UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

REACH AIR MEDICAL SERVICES LLC, CALSTAR AIR MEDICAL SERVICES, LLC and GUARDIAN FLIGHT, LLC, Plaintiffs, v. KAISER FOUNDATION HEALTH PLAN INC., and MEDICAL EVALUATORS OF TEXAS ASO, LLC, Defendants.	§ § § § § § § § § § §	CIVIL ACTION NO. 4:22-cv-03979

PLAINTIFFS' RESPONSE TO DEFENDANT KAISER FOUNDATION HEALTH PLAN INC.'S MOTION TO DISMISS AND MOTION TO STRIKE

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STATEMENT OF THE NATURE AND STAGE OF THE PROCEEDINGS

Plaintiffs REACH Air Medical Services LLC ("REACH"), CALSTAR Air Medical Services, LLC ("CALSTAR"), and Guardian Flight, LLC ("Guardian") (collectively "Plaintiffs") filed a complaint to vacate six IDR awards and request rehearings (Doc. 1). Defendant Kaiser Foundation Health Plan Inc.'s ("Kaiser") filed a Motion to Dismiss and Motion to Strike Plaintiffs' Claim for Attorney's Fees (Doc. 25). Plaintiffs oppose Defendants Motion to Dismiss and Motion to Strike and would respectfully show the Court as follows:

PLAINTIFFS' STATEMENT OF THE ISSUES

1. Whether Plaintiffs' complaint should have been brought as a motion under the Federal Arbitration Act;

2. Whether Plaintiffs have stated a claim to vacate an IDR determination under the No Surprises Act; and

3. Whether Plaintiffs' request for attorneys' fees should be struck at this stage.

SUMMARY OF ARGUMENT

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

Plaintiffs seek through this lawsuit to establish the judicial review available under the NSA when 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, Plaintiffs 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, Plaintiffs assert similar theories in the cases filed—they all involve the same types of misconduct.

And despite Kaiser's contention, Plaintiffs 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.

Plaintiffs' 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 about 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 Medical Evaluators of Texas ASO, LLC's ("MET") improper application of an illegal presumption.

In sum, Kaiser exaggerates. Plaintiffs are not attempting "to rewrite [a] statute" because it is "[d]issatisfied with their losses in IDR arbitrations." Doc. 25 at 9, 13. Rather, Plaintiffs are asking this Court to determine the bounds of the statute and how judicial review will proceed. 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.

STANDARD OF REVIEW

Motions to dismiss for failure to state a claim are "viewed with disfavor and [are] rarely granted." *Tanglewood E. Homeowners v. Charles—Thomas, Inc.*, 849 F.2d 1568, 1572 (5th Cir. 1988) (quoting *Sosa v. Coleman*, 646 F.2d 991, 993 (5th Cir. 1981)). 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 in support of his claim which would entitle him to relief." *Ramming v. U.S.*, 281 F.3d 158, 161 (5th Cir. 2001 (emphasis added). In reviewing for sufficiency under Rule 12(b)(6), "the district court must accept all well-pleaded facts as true and view them in the light most favorable to the plaintiff." *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996) (citing *McCartney v. First City Bank*, 970 F.2d 45, 47 (5th Cir. 1992)).

The "threshold of sufficiency that a complaint must meet to survive a motion to dismiss is exceedingly low." *Ramteq Inc., v. Alfred Karcher, Inc.*, 2006 WL 8451174, at *1 (S.D. TX., Jan. 12, 2006) (quoting *Spanish Broad. Sys. of Fla., Inc. v. Clear Channel Communications, Inc.*, 376 F.3d 106, 1070 (11th Cir. 2004)). "The issue is not whether the plaintiff will ultimately prevail, but whether he is entitled ***to offer evidence to support his claim[s]***." *Jones v. Greninger*, 188 F.3d 322, 324 (5th Cir. 1999) (citing *Doe v. Hillsboro Indep. Sch. Dist.*, 81 F.3d 1395, 1401 (5th Cir. 1996). Dismissal is improper if the allegations support relief on ***any*** possible theory. *See Cinel v. Connick*, 15 F.3d 1338, 1341 (5th Cir. 1994)("A dismissal will not be affirmed if the allegations support relief on any possible theory." (citing *McCartney v. First City Bank*, 970 F.2d 45, 47 (5th Cir. 1992)).

ARGUMENT & AUTHORITIES

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. 25 at 15. 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 on 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-111(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. Nothing in the NSA supports 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 Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 273-274 (1995). There is no such agreement here. 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. 25 at 16. There, the petitioner moved to confirm an arbitration award issued

by the National Association of Securities Dealers. *Kruse*, 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.

That is hardly the case here. First, as discussed 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. So 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.[1] Moreover, Plaintiffs' pleadings set forth detailed legal and factual bases for which it seeks vacatur of the IDR determination, not nine short paragraphs containing conclusory statements 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).[2] There, the plaintiff argued that a complaint was proper when vacating an award under

[1] 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.

[2] Kaiser also cites two other cases without acknowledging that both cases are involve voluntary arbitration clauses, which is not present here. *See Garber v. Sir Speedy, Inc.* , No. CIV.A.3:96-CV-1089-P, 1996 WL 734947, at *1 (N.D. Tex. Dec. 11, 1996)(arbitration brought "[p]ursuant to an arbitration clause contained in the written franchise agreement"); *Johnson v. Drake*, No. 3:16-CV-1993-L, 2017 WL 1173275, at *1 (N.D. Tex. Mar. 30, 2017), vacated, No. 3:16-CV-1993-L,

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 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. 25 at 16-17; *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. *O.R. Sec.*, 857 F.2d at 746. 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 Plaintiffs claims, a decision that will bring clarity to providers across the country dealing with the IDR process daily.

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., Vantage Deepwater Co. v. Petrobras Am., Inc.*, 966 F.3d 361, 372-73 (5th Cir. 2020); *Hoeft v. MVL Grp., Inc.*, 343 F.3d 57, 66-67 (2d Cir. 2003); *Salzgitter Mannesmann International (USA) Inc. v. Sun Steel Company LLC*, 2022 WL 3041134, at *1 (S.D. Tex. Aug. 2, 2022). Here, as discussed below in connection with the Rule 9(b) pleading standard, key evidence is solely within Kaiser's and MET's possession.

2017 WL 7736406 (N.D. Tex. Dec. 20, 2017)("The contingency fee agreement executed between Petitioner and Respondent contains an arbitration clause.").

To date, Plaintiffs have 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 MET's application of an illegal standard after the out-of-network payment decisions had been made. Even if IDR determinations must be challenged by motion practice, Plaintiffs should be allowed discovery in support of its challenge before the Court rules on it.

II. Plaintiffs have met the required pleading standard.

Kaiser claims that "Plaintiffs provide no plausible basis for their conclusory allegation that Kaiser used actionable 'misrepresentations and undue means.'" Doc. 25 at 23. 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 Fifth Circuit have held that although "fraud" and "undue means" are not defined in section 10(a) of the FAA, the terms should be interpreted together. *Matter of Arbitration Between Trans Chem. Ltd. & China Nat. Mach. Imp. & Exp. Corp.*, 978 F. Supp. 266, 304 (S.D. Tex. 1997), *aff'd sub nom. Trans Chem. Ltd. v. China Nat. Mach. Imp. & Exp. Corp.*, 161 F.3d 314 (5th Cir. 1998) (citing *Shearson Hayden Stone, Inc. v. Liang*, 493 F. Supp. 104, 108 (N.D. Ill. 1980), *aff'd*, 653 F.2d 310 (7th Cir. 1981). 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). "If ***the facts*** pleaded in a complaint are ***peculiarly within the opposing party's knowledge***, fraud pleadings may be based on information and belief." *Tuchman v. DSC Communications Corp.*, 14

F.3d 1061, 1068 (5th Cir. 1994) (emphasis added). "[W]here allegations are based on information and belief, the complaint must [still] set forth a ***factual basis for such belief***." *U.S. ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir. 1997) (emphasis added).

Kaiser asserts that vacatur based on "undue means" requires a party to demonstrate behavior that is "'immoral if not illegal' or 'otherwise in bad faith,' such as 'bribery, undisclosed bias of an arbitrator, or willfully destroying or withholding evidence.'" Doc. 25 at 24. 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***. *Id.* at 20 ("Plaintiffs are 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 Plaintiffs' 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 Plaintiffs when it made its initial payment on the claim. *Compare* Compl. at ¶ 40 with ¶ 42. 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. ¶ 43. Third, Plaintiffs are 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*. ¶ 27. Fourth, Kaiser refused to disclose how the QPA was calculated, including the in-network rates on which the QPA listed on its EOB was based. *Id.* ¶ 6. And it never disclosed to Plaintiffs the ***second, lower*** QPA it submitted to MET. *Id.* ¶ 42. The only reason Plaintiffs learned about the second QPA is because the IDR entity happened to list it in its decision. *Id.* These facts support an allegation that MET was misled into believing that Kaiser had offered to pay more than its QPA and that Plaintiffs were duped into basing its offer and submitting briefing based on a higher QPA than the one Kaiser submitted to MET. *Id.*

Kaiser attempts to trivialize its misrepresentations as "inadvertent pre-IDR error." Doc. 25 at 24. But this is the pleading stage, and the Court cannot adjudicate the facts or Kaiser's intent based on its lawyers' briefing seeking dismissal. *See Russell v. Harris County, Texas*, 500 F. Supp. 3d 577, 610 (S.D. Tex. 2020) (holding that resolution of "critical factual disputes" is not appropriate at the motion to dismiss stage); *G& G Closed-Circuit Events, LLC v. Houston Hobby Investments, Inc.*, 59 F. Supp. 3d 781, 784 (same). 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 be ascertained only after discovery. Kaiser's self-serving, unsupported statements regarding its misrepresentations should be disregarded at this stage of litigation.

Plaintiffs have 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 Plaintiffs believe Kaiser has engaged in misrepresentations and fraudulent behavior.[3]

While Plaintiffs ultimately bear 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***." *Householder Group v. Caughran*, 354 Fed. App'x. 848, 852 (5th Cir. 2009) (emphasis added). Even if the burden of proof for vacating an arbitration award based on alleged bias is "heavy," as Kaiser claims, it would not be appropriate to resolve Plaintiffs' claim of evident partiality at this stage. Plaintiffs have 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 select the person who makes the IDR decision, Plaintiffs should be afforded the opportunity to conduct discovery in support of its claim.

IV. MET revealed evident partiality, committed prejudicial misbehavior and exceed 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

[3] 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. 25 at 14, 19. As it very well knows, Kaiser's bald assertion that "Plaintiffs chose not to conduct any pre-suit investigation because it is not actually interested in addressing Kaiser's typographical error. . . " is patently false. Doc. 25 at 20. Plaintiffs have asked how Kaiser calculates its QPA, but have 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.

presumption with credible evidence. Compl. ¶ 30. The courts in *Texas Med. Association, et al. v. United States Department of Health and Human Services, et al.*, 587 F. Supp. 3d 528 (E.D. Tex. 2022) ("TMA") and *LifeNet, Inc. v. United States Department of Health and Human Services, et al.*, Case No. 6:22-cv-162-JDK, 2022 WL 2959715 (E.D. Tex. July 26, 2022) ("LifeNet") invalidated this "thumb on the scale" approach. Plaintiffs contend that MET applied this rebuttable presumption in favor of the QPA submitted by Kaiser.

Kaiser argues (without any evidence) that MET did not apply this presumption, but that even if it did, that is still not grounds for vacatur under the NSA. Doc. 25 at 22. Kaiser is wrong on both counts.

A. MET applied an illegal presumption.

The IDR Determination letters that Kaiser attaches to its request for judicial notice clearly demonstrate that MET applied the illegal "thumb on the scale" approach invalidated by the courts in *TMA* and *LifeNet*. As Plaintiffs stated in their complaint, five of the six letters expressly state that an illegal presumption was applied. In particular, the MET reviewer repeated verbatim the following in its determinations:

> [Plaintiff]'s submission has been considered carefully. However, [Plaintiff] has not "***clearly demonstrated that the qualifying payment amount is materially different from the appropriate out-of-network rate***." 29 Code of Federal Regulations 2590.716-8(c)(4)(iii)(C). (emphasis added).

Compl. at ¶ 48. MET cited and applied the exact regulation that was invalidated in *TMA* and the standard that was ruled illegal to apply to air ambulance claims in *LifeNet*. *See Tex. Med. Ass'n*, 587 F. Supp. 3d at 549 (ordering that "the following provisions of the Rule are VACATED: . . . the final sentence of 29 C.F.R. § 2590.716-8(c)(4)(iii)(C)"); *Lifenet Inc.*, 2022 WL 2959715 at *10 (E.D. Tex., June 26, 2022) (vacating the requirement that information submitted by an air ambulance company "demonstrate that the qualifying payment amount is materially different from

the appropriate out-of-network rate"). In other words, MET held Plaintiffs to an illegal burden of proof and, unsurprisingly, selected Kaiser's (purported) QPA as the payment amount. As the Court in *TMA* explained, such a rule "places its thumb on the scale for the QPA, requiring arbitrators to presume the correctness of the QPA and then imposing a heightened burden on the remaining statutory factors to overcome that presumption." *Tex. Med. Ass'n* 587 F. Supp. 3d at 542. This rule "treats the QPA—an insurer-determined number—as the default payment amount and imposes on any provider attempting to show otherwise a heightened burden of proof that appears nowhere in the [NSA]." *Id.* at 543. Indeed, it is so clear that application of this illegal standard will result in lower payment determinations that the Departments themselves argued in *TMA* that *vacating* the rule "would result in higher reimbursement payments to providers." *Id.* This lawsuit concerns six examples of lower payment determinations when the illegal rule is applied.

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

Kaiser argues that "[e]ven assuming MET purportedly applied an 'illegal presumption,' the misapplication of the law is still not a valid basis for vacating the arbitration award." Doc. 25 at 23. This is not a mere "misapplication" of the law or "legal error." Just like an arbitrator's power is limited by the parties' agreement, an IDR entity's power is limited by the terms of the NSA, including its rules on how to adjudicate IDR disputes.

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). And, as the Fifth Circuit explains, "'arbitral action contrary to express contractual provisions will not be respected' on judicial review." *Executone Info. Sys., Inc. v. Davis*, 26 F.3d 1314, 1325 (5th Cir. 1994) (citing *Delta Queen Steamboat Co. v. District 2 Marine Eng'rs Beneficial Ass'n*, 889 F.2d 599, 604 (5th Cir. 1989), cert. denied, 498 U.S. 853 (1990).

As discussed above, in IDR proceedings, there is no arbitration agreement. Instead, the IDR entity's authority derives from the NSA. 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. But 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. Here, too, MET applied the wrong rules (an illegal presumption) to the parties' dispute and its award should be vacated.

MET 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. ¶ 52. Plaintiffs have 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. 25 at 25. But Kaiser confuses the issues. Plaintiffs offer 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 Plaintiffs would never see.

Kaiser contends that even if it calculated the QPA fraudulently, this Court "is not responsible for assessing the accuracy of Kaiser's QPA calculation or methodology." *Id.*at 24. 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.'" *Id.*

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.

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

This informal guidance merely encourages 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 when there is no requirement there will be any investigation or enforcement at all. All the while, Kaiser can continue submitting different QPAs to IDR entities than it submits 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 result. Kaiser's motion to dismiss should be denied and this matter should proceed to discovery.

VI. Kaiser's Motion to Strike is premature.

Finally, Kaiser asks this Court to strike Plaintiffs' request for attorney's 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). Plaintiffs' 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 Plaintiffs' claims.

CONCLUSION

For all these reasons, Plaintiffs asks this Court to deny Kaiser's Motion to Dismiss and Motion to Strike. Should the Court grant the Motion to Dismiss, Plaintiffs request that the dismissal be without prejudice and that it be granted an opportunity to amend.

Dated: February 21, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 21, 2023, a true and correct copy of the foregoing was served via the Court's ECF system on all counsel of record.

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