UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

REACH Air Medical Services, LLC, et al., Plaintiffs, v. Kaiser Foundation Health Plan Inc., et al., Defendants.	Case No. 4:22-cv-03979

DEFENDANT KAISER FOUNDATION HEALTH PLAN INC.'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFFS' COMPLAINT AND STRIKE PLAINTIFFS' CLAIM FOR ATTORNEY'S FEES

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I. INTRODUCTION

The Court should reject Plaintiffs' attempt to undermine the independent dispute resolution ("IDR") process crafted by Congress. Plaintiffs' complaint is procedurally defective because Plaintiffs failed to file a requisite motion supported by evidence pursuant to the Federal Arbitration Act ("FAA"). Plaintiffs further fail to show that any of the FAA's four narrow exceptions for vacatur applies. None of Plaintiffs' arguments in their opposition changes this analysis.

First, Plaintiffs' effort to seek a more lenient judicial review standard is unavailing. The familiar FAA standard of judicial review chosen by Congress governs. Federal courts have repeatedly confirmed that Congress can mandate arbitration with limited—or no—judicial review without offending the Constitution.

Second, it is undisputed that IDRs are arbitrations. Congress, the implementing agencies, courts, and even Plaintiffs have acknowledged as much. The FAA standard of review applies.

Third, the FAA applies in its entirety, including the procedures for challenging an arbitration award, because courts presume that Congress intended statutorily mandated arbitration to fit within existing arbitration law. Indeed, case law confirms that the FAA applies even when the underlying statute does not mention the FAA.

Fourth, Plaintiffs cannot satisfy their heightened pleading standard under Rule 9(b), nor can they meet the FAA's stringent standard for establishing fraud or undue means.

Fifth, Plaintiffs misapply the narrow bases for vacatur for an arbitrator's "excess of powers" and "evident partiality" of the arbitrator. But mere errors of fact or law do not trigger these narrow bases, and that is all that Plaintiffs allege.

Sixth, contrary to Plaintiffs' assertion, a lower reimbursement rate after enactment of the NSA is not evidence of Kaiser's alleged fraud. Rather, a reduction in health care premiums and

the deficit by lowering emergency medical reimbursement was the very purpose of enacting the NSA.

II. LEGAL ARGUMENT

A. Plaintiffs' 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 FAA section 10(a), "judicial review of arbitration decisions is among the narrowest known to the law." *Halliburton Energy Servs., Inc. v. NL Indus*., 618 F. Supp. 2d 614, 634 (S.D. Tex. 2009). Not even grave errors of law or fact satisfy this standard. *Soaring Wind Energy, LLC v. CATIC USA, Inc*., 333 F. Supp. 3d 642, 663 (N.D. Tex. 2018). And it is well established that an arbitration panel need not state ***any*** basis for its award. *Valentine Sugars, Inc. v. Donau Corp*., 981 F.2d 210, 214 (5th Cir. 1993).

Congress intentionally adopted the FAA's standard for judicial review and its emphasis on finality to resolve payment disputes between out-of-network providers and health plans in an efficient, streamlined, and low-cost manner. *See, e.g*., H.R. REP. NO. 116-615, pt. I, at 48, 58 (Dec. 2, 2020). The need for efficient and final arbitration is apparent—***71,915 IDR disputes were filed in the third quarter of 2022 alone***. (RJN, Exh. G.) If the FAA standards for judicial review did not apply, unhappy losing parties could take "full-bore legal and evidentiary appeals" of these 70,000-plus disputes per quarter, and the IDR process 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).

Despite Congress' express incorporation of section 10(a) into the NSA, Plaintiffs maintain that the Court should disregard this provision and apply a more lenient standard of review. (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—it has the authority to decide the method for protecting that right. Analogous cases are instructive.

In *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985), 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 disputes involving compensation be decided by arbitration. *Id*. at 573–74. The arbitration decisions 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 Plaintiffs do here. *Id.* at 582. The Supreme Court rejected the challenge, explaining 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 593–94. "To hold otherwise," the Supreme 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 reached the same result in in *In re Motors Liquidation Co*., 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.* The court explained that "where Congress creates a new statutory right, Congress has

the authority to decide the method for the protection of that right." *Id.*; *Switchmen's Union of N. Am. v. Nat'l Mediation Bd.*, 320 U.S. 297, 301 (1943) (similar result under Railway Labor Act).

Similarly here, this Court should reject Plaintiffs' argument that they are 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. *Thomas*, *In re Motors Liquidation*, and *Switchmen* make clear that Congress can mandate arbitration of disputes under the NSA, and adopt the highly limited FAA standards governing judicial review without offending the Constitution.

B. IDRs are arbitrations.

Plaintiffs' attempt to characterize IDRs as "not arbitrations" fails. As MET correctly argues, IDRs are arbitrations. (Dkt. No. 24, at 6–9.) Congress, the agencies Congress chose to implement the IDR process, and every court that has confronted the issue all describe IDRs as arbitrations. *Id.* Indeed, ***Plaintiffs themselves*** repeatedly assert in their complaint that IDRs are "arbitrations," that IDR entities are "arbitrators," and that IDR decisions are "arbitration awards." (Compl. ¶¶ 2, 25, 28, 30, 57.)

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

There is also no merit to Plaintiffs' argument that ***only*** section 10(a) of the FAA—and no

other provision—applies when a disgruntled party seeks to vacate an IDR arbitration award. Case law applying the FAA in challenges to arbitration awards are dispositive on this point.

Spray Drift Task Force v. Burlington Bio-Med. Corp., 429 F. Supp. 2d 49 (D.D.C. 2006), is illustrative. In that case, the court rejected a challenge to an arbitration award under FIFRA (which, like the NSA, mandates arbitration of disputes), and applied the three-month limit under 9 U.S.C. § 12 for challenging an arbitration award, ***even though FIFRA never mentions the FAA***. *Spray Drift Task Force*, 429 F. Supp. 2d at 49–50 (finding that the petitioner had failed to satisfy the three-month filing requirement). 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).

Indeed, Plaintiffs' complaint implicitly recognizes that the FAA in its entirety applies. Plaintiffs assert that only FAA section 10(a) applies here, yet the relief they request in their complaint is found under FAA section ***10(b)***—a section that is nowhere referenced in the NSA. (Compl. 1, ¶ 53 [citing FAA section 10(b) and requesting that the Court "direct a rehearing by the arbitrators" under that section].) Accordingly, there is no merit to Plaintiffs' position that they need not file a motion supported by evidence, or follow FAA's other requirements for vacating an arbitration award.[1]

D. Plaintiffs fail to allege fraud or undue means.

Plaintiffs' assertion of fraud or undue means is based solely on a ***pre-arbitration*** reference

[1] Federal Rule of Civil Procedure 81 also defers to the FAA in cases "relating to arbitration." Fed. R. Civ. P. 81(a)(6)(B); *see also Halliburton Energy Servs., Inc. v. NL Indus.*, 618 F. Supp. 2d 614, 631 (S.D. Tex. 2009) (explaining that Rule 81 defers to the procedures of the FAA in proceedings relating to arbitration).

in Kaiser's explanation of payment ("EOP") form 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 their opposition, Plaintiffs refuse to address the undisputed facts that undermine their position, including that health plans can allow above, below, or at their QPA, and their tacit admission that Kaiser's allowed amount is above that of other plans.[2] 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—which Plaintiffs do not contest. *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"); *cf. Hall St.*, 552 U.S. at 586 (2008) (recognizing that "[f]raud" and a mistake of law are "not cut from the same cloth"); *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).

Plaintiffs' complaint also fails to meet the FAA's standard for establishing fraud or undue means, under which a plaintiff must demonstrate behavior that is "***immoral if not illegal***," such as "bribery, undisclosed bias . . . or willful[] dest[ruction]" of evidence. *Trans Chem. Ltd. v. China Nat'l Mach. Import & Export Corp.,* 978 F. Supp. 266, 304 (S.D. Tex. 1997) (emphasis added). Plaintiffs, however, assert that the Court should ignore this standard because "the decisions Kaiser cites interpreting 'undue means' pre-date the NSA." (Opp'n at 8.) But as discussed above,

[2] Plaintiffs also refuse to address that the material Plaintiffs seek would give them an unfair advantage in future IDRs since Kaiser has no access to Plaintiffs' IDR submissions.

Congress expressly 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. Plaintiffs cannot evade this framework.

E. Plaintiffs' "excess of powers" and "evident partiality" arguments fail.

Plaintiffs acknowledge that an arbitrator's error of law does not warrant vacatur under the FAA. (Opp'n at 12.) Plaintiffs nevertheless argue that the arbitrators' application of an allegedly improper weighing of factors in the IDR warrants vacatur. *Id.* Plaintiffs are wrong.

The inquiry in determining whether an arbitrator has exceeded its authority under section 10(a)(4) of the FAA focuses on "whether the arbitrators had the power, based on the parties' submissions or the arbitration agreement, to reach a certain issue, not whether the arbitrators correctly decided that issue." *DiRussa v. Dean Witter Reynolds, Inc*., 121 F.3d 818, 824 (2d Cir. 1997) (citation omitted); *Saipem Am., Inc. v. Wellington Underwriting Agencies, Ltd*., No. 4:07-CV-03080, 2008 WL 2276210, at *1 (S.D. Tex. Mar. 18, 2008). If arbitrators "rule on issues not presented to them by the parties, they have exceeded their authority and the award must be vacated." *Fahnestock & Co., Inc. v. Waltman*, 935 F.2d 512, 515 (2d Cir. 1991) (quotes omitted). But if arbitrators rule on issues that are presented to them—even if they make errors of law or fact in doing so—that is not a basis for vacatur. *Soaring Wind Energy*, 333 F. Supp. 3d at 663. The cases cited by Plaintiffs are in accord. *See Stolt-Nielsen S.A. v. AnimalFeeds Int'lCorp.*, 559 U.S. 662, 673 (vacating an arbitration award regarding class certification because the arbitrator had no power to reach that issue at all); *PoolRe Ins.Corp. v. Organizational Strategies, Inc*., 783 F.3d 256, 263–64 (5th Cir. 2015) (vacating an award where the arbitrator appointed himself, even though he had no power to be arbitrator, and chose an arbitration forum despite having no authority to do so); *see also* Opp'n at 12, 13 (citing cases).

Here, Plaintiffs complain that MET put too much emphasis on one factor (the QPA) and not enough emphasis on others when determining the issue properly before it. (Compl. ¶ 27.) Plaintiffs' complaint, however, does not question whether MET decided an issue it did not have the authority to reach, whether MET lacked authority to decide the IDR arbitration, or whether IDR process was the incorrect forum. To the contrary, Plaintiffs concede that MET had the authority to determine pricing for out-of-network air ambulance transports based on a litany of different factors, including the QPA. *Id.* ¶¶ 2, 28, 29, 30. Thus, at most, Plaintiffs allege an error in law, which is not a basis for vacatur.

Plaintiffs' "evident partiality" argument, likewise, falters. Evident partiality is "a stern standard" that requires the challenging party to establish that "bias was clearly evident in the decisionmakers." *Positive Software Sols., Inc. v. New Century Mortg. Corp.*, 476 F.3d 278, 281 (5th Cir. 2007). An alleged error in law, or even the arbitrator's "complete disregard of the evidence" is not an adequate basis to allege evident partiality. *MPJ v. Aero Sky, LLC*, 673 F. Supp. 2d 475, 496 (W.D. Tex. 2009). To warrant vacatur, Plaintiffs "must produce specific facts from which a reasonable person would have to conclude that the arbitrator was partial to" Kaiser. *Cooper v. WestEnd Cap. Mgmt., LLC*, 832 F.3d 534, 545 (5th Cir. 2016). Plaintiffs fail to identify any such allegations in their complaint.

F. Reduced emergency medical reimbursement is not a basis for vacatur.

Contrary to Plaintiffs' assertion, a reduced reimbursement is not evidence that Kaiser engaged in "fraud" or "undue means." Rather, the reduction in reimbursement rates was Congress' express purpose in enacting the NSA. Congress enacted the NSA to end "surprise billing"—a practice where providers like Plaintiffs sent "surprise" bills to health plan members to extract above-market payments from their health plans. H.R. REP. NO. 116-615, pt. I, at 51, 53 (Dec. 2, 2020). 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. (Requirements Related to Surprise Billing; Part I, 86 Fed. Reg. 36,872, 36,874, 36,924 & n.130 (July 13, 2021).) Beyond the financial consequences in individual cases, Congress recognized that the market distortion created by surprise billing had the broader effect of driving up health care costs for all parties. Congress thus concluded that by ending surprise billing, the NSA would "reduce premiums and the deficit." H.R. REP. NO. 116-615, at 58 (Dec. 2, 2020). Indeed, recognizing that pre-NSA rates were inflated and not representative of noncoercive market rates, Congress specifically prohibited IDRs from considering pre-NSA charges in an effort "to reduce costs for patients and prevent inflationary effects on health care costs." *Id.* at 48.

The Congressional Budget Office evaluated the NSA ***with the express understanding*** that the law would reduce reimbursement, predicting that the NSA's arbitration procedures will result in "smaller payments to some providers [that] would reduce premiums by between 0.5 percent and 1 percent. Lower costs for health insurance would reduce federal deficits because the federal government subsidizes most private insurance through tax preferences for employment-based coverage and through the health insurance marketplaces established under the Affordable Care Act." (CBO, Estimate for Divisions O Through FF H.R. 133, Consolidated Appropriations Act 2021, Public Law 116-260 Enacted on December 27, 2020 at 3 (Jan. 14, 2021).) In total, the NSA was expected to achieve $16.8 billion in budget savings, over ten years. *Id*. at 7.

Indeed, the NSA would not succeed in its goal of reducing premiums and the deficit if air ambulance providers could escape IDR decisions by claiming that pre-NSA charges were evidence of some illicit conduct by health plans. If accepted, such an argument would increase both federal deficits and health insurance premiums. H.R. REP. NO. 116-615, at 57 (Dec. 2, 2020). Plaintiffs' unfounded emphasis on inflated pre-NSA reimbursement rates only demonstrates that Plaintiffs'

true gripe is with the NSA, not with Kaiser or any of the other health plans Plaintiffs have sued.

III. CONCLUSION

For the foregoing reasons, Kaiser respectfully requests that this Court to dismiss Plaintiffs' complaint with prejudice, deny the relief sought, and strike Plaintiffs' request for an award of attorney's fees.

Dated: February 28, 2023

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 28th day of February 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/ Erica C. Gibbons

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