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 MOTION TO DISMISS PLAINTIFF'S COMPLAINT AND STRIKE PLAINTIFF'S CLAIM FOR ATTORNEY'S FEES

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KAISER'S MOTION TO DISMISS COMPLAINT AND STRIKE PLAINTIFF'S CLAIM FOR ATTORNEY'S FEES

Defendant Kaiser Foundation Health Plan, Inc. ("Kaiser") moves to dismiss Plaintiff REACH Air Medical Services, LLC's Complaint, for failure to state a claim upon which relief can be granted. Kaiser also moves to strike REACH's claim for attorney's fees on the ground that REACH has no basis for such a claim.

I. INTRODUCTION

REACH's complaint should be dismissed with prejudice because it is an improper attempt to topple the independent arbitration process implemented under the No Surprises Act ("NSA") and its core purpose of providing an efficient means for dispute resolution. Congress enacted the NSA to end "surprise billing"—a practice where providers sent "surprise" bills to health plan members to extract above-market payments from their health plans. The NSA established an independent dispute resolution ("IDR") process to resolve payment disputes between out-of-network providers and health plans in an efficient, streamlined, and low-cost manner. To maximize this goal of efficiency, the NSA expressly incorporates the highly limited standards of judicial review under the Federal Arbitration Act ("FAA"), which provides only four narrow exceptions for reviewing an arbitration decision. 42 U.S.C. § 300gg-111(c)(5)(E)(i). None applies here.

REACH and its affiliates (represented by the same plaintiff's firm) filed this and other cases against various health plans and IDR arbitrators challenging unfavorable arbitration decisions. In ***every one*** of these cases, REACH and its affiliates assert identical theories. Each lawsuit repeats the same copy-and-paste legal challenge criticizing the substance of the NSA, accuses the health plan of securing the arbitration decision "through undue means and misrepresentations" and "bad faith," without factual support, and characterizes the IDR arbitrator as "partial," again without facts to demonstrate its supposed bias. In addition, each lawsuit attempts to litigate the health plan's calculation of its median contracted rates ("qualifying payment amount" or "QPA")—which an IDR arbitrator is not even permitted to decide in the arbitration, and is instead overseen by the Centers for Medicare & Medicaid Services ("CMS"). In all these cases, REACH seeks vacatur of the arbitration award based on the alleged misconduct of the health plan and the IDR arbitrator. There is no basis in law or fact for vacatur.

As an initial matter, the complaint should be dismissed because it is procedurally defective. The FAA clearly requires a party who seeks to challenge an arbitration award to file a ***motion to vacate*** rather than a complaint—but REACH ignored this express requirement and instead filed a complaint wholly unsupported by evidence. On the allegations, the complaint is equally defective: REACH fails to show or sufficiently allege corruption, fraud, or undue means. When a plaintiff's

claims sound in fraud, the complaint must satisfy the heightened pleading requirements of Rule 9(b)—describing ***with particularity*** the circumstances of the fraud. REACH's complaint is devoid of allegations meeting this exacting standard. Moreover, REACH fails to demonstrate that any of the FAA's four narrow exceptions for vacatur of an arbitration award applies warranting court review. Finally, none of REACH's attempts to assail the arbitrator or its decision are a valid basis to vacate the IDR's arbitration award. A court may only disturb an arbitration award if the result was "egregious"—which REACH has not demonstrated. *Wallace v. Civil Aeronautics Bd.*, 755 F.2d 861, 863 (11th Cir. 1985).

Finality is arbitration's essential virtue. "If parties could take full-bore legal and evidentiary appeals, arbitration would become merely a prelude to a more cumbersome and time-consuming judicial review process." *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 588 (2008). REACH cannot overturn IDR arbitration decisions by parroting ominous legal conclusions with only cursory facts as support. This Court should reject REACH's attempt to rewrite statute.

II. BACKGROUND

A. The Parties.

REACH is a corporation that provides air ambulance services throughout the country. Compl. ¶ 7. Kaiser is a non-profit public health plan that provides comprehensive medical, surgical, and hospital services to its members. *Id.* ¶ 8; *U.S.*

v. Basye, 410 U.S. 441, 443 (1973). C2C is a medical appeals company that also serves as an IDR arbitrator in disputes under the NSA. Compl. ¶ 17.

B. The NSA and IDR Dispute Process.

1. Background of the NSA.

For services where patients cannot choose the provider in advance—like emergency air ambulance services—providers lack the incentive to enter negotiated contracts to join health plans' networks. H.R. REP. NO. 116-615, pt. I, at 53 (Dec. 2, 2020). By remaining "out-of-network," these providers can charge "highly inflated payment rates." *Id.* And before the NSA, if health plans did not pay the inflated charges in full, the provider could bill the patient directly for any remaining amounts not paid by the health plan through what is called a "surprise" or "balance" bill. *Id.* at 51; 86 Fed. Reg. 36,872, 36,874 (July 13, 2021). The threat of surprise bills enabled providers to coerce carriers to pay above-market rates for services, or risk members being dragged into billing disputes at tremendous individual expense. *Id.* at 36,874, 36,924 & n.130.

Congress enacted the NSA to address this "market failure" enabling providers to extract extortionate rates. H.R. REP. NO. 116-615, pt. I, at 53. The NSA prohibits providers from attempting to collect billed charges not paid by the health plan from patients. 42 U.S.C. § 300gg-135. Any remaining disputes between health plans and

providers must be resolved via the IDR arbitration process created by Congress, pursuant to 42 U.S.C. § 300gg-112.

2. The IDR arbitration process.

Under the NSA, the health plan must first either pay or deny the claim within 30 calendar days of bill transmittal. 42 U.S.C. § 300gg-112(a)(3)(A-B). Upon payment, the provider has 30 days to initiate the "open negotiation period" to informally resolve the claim. *Id.* § (b)(1)(A). If negotiations fail, the provider may initiate IDR arbitration. *Id.* § (b)(1)(B). If arbitration is initiated, the parties each submit a proposed offer for payment of the services at issue. *Id.* § (b)(5)(B)(i)(I). The IDR arbitrator—who as REACH admits is often randomly appointed—then selects between the offers to determine the payment amount (i.e., "baseball-style" arbitration). *Id.* § (b)(5)(C)(i)(I-II); Compl. ¶ 41. Neither party has a right to discover any of the confidential materials submitted by the opposing party in support of its offer. *Id.* ¶ 18.

The IDR arbitrator is required to consider the health plan's "qualifying payment amount"—generally the median of the health plan's contracted rates—when selecting between offers. 42 U.S.C. § 300gg-112(b)(5)(C)(i)(I). Though the IDR arbitrator must consider this information, a health plan need not reimburse at its QPA rate, or offer an amount equal to its QPA in the IDR arbitration. *Id.* Thus,

a health plan may choose to pay a provider at, above, or below its QPA rate, or ignore it entirely—a fact that even REACH acknowledges. Compl. ¶ 15.

Taking the allegations in REACH's affiliate lawsuits as true, plans reimburse providers well below their QPA rate. *Med-Trans Corp. v. Capital Health Plan et al.*, 3:22-cv-1077 (M.D. Fla.) (Dkt. No. 1, ¶ 4) (alleging the health plan paid **59%** of its QPA). Comparatively, as identified by the IDR arbitrator, Kaiser paid 163% of its QPA for code A0431 (pickup), and 114% of its QPA for code A0436 (mileage). Request for Judicial Notice ("RJN"), Exh. A; *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1278 (11th Cir. 1999) (holding that court may take judicial notice of certain facts without converting a motion to dismiss into a motion for summary judgment). Kaiser also paid more per mile than any of the other plans REACH and its affiliates attack in their related lawsuits,[1] and was the only health plan to pay more than 100% of its QPA rate.[2] REACH and its affiliates tacitly acknowledge this: while REACH labels the payments at issue in its other lawsuits as "improbably low," they do not

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[1] Compl. ¶¶ 1, 28, 34 *and* RJN, Exh. A; *cf. Med-Trans v. Capital Health Plan et al. ("Capital Health")*, 3:22-cv-1077 (M.D. Fla.) (Dkt. No. 1, ¶¶ 1, 28) (alleging Capital Health paid $16,361.54 for a **238**-mile trip, versus Kaiser's $24,813.48 for an **80**-mile trip); *Med-Trans v. Blue Cross and Blue Shield of Florida et al. ("Blue Cross")*, 3:22-cv-01139 (M.D. Fla.) (Dkt. No. 1, ¶ 43) (alleging Blue Cross paid **$77.39** per mile versus Kaiser's **$100.40** per mile); *Guardian Flight LLC v. Aetna Health Inc. et al. ("Aetna")*, 4:22-cv-03805 (S.D. Tex.) (Dkt. No. 1, ¶¶ 28, 33) (alleging Aetna paid **$85.04** per mile versus Kaiser's **$100.40** per mile).

[2] Compl. ¶¶ 28, 34 *and* RJN, Exh. A (recognizing that Kaiser paid **163%** of its QPA for code A0431 (pickup), and **114%** of its QPA for code A0436 (mileage); *cf. Capital Health* (Dkt. No. 1, ¶ 4) (alleging Capital paid **59%** of its QPA rate); *Blue Cross* (Dkt. No. 1, ¶ 4) (alleging Blue Cross paid **100%** of its QPA rate); *Aetna* (Dkt. No. 1, ¶ 4) (alleging Aetna paid **100%** of its QPA rate).

make that same accusation about Kaiser's payment.[3]

3. The IDR process is designed for *efficiency* and *finality*.

Congress specifically designed the IDR process to provide for an "efficien[t]" and streamlined means of dispute resolution at a "minimal cost[.]" 42 U.S.C. § 300gg-111(c)(3)(A); *id.* § 300gg-111(c)(4)(E); *see also* H.R. REP. NO. 116-615, at 48, 58 (IDR process is structured "to reduce costs for patients and prevent inflationary effects on health care costs"); 86 Fed. Reg. 55,980, 55,996, 56,001 (Oct. 7, 2021) (emphasizing the importance of "efficiency," "predictability," and "streamlining" in IDR process); *Haller v. U.S. Dep't of Health & Hum. Servs.*, 2022 WL 3228262, at *7 (E.D.N.Y. Aug. 10, 2022) (noting that Congress devised the IDR process as an "expert and inexpensive method" for resolving disputes).

To advance this goal, payment amounts are determined on the papers on a condensed timeline, rather than through a lengthy and expensive trial subject to the federal rules. *See* 42 U.S.C. § 300gg-111(c)(5); 42 U.S.C. § 300gg-111(b)(5). For the same reasons, Congress expressly incorporated the FAA's narrow standards of judicial review into the NSA. 42 U.S.C. § 300gg-111(c)(5)(E)(i)(II). The purpose of the FAA is "to relieve congestion in the courts" and to provide a "speedier and less costly" litigation alternative. *O.R. Securities, Inc. v. Prof'l Planning Assocs.*,

[3] *See Blue Cross* (Dkt. No. 1, ¶ 42); *Aetna* (Dkt. No. 1, ¶¶ 27, 32).

Inc., 857 F.2d 742, 745 (11th Cir. 1988). The FAA's limitation on judicial review is central to arbitration's "essential virtue of resolving disputes straightaway"—except in the most extreme circumstances. *Hall St.*, 552 U.S. at 588.

Post-implementation of the NSA, efficiency has become more critical than ever. Although the promulgating Departments[4] initially estimated that at least 50 IDR arbitrators would seek certification, today, less than 11 IDR arbitrators are accepting new disputes. 86 Fed. Reg. 56,052 (Oct. 7, 2021); Compl. ¶ 2. Meanwhile, the number of IDR arbitrations continues to rise—for example, 71,915 disputes were filed in the third quarter of 2022 alone. RJN, Exh. B.

C. REACH's Complaint.

Dissatisfied with its losses in IDR arbitrations, REACH and its affiliate entities filed several virtually identical lawsuits against health plans and IDR arbitrators challenging IDR decisions in the health plan's favor. Every one of these lawsuits inserts the same baseless copy-and-paste allegations: (1) accusing the health plan of securing the arbitration decision "through undue means and misrepresentations" and "bad faith" without factual support;[5] (2) characterizing the

[4] Department of Health and Human Services ("HHS"), the Department of Labor ("DOL"), and the Department of the Treasury, collectively, the "Departments."

[5] Compl. ¶ 37; *cf. Capital Health* (Dkt. No. 1, ¶ 36); *Blue Cross* (Dkt. No. 1, ¶ 45); *Aetna* (Dkt. No. 1, ¶ 35).

IDR arbitrator as "partial[]" without facts to demonstrate its supposed bias;[6] and (3) attempting to litigate the health plan's QPA calculation,[7] which an IDR arbitrator is not even permitted to decide in an IDR dispute. 87 Fed. Reg. 52,618, 52627 n.31 (Aug. 26, 2022); 5 C.F.R. § 890.114. REACH and its affiliates are the *only* providers trying to challenge IDR arbitration decisions in federal court.

III. LEGAL STANDARD

IDR arbitration determinations "***shall not*** be subject to review" unless one of the FAA's four narrow exceptions applies. 42 U.S.C. § 300gg-111(c)(5)(E)(i) (emphasis added). These four limited bases are:

> (1) where the award was procured by corruption, fraud, or undue means;[8]
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> 4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

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[6] Compl. ¶ 38; *cf. Capital Health* (Dkt. No. 1, ¶ 37); *Blue Cross* (Dkt. No. 1, ¶ 46); *Aetna* (Dkt. No. 1, ¶ 36).

[7] *Supra* n.4.

[8] It appears this factor is the only basis for reviewability that does not exclusively relate to an arbitrator.

9 U.S.C. § 10(a)(1–4). The FAA "imposes a heavy presumption in favor of confirming arbitration awards." *Cat Charter, LLC v. Schurtenberger*, 646 F.3d 836, 842 (11th Cir. 2011). Indeed, "judicial review of arbitration decisions 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). An arbitrator's error does not warrant vacatur, unless such error was "egregious[.]" *Wallace v. Civil Aeronautics Bd.*, 755 F.2d 861, 863 (11th Cir. 1985). As the party seeking to vacate the IDR award, REACH carries the heavy burden to establish the existence of a specific statutory ground for vacatur. *See Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217, 1223 (11th Cir. 2000).

In its complaint, REACH appears to rely on all four of the bases for vacatur under FAA § 10(a). Compl. ¶ 36. Each of these statutory bases (along with other non-statutory grounds) fail, and the complaint should be dismissed with prejudice.

IV. ARGUMENT

A. The complaint is procedurally defective.

As an initial matter, the complaint should be dismissed because it is procedurally defective. The FAA clearly requires that a party who seeks to challenge an arbitration award to file a ***motion to vacate*** rather than a complaint. 9 U.S.C. § 6 ("[a]ny application to the court hereunder shall be made and heard in the manner provided by law ***for the making and hearing of motions*** . . . .") (emphasis added).

Where a statute is "clear and unambiguous . . . that is the end of the matter, for the court . . . must give effect to the unambiguously expressed intent of Congress." *Sullivan v. Stroop*, 496 U.S. 478, 482 (1990). Moreover, the ***motion*** must be supported by evidence—not just allegations—demonstrating one of the four bases for vacatur set forth in 9 U.S.C. § 10(a)(1–4). *See Nordahl Dev. Corp. v. Salomon Smith Barney,* 309 F. Supp. 2d 1257, 1270 (D. Or. 2004) (denying plaintiff's motion to vacate as lacking evidence justifying vacatur, and granting leave to amend *only* if plaintiff could, in good faith, "allege facts sufficient to indicate [defendant's] alleged falsehoods . . . ."). Here, REACH's complaint fails to comply with the FAA. REACH filed a complaint, not a motion to vacate, which is "***required*** in order to preserve the proper function of arbitration . . . ." *Kruse v. Sands Bros. & Co., Ltd.*, 226 F. Supp. 2d 484, 487 (S.D.N.Y. 2002) (emphasis added). REACH also failed to submit any evidence to support its complaint. Because REACH failed to comply with the FAA's mandatory requirements, under the plain text of the FAA, the Court must dismiss its complaint. *Id. Kruse* is instructive. There, the Court dismissed a petition to vacate under the FAA because it was filed as a complaint instead of a motion, containing only "conclusory statements . . . devoid of any argument or legal or factual support." *Id.* at 487. The Court further found that petitioner could not file a motion to vacate because the three-month filing period had lapsed, and therefore the petitioner "lost the opportunity to make such a Motion." *Id.* The same is true

here. REACH's failure to timely file a motion, and include any evidence to support its allegations, warrant dismissal with prejudice.[9]

Requiring REACH to comply with the mandatory requirements of the FAA is not a matter of elevating form over substance. The Eleventh Circuit has emphasized that "[t]he manner in which an action to vacate an arbitration award is made is obviously important, for the nature of the proceeding affects the burdens of the various parties [and] the rule of decision to be applied by the district court." *O.R. Secs., Inc.*, 857 F.2d at 745. If brought in the form of a complaint, "the burden of dismissing the complaint would be on the party defending the arbitration award." *Id.* And "[i]f the defending party did not prevail on its motion to dismiss, the proceeding to vacate the arbitration award would develop into full scale litigation, with the attendant discovery, motions, and perhaps trial." *Id.* The Eleventh Circuit has rejected the approach used by REACH because it remains the moving party that bears "the burden to set forth sufficient grounds to vacate the arbitration award in his moving papers." *Id.* at 748. This principle is paramount to upholding "basic principles of fairness." *Kruse*, 226 F. Supp. 2d at 487.

[9] Moreover, it is now too late for REACH to submit evidence in support of a motion to vacate. Under the FAA, the motion to vacate with supporting evidence must be filed within three months after the arbitration award is filed or delivered. 9 U.S.C. § 12. Here, the arbitration award is dated September 12, 2022, which is more than three months ago.

B. REACH fails to allege corruption, fraud, or undue means.

REACH provides no plausible basis for its conclusory allegation that Kaiser used actionable "misrepresentations and undue means." Compl. ¶ 43.

1. Rule 9(b)'s heightened pleading standard applies.

REACH alleges—***on information and belief***—that Kaiser secured the IDR arbitration through "undue means." Compl. ¶¶ 1, 35, 37, 43. When a plaintiff's claims sound in fraud, the plaintiff must satisfy the heightened pleading requirements of Rule 9(b), which requires "a party [to] state ***with particularity*** the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b) (emphasis added). This standard applies to all averments of fraud, whether they are part of a claim of fraud or not. *Wagner v. First Horizon Pharm. Corp.*, 464 F.3d 1273, 1278 (11th Cir. 2006) (holding plaintiffs must plead non-fraud claims with particularity when those claims are based on defendants' fraudulent conduct); *Paladin Shipping Co. v. Star Cap. Fund, LLC*, 2014 WL 12684999, at *2 (S.D. Fla. Nov. 26, 2014). Thus, REACH's allegations of fraud must meet Rule 9(b)'s heightened pleading standard. *SanMartino v. Toll Bros., Inc.*, 2010 WL 11693556, at *6 (D.R.I. Mar. 16, 2010) (applying Rule 9(b)'s heightened standard where the plaintiff sought to vacate arbitration award under 9 U.S.C. § 10(a)(1)).

Rule 9(b) "requires a complaint to set forth (1) precisely what statements or omissions were made in which documents or oral representations; (2) the time and

place of each such statement and the person responsible for making (or, in the case of omissions, not making) them; (3) the content of such statements and the manner in which they misled the plaintiff; and (4) what the defendant obtained as a consequence of the fraud." *FindWhat Inv. Grp. v. FindWhat.com*, 658 F.3d 1282, 1296 (11th Cir. 2011). REACH must provide the "the who, what, when, where, and how of the allegedly false statements." *Mizzaro v. Home Depot, Inc.*, 544 F.3d 1230, 1237 (11th Cir. 2008). Failure to satisfy Rule 9(b) warrants dismissal. *Hopper v. Solvay Pharms., Inc.*, 588 F.3d 1318, 1325 (11th Cir. 2009).

2. REACH's allegations fail to satisfy Rule 9(b).

REACH's allegations that Kaiser used "undue means" to prevail in arbitration cannot withstand a motion to dismiss. To vacate an arbitration award based on this theory, 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), *aff'd sub nom. Floridians for Solar Choice, Inc. v. Paparella*, 802 F. App'x 519 (11th Cir. 2020) (emphasis added). None of REACH's allegations come close to meeting this high standard.

First, REACH alleges that Kaiser "secured an award through undue means and misrepresentations of fact" because the explanation of payment ("EOP") Kaiser issued to REACH for the transport stated that Kaiser allowed $24,813.48 for

REACH's services, and equated the allowed amount to Kaiser's QPA. Compl. ¶ 28. This allegation does not amount to "bribery, corruption, or physical threat[.]" *Floridians for Solar Choice,* 314 F. Supp. 3d 1346 at 1355. At most, it describes an inadvertent error. But an inadvertent error does not equate to fraud. *U.S. ex rel. Digital Healthcare, Inc. v. Affiliated Computer Servs.*, 778 F. Supp. 2d 37, 50 (D.D.C. 2011) (recognizing the difference between "inadvertent errors" and 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 inauthenticity—that suggest carelessness or haste"); *In re Med/Waste, Inc.*, 2000 WL 34241099, at *8 (S.D. Fla. Aug. 30, 2000) (granting motion to dismiss because allegation of accounting errors—even serious ones—are not sufficient to plead fraud).

Further, REACH's quibble with Kaiser's above-QPA reimbursement also does nothing to support its case. As REACH admits, health plans need not reimburse providers—or submit offers—at their QPA rate. *See* Compl. ¶ 15. The QPA is simply a data point that IDR arbitrators consider when determining an appropriate payment amount. 42 U.S.C. § 300gg-112(b)(5)(C)(i)(I). And even if Kaiser's QPA were relevant to this lawsuit, REACH and its affiliates acknowledge that Kaiser is the only health plan that pays more than 100% of its QPA for ambulance transports,

supra n.2. Thus, it does not help REACH that Kaiser paid more than its QPA when it reimbursed REACH.

Next, without ***any*** facts, REACH alleges that Kaiser's allowed amount and QPA are lower than amounts unnamed payors reimbursed providers for out-of-network services before the NSA. Compl. ¶ 32. This allegation is irrelevant. Because of the highly coercive nature of the pre-2022 air ambulance market, Congress instructed IDR arbitrators to consider a health plan's ***contracted*** rates when selecting between the parties' offers in IDR arbitration, not the ***out-of-network*** payments that providers often strong-armed health plans into paying before the NSA. 42 U.S.C. § 300gg-111(a)(3)(E)(i)(l). Nothing in the Act requires Kaiser to reimburse providers in accordance with pre-2022 ***out-of-network*** rates. *Id.* Finally—and most importantly—it is not the court's role to determine whether Kaiser's reimbursement amount is too low or too high. A court assesses whether Kaiser's actions amount to "bribery, corruption, or physical threat to [the] arbitrator." *Floridians for Solar Choice,* 314 F. Supp. 3d 1346 at 1355. REACH's dissatisfaction with Kaiser's reimbursement amount does not meet this standard.

REACH also alleges—again, without ***any*** facts—that "certain" unnamed payors "are not properly calculating the QPA." Compl. ¶ 31. As a preliminary matter, REACH relies on speculation, not any facts showing Kaiser's QPA was not calculated properly under federal law. In any event, as a matter of law, it is not the

court's role—nor the role of the IDR arbitrator—to assess whether Kaiser (or any other health plan) properly calculated its QPA. 87 Fed. Reg. at 52627 n.31; 5 C.F.R. § 890.114. REACH is attempting to litigate an issue that not even an IDR arbitrator can consider, let alone this court.

In sum, REACH fails to sufficiently plead fraud, undue means, and misrepresentation. Indeed, Rule 9(b) is meant to discourage the "sue first, ask questions later approach" that REACH uses here. *Casey v. Fla. Coastal Sch. of L., Inc.*, 2015 WL 10096084, at *9 (M.D. Fla. Aug. 11, 2015), *report and recommendation adopted*, 2015 WL 10818746 (M.D. Fla. Sept. 29, 2015). REACH chose not to conduct any pre-suit investigation because it is not actually interested in addressing Kaiser's mistake—but seeks to use that mistake to create extra-statutory exceptions to the Act's narrow bases for appeal. Rule 9(b) forbids REACH's scheme.

3. REACH's claims also fail under Rule 8.

REACH's allegations also fail under Rule 8. Rule 8(a) requires "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Facial plausibility means enough "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). But when "the well-pleaded facts do not permit the court to infer more than the mere *possibility* of

misconduct, the complaint . . . has not shown that the pleader is entitled to relief." *Ashcroft v. Iqbal,* 556 U.S. 662, 679 (2009). Therefore, where the allegations of a complaint have a "more likely explanation[]," they do not "plausibly establish" a plaintiff's theory. *Ashcroft,* 556 U.S. at 681.

Here, there is indeed a far "more likely explanation[]"—that Kaiser paid the claim at issue *above* its QPA, just as C2C acknowledged and as Kaiser is permitted to do under the NSA. *See id.*; *see also* Compl. ¶¶ 28, 30; *and* RJN, Exh. A. Thus, the complaint does not "plausibly establish" a supposed "scheme" by Kaiser to mislead the arbitrator and prevail in IDR. *Ashcroft*, 556 U.S. at 681; Compl. ¶ 35. Instead, it demonstrates REACH's opportunistic "sue first, ask questions later" approach admonished by courts. *See Casey*, 2015 WL 10096084, at *9.

C. REACH's unsupported assertion that C2C is "partial" is an insufficient basis for vacatur.

REACH's conclusory allegations that that C2C is "partial[]" do not warrant vacatur under FAA § 10(a)(2). Compl. ¶¶ 38, 43. The FAA presumes that arbitration awards will be confirmed, and as a result "the evident partiality exception is to be strictly construed" and the "alleged partiality must be direct, definite and capable of demonstration rather than remote, uncertain and speculative." *Gianelli Money Purchase Plan & Tr. v. ADM Investor Servs., Inc.*, 146 F.3d 1309, 1312 (11th Cir. 1998). "[T]he mere appearance of bias or partiality is not enough to set aside an arbitration award." *Lifecare Int'l, Inc. v. CD Med., Inc.*, 68 F.3d 439, 433 (11th

Cir. 1995).

In the Eleventh Circuit, "an arbitration award may be vacated due to the "evident partiality" of an arbitrator only when either (1) an actual conflict exists, or (2) the arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that a potential conflict exists." *Gianelli*, 145 F.3d at 1312. "The burden of demonstrating facts which would establish a reasonable impression of partiality is on the party challenging the award." *Austin S. I, Ltd. v. Barton-Malow Co.*, 799 F. Supp. 1135, 1142 (M.D. Fla. 1992). This burden is "heavy"—the moving party must "demonstrate that the arbitrator had a personal interest in the proceedings, whether pecuniary or otherwise, which would have biased his or her judgment in the proceedings." *Id.*

REACH alleges that "C2C revealed evident partiality, committed prejudicial misbehavior, and exceeded its powers by using an illegal presumption in favor of the undisclosed QPA." *Id.* ¶ 38. This allegation does not justify vacatur. REACH does not allege a single fact that goes to either basis for vacating an arbitration award. REACH's single allegation to demonstrate partiality is that C2C applied an improper presumption, but that allegation does not constitute direct, definite, and demonstrable evidence of an "actual conflict" or nondisclosure of "information which would lead a reasonable person to believe that a potential conflict exists." 9 U.S.C. § 10(a)(2).

Moreover, as discussed below (*see* Sect. II(D)), even a cursory evaluation of the pertinent regulations and C2C's decision demonstrates that C2C did not apply any illegal presumption. At most, REACH's unsupported claim would connote an incorrect legal conclusion, which "is not grounds for vacating or modifying the award." *White Springs Agric. Chemicals*, 660 F.3d at 1280.

D. C2C's alleged application of an improper presumption is not a proper basis for vacatur.

REACH further alleges that C2C applied an "illegal presumption in favor of the QPA," apparently as a basis to seek vacatur under FAA § 10(a)(3) or (4) Compl. ¶¶ 23–25, 32, 34. REACH asserts that because a health plan's QPA is based on contracts with providers that are dissimilar to REACH, IDR arbitrators should ignore the contracts. *Id.* ¶ 24 n.4.

As an initial matter, REACH misstates the law related to use of the QPA in IDR determinations. IDR arbitrators must "select the offer that best represents the value of the item or service under dispute" based on "all permissible information." 87 Fed. Reg. at 52,628. The scope of permissible information specifically includes the QPA. *Id.* ("[I]t will often be the case that the QPA represents an appropriate out-of-network rate, as the QPA is largely informed by similar information to what would be provided as information in support of the additional statutory circumstances."). REACH's characterization of the QPA as having "little relevance" thus grossly misinterprets the statute. Compl. ¶ 24.

C2C's award shows that it selected the offer best representing the value of the services at issue after considering the parties' evidence, exactly as directed by statute. Indeed, far from rejecting REACH's evidence, C2C specifically acknowledged the evidence submitted by both parties, and concluded that Kaiser's offer "represent[ed] the value of the services at issue." RJN, Exh. A. Tellingly, REACH omitted this language when (partially) quoting the award. Compl. ¶ 34.

Even assuming C2C purportedly applied an "illegal presumption" (it did not), the misapplication of the law is still not a valid basis for vacating the arbitration award. The well-settled law of this circuit provides that in reviewing arbitration awards, even an "incorrect legal conclusion is not grounds for vacating or modifying the award." *White Springs Agric. Chemicals, Inc.*, 660 F.3d at 1280. Nor is an arbitrator's "manifest disregard of the law" enough to vacate. *Frazier v. CitiFinancial Corp., LLC*, 604 F.3d 1313, 1323 (11th Cir. 2010). Importantly, it is not the role of the court to weigh the evidence before the arbitrator. *See Wiand v. Schneiderman*, 778 F.3d 917, 926 (11th Cir. 2015) (finding the "entire argument for vacatur is based on the weight of the evidence presented, [which] is simply beyond this court's—or the district court's—power to review"). Thus, even if C2C had applied an impermissible presumption or applied undue weight to any factor (it did neither), ***at most***, all that occurred was an error of law, which does not warrant vacatur.

Finally, it is not for the courts (or even the arbitrator) to assess the health plan's QPA methodology. REACH alleges on "information and belief," that Kaiser miscalculated its QPA. Compl. ¶ 37. But as the department has made clear in its final rules, it is not arbitrator's role to determine or police QPA calculations:

> To the extent there is a question whether a plan . . . has complied with the July 2021 interim final rules' requirements10 for calculating the QPA, ***it is the Departments' (or applicable State authorities') responsibility, not the certified IDR [arbitrator],*** to monitor the accuracy of the plan's . . . QPA calculation methodology by conducting an audit . . . .

87 Fed. Reg. at 52,627 n.31 (emphasis added); 5 C.F.R. § 890.114. It follows that this court, likewise, is not responsible for assessing the accuracy of Kaiser's QPA calculation or methodology. That responsibility rests exclusively with "the Departments" or "applicable State authorities." *Id.* REACH's allegations regarding Kaiser's underlying QPA calculation are neither a question for the court to decide nor a basis vacate the IDR award.

E. Allegations of pre-NSA market data do not justify vacatur.

REACH complains that Kaiser's allowed amount and QPA are below the out-of-network market average rate for 2019 air ambulance trips, and that Kaiser intentionally reduced reimbursement amounts after the NSA prevented air ambulance companies from balance billing patients. Compl. ¶¶ 32, 33. REACH alleges that this shows Kaiser pays "far below reasonable market rates." *Id.* ¶¶ 29,

32, 33, 35. Even if accepted as true (it is not), payment below pre-NSA market rates is not a permissible factor in IDR determinations, let alone a basis for vacatur.

The NSA specifically prohibits the IDR entity from considering the amount the provider billed before the NSA went into effect. 42 U.S.C. § 300gg-112(b)(5)(C)(iii). Indeed, the very purpose of the NSA is to prevent health plans from overpaying providers and to shield plan members from egregious surprise bills. H.R. REP. NO. 116-615, pt. I, at 56 (Dec. 2, 2020). Congress specifically recognized that air ambulance providers used surprise bills to extract higher payment, and that health plans succumbed to the pressure of surprise billings to protect its members. *Id.*; 86 Fed. Reg. 36,872, 36,874 (July 13, 2021). Thus, it should come as no surprise that without the threat of surprise billing, Kaiser no longer voluntarily elects to reimburse providers at a rate that significantly exceeds the median of its in-network rates. And regardless, even an IDR arbitrator does not consider amounts paid by the health plan—but rather the health plan's QPA (and other statutory factors as appropriate)—when selecting between the parties' offers. 42 U.S.C. § 300gg-112(b)(5)(C)(i)(I–II). REACH's contentions about what it believes constitutes "market rate" bear only on the determination of the appropriate payment rate, which is not for this court to decide. *Wiand*, 778 F.3d at 926.

F. REACH has no basis to seek attorney's fees.

Kaiser requests that this Court strike REACH's demand for attorney's fees. REACH has identified no law or contract that would provide for an award of attorney's fees, because none exists. *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 382 (2013) (recognizing the principle that each party must pay their "own attorney's fees, win or lose, unless a statute or contract provides otherwise"). REACH is not entitled to the relief it seeks.

V. CONCLUSION

REACH should not be permitted to disrupt the dispute resolution process created by Congress, nor relitigate the merits of a fee dispute that has already been decided in arbitration. Kaiser asks the court to dismiss REACH's complaint with prejudice, deny the relief sought, and strike REACH's request for an award of attorney's fees.

LOCAL RULE 3.01(G) CERTIFICATION

Pursuant to Local Rule 3.01(g), the undersigned has conferred with counsel for REACH who does not consent to any of the relief requested in this motion.

Dated: January 13, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 13th day of January 2023, a true and correct copy of the above and foregoing document has been served on all counsel of record who are deemed to have consented to electronic service via the Court's CM/ECF system. All others will be served via electronic mail.

/s/ Christian E. Dodd

Christian E. Dodd