FIFRA arbitration scheme to fit within existing arbitration law." *Cheminova A/S v. Griffin LLC*, 182 F. Supp. 2d 68, 74 (D.D.C. 2002).

This authority makes plain that REACH cannot dictate its preferred standard of judicial review by trying to exclude parts of the FAA that do not help REACH. Just

[2] As Capital Health and Florida Blue correctly argue, IDRs are arbitrations. Case No. 3:22-cv-1077, Dkt. No. 46 at 3–6; 3:33-cv-1139, Dkt. No. 32 at 2–3. Congress, the agencies Congress chose to implement the IDR process, and every Court that has confronted the issue all describe IDRs as arbitrations. Even REACH's Complaint states that IDRs are arbitrations. (Dkt. No. 1, ¶¶ 2, 16, 43.)

as in *Cheminova*, it makes sense that "Congress intended the [NSA] arbitration scheme to fit within existing arbitration law." *Cheminova*, 182 F. Supp. 2d at 74. Thus, there is no merit to REACH's position that it need not file a motion, submit admissible evidence, or follow FAA's other requirements. In fact, the opposite is true. *See, e.g.*, *Spray Drift Task Force*, 429 F. Supp. 2d at 50 (finding a FIFRA arbitration untimely under FAA section 12, even though the FAA was not incorporated into FIFRA).[3]

C. REACH fails to allege fraud or undue means.

REACH's assertion of fraud or undue means is based solely on a ***pre-arbitration*** reference equating Kaiser's allowed amount to its QPA. This single allegation does not support an inference of fraud or undue means under either Rule 9(b) or Rule 8(a). In its opposition, REACH, refuses to address the undisputed facts that undermine its speculation, including that health plans can allow above, below, or at their QPA and its tacit admission that Kaiser's allowed amount is above that of other plans. A more plausible explanation is that there was a typo in Kaiser's EOP's form definition of the allowed amount, rather than any misrepresentation of the QPA to the IDR entity. A typo or mistake does not amount to fraud. *Hart v. Internet Wire, Inc.*, 50 F. App'x 464, 466 (2d Cir. 2002) (affirming dismissal under Rule 12(b)(6) because "[a]t most, plaintiffs have alleged errors and omissions—such as failure to detect or investigate typing errors, inconsistencies of naming, and other supposed signs of the Release's

[3] REACH's argument is also undermined by Federal Rule of Civil Procedure 81, which defers to the FAA in cases "relating to arbitration." Fed. R. Civ. P. 81(a)(6)(B); *see also PTA-FLA, Inc. v. ZTE USA, Inc.*, 2015 WL 12819186, at *8 (M.D. Fla. Aug. 5, 2015) (Corrigan, J.) (explaining that Rule 81 "defer[s] to the procedures of § 9 in proceedings relating to arbitration").

inauthenticity—that suggest carelessness or haste"). REACH does not rebut this law.

REACH's assumptions also fail the FAA's standard for establishing fraud or undue means, under which a plaintiff "must demonstrate intentional misconduct that measures equal in gravity to bribery, corruption, or physical threat to an arbitrator." *Floridians for Solar Choice, Inc. v. PCI Consultants, Inc.*, 314 F. Supp. 3d 1346, 1355 (S.D. Fla. 2018). Rather than address this standard, REACH asserts that the Court should ignore it because "the decisions Kaiser cites interpreting 'undue means' pre-date the NSA." (Opp'n at 10.) But as discussed above, Congress was not writing on a blank slate when it enacted the NSA or incorporated the FAA's standard for judicial review. Congress was free to choose the standard for challenging arbitration awards and it chose the well-established FAA standard. REACH cannot evade the FAA.

III. CONCLUSION

Kaiser requests that the Court grant its motion to dismiss with prejudice.

Dated: March 8, 2023

Respectfully submitted,

/s/ Christian E. Dodd
Christian E. Dodd
Florida Bar No. 93404
cdodd@hickeysmith.com
HICKEY SMITH DODD LLP
10752 Deerwood Park Blvd., Ste. 100
Jacksonville, FL 32256
Telephone: 904-374-4238
-and-

Moe Keshavarzi (*pro hac vice*)
California Bar No. 223759
mkeshavarzi@sheppardmullin.com
SHEPPARD MULLIN RICHTER & HAMPTON LLP
333 South Hope Street, 43rd Floor
Los Angeles, CA 90071-1422
Telephone: 213-620-1780
Attorneys for Kaiser Foundation Health Plan, Inc.

CERTIFICATE OF SERVICE

I certify that on March 8, 2023, a true and correct copy of the foregoing was served on all counsel of record via the Court's ECF system.

/s/ Christian E. Dodd
Christian E. Dodd