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 TO PLAINTIFF'S SUPPLEMENTAL BRIEF

On May 26, 2023, Plaintiff filed a supplemental brief addressing issues discussed during the May 16, 2023 hearing on Kaiser Foundation Health Plan, Inc.'s ("Kaiser") motion to dismiss. With the Court's leave [Dkt. 56], Kaiser now files this reply to demonstrate Plaintiff's misapplication of the *Cheminova* case cited in Kaiser's reply brief [Dkt. 45].

I. Plaintiff Mischaracterizes the Application of *Cheminova* To This Dispute.

Plaintiff ignores binding precedent demonstrating that the Federal Arbitration Act ("FAA") applies to statutorily mandated arbitrations. *See* Dkt. 45 [Kaiser's Reply]. For example, Plaintiff fails to address the numerous cases cited by Kaiser—including United States Supreme Court precedent—

demonstrating that the FAA applies in its entirety to arbitrations created by statute. Instead, Plaintiff relies on an improperly narrow reading of a single case, *Cheminova A/S v. Griffin LLC,* 182 F. Supp. 2d 68, 74 (D.D.C. 2002), to argue that the FAA does not apply to the NSA. Plaintiff is wrong.

1. Plaintiff Ignores Binding Supreme Court Precedent Showing that the FAA Applies.

The FAA applies in its entirety because courts presume that Congress intended statutorily mandated arbitration to fit within the framework of existing federal arbitration law. *See* Dkt. 45 [Kaiser's Reply], at 5. Plaintiff ignores *Thomas v. Union Carbide,* where the United States Supreme Court determined that the FAA applied to statutory arbitration created by the Federal Insecticide Fungicide and Rodenticide Act ("FIFRA")—even though FIFRA does not adopt (let alone even mention) the FAA. 473 U.S. 568, 573 (1985); *cf.* 7 U.S.C. § 136a(c)(l)(F)(iii). Plaintiff also fails to address *Spray Drift Task Force*, where a federal district court rejected a challenge to a FIFRA arbitration award because the movant failed to comply with the FAA's three-month limit for challenging an award under the FAA—again, even though FIFRA never mentions the FAA. *Spray Drift Task Force v. Burlington Bio-Med. Corp.*, 429 F. Supp. 2d 49, 50 (D.D.C. 2006).[1]

[1] Plaintiff also relies on *Skinner v. Brown*, 27 F.3d 1571 (Fed. Cir. 1994), to argue that Congress's failure to expressly incorporate a particular provision of a statute necessitates its exclusion. But that case involved a challenge to the *substance* of a benefits determination issued by the Department of Veterans Affairs (i.e.,

2. *Cheminova* Involved a Motion to Confirm an Arbitration Award.

In its supplemental brief, Plaintiff ignores the precedent above, and instead misapplies a single case—*Cheminova.* First, Plaintiff argues that because *Cheminova* involved "enforcement" of a FIFRA arbitration award (rather than a vacatur proceeding), it is inapplicable here. That is wrong. *Cheminova* clearly states that it involves "*confirmation of [a] final arbitration award*"—the same remedy that Plaintiff seeks, simply in reverse. *Cheminova,* 182 F. Supp. 2d at 71 (emphasis added). The FAA does not differentiate between the process for confirming or vacating an arbitration award. 9 U.S.C. § 12 ("*any* 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)). Plaintiff's remedy for vacatur rather than confirmation (or "enforcement," as Plaintiff characterizes it) is irrelevant. Further, the *Cheminova* court rejected as hypothetical and irrelevant the arguments that an arbitration award was unenforceable due to alleged issues relating to FIFRA's constitutionality, and ultimately granted Cheminova's application to confirm the arbitration award. *Cheminova,* 182 F. Supp. 2d at 78–80. *Cheminova* clearly involved a motion to confirm an arbitration proceeding, so this argument does not help Plaintiff.

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the amount of benefits payable to plaintiff under the Restored Entitlement Program for Survivors)—not the *process* for reviewing the benefit determination. *Id.* at 1572. Neither party in *Skinner* argued that a federal court was an improper forum to determine Plaintiff's claims according to statute. *Skinner* is thus inapposite.

3. The Structural Differences between the NSA and FIFRA Statutory Arbitration Processes Are Irrelevant.

Next, Plaintiff nitpicks the structural differences between the underlying NSA and FIFRA statutory arbitration proceedings to argue that *Cheminova* does not apply. FIFRA arbitrations appear to allow parties to conduct more extensive discovery than NSA arbitrations (at least as described in *Cheminova*), but Congress has wide latitude to structure a statutory arbitration process however it wishes. That includes the power to exclude discovery mechanisms from the statutory arbitration process whatsoever. *See Switchmen's Union of N. Am. v. Nat'l Mediation Bd.,* 320 U.S. 297, 301 (1943) ("[I]t is for Congress to determine how the rights which it creates shall be enforced."); *In re Motors Liquidation Co.*, 2010 WL 4449425 (S.D.N.Y. Oct. 29, 2010) (citing *Switchmen's* and recognizing that "where Congress creates a new statutory right, Congress has the authority to decide the method for the protection of that right."). Thus, Congress is well within its power to allow implementing agencies to prohibit parties from exchanging discovery in a statutory arbitration process that *it created*. It is irrelevant whether the specific statutory arbitration at issue in *Cheminova* allowed more. Indeed, the Departments' decision to prevent parties from exchanging discovery in IDR arbitrations certainly furthers Congress's goal of providing 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). The underlying technical differences between FIFRA and IDR arbitrations do not support Plaintiff.

4. *Thomas*, *Spray Drift*, and *Cheminova* Demonstrate that the FAA Applies in Its Entirety.

Plaintiff further argues that the court in *Cheminova* did not apply the FAA when deciding it had jurisdiction to enforce the FIFRA arbitration award, and thus *Cheminova* does not support applying the FAA in this case. Again, this argument flatly ignores numerous decisions—including a United States Supreme Court case—finding that the FAA applies in its entirety to statutory arbitration awards. *See Thomas,* 473 U.S. at 573; *Spray Drift Task Force*, 429 F. Supp. 2d at 50. Within the context of these cases, it is irrelevant whether the *Cheminova* court found it had an additional, independent reason to exercise jurisdiction over the claims at issue based on the specific language of the underlying statute. *Cheminova* does not exist in a vacuum. Plaintiff fails to address the *Cheminova* court's express recognition that "Congress intended the [statutory] arbitration scheme to fit within existing arbitration law." *Cheminova,* 182 F. Supp. 2d at 74. Read together, *Thomas, Spray Drift,* and *Cheminova* demonstrate that this Court "must assume" that the FAA applies its entirety. *Cheminova,* 182 F. Supp. 2d at 74. Plaintiff fails to demonstrate "a plain indication to the contrary" that would lead to a different result here. *Id.*

5. Plaintiff's Interpretation of the NSA Would Leave It No Remedy.

As a practical matter, if Plaintiff is correct and *only* section 10(a) of the FAA applies, then Plaintiff has no remedy. The relief Plaintiff seeks (rehearing) is set forth in FAA section 10(b), which Plaintiff contradictorily argues is *not* incorporated into the NSA. If Plaintiff is correct, then this Court by law cannot grant the relief Plaintiff seeks, and this case must be dismissed.

Dated: June 16, 2023

/s/ Moe Keshavarzi

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CERTIFICATE OF CONFERENCE

Pursuant to Local Rule 3.01(g), Kaiser certifies that before filing the motion, it notified REACH of the issues asserted in this reply, and the parties tried but could not agree on the relief sought. Specifically, counsel for Kaiser spoke with counsel for REACH on June 2, 2023, and June 5, 2023.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 16th day of June 2023, a true and correct copy of the above and the 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/Elisabeth Walters
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