No. 24-10135

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REACH AIR MEDICAL SERVICES LLC,

Plaintiff-Appellant,

v.

KAISER FOUNDATION HEALTH PLAN, INC.,
C2C INNOVATIVE SOLUTIONS, INC.,

Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Florida, Hon. Timothy J. Corrigan,
No. 3:22-cv-01153-TJC-JBT

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

As required by Federal Rule of Appellate Procedure 26.1 and 11th Circuit Rule 26.1-1(a), Plaintiff-Appellant REACH Medical Services LLC provides this Certificate of Interested Persons and Corporate Disclosure Statement. The following trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations have an interest in the outcome of this appeal:

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46. United States of America (Amicus Curiae)

No other persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, parent or subsidiary corporations, or other legal entities are financially interested in the outcome of this case or appeal.

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INTRODUCTION

The No Suprises Act ("NSA") sets forth a detailed process for resolving disputes between medical providers and insurers over payment for out-of-network services. Congress's design depends on an insurer's accurate representations about its "qualifying payment amount" ("QPA"), or median in-network rate. The NSA scheme requires insurers to disclose and certify the accuracy of their QPAs. The NSA also requires insurers to provide additional information about their QPA calculations when providers request it.

So what happens when an insurer makes a material misrepresentation about its QPA and defies the mandatory disclosure requirements? According to Kaiser, nothing. The NSA, in Kaiser's view, allows insurers to manipulate their QPAs and ignore disclosure requirements with absolute impunity. That cannot be right.

To recap what REACH alleged: After REACH submitted a bill for services, Kaiser provided an explanation of benefits ("EOB") naming an amount Kaiser represented was its QPA—which it was required to certify had been calculated in compliance with federal requirements. (Doc. 1 ¶¶ 26, 28.) When REACH requested further information about Kaiser's calculation, as was its right, Kaiser refused to respond. (*Id.* ¶ 29.) Then, when the parties proceeded to IDR (with REACH relying on the initial statement), Kaiser submitted a different, *lower* QPA to the IDR entity without disclosing the change to REACH. (*Id.* ¶ 34.) Kaiser's subterfuge worked.

The IDR entity selected Kaiser's offer, noting expressly that it understood the offer to be substantially higher than Kaiser's QPA. (*Id.*)

Citing the "virtues" of "[f]inality" in arbitration, Kaiser asks this Court (at 15) to hold that these alleged facts do not state a claim under either Subsection (II), which allows for "judicial review" where a party uses "fraud or undue means" in the IDR process, or Subsection (I), which provides that IDR determinations are not "binding" where there is a "fraudulent claim or … misrepresentation of facts." 42 U.S.C. § 300gg-111(c)(5)(E)(i). But Congress did not put finality above all other values in NSA IDR. Rather, it established pathways to relief when a party procures an award by fraud or misrepresentation.

Subsection (II) could hardly be more explicit, and indeed all parties, including Kaiser, agree that it provides for judicial review and vacatur of otherwise binding IDR awards when procured by "fraud or undue means" or where the IDR entity "exceed[ed] [its] powers." Unable to evade Subsection (II)'s text, Kaiser claims that the standards the NSA supposedly imported from the Federal Arbitration Act ("FAA") impose a near-total bar to relief. But the facts REACH pleaded—which Kaiser asks this Court to disregard—satisfy *any* version of the "fraud or undue means" standard. Kaiser further asks this Court to hold that courts can never provide relief when the insurer's fraud relates to its QPA. But this argument has no foundation in the statute.

For good measure, REACH also adequately pleaded that the IDR entity exceeded its authority by illegally giving the QPA presumptive weight. REACH's complaint states a claim for review and vacatur under Subsection (II), and that is sufficient for this Court to reverse.

In addition, Subsection (I) specifies that IDR awards are not "binding" if procured by fraudulent claims or misrepresentations of fact. Kaiser would have this Court read Subsection (I) out of the NSA. But this Court must give meaning to the text. If Subsection (I) means anything, it means courts can enforce binding awards and invalidate nonbinding awards. Kaiser's misrepresentations about its QPA render the IDR award nonbinding—and thus subject to invalidation by a court. This Court can reverse the district court's judgment on this independent basis.

Finally, this Court should confirm what C2C and the United States now concede: a party challenging an IDR determination can obtain vacatur and remand of IDR decisions regardless of whether the IDR entity is named as a party. That will ensure relief is available to REACH on remand.

I. REACH IS ENTITLED TO RELIEF UNDER SUBSECTION (II).

All participants here agree that where a challenger properly pleads that the IDR award was procured through "fraud or undue means" or that the IDR entity "exceeded [its] powers," judicial review and vacatur are available under Subsection (II). Kaiser invokes FAA caselaw (at 29–30) to argue that REACH "carries [a]

heavy burden to establish the existence of a specific statutory ground for vacatur," but notwithstanding this rhetoric, Kaiser *concedes* that the analysis must take account of the unique features of the IDR process. Whether courts apply the plain meaning of statutory text, as REACH has argued, or apply FAA caselaw in a way that accounts for the NSA's peculiarities, as Kaiser would have it, both methods point to the same outcome. REACH pleaded adequate facts under Rule 9(b) to state a claim. Kaiser's tries to resist this conclusion by mischaracterizing REACH's complaint, but that improper argument fails.

A. REACH Sufficiently Stated a Claim For "Fraud or Undue Means" Based on Kaiser's Misrepresentation of its QPA.

1. All Parties and *Amici* Agree That REACH Can Obtain Relief If It Properly Pleaded "Fraud or Undue Means."

Subsection (II) unambiguously states that "[a] determination of a certified IDR entity … shall not be subject to judicial review, except in a case described in any of the paragraphs (1) through (4) of section 10(a) of [the FAA]." 42 U.S.C. § 300gg-111(c)(5)(E)(i)(II). Under FAA § 10(a)(1), judicial review is available "where the award was procured by corruption, fraud, or undue means." 9 U.S.C. § 10(a)(1). Unsurprisingly, then, all participants agree that if REACH properly pleaded that an IDR determination was "procured by … fraud or undue means," then it can obtain judicial review and vacatur of the IDR award with a remand for further proceedings before the IDR entity. Op. Br. 36–37, 46–48; Kaiser Resp. Br. 27–29;

C2C Resp. Br. 7–8; U.S. Br. 7, 12–13; AHIP Br. 15. Subsection (II) therefore provides the simplest way for this Court to resolve the case.

2. A Subsection (II) "Fraud or Undue Means" Claim Requires an Intentional, Material Misrepresentation or Bad-Faith Act.

In order to determine whether REACH properly pleaded a "fraud" or "undue means" claim, this Court must determine the substantive standard that applies. As REACH explained (at 37–39), FAA caselaw should not be imported wholesale into the NSA for two reasons. *First*, the NSA does not state that vacatur of IDR determinations is available only where it would be available under the FAA; it states that determinations are "*subject to judicial review* … in *a case described* in any of paragraphs (1) through (4) of section 10(a)." 42 U.S.C. § 300gg-111(c)(5)(E)(i)(II) (emphasis added). This precisely targeted language omits any reference to any part of FAA § 10(a) that uses the word "vacate." *Second*, IDR under the NSA is meaningfully different from arbitration. It is statutorily imposed, not contractually agreed-upon; requires blind simultaneous submissions, not exchange of adversarial briefing; and concludes after written submissions are made, not after discovery and a hearing. These differences are independent reason not to analyze IDR decisions under caselaw restricting judicial review to the "narrowest" form because the "parties *elected* to settle their dispute by arbitration rather than litigation." *AIG*

Baker Sterling Heights, LLC v. Am. Multi-Cinema, Inc., 508 F.3d 995, 1001 (11th Cir. 2007) (emphasis added).

Kaiser argues (at 28) that FAA caselaw and a "heavy presumption in favor of confirming" the IDR determination must be engrafted upon the NSA (quoting *Cat Charter, LLC v. Schurtenberger*, 646 F.3d 836, 842 (11th Cir. 2011)). But Kaiser concedes (at 32 n.9) that FAA caselaw should be read in light of the structural differences between the NSA and the FAA. With this concession, there is little practical difference between applying the plain meaning of Subsection (II)—including the language adopted from 9 U.S.C. § 10(a)—and importing FAA caselaw.

To vacate an award for fraud under FAA § 10(a)(1), a movant must (1) "establish the fraud," (2) show that the "fraud must not have been discoverable upon the exercise of due diligence prior to or during the arbitration," and (3) "demonstrate that the fraud materially related to an issue in the arbitration." *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1383 (11th Cir. 1988). To vacate an award for "undue means" under the FAA, a party must show "bad faith conduct," as well as diligence and materiality. *See, e.g.*, *Am. Postal Workers Union, AFL-CIO v. U.S. Postal Serv.*, 52 F.3d 359, 362 (D.C. Cir. 1995); *A.G. Edwards & Sons, Inc. v. McCollough*, 967 F.2d 1401, 1403–04 (9th Cir. 1992).[1]

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[1] Kaiser dwells on the "clear and convincing evidence" standard that applies on the merits. Resp. Br. 32; *see also Bonar*, 835 F.2d at 1383. But a "clear and convincing

There is nothing magical about the definition of "fraud" or "undue means" in FAA caselaw. Courts are generally guided by these terms' "plain meaning." *PaineWebber Grp. Inc. v. Zinsmeyer Trts. P'ship*, 187 F.3d 988, 991 (8th Cir. 1999). As commonly understood, "fraud" entails "the knowing misrepresentation of a material fact … done to induce another to act to his or her detriment." Op. Br. 36 (citing *Info-Hold, Inc. v. Sound Merch., Inc.*, 538 F.3d 448, 456 (6th Cir. 2008)). And "undue" means "excessive or unwarranted." *Id.* (citing UNDUE, *Black's Law Dictionary* (11th 2019)); *see also Groff v. DeJoy*, 600 U.S. 447, 469 (2023) ("[T]he modifier 'undue' means that the requisite burden … must rise to an … 'unjustifiable' level.").

Nor does materiality have any extra requirements under the FAA. For example, "the materiality element 'does not require the movant to establish that the result of the proceedings would have been different had the fraud not occurred.'" *NuVasive, Inc. v. Absolute Medical LLC*, 71 F.4th 861, 879 (11th Cir. 2023) (quoting *Bonar*, 835 F.2d at 1383). The test is simply "whether the fraud was materially related to an issue in the arbitration." *Id.* (internal quotation marks omitted).

Accordingly, as this Court's precedents illustrate, an intentional misrepresentation about a material fact suffices under FAA § 10(a) to show both

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evidence" standard cannot be applied to a complaint, and Kaiser otherwise accepts (at 32–33) that Rule 9(b) applies here.

fraud and materiality. For example, in *Bonar*, this Court reversed the denial of vacatur of an arbitration award because the sole testifying expert "committed perjury by falsifying his credentials" and the arbitrator's decision "unquestionably reflect[ed] the influence of []his testimony." 835 F.2d at 1385. Likewise, in *NuVasive*, this Court affirmed vacatur for fraud where a witness "appeared to change his answer after [someone] directed him to not implicate [the respondent]" regarding facts that "related directly to issues that the court had ordered the parties to [arbitrate]." 71 F.4th at 878–79.[2]

The stumbling block for an FAA vacatur motion is often the third element: due diligence. *See, e.g.*, *O.R. Sec., Inc. v. Pro. Plan. Assocs., Inc.*, 857 F.2d 742, 749 (11th Cir. 1988) (denying vacatur where false testimony "should have been noticed during the … arbitration proceedings … [and] O.R. had the opportunity to cross-examine"). In the FAA context, "due diligence" imposes a high hurdle because typical arbitration provides for many litigation-like procedures—discovery, adversarial briefing, and a hearing—that make malfeasance discoverable by

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[2] Similarly, "willfully destroying or withholding evidence" on a material issue constitutes "bad faith" under the "undue means" prong of FAA § 10(a)(1). *Matter of Arb. Between Trans Chem. Ltd. & China Nat'l Mach. Imp. & Exp. Corp.*, 978 F. Supp. 266, 304 (S.D. Tex. 1997), *aff'd*, 161 F.3d 314 (5th Cir. 1998). In *Bauer v. Carty & Co.*, for example, the Sixth Circuit acknowledged that a party's intentional withholding of documents in response to discovery requests "could certainly be consistent with bad faith" required for vacatur. 246 Fed. App'x 375, 378–79 (6th Cir. 2007).

reasonably vigilant parties. *See* Op. Br. 38–39, 42–43. The NSA lacks such procedures. That is why REACH argued that importing the FAA's due-diligence requirement into the NSA makes no sense. *See supra* 5; Op. Br. 38–39.

Kaiser resists that point as a technical matter but concedes its substance. As Kaiser states (at 37 n.9), "the procedures provided by the IDR arbitration may influence what the party should have discovered upon the exercise of due diligence." Precisely. Whether one applies an FAA lens or not, a party will satisfy the diligence requirement by demonstrating that it used all available tools to uncover the fraud at the time of the proceeding.

3. REACH Sufficiently Alleged "Fraud or Undue Means" Under Any Construction of Subsection (II).

To state a claim for vacatur under Subsection (II), then, REACH was required to plead "fraud or undue means" that "materially related to an issue in the arbitration" and that was "not … discoverable upon the exercise of due diligence prior to or during" the IDR proceedings—using the limited tools at REACH's disposal. *Bonar*, 835 F.2d at 1383. Rule 9(b), which the parties agree applies, *see* Op. Br. 31; Kaiser Resp. Br. 30–31, requires a party to plead the "who, what, when, where, and how of the [] false statements and then allege generally that those statements were made with the requisite intent" to mislead the IDR entity. *Mizzaro v. Home Depot, Inc.*, 544 F.3d 1230, 1237 (11th Cir. 2008). Here, by alleging with specificity how Kaiser intentionally misrepresented its QPA to REACH and to the

IDR entity and withheld information about its QPA calculation in contravention of applicable regulations, REACH satisfied Rule 9(b).[3]

First, REACH alleged that the QPA is "materially related" to the NSA process. *Bonar*, 835 F.2d at 1383. REACH explained that "[b]y regulation, insurers are required to include with each initial payment or denial the insurer's QPA for each item or service involved" and "must certify that each QPA was determined in compliance with federal requirements." (Doc. 1 ¶ 26.) Insurers are also required to "provide additional information [about the QPA] upon request of the provider." (*Id.*) If the parties proceed to IDR, insurers must again disclose their QPA to the IDR entity, which in turn must consider the QPA in its decision. (*Id.* ¶ 21.) Indeed, here REACH alleged that the QPA was the most important factor in the IDR entity's decision. (*Id.* ¶ 34.) Kaiser does not, and cannot, dispute that an insurer's representations about the QPA materially relate to a provider's decision to accept payment or initiate IDR. Likewise, Kaiser does not, and cannot, dispute that an insurer's representations about its QPA materially relate to the IDR entity's award.

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[3] Information related to Kaiser's QPA was "peculiarly within [Kaiser's] knowledge or control," so that Rule 9(b)'s heightened pleading standard is relaxed. *See* Op. Br. 34; *e.g.*, *Hill v. Morehouse Med. Assocs., Inc.*, 2003 WL 22019936, at *3 (11th Cir. Aug. 15, 2003). Kaiser disagrees (at 35–37), purporting to factually distinguish cases REACH cited on this point. But none of Kaiser's distinctions address the central issue: Kaiser ignored its legal obligation to provide further information about its QPA when REACH asked. In any event, REACH sufficiently pleaded fraud regardless of whether Rule 9(b)'s standard is relaxed.

Second, REACH alleged that it could not have discovered Kaiser's misrepresentations even having exercised due diligence. *Bonar*, 835 F.2d at 1383. After Kaiser made its initial QPA representation, "Kaiser refused to provide additional information regarding its alleged QPA calculation in response to questions from REACH." (Doc. 1 ¶ 29.) And because the parties to IDR do not exchange submissions, REACH had no means of discovering Kaiser's second QPA representation to the IDR entity. (*Id.* ¶¶ 18.) Indeed, the only reason REACH discovered the fraud was because the IDR entity's decision identified the QPA Kaiser provided. (*Id.* ¶ 34.) Accordingly, Kaiser does not, and cannot, argue that REACH could have discovered its misrepresentations through due diligence.

Finally, REACH adequately alleged that Kaiser's material misrepresentations and its withholding of relevant information amounted to fraud or undue means. Kaiser claims the allegations are insufficient under Rule 9(b). That is wrong. REACH provided detailed allegations showing the "who, what, when, where, and how" of Kaiser's false statements. REACH recounted Kaiser's legal obligations to provide its QPA with its initial payment and to certify that this QPA "was determined in compliance with federal requirements." (Doc. 1 ¶ 26 (citing 45 C.F.R. § 149.140(d)(1).) REACH then stated that "[o]n April 21, 2022, Kaiser issued an EOB" reciting an "allowed" amount of $24,813.48; and that "Kaiser represented to REACH that the amount allowed was its QPA for the claim." (*Id.* ¶ 28.) REACH

further alleged that when it asked for additional information regarding Kaiser's QPA calculation—as was its right, *see* 45 C.F.R. § 149.140(d)(2)—"Kaiser refused to provide [it]." (Doc. 1 ¶ 29.) The Complaint went on to state that Kaiser submitted "a different, even lower QPA to C2C" that "misled C2C into believing [Kaiser] was offering an amount higher than its QPA" and "resulted in a decision in favor of Kaiser." (*Id.* ¶¶ 30, 34.) Summing up, REACH alleged that Kaiser "created two QPAs, submitting the lower one to the IDR entity to create the false impression that it was offering to pay more than its QPA" and "a higher QPA to REACH, resulting in REACH submitting its IDR brief under false pretenses." (Doc. 1 ¶ 37.)

Kaiser launches several attacks on REACH's allegations under the Rule 9(b) standard. Each should be rejected.

(a) REACH pleaded Kaiser's fraud with appropriate specificity.

Kaiser faults REACH (at 33–34) for not "set[ting] forth" the Kaiser representative who made the statement that Kaiser's first offer was its QPA or the time, place, and contents of such statement. But REACH identified the date and document—an EOB—in which Kaiser made its offer. (*Id.* ¶¶ 28, 30.) An EOB is not ordinarily signed by an individual corporate representative. Kaiser also makes the confusing assertion that REACH did not plead with sufficient particularity the basis for its belief that Kaiser represented that the offer *was* Kaiser's QPA. Aside from the fact that the allegation stands for itself—*i.e.*, the basis for the belief was

that Kaiser indicated as much—REACH also specifically cited the federal regulation that "required [Kaiser] to include with [its] initial payment … the insurer's QPA for each item or service involved." (*Id.* ¶ 26 (citing 45 C.F.R. § 149.140(d)(1)(i).) When Kaiser issued the offer, it submitted only one number—its QPA. (*Id.* ¶¶ 4, 28.) When REACH requested information about that QPA, Kaiser did not respond, let alone dispute that the number provided was Kaiser's QPA. (*Id.* ¶ 29.) In any event, "[w]hat constitutes 'particularity' will necessarily differ with the facts of each case." *Guidry v. Bank of LaPlace*, 954 F.2d 278, 288 (5th Cir. 1992). REACH's detailed pleadings served Rule 9(b)'s purpose to "alert[] [Kaiser] to the precise misconduct with which they are charged" and to protect Kaiser "against spurious charges of immoral and fraudulent behavior." *Durham v. Bus. Mgmt. Assocs.*, 847 F.2d 1505, 1511 (11th Cir. 1988) (internal citations omitted).

(b) REACH adequately pleaded that Kaiser's misrepresentations were intentional.

Kaiser next asserts (at 34–35) that REACH "failed to allege facts demonstrating that the alleged misstatement was intentional." But it is blackletter law that "Rule 9(b) does not require a plaintiff to allege specific facts related to the defendant's state of mind when the allegedly fraudulent statements were made." *Mizzaro*, 544 F.3d at 1237. "[A]s Rule 9(b) itself states, '[m]alice, *intent*, knowledge, and other conditions of a person's mind may be alleged generally.'" *Id.* (quoting Fed. R. Civ. P. 9(b) (emphasis added)).

REACH alleged that throughout the NSA-governed process Kaiser strategically provided two QPAs—first, a higher QPA to REACH "dup[ing] [REACH] into basing its offer and submitting briefing based on a higher QPA," and second, a lower QPA to the IDR entity which "misled [the entity] into believing [Kaiser] was offering an amount higher than its QPA." (Doc. 1 ¶¶ 5, 34.) At least one of those QPAs had to be false. And REACH's other detailed allegations support an inference of intentionality: Not only did Kaiser certify its initial QPA representations as accurate (impossible if the second QPA representation was indeed accurate), it also refused to provide further information about its QPA calculation when asked. REACH thus had a sufficient basis to allege generally, as Rule 9(b) permits, that Kaiser "developed a scheme to minimize payments." (Doc. 1 ¶ 35.)

REACH further supported its allegation of intentionality by pleading that *both* QPAs were questionable because they were "approximately one-third of the average [Out of Network] rate for helicopter air ambulance trips in California based on 2019 allowables." (Doc. 1 ¶ 32.) Kaiser attempts (at 37–38) to duck this point by resorting to broad claims—straying far beyond the four corners of the complaint—about the "highly coercive nature of the pre-2022 air ambulance market." But even if this market rate comparison is imperfect, it is a data point that further supported REACH's claim of Kaiser's intentional misrepresentation.

At the motion-to-dismiss stage, Kaiser cannot simply *assert* that it mistakenly calculated its QPA in its initial submission to REACH or that there was a non-fraudulent explanation for why Kaiser represented to the IDR entity that it offered to pay REACH more than the QPA. Kaiser will have the opportunity to present evidence; accepting Kaiser's assertions now is inappropriate. *See U.S. ex rel. Clausen v. Lab'y Corp. of Am.*, 290 F.3d 1301, 1313 (11th Cir. 2002) ("When Rule 9(b) applies …, a plaintiff is not expected to actually *prove* his allegations, and [courts] defer to the properly pleaded allegations of the complaint." (emphasis in original)).

(c) It suffices to plead fraud if Kaiser lied to REACH in the first instance.

Kaiser protests (at 35) that REACH's claims fail because it "provide[d] no basis to conclude that the QPA submitted *during the arbitration proceedings* was the inaccurate one" (emphasis added). Kaiser takes the position that if the *first* QPA it provided to REACH was the false one, that is not fraud or undue means. That is nonsensical. Again, the insurer must disclose and certify its QPA; and the insurer must provide further information about its QPA calculations upon request. *Supra* 10. That is all the discovery that the IDR process allows. *See* Op. Br. 8–10. Making an intentional misrepresentation about the QPA upon which one's adversary will necessarily rely in formulating its payment offer and IDR briefing constitutes fraud committed in the course of the proceedings. Indeed, the single case Kaiser cites on

this point concerns alleged improper conduct *during discovery* and confirms that if information had been intentionally concealed in that process, an FAA claim would lie. *See Matter of Arb. Between Trans Chem. Ltd.*, 978 F. Supp. at 305 (rejecting FAA fraud claim only because objecting party offered "no evidence" that its adversary "intentionally or even recklessly delayed or otherwise attempted in any way to prevent production of the report").

(d) There is no statutory basis for exempting from judicial scrutiny insurer fraud related to QPAs.

Finally, Kaiser (with AHIP's support) resorts to an atextual argument that judicial review is entirely precluded because REACH's allegations concern Kaiser's QPA. Kaiser posits (at 38–39) that the "responsibility [for assessing the accuracy of Kaiser's QPA calculation] rests exclusively with the Departments." *See also* AHIP Br. 23–24 (similar). No such exemption appears on the face of Subsection (II); and the regulation Kaiser cites specifies only that *IDR entities* are not responsible for monitoring QPA accuracy—it says nothing about courts. *See* Kaiser Resp. Br. 38 (citing 87 Fed. Reg. 52,618, 52,627 n.31 (Aug. 26, 2022)).

Even setting aside this textual deficiency, both Kaiser and AHIP are wrong to characterize REACH's claims as concerning a simple miscalculation or improper methodology in Kaiser's QPA. Rather, REACH claims Kaiser intentionally misrepresented its QPA to gain advantage. *Supra* 11–15. Allowing this case to proceed does not open the courthouse doors to technical quibbles about QPA

methodologies. Not only are courts well-equipped to decide such claims of intentional misrepresentation, they are expressly empowered to do so by Subsection (II)—as everyone agrees. *Supra* 4.[4]

B. REACH Also Stated a Valid Claim Under Subsection (II) That C2C Exceeded its Authority.

For good measure, REACH also adequately pleaded an independently valid Subsection (II) claim because C2C "exceeded [its] powers" by applying an illegal presumption in favor of the QPA. (*See* Doc. 1 ¶ 38.) Kaiser's contrary arguments fail.

First, Kaiser disputes (at 51–52) whether C2C *in fact* applied an invalid presumption. But on a motion to dismiss, all factual inferences are drawn in REACH's favor. *See Nance v. Comm'r, Georgia Dep't of Corr.*, 59 F.4th 1149, 1154 (11th Cir. 2023).

Second, Kaiser argues (at 53–54) that the "misapplication of law is … not a valid basis for vacating an arbitration award." But Kaiser does not grapple with the fundamental differences between the NSA and the FAA, which dictate that FAA

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[4] To date, providers have not been able to obtain effective relief through administrative channels when insurers miscalculate their QPAs. Indeed, after a recent audit revealed widespread problems with one insurer's calculation, the agencies took no action to make providers whole even after finding that the insurer was processing claims and paying providers based on a QPA that was significantly lower than its actual QPA. *See* U.S. Dep't of Health & Human Serv., *Final Report: Federal Qualifying Payment Amount Audit of Aetna Health Inc.*, at 7–9 (May 29, 2024), https://perma.cc/GMH2-G42X.

caselaw should not control on this point. Op. Br. 46–47. The FAA requires courts to "defer to the arbitrator's reasoning" because "[a]rbitration agreements are contracts where the bargain is for the arbitrator's construction of the underlying agreements, rather than for any particular outcome." *Gherardi v. Citigroup Glob. Markets Inc.*, 975 F.3d 1232, 1237 (11th Cir. 2020). Accordingly, under the FAA, "even serious interpretative error does not justify vacatur." *Id.* Here, however, the NSA supplies the IDR entity's authority and governing principles of its decisionmaking. *Supra* 5. Therefore, as a court already held, "if Plaintiffs allege that [an IDRE] applied an illegal presumption in selecting the prevailing payment amounts, then such conduct would violate the NSA and exceed [the IDRE]'s powers." *Guardian Flight, LLC v. Aetna Health Inc.*, 2024 WL 484561, at *8 (S.D. Tex. Jan. 5, 2024).

II. SUBSECTION (I) PROVIDES A SEPARATE BASIS FOR RELIEF.

This Court can reverse because REACH pleaded sufficient facts to proceed under Subsection (II). In addition, Subsection (I) provides an avenue to invalidate IDR awards that have been procured by misrepresentations or fraud. Kaiser disagrees but offers no sensible interpretation of Subsection (I), suggesting this Court should simply ignore it. But there is no justification for such abdication of judicial responsibility—on the contrary, Kaiser's view of the statutory scheme is inequitably one-sided. Moreover, because Subsection (I) imposes a meaningful bar

to relief, Kaiser's suggestion that giving it effect will allow a flood of run-of-the-mill claims to be brought in federal court is unfounded.

A. Kaiser's Threshold Arguments for Avoiding an Explanation of Subsection (I) All Fail.

Kaiser attempts to dodge REACH's Subsection (I) claim with multiple threshold arguments. All fail.

First, Kaiser leads (at 41–43) with a meritless claim of waiver—more accurately, forfeiture. But "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). In this Court's words, "[o]ffering a new argument or case citation in support of a position advanced in the district court is permissible—and often advisable." *Sec'y, U.S. Dep't of Lab. v. Preston*, 873 F.3d 877, 883 n.5 (11th Cir. 2017).

REACH clearly relied on Subsection (I) as a basis for relief in its Complaint. REACH alleged that under the NSA, "the IDR entity's decision is binding … unless there has been a misrepresentation of fact to the IDR entity or it meets the requirements to be vacated under the Federal Arbitration Act." (Doc. 1 ¶ 2.) REACH further asserted that the "IDR award in favor of Kaiser should be vacated under *all five of these grounds*"—the four bases under the FAA and "where there is evidence of misrepresentation of facts presented to an IDR entity." (*Id.* ¶ 36 (emphasis added).) In responding to Kaiser's motion to dismiss, REACH

acknowledged that REACH would "ultimately bear[] the burden to prove one of the statutory grounds." (Doc. 37 at 11–12.)

Moreover, the district court passed upon the "air ambulance companies['] argu[ment] that subsection (I) creates another avenue for [relief]." (Doc. 64 at 18–19.) So even if this "claim [was] not raised … below, [this Court should] feel free to address it, since it was addressed by the court below." *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 379 (1995).

Second, Kaiser again claims (at 43–44) REACH has not pleaded an "intentional" misrepresentation. But as stated above, this argument fails. *See supra* 13–15.

Finally, Kaiser again argues (at 44–45) without textual foundation that courts cannot consider claims based on insurer misrepresentations about QPAs. Again, that is wrong. *See supra* 16–17.

B. Subsection (I) Should Be Given Effect to Invalidate Awards that Are Not Binding Due to Misrepresentations of Fact.

When it eventually gets to Subsection (I), Kaiser spills much ink (at 45–48) arguing about what the text of the provision *does not* mean—namely, Kaiser says, it does not allow providers like REACH to get review in court. But Kaiser avoids explaining what Subsection (I) *does* mean.

This Court does not have that luxury. A court must construe a statute "so that effect is given to all its provisions" and no part is rendered "inoperative or

superfluous, void or insignificant." *United States v. Hastie*, 854 F.3d 1298, 1304 (11th Cir. 2017) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)). Subsection (I) has to mean *something*.

What it means is determined by the statute's language. Subsection (I) provides that an IDR entity's determination "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 a claim." 42 U.S.C. § 300gg-111(c)(5)(E)(i)(I). "Binding" means "having legal force to impose an obligation" or "requiring obedience." BINDING, *Black's Law Dictionary* (11th ed. 2019). When something is binding, it is "given effect" by courts. *Jones v. Cent. of Georgia Ry. Co.*, 331 F.2d 649, 653 (5th Cir. 1964) (quotation marks omitted); *see* Op. Br. 21–22. Therefore, if IDR awards are binding, they are enforceable in court. Indeed, where binding arbitration awards result from "an executed arbitration agreement," "United States courts have always been willing to promptly interfere to enforce awards … without hesitation or question." *Sverdrup Corp. v. WHC Constructors, Inc.*, 989 F.2d 148, 154–55 (4th Cir. 1993) (internal quotation marks omitted); *see also, e.g.*, *Red Cross Line v. Atl. Fruit Co.*, 264 U.S. 109, 121 n.1 (1924) ("[Courts] have and can have no objection to [arbitrations] and will enforce, and promptly interfere to enforce their awards when fairly and lawfully made."). There is no reason a court should treat a binding IDR award any differently.

But Subsection (I) says more. It specifies that IDR awards are *not* binding if there is "a fraudulent claim or evidence of misrepresentation of facts presented to the IDR entity involved regarding such claim." 42 U.S.C. § 300gg-111(c)(5)(E)(i); *see* 45 C.F.R. § 149.510(c)(4)(vii)(A) (the "misrepresentation" must be "intentional" and "material"). That means that if a party tried to enforce an award based on a fraudulent claim or tainted by misrepresentation, the court would refuse. *Cf. Sverdrup Corp.*, 989 F.2d at 155 ("The court will enter judgment upon [an award], but not if the award was fraudulent or arbitrary or the result of gross mistake of fact …." (internal quotation marks omitted)). (Presumably, Kaiser would agree that it should have a defense to paying an award based on a fraudulent claim.) Equity and common sense dictate that if a court can deny enforcement of an award where a party asserts the defense that the award is not binding, a court should be able to grant a party's affirmative request to invalidate an award as not binding.

Otherwise, Subsection (I) becomes a heads-I-win, tails-you-lose proposition favoring insurers. Compare two hypothetical cases involving a "fraudulent claim or misrepresentation of fact": In the first, a provider tries to enforce its IDR award in court because an insurer refuses to pay. The insurer, citing Subsection (I), argues that the award cannot be enforced because the provider's material misrepresentations of fact to the IDR entity render the award nonbinding. The court agrees with the insurer and declares the award invalid, and the insurer does not have to pay. In the

second case, a provider seeks invalidation of an IDR award based on the insurer's similar misrepresentations of material fact. In Kaiser's view (at 47), even if the court agrees that the insurer made the qualifying misrepresentations, it cannot invalidate the award under Subsection (I) because that provision "d[oes] not create a remedy pursuant to which a party can obtain review by a court." If, in this hypothetical, the court finds that the misrepresentations do not rise to the level of fraud or undue means—which the insurer would doubtless argue is a prohibitively high bar, as Kaiser does here—then Subsection (II) relief is foreclosed as well. Such a lopsided scheme makes no sense and is contrary to Congress's intent of creating a fair and efficient billing dispute resolution process for insurers and providers. *See Turkiye Halk Bankasi A.S. v. United States*, 598 U.S. 264, 275 (2023) (statutory provisions must be read "with a view to their place in the overall statutory scheme").[5]

Kaiser does not engage with any of these issues. Instead, it pivots and claims (at 45–47) that because Subsection (II)'s language indicates it is the sole avenue for "judicial review," that means Subsection (I) affords no relief here. But as REACH has explained (at 29–30), Subsection (I) calls not for judicial *review* of an otherwise

[5] Of course, Kaiser's intentional misrepresentation of its QPA here satisfies both Subsection (I) and Subsection (II). *See supra* 13–15, 20. Accordingly, the Court need not define today the universe of cases that may involve a "misrepresentation" under Subsection (I) without rising to the level of "fraud" or "undue means" under Subsection (II). The Court may assume arguendo that there is binding IDR award and vacate that award under Subsection (II) as one procured by fraud or undue means.

binding, enforceable decision but for judicial *action* in the form of a declaration that an IDR determination must be disregarded or set aside "as a nullity" when infected with misrepresentations from the start. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 83 cmt. D (1982). In that case, there is no binding or enforceable award to review. The two provisions are analytically distinct—indeed, although the factual predicates for Subsection (I) and Subsection (II) relief overlap here, the majority of grounds for review and vacatur under Subsection (II), such as arbitrator corruption and misconduct, are unrelated to fraud or misrepresentations. *See* 9 U.S.C. § 10(a)(2)–(4). And a Subsection (I) analysis is analytically first. Kaiser just skips over it.

C. Kaiser's Concern That Giving Effect to Subsection (I) Will Open the Floodgates Is Unfounded.

Determining that REACH can obtain relief for Kaiser's QPA-related misrepresentations will not, as Kaiser (at 43–44, 57) and AHIP (at 14–23) claim, generate a flood of lawsuits.

The NSA's implementing regulations require misrepresentations under Subsection (I) to be both "intentional" and "material" in order to render a decision nonbinding. 45 C.F.R. § 149.510(c)(4)(vii)(A); *see* Kaiser Resp. Br. 44 (acknowledging this). Moreover, the parties agree that Rule 9(b)'s pleading requirements apply to misrepresentations covered by Subsection (I). *See* Op. Br. 31. Accordingly, not every false statement will clear Subsection (I)'s threshold and not every aggrieved party will get to court. But Kaiser's intentional misrepresentation

of its QPA—the accuracy of which is of paramount importance in the NSA scheme—easily clears the threshold, and Subsection (I) provides a judicial remedy.

III. REACH WAS NOT REQUIRED TO PROCEED BY MOTION INSTEAD OF COMPLAINT.

REACH initiated this lawsuit by filing a complaint, rather than a motion for vacatur under the FAA, because the NSA did not incorporate the FAA wholesale. (Doc. 1.) Kaiser disagrees (at 54–58). But as REACH explained above, the NSA incorporates the FAA only to the extent indicated by the text. For example, the NSA narrowly incorporates the descriptions in "paragraphs (1) through (4) of section 10(a) of [the FAA]." 42 U.S.C. § 300gg-111(c)(5)(E)(i)(II)). *Supra* 5. It does not incorporate FAA section 6, on which Kaiser relies. Nor does it offer any other textual indication that the NSA imports all of the FAA's procedural rules. And none of the cases Kaiser cites identifies any statutory basis for applying the FAA's procedural rules to challenges to NSA IDR awards.

IV. THIS COURT SHOULD CLARIFY THAT PROVIDERS CAN OBTAIN RELIEF WITHOUT NAMING IDR ENTITIES AS PARTIES.

When REACH filed its complaint, no court had ever decided when and how courts can remand NSA disputes to IDR entities for further proceedings; and the statute does not expressly address this point. To ensure it could obtain a remedy if C2C's award was vacated, REACH named C2C as a party. REACH further

presented arguments supporting its entitlement to a remedy both in the district court and before this Court.

The United States and C2C now both take the position that REACH can obtain vacatur and remand of an IDR award, as well as a redo of the IDR proceeding, even where the IDR entity is not named as a party to the lawsuit. Specifically, the United States asserts (at 12–13) that IDR entities are not proper parties to suits challenging their awards because the NSA's "detailed scheme for the resolution of … disputes" "between medical providers and insurers" "presumes that any disputes" will be limited to those parties. According to the United States (at 13–14), nothing in the NSA "require[s] the [IDR entity] to be a party" and nothing in the "Act prohibit[s] a court from remanding to the [IDR entity] for a new determination." Similarly, C2C asserts (at 16) that the NSA does not "impliedly require[] parties to name the [IDR entity] as a defendant when challenging an NSA IDR award" because IDR entities "must comply" with a district court's decision to vacate an IDR award and must "arbitrate the matter a second time."

REACH's concerns about available remedies (at 48–53) are alleviated if this Court accepts the view of C2C and the United States. But if this Court finds that a remand to the IDR entity for another proceeding would not flow from vacatur of an

NSA IDR award, it should find that C2C is a proper party for the reasons stated in REACH's Opening Brief or otherwise provide clarity on how to obtain relief.

CONCLUSION

For the foregoing reasons, the Court should reverse the order of the district court.

Date: September 25, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that

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Dated: September 25, 2024

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I hereby certify that on September 25, 2024, I caused a copy of the foregoing to be electronically filed with the Clerk of the Court by using the Court's Appellate PACER system, which will automatically send a notice of electronic filing to all counsel of record. Under 11th Circuit Rule 25-3(a), no independent service by other means is required.

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