CASE NO. 24-20051

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

GUARDIAN FLIGHT, L.L.C.,
Plaintiff-Appellee
v.
MEDICAL EVALUATORS OF TEXAS ASO, L.L.C.,
Defendant-Appellant

Consolidated with

CASE NO. 24-20204

GUARDIAN FLIGHT, L.L.C.; REACH AIR MEDICAL SERVICES, L.L.C.; CALSTAR AIR MEDICAL SERVICES, L.L.C.,
Plaintiffs-Appellants
v.
AETNA HEALTH, INCORPORATED; KAISER FOUNDATION HEALTH PLAN, INCORPORATED,
Defendants-Appellees

Appeal from the United States District Court,
Southern District of Texas, Hon. Alfred H. Bennett
Case Nos. 4:22-cv-03805 & 4:22-cv-03979

BRIEF OF APPELLEE KAISER FOUNDATION HEALTH PLAN, INC.

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

Moe Keshavarzi
mkeshavarzi@sheppardmullin.com
333 South Hope Street, 43rd Floor
Los Angeles, CA 90071
Telephone: 213.620.1780

John F. Burns
jburns@sheppardmullin.com
Matthew G. Halgren
mhalgren@sheppardmullin.com
Megan McKisson
mmckisson@sheppardmullin.com
501 West Broadway, 18th Floor
San Diego, CA 92101
Telephone: 619.338.6500

Attorneys for KAISER FOUNDATION HEALTH PLAN, INC.

CERTIFICATE OF INTERESTED PERSONS

No. 24-20051, Guardian Flight, LLC v. Medical Evaluators of Texas ASO, LLC
and
No. 24-20204, Guardian Flight, LLC, et al., v. Aetna Health, Inc., et al.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Defendant-Appellant (No. 24-20051): Medical Evaluators of Texas ASO, LLC.

2. Plaintiff-Appellee (No. 24-20051), Plaintiff-Appellant (No. 24-20204): Guardian Flight, LLC, is a wholly-owned subsidiary of Global Medical Response, Inc. through a holding company, Air Medical Group Holdings Company LLC.

3. Plaintiff-Appellant (No. 24-20204): CALSTAR Air Medical Services, LLC, is a wholly-owned subsidiary of Global Medical Response, Inc. through a holding company, Air Medical Group Holdings Company LLC.

4. Plaintiff-Appellant (No. 24-20204): REACH Air Medical Services, LLC, is a wholly-owned subsidiary of Global Medical Response, Inc. through a holding company, Air Medical Group Holdings Company LLC.

5. Defendant-Appellee (No. 24-20204): Aetna Health, Inc. is 100% owned by Aetna Health Holdings, LLC, which is 100% owned by Aetna Inc., which is 100% owned by CVS Pharmacy, Inc., which is 100% owned by CVS Health Corporation, a publicly traded company.

6. Defendant-Appellee (No. 24-20204): Kaiser Foundation Health Plan Inc.

7. Amicus Curiae Movant (in the district court): America's Health Insurance Plans.

8. Counsel for Medical Evaluators of Texas ASO, LLC: Joseph Leo Lanza, Charles Vethan (The Vethan Law Firm, P.C.).

9. Counsel for Guardian Flight, LLC, CALSTAR Air Medical Services, LLC, and REACH Air Medical Services, LLC: Adam T. Schramek, Dewey Jude Gonsoulin, III, Abraham Chang (Norton Rose Fulbright US LLP); Charlotte H. Taylor, Alexa R. Baltes, Amelia A. DeGory, Shelby Baird Smith (Jones Day).

10. Counsel for Aetna Health, Inc.: John B. Shely, M. Katherine Strahan, Cameron Pope, David W. Hughes (Hicks Thomas, LLP).

11. Counsel for Kaiser Foundation Health Plan Inc.: Moe Keshavarzi, John F. Burns, Matthew G. Halgren, Megan McKisson, Erica C. Gibbons (Sheppard, Mullin, Richter & Hampton, LLP).

12. Counsel for America's Health Insurance Plans: Hyland Hunt, Ruthanne M. Deutsch (Deutsch Hunt PLLC).

Dated: October 7, 2024 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By *s/Moe Keshavarzi*

MOE KESHAVARZI
JOHN F. BURNS
MATTHEW G. HALGREN
MEGAN MCKISSON
Attorneys for Defendant and Appellee
KAISER FOUNDATION
HEALTH PLAN, INC.

STATEMENT REGARDING ORAL ARGUMENT

Appellee Kaiser Foundation Health Plan, Inc. believes the decisional process would be aided by oral argument and therefore requests that the Court hear oral argument in this case.

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I. INTRODUCTION

Plaintiffs and Appellants REACH Air Medical Services LLC, CALSTAR Air Medical Services LLC, and Guardian Flight LLC provided air transport for six patients who were members of Defendant and Appellee Kaiser Foundation Health Plan, Inc. Plaintiffs and Kaiser disputed the value of the transport services, and so they were required to resolve their differences via the independent dispute resolution (IDR) arbitration process established by the No Surprises Act (NSA). When the arbitrators at Defendant and Appellee Medical Evaluators of Texas ASO, LLC (MET) selected Kaiser's offer in the baseball-style arbitration, Plaintiffs filed a complaint in the district court seeking to vacate the awards.

The district court correctly dismissed the complaint. Plaintiffs had alleged, among other things, that the awards were procured by fraud—one of the limited bases for vacating an arbitration award under the FAA, which the NSA incorporates by reference. Plaintiffs focused on alleged discrepancies and nondisclosures related to Kaiser's median contracted rates, referred to as the qualifying payment amount (QPA), for the relevant services. These allegations, however, did not meet the high standard for fraud necessary to vacate an arbitration award. The district court gave Plaintiffs an opportunity to amend, but they declined to do so.

Evidently recognizing they cannot successfully plead fraud, on appeal Plaintiffs take a new tack. Confronted with the statutory command that IDR arbitration determinations "shall not be subject to judicial review" unless one of the FAA's four narrow exceptions applies, 42 U.S.C. § 300gg-111(c)(5)(E)(i), Plaintiffs contend they may nevertheless pursue a "judicial action" to have the awards vacated on the ground of an alleged misrepresentation. This position is legally incorrect; Plaintiffs waived it; and, even if such relief were theoretically possible, Plaintiffs would not satisfy the requirements to obtain it.

Plaintiffs are not without recourse. If they believe there is a problem with the IDR process or how Kaiser is reporting its QPA, they may notify or make a petition to the Centers for Medicare and Medicaid Services (CMS), which has authority to take appropriate action. They cannot, however, state a claim sufficient to overturn an IDR arbitration decision with conclusory allegations. This Court should reject Plaintiffs' attempt to circumvent the statute and should affirm the district court's dismissal.

II. STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1331 because it arises under the laws of the United States. This Court has appellate jurisdiction over Plaintiffs' appeal of the district court's final judgment in favor of Kaiser and Aetna pursuant to 28 U.S.C. § 1291. The district

court entered judgment on April 9, 2024. ROA.24-20204.1965. Plaintiffs filed their notice of appeal on May 6, 2024. ROA.24-20204.1966; Fed. R. App. P. 4(a)(1)(A).

III. STATEMENT OF THE ISSUES

1. Did Plaintiffs plead with sufficient particularity fraud or undue means in procuring the arbitration award?

2. Can Plaintiffs avail themselves of a purported separate cause of action created by the NSA to vacate IDR determinations based on alleged misrepresentations regarding the applicable QPA?

3. As an alternate basis to affirm, were Plaintiffs required to file a motion to vacate the arbitration award supported by evidence instead of an unverified complaint?

4. If the Eleventh Circuit were to reverse in a related case before this Court issues its opinion, how would the judgment in this case be impacted?

IV. STATEMENT OF THE CASE

A. Factual Background

Plaintiffs are affiliated corporations that provide air ambulance services throughout the country. ROA.24-20204.12, 66. Kaiser is a non-profit health plan that provides comprehensive medical care and hospital services to its members. ROA.24-20204.12; *U.S. v. Basye*, 410 U.S. 441, 443 (1973). MET is a medical

appeals company that also serves as an IDR arbitrator in disputes under the NSA. ROA.24-20204.10.

According to the complaint, in January and February 2022 Plaintiffs provided air transport services for six Kaiser members. ROA.24-20204.14-15. These services resulted in six claims: (1) the January 17, 2022 "Stroke Claim,"[1] DISP-27514, (2) the February 6, 2022 "Ski Lift Claim," DISP-27486, (3) the February 6, 2022 "ATV Claim," DISP-29872, (4) the February 6, 2022 "Motocross Claim," DISP-27490, (5) the February 8, 2022 "Tractor Claim," DISP-29936, and (6) the February 22, 2022 "Hemorrhage Claim," DISP-32104. ROA.24-20204.14-15. Plaintiffs are not part of Kaiser's provider network, so the parties did not have pre-negotiated reimbursement amounts for the trips. ROA.24-20204.10.

On April 18, 2022, Kaiser issued an explanation of benefits (EOB) in which it stated that its allowed charge for the Stroke Claim was $19,186.68, and it paid that amount for the claim. ROA.24-20204.22; *see* 42 U.S.C. § 300gg-112(a)(3). Payments for the other claims soon followed. On April 21, Kaiser allowed and paid $34,419.20 on the Ski Lift Claim and $35,473.40 on the Motocross Claim. ROA.24-20204.22. It allowed and paid $29,148.20 on the Tractor Claim and

[1] Kaiser uses the shorthand Plaintiffs adopted in their complaint for referring to the various claims. *See* ROA.24-20204.14-15.

$38,784.96 on the ATV Claim on April 25. ROA.24-20204.22. And on April 28, it allowed and paid $22,260.12 on the Hemorrhage Claim. ROA.24-20204.23.

A QPA is meant to approximate the median rate a health plan pays its in-network providers for the services in question. 42 U.S.C. § 300gg-111(a)(3)(c)(i)-(iii); *Med-Trans Corp. v. Cap. Health Plan, Inc.*, 700 F. Supp. 3d 1076, 1079 (M.D. Fla. 2023). The complaint alleges that for three of the claims—the Stroke Claim, ATV Claim, and Hemorrhage Claim—Kaiser "represented that the allowed amount was its QPA for the claim" and made statutory disclosures. ROA.24-20204.22 (Stroke Claim); *see also id.* (stating with respect to the ATV Claim that "Kaiser represented on this EOB that the allowed amount was also the QPA"); ROA.24-20204.23 (stating with respect to the Hemorrhage Claim that "Kaiser represented on this EOB that the amount allowed was its QPA for the claim"). The complaint does not provide further details regarding these representations. The complaint alleges that the other three claims—the Ski Lift Claim, Motocross Claim, and Tractor Claim—were coded as "claim paid at allowed amount," but Kaiser did not make any representations about its QPA for these claims. ROA.24-20204.22.

Plaintiffs believed they should be paid more for their services. The parties were unable to agree on an additional amount, so they proceeded to arbitration as required by the NSA. ROA.24-20204.23; 42 U.S.C. § 300gg-111. MET served as

the IDR arbitrator. ROA.24-20204.23. In the baseball-style arbitration for each claim, Kaiser offered the amount it had already paid, and Plaintiffs proposed considerably higher amounts. Kaiser also stated its QPA for each claim. The amounts were as follows:[2]

Claim	Kaiser's QPA Submitted to MET	Kaiser's Offer	Plaintiffs' Offer
Stroke - Guardian (DISP-27514)	$7,482.41	$19,186.68	$49,844.00
ATV - REACH (DISP-29872)	$18,885.59	$38,636.00	$58,077.94
Hemorrhage - REACH (DISP-32104)	$8,687.07	$21,679.48	$67,188.80
Ski Lift - CALSTAR (DISP-27486)	$16,952.89	$34,419.20	$48,738.60
Motocross - CALSTAR (DISP-27490)	$17,040.74	$35,473.40	$48,899.60
Tractor - REACH (DISP-29936)	$13,351.04	$29,148.20	$37,909.05

[2] The complaint states that it is concerned only with the base and mileage rates for air ambulance services and so, like the complaint, Kaiser omits ancillary services from this table. ROA.24-20204.22 n.5. Therefore, for claims in which Kaiser paid for ancillary services, the amount of Kaiser's offer reflected in this table will not match the total it actually paid. The values reflected in this chart are the result of adding figures stated in the arbitrators' awards, which can be found on the following pages of the record: Stroke Claim - ROA.24-20204.139; ATV Claim - ROA.24-20204.143-145; Hemorrhage Claim - ROA.24-20204.153-154; Ski Lift Claim - ROA.24-20204.131-132; Motocross Claim - ROA.24-20204.135; Tractor Claim - ROA.24-20204.149-150. *See also* ROA.24-20204.24.

After "thorough and careful consideration of the evidence submitted by both parties," including the QPA, the arbitrator selected Kaiser's offer as the appropriate out-of-network rate for each of these six claims. ROA.24-20204.131-132; ROA.24-20204.135; ROA.24-20204.139; ROA.24-20204.143-145; ROA.24-20204.149-150; ROA.24-20204.153-154.

B. Procedural History

Dissatisfied with their losses in IDR arbitrations, Plaintiffs filed several virtually identical lawsuits against health plans and IDR arbitrators each challenging an IDR decision in the health plan's favor. These lawsuits repeated similar 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;[3] (2) characterizing the IDR arbitrator as "partial[]" without facts to demonstrate its supposed bias;[4] and (3) attempting to litigate the health plan's QPA calculation,[5] an issue the arbitrator is not permitted to decide in an IDR dispute. *Infra* Parts VI.C.2, VI.D.4.

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[3] ROA.24-20204.28-29; *cf.* ROA.24-20204.501, 514; *Med-Trans Corp. v. Capital Health Plan et al.* ("*Capital Health*"), 3:22-cv-1077 (M.D. Fla.), Dkt. No. 1 ¶ 36; *Med-Trans v. Blue Cross and Blue Shield of Florida et al.* ("*Blue Cross*"), 3:22-cv-01139 (M.D. Fla.), Dkt. No. 1 ¶ 45.

[4] ROA.24-20204.29; *cf.* ROA.24-20204.515; *Capital Health*, 3:22-cv-1077, Dkt. No. 1 ¶ 37; *Blue Cross*, 3:22-cv-01139, Dkt. No. 1 ¶ 46.

[5] ROA.24-20204.25; *cf.* ROA.24-20204.515; *Capital Health*, 3:22-cv-1077, Dkt. No. 1 ¶ 33; *Blue Cross*, 3:22-cv-01139, Dkt. No. 1 ¶¶ 40-42.

Plaintiffs filed two of these cases in the Southern District of Texas, which were subsequently consolidated. ROA.24-20204.484-485. The first was against Aetna Health Inc. and MET, and the second was against Kaiser and MET. ROA.24-20204.8, 499. In the second case, Kaiser and MET separately moved to dismiss. ROA.24-20204.80, 96. Kaiser argued that the complaint was procedurally defective because an arbitration award must be challenged by a motion to vacate rather than a complaint. ROA.24-20204.110-112. Kaiser also argued that Plaintiffs failed to plead facts that would support vacating an arbitration award under 9 U.S.C. § 10(a)(1)-(4), which the NSA states are the exclusive bases for judicial review of IDR decisions. ROA.24-20204.112-120.[6] In particular, Kaiser explained that the alleged discrepancies in its QPAs did not provide a sufficient basis to vacate the arbitration awards based on fraud or undue means. ROA.24-20204.113-116. For its part, MET argued, among other things, that it was entitled to arbitrator's immunity. ROA.24-20204.88-92.

[6] With its motion to dismiss, Kaiser also submitted copies of the IDR arbitration decisions that Plaintiffs were challenging. ROA.24-20204.130-157. The decisions form the basis of Plaintiffs' case, and the decisions are referenced repeatedly in the complaint. *See, e.g.*, ROA.24-20204.8-9, 12, 27-29. Documents that are referenced in and are integral to a complaint may be considered by the court on a motion to dismiss. *Emden v. Museum of Fine Arts, Houston*, 103 F.4th 308, 314 n.8 (5th Cir. 2024) (A court considering a motion to dismiss "may examine 'any documents attached to the complaint, and any documents attached to the motion to dismiss that are central to the claim and referenced by the complaint.'").

After motions to dismiss were fully briefed in both of the consolidated cases, the district court advised that it would wait to rule on the motions until after a district court in the Middle District of Florida had ruled on a similar case involving some of the same parties, including Kaiser and Plaintiff REACH. ROA.24-20204.2126. The district court invited the parties to file supplemental briefs following the Florida ruling. ROA.24-20204.2135.

The Florida court subsequently dismissed the air ambulance companies' complaint, holding that the plaintiffs had failed to state a claim for vacating the arbitration awards based on fraud. *Med-Trans Corp.*, 700 F. Supp. 3d at 1086. Kaiser then filed a supplemental brief arguing that Plaintiffs—who are all affiliates under common ownership with the plaintiffs from the Florida case—were barred by collateral estoppel from pursuing their claims in this case in light of the Florida court's ruling. ROA.24-20204.1826-1828.

The district court then ruled on the motions to dismiss. It first adopted the Florida court's conclusion on "the proper way to seek judicial review of IDR awards," i.e., that Plaintiffs were permitted to challenge the arbitration awards via a complaint and were not required to bring a motion to vacate. ROA.24-20204.1874. It then held that REACH, which was a party to both this case and the Florida case, was collaterally estopped from pursuing its claims, but REACH's corporate affiliates were not. ROA.24-20204.1876. The court went on to hold that

the NSA did not provide a basis for Plaintiffs to vacate the arbitration awards based on the health plans' alleged misrepresentations of their QPAs. ROA.24-20204.1877-1878. It noted that "the Departments of the Treasury, Labor, and Health and Human Services are responsible for monitoring the accuracy of the QPA calculation methodology" and so "Plaintiffs' complaints about the accuracy of Aetna and Kaiser's QPA calculations are better suited for the aforementioned Departments to address." ROA.24-20204.1879 (citing 87 Fed. Reg. 52,618, 52,627 n.31 (Aug. 26, 2022)). The court also held that Plaintiffs' complaints fell "woefully short of alleging fraud or undue means." ROA.24-20204.1878. The district court therefore dismissed the complaint as to the health plans with leave to amend. ROA.24-20204.1879. The district court denied MET's motion to dismiss, holding that MET was not entitled to an arbitrator's immunity. ROA.24-20204.1881.

Plaintiffs then declined the opportunity to amend, and the district court entered judgment in favor of the health plans. ROA.24-20204.1963. Plaintiffs appealed the judgments, and MET appealed the denial of its motion to dismiss. ROA.24-20204.1884-1885, 1974. This Court then granted Plaintiffs' motion to consolidate the two appeals. Dkt. No. 15.

V. SUMMARY OF ARGUMENT

Congress enacted the NSA to ensure that patients would be protected from surprise bills for out-of-network emergency services, and to provide an efficient IDR mechanism for providers and health plans to resolve payment disputes. A key method for achieving that efficiency is to discourage a proliferation of litigation by limiting the bases on which an IDR arbitration award may be challenged in court to the four narrow grounds provided in the FAA.

Plaintiffs argue that Kaiser committed fraud in reporting its QPA. Fraud is a basis for vacating an arbitration award under the FAA, but Plaintiffs' complaint does not adequately allege this circumstance, much less with the particularity that Rule 9(b) requires for allegations of fraud.

Contrary to Plaintiffs' new position on appeal—which Plaintiffs forfeited by failing to raise in the district court—the statute does not provide a separate cause of action for vacating an arbitration award where a party alleges a misrepresentation. The Court should not entertain Plaintiffs' bid to undercut the limited grounds Congress established for reviewing an award under the NSA.

Finally, as an alternative ground to affirm, Plaintiffs should have sought to vacate the arbitration award by motion, not by filing a complaint. This procedure matters because it impacts the parties' burdens and the shape of litigation. Importantly, a motion requires evidence from the outset, whereas a complaint

merely contains allegations. A proceeding such as this has the potential to escalate into full-fledged litigation, which is not what Congress intended when it established the highly efficient NSA arbitration process.

Accordingly, this Court should affirm.

VI. ARGUMENT

A. Standard of Review

This Court reviews de novo a district court's order granting a motion to dismiss. *Inclusive Communities Project, Inc. v. Lincoln Prop. Co.*, 920 F.3d 890, 899 (5th Cir. 2019). In the arbitration context, however, "[t]his court's de novo review 'is intended to reinforce the strong deference due an arbitrative tribunal.'" *Rain CII Carbon, LLC v. ConocoPhillips Co.*, 674 F.3d 469, 472 (5th Cir. 2012). This Court "may affirm the district court's dismissal on any ground supported by the record." *Inclusive Communities*, 920 F.3d at 899.

B. The NSA Establishes an Arbitration Process for Resolving Disputes Over Payment for Air Ambulance Services and Narrowly Defines the Circumstances in Which an Arbitrator's Determination Is Subject to Review

1. Congress Enacted the NSA to Correct a Market Failure that Enabled Providers of Emergency Services to Extract Extortionate Rates

For services where patients cannot choose a 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 a health plan 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 health plans 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. Recognizing this market reality as a potential financial boon, private equity groups "center[ed] on risky investments with short-term horizons" began to take over the air ambulance industry, causing charges to soar even higher. 86 Fed. Reg. 55,980, 56,046 (Oct. 7, 2021).

Congress enacted the NSA to address this "market failure" that had enabled providers to extract extortionate rates. H.R. Rep. No. 116-615, pt. I, at 53. The NSA prohibits providers from attempting to collect from patients billed charges not paid by health plans. 42 U.S.C. § 300gg-135.[7] Rather, providers must look to

[7] The NSA simultaneously made equivalent modifications to portions of the Public Health Service Act, the Internal Revenue Code, and the Employee Retirement Income Security Act. For simplicity, Kaiser cites only the Public Health Service Act.

health plans to pay for services, and the statute sets out a process for resolving any disputes. 42 U.S.C. § 300gg-112.

2. The NSA Establishes the IDR Arbitration Process by Which Health Plans and Providers Must Resolve Billing Disputes

Under the NSA, a health plan must first either pay or deny a claim within 30 calendar days of bill transmittal. 42 U.S.C. § 300gg-112(a)(3)(A)-(B). The plan is supposed to simultaneously disclose its QPA for the services in question. 45 C.F.R. § 149.140(d)(1)(i). Upon payment, the provider has 30 days to initiate the "open negotiation period" to try to resolve informally any dispute over the initial payment amount on the claim. 42 U.S.C. § 300gg-112(b)(1)(A). If negotiations fail, the provider may initiate IDR arbitration with an arbitration entity certified for participation in the program. 42 U.S.C. § 300gg-112(b)(1)(B). If arbitration is initiated, the parties each submit a proposed offer for payment of the services at issue. 42 U.S.C. § 300gg-112(b)(5)(B)(i)(I). The arbitrator from a certified IDR entity—which is agreed upon by the parties or, absent agreement, randomly appointed by the Department of Health and Human Services (HHS)—then selects between the offers to determine the final payment amount (i.e., "baseball-style" arbitration). 42 U.S.C. § 300gg-112(b)(4)(B); 42 U.S.C. § 300gg-111(c)(4)(F); 42 U.S.C. § 300gg-112(b)(5)(A)(i). Neither party has a right to discover any of the confidential materials submitted by the opposing party in support of its offer. ROA.24-20204.16.

When selecting between offers, the IDR arbitrator is required to consider the health plan's "qualifying payment amount"—generally the median of the rates to which the health plan and its in-network providers in the relevant geographic area have agreed for the services in question. 42 U.S.C. § 300gg-112(b)(5)(C)(i)(I); 42 U.S.C. § 300gg-111(a)(3)(E)(i). Though the IDR arbitrator must consider this information, a health plan need not reimburse at its QPA, or offer an amount equal to its QPA in the IDR arbitration. *See* 42 U.S.C. § 300gg-112(b)(5)(B)(i)(I). Thus, a health plan may choose to pay a provider at, above, or below its QPA, or ignore it entirely—a fact that Plaintiffs acknowledge. ROA.24-20204.16.

3. The IDR Arbitration Process Is Designed for Efficiency and Finality

Congress designed the IDR process to provide for an "efficient" and streamlined means of dispute resolution while "minimizing costs." 42 U.S.C. § 300gg-111(c)(3)(A); 42 U.S.C. § 300gg-111(c)(4)(E); *see also* H.R. Rep. No. 116-615 at 48, 58 (stating that the 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 the IDR process).

To advance these goals, 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-112(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); 42 U.S.C. § 300gg-112(b)(5)(D). The purpose of the FAA is to "encourage[] . . . efficient and speedy" dispute resolution. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 345 (2011). Arbitration is intended to be "speedy and not subject to delay and obstruction." *Prima Paint Corp. v. Flood & Conklin Mfg. Co*., 388 U.S. 395, 404 (1967). 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. Assocs., LLC v. Mattel, Inc*., 552 U.S. 576, 588 (2008).

Following implementation of the NSA, promoting efficiency and adhering to the statutory limitations on judicial review has become more critical than ever. The number of IDR arbitrations has grown each quarter, and 288,810 disputes were filed in the first half of 2023 alone.[8] This exceeds the number of civil cases

[8] *Supplemental Background on Federal Independent Dispute Resolution Public Use Files January 1, 2023 - June 30, 2023*, U.S. Department of Health & Human Servs., 2 (last visited Sept. 19, 2024), https://www.cms.gov/files/document/federal-idr-supplemental-background-2023-q1-2023-q2.pdf ("Between January 1, 2023 and June 30, 2023, disputing parties initiated 288,810 disputes through the Federal IDR portal. The number of disputes initiated through the Federal IDR portal over this six-month period was 13 times greater than the Departments initially estimated the number of disputes initiated would be over the course of a full calendar year and has grown each quarter.").

initiated in all district courts across the country in the entire year ending March 31, 2023.[9]

4. IDR Arbitration Decisions Are Subject to Review Only in Limited Circumstances

IDR arbitration determinations "*shall not* be subject to judicial 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;
>
> (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.

9 U.S.C. § 10(a)(1)-(4).

The FAA imposes a strong presumption in favor of confirming arbitration awards. *Downer v. Siegel*, 489 F.3d 623, 626 (5th Cir. 2007). Indeed, "review of

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[9] *Federal Judicial Caseload Statistics 2023*, U.S. Courts (last visited Sept. 19, 2024), https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2023 ("Civil case filings in the U.S. district courts dropped 8 percent (down 24,882 cases) to 284,220.").

an arbitration award is extraordinarily narrow." *Id.*; *accord Halliburton Energy Servs., Inc. v. NL Indus*., 618 F. Supp. 2d 614, 634 (S.D. Tex. 2009) ("[J]udicial review of arbitration decisions is among the narrowest known to the law . . . ."). "[R]eview under § 10 focuses on misconduct rather than mistake." *AT&T Mobility*, 563 U.S. at 350-51. An arbitrator's error—even a "serious" one—does not warrant vacatur under the FAA. *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671 (2010); *see also Hall St. Assocs.*, 552 U.S. at 586 (recognizing that the specific, narrow bases set forth in the FAA are the "exclusive" means for vacatur). As the parties seeking to vacate the IDR award, Plaintiffs have the heavy burden to establish the existence of a specific statutory ground for vacatur. *See Trans Chem. Ltd. v. China Nat'l Mach. Imp. & Exp. Corp.*, 978 F. Supp. 266, 303 (S.D. Tex. 1997), *aff'd and adopted*, 161 F.3d 314 (5th Cir. 1998) ("A party moving to vacate an arbitration award has the burden of proof."); *see also Walker v. Ameriprise Fin. Servs.*, 787 Fed. Appx. 211, 213 (5th Cir. 2019) (recognizing that the party seeking vacatur "must clear a high hurdle").

Plaintiffs argue that when Congress incorporated the grounds for review of an arbitration decision provided by 9 U.S.C. § 10(a)(1)-(4), Congress did not

intend to adopt the existing caselaw interpreting that statute. AOB 61-62.[10] It is well settled that when "judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well." *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998); *see also Georgia v. Public.Resource.Org, Inc.*, 590 U.S. 255, 270 (2020) ("[W]hen Congress 'adopt[s] the language used in [an] earlier act,' we presume that Congress 'adopted also the construction given by this Court to such language, and made it a part of the enactment.'"). This is certainly true where, as here, Congress did not merely repeat the language from the FAA, but actually incorporated the FAA provision by reference. 42 U.S.C. § 300gg-111(c)(5)(E)(i). This is not, as Plaintiffs posit, a situation where a court must speculate as to whether a statutory word is being used as a term of art. AOB 60. Rather, this involves the express incorporation of an entire statutory subsection into the new statute, and when "Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the

[10] Citations to the appellants' opening brief (AOB) are to the page numbers stamped at the top of the pages by CM/ECF, not to the page numbers printed on the bottom of the pages.

incorporated law . . . ." *Munoz v. Intercontinental Terminals Co., L.L.C.*, 85 F.4th 343, 349 (5th Cir. 2023).

Accordingly, as the parties seeking to vacate the IDR award, Plaintiffs have the heavy burden to establish the existence of a specific statutory ground for vacatur. *See Cooper v. WestEnd Cap. Mgmt., L.L.C.*, 832 F.3d 534, 544 (5th Cir. 2016). On appeal, Plaintiffs invoke the first basis for vacatur under 9 U.S.C. § 10(a)(1), addressing fraud and undue means.[11] AOB 59-64. However, they do not carry their burden with respect to this ground.

C. Plaintiffs Fail to Plead Fraud or Undue Means with Requisite Particularity

Plaintiffs do not provide a sufficient basis for their allegation that the arbitration award was procured by fraud or undue means within the meaning of 9 U.S.C. § 10(a)(1). The district court therefore correctly determined this theory did not support vacating the arbitration award.

[11] In their opening brief, Plaintiffs note that in the proceedings below they also challenged the arbitrator's awards as being made in excess of authority. AOB 33. They do not argue this issue on appeal, thereby forfeiting it as a basis to reverse the judgment against the health plans. *Sec. & Exch. Comm'n v. Hallam*, 42 F.4th 316, 327 (5th Cir. 2022) ("[A]ny issue not raised in an appellant's opening brief is forfeited.").

1. As Plaintiffs Concede, Rule 9(b)'s Heightened Pleading Standard Applies

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. *Elson v. Black*, 56 F.4th 1002, 1008 (5th Cir. 2023). Thus, Plaintiffs' 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 an arbitration award under 9 U.S.C. § 10(a)(1)). Plaintiffs concede, as they must, that Rule 9(b)'s requirements apply in this case. AOB 59 n.15.

Rule 9(b) requires Plaintiffs "to specify the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent." *Herrmann Holdings Ltd. v. Lucent Techs., Inc.*, 302 F.3d 552, 564–65 (5th Cir. 2002). Plaintiffs must provide the "the who, what, when, where, and how" of the allegedly fraudulent conduct. *U.S. ex rel. Williams v. Bell Helicopter Textron, Inc.*, 417 F.3d 450, 453 (5th Cir. 2005). Rule 9(b) is meant to discourage the "sue first, ask questions later" approach that Plaintiffs use here. *See* 27 Fed. Proc., L. Ed. § 62:133 (Aug. 2024

Update). The rule prevents the "filing of a complaint as a pretext for the discovery of unknown wrongs[.]" *Samsung Elecs. Co., Ltd. v. Texas Instruments Inc.*, 1996 WL 343330, at *3 (N.D. Tex. 1996). "[A]pplication of Rule 9(b) is especially appropriate" in situations like this, where a plaintiff could use such discovery to "bolster" its position in related proceedings—such as other IDR arbitrations. *See id.*

Rule 9(b) has "bite," and this Court appl[ies] the rule with force, without apology." *Williams v. WMX Techs., Inc.*, 112 F.3d 175, 178 (5th Cir. 1997). Failure to satisfy Rule 9(b) warrants dismissal. *Shushany v. Allwaste, Inc.*, 992 F.2d 517, 520 (5th Cir. 1993).

2. Plaintiffs Do Not Allege Fraud or Undue Means with the Specificity Required by Rule 9(b)

The district court correctly concluded that Plaintiffs' allegations that Kaiser used fraud or undue means to prevail in arbitration were insufficient to withstand a motion to dismiss. ROA.24-20204.1878-1879. "Courts apply a three-prong test to determine whether an arbitration award is so affected by fraud" so as to warrant vacatur: "(1) the movant must establish the fraud by clear and convincing evidence; (2) the fraud must not have been discoverable upon the exercise of due diligence before or during the arbitration; and (3) the person challenging the award must show that the fraud materially related to an issue in the arbitration." *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d

274, 306 (5th Cir. 2004). To vacate an arbitration award based on "undue means," 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); *Am. Postal Workers Union, AFL-CIO v. U.S. Postal Serv.*, 52 F.3d 359, 362 (D.C. Cir. 1995) (holding in a labor arbitration context that "undue means must be limited to an action by a party that is equivalent in gravity to corruption or fraud, such as a physical threat to an arbitrator or other improper influence"). None of Plaintiffs' allegations meets these high standards with the specificity required by Rule 9(b).

First, for the claims for which the complaint alleges Kaiser did not provide a QPA to Plaintiffs (the Ski Lift Claim, Motocross Claim, and Tractor Claim), Plaintiffs cannot meet at least the first two elements of fraud. Plaintiffs allege that for these claims, the amount Kaiser paid "was coded as 'claim paid at allowed amount'" and that "[t]he EOB did not state that this was the QPA, disclose a QPA, or provide the statutory disclosures." ROA.24-20204.22. They further allege that Kaiser "refused to provide additional information regarding the alleged QPA calculations in response to questions from Plaintiffs." ROA.24-20204.23. Taking these allegations on their face, Kaiser did not make any representation to Plaintiffs

about the QPAs for these claims, so it could not have made a fraudulent representation. Plaintiffs therefore cannot prove there was any fraud at all for these claims, which is the first required element. *Karaha Bodas*, 364 F.3d at 306. They also cannot meet the second element, that the alleged fraud "must not have been discoverable upon the exercise of due diligence before or during the arbitration." *Id.* According to their own complaint, Plaintiffs knew Kaiser had not disclosed its QPA and asked for information about the QPA before Plaintiffs instituted the arbitration. ROA.24-20204.22-23. Thus, not only was the alleged absence of QPA information discoverable, but Plaintiffs say they did in fact discover it.[12]

Plaintiffs cannot remedy these defects by citing the mere fact that Kaiser originally paid an amount higher than the QPA it reported to the arbitrator. As Plaintiffs admit, health plans need not reimburse providers—or submit offers—at their QPA. *See* ROA.24-20204.16. The QPA is simply a data point that IDR arbitrators consider when determining an appropriate payment amount. 42 U.S.C.

[12] Plaintiffs argue that this second element shows that the caselaw interpreting the FAA standards should not apply to efforts to vacate NSA IDR arbitration awards because the IDR process does not provide a mechanism for the parties to review each other's pleadings and discover fraud therein. AOB 62. To the contrary, the complaint shows that in this instance Plaintiffs were aware of the allegedly missing information. ROA.24-20204.22-23. There is no basis not to apply the robust caselaw construing section 10(a) of the FAA—which section Congress expressly incorporated into the NSA. *Supra* Part VI.B.4.

§ 300gg-112(b)(5)(C)(i)(I). Accordingly, the amount a health plan pays on a bill does not itself constitute a representation about its QPA.

Plaintiffs' allegations are also insufficient as to the other three claims (the Stroke Claim, ATV Claim, and Hemorrhage Claim), for which Plaintiffs say Kaiser provided inconsistent QPAs. ROA.24-20204.22-23. The crux of Plaintiffs' argument as to these three claims is their allegation that Kaiser stated in its EOB that the amount paid was the QPA, but then it reported a different value as the QPA in its IDR briefing. ROA.24-20204.22-23. Plaintiffs argue: "Logic dictates that where an insurer provided two QPA representations, at least one was false." AOB 57.

Plaintiffs fail to allege facts demonstrating, or even suggesting, that the alleged misstatements in the EOBs were intentional. It is not plausible that Kaiser would have intentionally told Plaintiffs that its QPA was one number and then provided a different QPA to the arbitrator because the discrepancy was bound to be discovered eventually. The more likely explanation is that the alleged misstatements regarding the QPA in the three EOBs were the result of a typographical error in the definition of the allowed amount in Kaiser's EOB form. Where the allegations of a complaint have a "more likely explanation[]," they do not "plausibly establish" a plaintiff's theory. *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009). And it is well settled that an inadvertent error does not amount 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). Thus, the district court correctly concluded that "any allegations about [Kaiser] behaving in bad faith are conclusory, at best, and are not factually supported." ROA.24-20204.1879.

Additionally, "[f]raud requires a showing of bad faith *during the arbitration proceedings*." *Trans Chem. Ltd. v. China Nat'l Mach. Imp. & Exp. Corp.*, 978 F. Supp. 266, 304 (S.D. Tex. 1997) (emphasis added), adopted by *Trans Chem. Ltd. v. China Nat'l Mach. Imp. & Exp. Corp.*, 161 F.3d 314, 319 (5th Cir. 1998) ("We agree with the district court's analysis of these issues and therefore adopt Parts I–V of its careful and comprehensive opinion."); *accord Morgan Keegan & Co. v. Garrett*, 495 F. App'x 443, 446-47 (5th Cir. 2012). Plaintiffs posit that one of Kaiser's QPAs must have been inaccurate, but they provide no basis to conclude that the QPA submitted "during the arbitration proceedings" was the inaccurate

one—much less that the submission during the arbitration was made with bad faith. The statement Kaiser allegedly made in its EOBs equating the QPA with the amount paid was clearly not made "during the arbitration proceedings." A health plan issues an explanation of benefits, or EOB, as part of its initial payment for the claim. The EOB is not a discovery response, and it is not part of an arbitration proceeding. If the provider does not dispute the amount paid, that is the end of the process. It is only after a provider raises a dispute and negotiations fail that a provider may initiate arbitration. 42 U.S.C. § 300gg-112(b)(1)(B). Accordingly, Plaintiffs have not sufficiently alleged fraud "during the arbitration."

Plaintiffs argue that, while applicable, Rule 9(b)'s particularity requirement should be "relaxed." AOB 56. However, in *U.S. ex rel. Russell v. Epic Healthcare Mgmt. Grp.*, 193 F.3d 304, 308 (5th Cir. 1999), which Plaintiffs cite, the court declined to relax Rule 9(b) because, even though the plaintiff alleged she did not have the information she needed, the information was possessed by other entities, such as the Healthcare Financing Administration (as CMS was formerly known). *Russell* does not stand for the proposition that a plaintiff satisfies Rule 9(b) simply by alleging that the defendant previously represented that a datum had a value different from what it officially reported. This is certainly true where the plaintiff provides no basis to support the implausible inference that the inconsistency was intentional or any basis to conclude that the official report was the inaccurate one.

Plaintiffs also argue that their fraud claim is buttressed by their unsupported allegation that the amounts Kaiser paid and the QPAs it reported to the arbitrator are lower than amounts unnamed payors reimbursed providers for out-of-network services before the NSA was enacted. AOB 57 (citing ROA.24-20204.25). This allegation is irrelevant. Because of the highly coercive nature of the pre-2022 air ambulance market, Congress instructed IDR arbitrators to consider the QPA—which is based on a health plan's *contracted* rates—when selecting between the parties' offers in IDR arbitration. 42 U.S.C. § 300gg-111(a)(3)(E)(i)(l). By design, the QPA is not based on the *out-of-network* payments that providers often strong-armed health plans into paying before the NSA.[13] *Id.* Nothing in the NSA requires Kaiser to reimburse providers in accordance with pre-2022 *out-of-network* rates. *Id.*

[13] The Airline Deregulation Act of 1978 prevents states from regulating air ambulance providers. *See, e.g.*, *Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751, 755 (4th Cir. 2018) (affirming district court decision that state regulation of air ambulance billing practices was barred). Protected by this statute, air ambulance providers leveraged their out-of-network status to charge more for their services than any other emergency out-of-network provider—leaving patients and health plans with no recourse to fight back against those bills, a result that one federal district court described as "crazy." *See* Trans. of Sept. 27, 2017 hearing in *Scarlett et al. v. Air Methods Corp.*, Case No. 16-CIV-2723-RBJ (D. Colo. Nov. 4, 2016). The NSA sought to correct this situation. *See* H.R. Rep. No. 116-615, pt. I, at 53 (Dec. 2, 2020).

The Congressional Budget Office evaluated the NSA with the express understanding that the law would reduce reimbursement, predicting that the NSA's arbitration procedures would 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.

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 payments below 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. Plaintiffs' reliance on pre-NSA reimbursement rates only demonstrates that Plaintiffs' true gripe is with the NSA, not with Kaiser or any of the other health plans that Plaintiffs have sued.

Finally, it is not for the courts (or even the arbitrator) to assess a health plan's QPA calculation. Plaintiffs allege on "information and belief," that Kaiser

misstated its QPA. ROA.24-20204.28-29. But as the Departments[14] made clear in their regulations, it is not the 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' requirements for calculating the QPA, *it is the Departments' . . . responsibility, not the certified IDR entity's,* to monitor the accuracy of the plan's . . . QPA calculation methodology by conducting an audit . . . .

87 Fed. Reg. 52,618, 52,627 n.31 (Aug. 26, 2022) (emphasis added); *see also* 45 C.F.R. § 149.140(f); 45 C.F.R. § 149.150 (stating that a provider concerned with a health plan's compliance can file a complaint with HHS). It follows that this court, in reviewing the arbitrator's award, is likewise not responsible for assessing the accuracy of Kaiser's QPA calculation. That responsibility rests exclusively with "the Departments." 87 Fed. Reg. 52,618, 52,627 n.31 (Aug. 26, 2022). Accordingly, the district court correctly determined that Plaintiffs' allegations regarding Kaiser's QPA are neither a question for the court to decide nor a basis to vacate the IDR award. ROA.24-20204.1879.

To the extent that Plaintiffs attempt to couch Kaiser's alleged failure to disclose its QPA for the Ski Lift, Motocross, and Tractor Claims as "undue means"

[14] HHS, the Department of Labor, and the Department of the Treasury (collectively, the Departments) are jointly tasked with implementing the NSA.

independent of fraud, AOB 62, that argument also fails.[15] Again, Plaintiffs' argument as to these claims is based on their position that, before they initiated the IDR process, Kaiser should have disclosed a certain datum, but it did not do so. ROA.24-20204.22-23. Plaintiffs were evidently aware of this omission, and they do not allege there was anything stopping them from bringing it to the arbitrator's attention. Plaintiffs do not cite any case in which an arbitration award was vacated on "undue means" grounds in circumstances like these. It is easy to see why they are unable to cite such a case: there is no world in which such an omission is "equivalent in gravity to corruption or fraud, such as a physical threat to an arbitrator or other improper influence." *Am. Postal Workers*, 52 F.3d at 362; *see also Floridians for Solar Choice*, 314 F. Supp. 3d at 1355.

In sum, Plaintiffs fail to sufficiently plead fraud or undue means. By declining the district court's offer to amend their complaint, Plaintiffs indicated they could not cure the deficiency in their pleading. The district court correctly concluded that Plaintiffs had not alleged a basis to vacate the arbitration award for fraud or undue means, and this Court should affirm.

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[15] It does not appear that Plaintiffs mean to argue facts distinct from their fraud theory to support their "undue means" theory as to the Stroke, ATV, and Hemorrhage Claims. In any event, Plaintiffs also fail to meet the undue means standard as to those claims. *Floridians for Solar Choice*, 314 F. Supp. 3d at 1355.

D. The Statute Does Not Provide a Separate Cause of Action to Vacate IDR Determinations Based on Alleged Misrepresentations Regarding QPA Values, and Plaintiffs Have Forfeited Any Argument to the Contrary

On appeal, Plaintiffs lead with an argument they never raised before the district court. They focus on a subclause of the NSA, 42 U.S.C. § 300gg-111(c)(5)(E)(i)(I) (subclause (I)),[16] which states that an IDR 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 claim." Plaintiffs contend that this provision supplies an independent basis to vacate the arbitration award and that their complaint meets this standard. AOB 41-59.

The Court should not consider Plaintiffs' position because they forfeited the argument by failing to raise it before the district court. Moreover, as discussed above, Plaintiffs have failed to plead an intentional misrepresentation with the particularity required by Rule 9(b), so they would not be able to obtain vacatur under this provision if it did apply. Additionally, even if this provision provided an independent ground to review arbitration awards, it would not apply to issues related to the QPA as such disputes are committed to the Departments. Finally, the

[16] Plaintiffs refer to subclause (I) as "an entire separate subsection," AOB 52, but technically it is a "subclause." *See* Office of Legislative Counsel, U.S. House of Representatives, *House Legislative Counsel's Manual on Drafting Style*, HLC No. 117-2, at 16 (2022).

statute expressly provides that the FAA's four narrow grounds for vacatur provide the exclusive means for judicial review under the NSA, 42 U.S.C. § 300gg-111(c)(5)(E)(i)(II) (subclause (II)), so Plaintiffs' proposed interpretation of the statute cannot be correct.

1. Plaintiffs Have Forfeited Their New Interpretation of the Statute, Which They Raise for the First Time on Appeal

In the district court, Plaintiffs took the position that subclause (I) (relating to misrepresentations of facts) modified the grounds for judicial review stated in subclause (II) (i.e., the grounds listed in the FAA). Plaintiffs argued: "Awards may be vacated under the FAA when secured through 'undue means.' The NSA specifically adopts the standard of 'misrepresentation of facts' as a type of undue means that will support vacatur." ROA.24-20204.207 n.4; *see also* ROA.24-20204.233 ("The statute includes misrepresentations to IDR entities as a form of 'undue means' . . . ."). Accordingly, Plaintiffs did not contend in the district court that subclause (I) provided an independent basis for vacatur, and the district court addressed the position Plaintiffs actually presented. ROA.24-20204.1877 ("Plaintiffs' reading of the NSA is that misrepresentations of facts are a type of 'undue means,' which triggers judicial review."). It is therefore puzzling when, on appeal, Plaintiffs complain that "the district court concluded that [subclause] (I) does not provide an independent ground for vacatur." AOB 51. The district court can hardly be faulted for declining to adopt a theory that was never presented to it.

On appeal, Plaintiffs' new counsel begin their argument with an elaborate theory centered on subclause (I). AOB 41-59. Contrary to their position in the district court, when they contended that subclause (I)'s reference to "misrepresentation of facts" was a type of "undue means" for which a party could seek judicial review under the FAA, Plaintiffs now argue that review for "misrepresentation of facts" is not "judicial review," but rather is a distinct kind of "judicial action." AOB 53. To support this new position, they claim that the judicial review provided by subclause (II) arises under the Administrative Procedure Act, AOB 49-50, a law they did not cite in their complaint or in any of their district court briefing. AOB 49-50.

In addition to being unmeritorious, *see infra* Part VI.D.5, Plaintiffs' new position has been forfeited. It is well established that "[a] party forfeits an argument by failing to raise it in the first instance in the district court . . . ." *Bunker v. Dow Chem. Co.*, 111 F.4th 683, 688 n.3 (5th Cir. 2024).[17] This is because "[a]s a court for review of errors," this Court does not "make legal conclusions in the

[17] There are exceptions to this rule, but Plaintiffs do not attempt to invoke any of them. The most germane exception would appear to be for "issues 'purely legal' in nature that would 'result in a miscarriage of justice' if [the court] did not address them." *Bunker*, 111 F.4th at 688 n.3. Even if the interpretation of subclause (I) is a pure question of law, for the reasons discussed *infra* Part VI.D.2-4, declining to consider Plaintiffs' argument would not result in a miscarriage of justice. *Cf. id.* (declining to consider forfeited issue where the plaintiff "had every opportunity to present these arguments below").

first instance," but rather it reviews "the actions of a trial court for claimed errors." *Montano v. Texas*, 867 F.3d 540, 546 (5th Cir. 2017). "In other words, 'a court of appeals sits as a court of review, not of first view.'" *Id.* This is not a situation in which Plaintiffs have merely cited "new support for an existing argument." *Templeton v. Jarmillo*, 28 F.4th 618, 622 (5th Cir. 2022). Instead, they have shifted their position from arguing that subclause (I) modifies the grounds for judicial review under the FAA to arguing that subclause (I) does not provide for judicial review but rather an independent ground for vacatur. Accordingly, the Court should conclude that Plaintiffs' new argument with respect to subclause (I) is forfeited and should decline to consider it.

2. The Applicable Regulation Provides that IDR Determinations Are Binding Absent "Intentional" Misrepresentation

Even if subclause (I) provided an independent basis for vacatur, Plaintiffs would still be unable to satisfy the applicable standard, which requires that any misrepresentation be intentional. 45 C.F.R. § 149.510(c)(4)(vii)(A)(1).

Plaintiffs contend that, under subclause (I), "an IDR determination becomes nonbinding where there is simply a misrepresentation of fact." AOB 46. By this, Plaintiffs evidently mean that they need only particularly plead facts showing that the statement was "false." *See* AOB 68; AOB 57 ("Logic dictates that where an insurer provided two QPA representations, at least one was false."). This, however, is not sufficient.

The regulation provides that subclause (I) applies only where a misrepresentation was "intentional." 45 C.F.R. § 149.510(c)(4)(vii)(A)(1) (providing that an IDR determination "[i]s binding upon the parties, in the absence of fraud or evidence of intentional misrepresentation of material facts presented to the certified IDR entity regarding the claim"). The regulation correctly construes the statute because "misrepresentation" is commonly understood to refer to a statement that is more than just incorrect. Indeed, the dictionary defines "misrepresent" as meaning "to give a false or misleading representation of usually with an intent to deceive or be unfair."[18] In their brief, Plaintiffs acknowledge that the regulation requires a misrepresentation to be intentional, and Plaintiffs do not challenge the regulation. AOB 43.

An "intentional misrepresentation of material facts" is not the same thing as a simple false statement. *See* 45 C.F.R. § 149.510(c)(4)(vii)(A)(1). Plaintiffs concede that Rule 9(b) applies to their misrepresentation claim. AOB 55 n.13. As discussed *supra* Part VI.C.2, it is simply not plausible that Kaiser would have intentionally reported two different QPAs for the same claim because, among other reasons, the discrepancy would almost inevitably be uncovered. *See Iqbal*, 556 U.S. at 681. The only plausible explanation for the alleged discrepancy is an

[18] *Misrepresent*, Merriam-Webster Dictionary (last visited Sept. 19, 2024), https://www.merriam-webster.com/dictionary/misrepresent.

unintentional mistake. Accordingly, even if subclause (I) provided an independent ground for vacating IDR determinations in cases of intentional misrepresentation, Plaintiffs would not have established their entitlement to relief under that provision.

3. Plaintiffs Do Not Adequately Allege a Misrepresentation of Facts "Presented to the IDR Entity"

The statute on which Plaintiffs rely does not address a misrepresentation of facts at just any point during the claim negotiation process. Rather, it pertains only to "misrepresentation of facts *presented to the IDR entity* involved regarding such claim." 42 U.S.C. § 300gg-111(c)(5)(E)(i)(I) (emphasis added). Plaintiffs also fail to satisfy this requirement.

First, with respect to the Ski Lift Claim, Motocross Claim, and Tractor Claim—the claims for which the complaint alleges Kaiser did not provide a QPA to Plaintiffs—Plaintiffs cannot show a false statement (much less an intentional misrepresentation) was made to anyone. ROA.24-20204.22-23. They allege that Kaiser failed to disclose its QPA for these claims to Plaintiffs, but a failure to provide information is not a "misrepresentation of facts," especially where, as here, Plaintiffs specifically requested the information and evidently knew they had not received it. ROA.24-20204.23; *cf. Brody v. Transitional Hosps. Corp.*, 280 F.3d 997, 1006 (9th Cir. 2002) ("Often, a statement will not mislead even if it is incomplete or does not include all relevant facts.").

For the other three claims—the Stroke Claim, ATV Claim, and Hemorrhage Claim—the complaint alleges that Kaiser told Plaintiffs that the amount it paid was its QPA, but when Kaiser actually reported its QPA to the arbitrator, it provided a different number. ROA.24-20204.22-23. All this shows is that the EOB form Kaiser used for those claims contained an error that equated the paid amount with the QPA. It does not show that the QPA Kaiser "presented to the IDR entity" was incorrect, and it certainly does not do so under the Rule 9(b) standard that Plaintiffs concede applies to their misrepresentation claim. AOB 55 n.13

4. Disputes Regarding QPA Values Are Committed to the Departments, Not the Arbitrator or the Courts

The purported misrepresentation of fact on which Plaintiffs base their claim is the value of Kaiser's QPA for the services in question. It is therefore important to remember that the Departments excluded from the arbitrator's purview any inquiry into that value, expressly reserving that issue for the Departments. 87 Fed. Reg. 52,618, 52,627 n.31 (Aug. 26, 2022) ("[I]t is the Departments' . . . responsibility, not the certified IDR entity's, to monitor the accuracy of the plan's . . . QPA calculation methodology by conducting an audit . . . ."); *see also* 86 Fed. Reg. 55,980, 55,996 (Oct. 7, 2021) ("The Departments clarify that it is not the role of the certified IDR entity to determine whether the QPA has been calculated by the plan or issuer correctly . . . .").

Thus, the district court correctly held that "Plaintiffs[']] complaints about the accuracy of Aetna and Kaiser's QPA calculations are better suited for the aforementioned Departments to address." ROA.24-20204.1879. Accordingly, even if subclause (I) provided an independent basis for reviewing misrepresentations about other issues, a court is not in a position to vacate an arbitrator's award based on an alleged misrepresentation regarding a health plan's QPA.

5. Subclause (I) Does Not Create a Separate Cause of Action

For all of the foregoing reasons, the Court need not reach the issue of whether subclause (I) provides an independent basis for review and, if so, how that review functions. If the Court does reach this issue, however, it should reject Plaintiffs' position.

The district court correctly held:

> [T]he NSA uses exclusive language regarding when judicial review is permitted—only when one of the four paragraphs in Section 10(a) of the FAA is triggered. Otherwise, judicial review is prohibited, and subsection I of Section 300gg-111(c)(5)(E)(i)(I) does not create an additional avenue for judicial review. If Congress intended to make misrepresentations of fact a type of "undue means" that triggers judicial review, it would have stated as such. Instead, the NSA clearly separates when an IDR award is binding—absent a fraudulent claim or evidence of misrepresentation of fact to the IDR entity—and when an IDR award is subject to judicial review—pursuant to Section 10(a) of the FAA. § 300gg-111(c)(5)(E)(i)(I)-(II). Thus, to the extent Plaintiffs seek judicial review of the IDR awards based on the allegations in their Complaints that Aetna and Kaiser misrepresented their respective QPAs, those arguments fail.

ROA.24-20204.1877 (citation omitted). The district court cited the Florida court, which was also persuaded by this point. The Florida court explained that "subsection (II) is the final word on reviewability. It contains exclusive language—'shall not be subject to judicial review, except'—and lists § 10(a) of the FAA as supplying the only grounds for judicial review." *Med-Trans Corp.*, 700 F. Supp. 3d at 1086.

Plaintiffs attempt to escape this problem by arguing (again, for the first time on appeal) that the review they seek under subclause (I) is not "judicial review," and so it is not excluded by subclause (II). AOB 53 (attempting to distinguish between "judicial review" and "judicial action"). Plaintiffs contend that reviewing an arbitration award constitutes judicial review, while revieing the award's "inputs" does not. AOB 46-47 & n.10. This theory does not square with the plain meaning of these words or the law. Actions to vacate arbitration awards are routinely referred to as "judicial review." *E.g.*, *YPF S.A. v. Apache Overseas, Inc.*, 924 F.3d 815, 819 (5th Cir. 2019) ("[J]udicial review of an arbitration award is extraordinarily narrow."); *Rain CII Carbon*, 674 F.3d at 471-72 (same). The very first basis the FAA provides for judicial review of awards is "where the award was procured by corruption, fraud, or undue means." 9 U.S.C. § 10(a)(1). These are clearly "inputs." Thus, the input vs. output distinction Plaintiffs seek to draw does

not separate the judicial review afforded by subclause (II) from the review Plaintiffs seek under subclause (I).[19]

If subclause (I) does not create a separate basis to vacate an arbitration award, what does it do? The Court need not necessarily resolve this question in order to reject Plaintiffs' interpretation. If, however, the Court is inclined to provide an affirmative interpretation of subclause (I), Kaiser suggests two possibilities.

One possibility is the reading provided by the district court in another case involving Guardian Flight. There, the district court explained:

> To the extent Plaintiffs are arguing that the NSA creates a right and thereby a remedy, this proposition is incorrect. Plaintiffs identify two textual provisions within the NSA to support the existence of a cause of action. First, the NSA states that any decision by a certified IDR entity "shall be binding." 42 U.S.C. § 300gg-111(c)(5)(E)(i)(I). . . . [T]hese provisions . . . do not suggest that Congress intended to create a procedural mechanism for providers to convert IDR awards to final judgments. Further, there is no other language in the statute suggesting that Congress contemplated providers would be able to file a lawsuit to enforce IDR awards. In other words, these provisions only suggest that Congress created a right, but there is nothing to suggest that Congress also intended to confer a corresponding remedy.

Guardian Flight LLC v. Health Care Serv. Corp., ___ F.Supp.3d ___, 2024 WL 2786913, at *4 (N.D. Tex. May 30, 2024) (citations omitted). The argument the

[19] Plaintiffs seem to be aware of this problem when they say that some bases for vacatur (presumably including an intentional misrepresentation of fact) could "satisfy both standards." AOB 54. They fail, however, to explain how the distinction they seek to draw can survive this concession.

provider makes in the instant case is somewhat different, but the interpretation of subclause (I) could still apply: in declaring when IDR determinations would be binding, Congress might have created at right without creating a remedy pursuant to which a party can obtain review by a court.

A second possibility is that subclause (I) relates to efforts to enforce (rather than vacate) an award. After all, on its face subclause (I) addresses when an award is binding, not when it can be vacated: an IDR 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 claim." 42 U.S.C. § 300gg-111(c)(5)(E)(i)(I). Perhaps, then, subclause (I) provides a defense to an effort to enforce an award. That is, a party could resist enforcement of an award by showing that the claim was fraudulent or that its opponent intentionally misrepresented material facts to the IDR entity. A provider or a health plan could theoretically want to enforce an IDR determination, so both sides would stand to benefit from such a defense. *E.g.*, ROA.24-20204.132 (explaining that, following a determination, a payment may be owed to a provider, or a refund may be owed to a health plan (which would occur if, for example, a health plan offered a lower amount in arbitration than what it initially paid and the arbitrator selected the health plan's offer)). Of course, the "fraudulent claim" ground would apply only against providers, but either party could potentially

benefit from being able to resist enforcement by proving an intentional misrepresentation.

Kaiser does not take a position on whether either of these possibilities (or some other possibility) is correct. Rather, Kaiser's position is simply that the district court correctly held that the statute unambiguously provides that the four grounds for vacatur provided by the FAA are the only bases on which an NSA arbitration award may be judicially reviewed, and Plaintiffs cannot evade that limitation by declaring that vacatur on misrepresentation grounds somehow does not qualify as judicial review.

6. Plaintiffs Have Other Avenues Available to Address Concerns Regarding QPA Accuracy

All of this is not to say that a provider cannot do anything when it believes a health plan is relying on an incorrect QPA or an IDR entity is unfairly adjudicating claims. A provider can "notify [CMS] about issues with the IDR process." *FHMC LLC v. Blue Cross & Blue Shield of Arizona Inc.*, 2024 WL 1461989, at *3 (D. Ariz. Apr. 4, 2024). A provider can also "report [a health plan] to CMS for their violations of the NSA." *Id.* Or a provider can petition CMS to revoke an IDR entity's certification to participate in the NSA program.[20] What a provider cannot

[20] Ctrs. for Medicare & Medicaid Servs., *Submit a Petition to Revoke the Certification of a Current IDR Entity Providing Dispute Services*, https://perma.cc/ZMZ7-8YN5 (Jan. 4, 2024); *see also Reach Air Medical Services LLC v. Kaiser Foundation Health Plan Inc.*, Brief for the United States as Amicus

do, however, is seek to vacate an award on a ground beyond the exclusive grounds defined by the statute.

Plaintiffs complain that, while CMS has in fact conducted audits of QPAs, when CMS identifies errors, it does not take corrective action for the benefit of providers. AOB 57-58 n.14. They cite one audit in support of this position. *Id.* However, CMS reports that it has addressed thousands of complaints under the NSA, and while it often finds no violation, when there are violations, "CMS has directed plans, issuers, providers, health care facilities, or providers of air ambulance services to take remedial and corrective actions to address instances of non-compliance, which has resulted in approximately $4,183,383 in monetary relief paid to consumers *or providers*."[21] In any event, as the Florida court correctly explained, judicial review of IDR awards "is not the proper vehicle to challenge the NSA, its regulations, or how it is being administrated by the implementing agencies." *Med-Trans Corp.*, 700 F. Supp. 3d at 1085 n.7. Rather, if the Departments have "fallen short," a provider can bring an action against the

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Curiae in Support of Appellee C2C Innovative Solutions, Inc., 2024 WL 4024805, at *16 (11th Cir. Case No. 24-10135, Aug. 28, 2024).

[21] *CMS Complaint Data and Enforcement Report on Health Insurance Market Reforms August 2024*, Ctrs. for Medicare & Medicaid Servs., https://www.cms.gov/files/document/august-2024-complaint-data-and-enforcement-report.pdf (Aug. 2024) (emphasis added).

Departments. *Id.*; *see also* 24-20204.16 (Plaintiffs complaining about "[t]he way the Departments have implemented the No Surprises Act").

E. Plaintiffs' Arguments Addressing the NSA's Constitutionality Do Not Undermine the District Court's Judgment

Plaintiffs undertake a lengthy discussion of due process, the gist of which seems to be that if Plaintiffs lose, then the NSA is likely unconstitutional. AOB 64-70. To be clear, Plaintiffs do not challenge the NSA as unconstitutional. Rather, they argue that a provider in their position must win to avoid constitutional concerns. AOB 65 ("[I]f a party to NSA IDR cannot obtain relief from an IDR determination where it has plausibly alleged that its adversary has misrepresented a critical fact—and won the IDR on that basis—then the scheme raises substantial constitutional concerns.").

Plaintiffs' primary concern is that arbitration under the NSA is mandatory and that a more lenient standard of review is therefore appropriate. AOB at 66-67. However, the NSA is not the first statute to compel parties to resolve their disputes by arbitration.

In *Thomas v. Union Carbide Agr. Prod. Co*., 473 U.S. 568 (1985), the Supreme Court upheld a statutory scheme in the Federal Insecticide Fungicide and Rodenticide Act ("FIFRA") that required that disputes over compensation for data sharing 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. It explained 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 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.*

In re Motors Liquidation Co., 2010 WL 4449425 (S.D.N.Y. Oct. 29, 2010) reached the same result. 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.*; *Switchmen's Union of N. Am. v. Nat'l Mediation Bd.*, 320 U.S. 297, 301 (1943) (similar result under Railway Labor Act).

Plaintiffs argue that in those cases—in which arbitration was mandatory and judicial review was limited—the underlying arbitrations had more robust

procedures than what is available under the NSA. AOB 69. But Plaintiffs do not cite any case for their hypothesis that arbitration procedures they deem inadequate must be balanced by heightened levels of judicial review that depart from the judicial review prescribed by section 10(a) of the FAA. The reason Plaintiffs' complaint was dismissed was that Plaintiffs failed to plead with sufficient particularity the fraud (or even intentional misrepresentation) that they alleged entitled them to vacatur. The fact that participation in the IDR process is mandated by statute simply does not provide a basis to relieve Plaintiffs of their failure to satisfy their burden.

F. As an Alternative Ground to Affirm, the Court Should Conclude that the Complaint Was Procedurally Deficient Because Vacatur of an Arbitration Award Should Be Sought by Motion, Not a Complaint

Kaiser also moved to dismiss on the ground that Plaintiffs should have moved to vacate the arbitration award instead of filing a complaint. ROA.24-20204.110-112. The district court evidently adopted the holding of the Florida court on this issue, concluding that the portion of the FAA requiring that an arbitration award be challenged via a motion to vacate did not apply under the NSA because the NSA incorporated only subsection 10(a) of the FAA. ROA.24-20204.1872. If the Court affirms dismissal on the grounds discussed in the preceding sections, it need not reach this issue. However, if the Court does reach

this issue, it should conclude that the proper mechanism for vacating an IDR arbitration award is a motion to vacate.

The FAA clearly requires that a party who seeks to challenge an arbitration award file a motion to vacate rather than a complaint. 9 U.S.C. § 6 ("Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions . . . ."). 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); *Kruse v. Sands Bros. & Co., Ltd*., 226 F. Supp. 2d 484, 487-88 (S.D.N.Y. 2002). Here, Plaintiffs filed a complaint, not a motion to vacate, and failed to submit any evidence to support their complaint. Thus, there is no doubt that Plaintiffs failed to comply with the standard requirements for vacating arbitration awards; the only question is whether those requirements apply to NSA arbitrations.

In the district court, Plaintiffs argued that the procedure for bringing a motion to vacate could not be imposed on parties to NSA arbitrations because the NSA does not expressly incorporate the relevant provisions of the FAA, and because arbitrations "rely on consent" whereas NSA arbitration is mandatory. 24-20204.229-230. However, the rationale for challenging an arbitration award via a

motion to vacate relates to the efficiency and finality of the arbitration process, not to mutual consent. *O.R. Sec., Inc. v. Pro. Plan. Assocs., Inc.*, 857 F.2d 742, 745-46 (11th Cir. 1988); *see also Hall St. Assocs.*, 552 U.S. at 588 ("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.").

In a case cited with approval by district courts within the Fifth Circuit, the Eleventh Circuit 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; *see also Garber v. Sir Speedy, Inc.*, 1996 WL 734947, at *4-5 (N.D. Tex. Dec. 11, 1996) (citing *O.R. Secs.*); *see also Johnson v. Drake*, 2017 WL 1173275, at *3 (N.D. Tex. Mar. 30, 2017) (vacated on other grounds) (same). If brought in the form of a complaint, "the burden of dismissing the complaint would be on the party defending the arbitration award." *O.R. Secs., Inc.*, 857 F.2d at 745. 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 policy of expedited resolution of disputes is not served by permitting a party who has lost in the arbitration process to file a new full-scale suit in federal court. *Id.* at 746.

Recognizing these principles, another district court in an NSA case has held "it was procedurally improper for Plaintiff to proceed by way of a complaint and order to show cause in seeking to vacate the arbitration award . . . . Instead, '[t]he proper procedure . . . is for the party seeking to vacate an arbitration award to file a Motion to Vacate in the district court." *GPS of New Jersey MD, P.C. v. Aetna, Inc.*, 2024 WL 414042, at *2 (D.N.J. Feb. 5, 2024); *see also* Fed. R. Civ. P. 81(a)(6) ("These rules, to the extent applicable, govern proceedings under the following laws, except as these laws provide other procedures: . . . (B) 9 U.S.C., relating to arbitration . . . ."); *Halliburton*, 618 F. Supp. 2d at 631 (citing Fed. R. Civ. P. 81(a)(6)(B)). Similarly, FIFRA mandates arbitration, but it doesn't expressly adopt (or even mention) the FAA. 7 U.S.C. § 136a(c)(1)(F)(iii). Nonetheless, courts still apply the FAA standard when parties seek review of FIFRA arbitration awards. *Spray Drift Task Force v. Burlington Bio-Med. Corp*., 429 F. Supp. 2d 49, 50 (D.D.C. 2006).

In fact, Plaintiffs' complaint implicitly recognizes that other portions of the FAA (not just those provisions expressly cited by the NSA) apply in the NSA context. The relief Plaintiffs request in their complaint is found under FAA subsection 10(b)—a subsection that is nowhere referenced in the NSA. ROA.24-20204.29 (citing FAA section 10(b) and requesting that the court "direct a rehearing by the arbitrators" under that section). This is consistent with Plaintiffs'

repeated references in their complaint to IDR proceedings as "arbitrations," to IDR entities as "arbitrators," and to IDR decisions as "arbitration awards." ROA.24-20204.9, 16, 17, 19, 31.

Congress cannot have intended the hundreds of thousands of NSA IDR disputes that are initiated annually to have a pathway to full-fledged federal litigation and discovery whenever a disappointed party decides to file a complaint under the permissive standards Plaintiffs advocate. If Plaintiffs' view of the law were correct, all a provider would have to do is allege that a health plan's QPA calculation was misrepresented, perhaps citing the provider's conclusion that the QPA was out of step with the provider's expectations based on the provider's analysis of other data. *See* AOB 57. Such litigation would quickly overwhelm the court system and undermine the efficient process the NSA established for resolving these disputes. The correct method to challenge an arbitration award—including an award under the NSA—is to file a motion to vacate with supporting evidence as required by the FAA. Plaintiffs' failure to follow this procedure is another ground to affirm the district court's dismissal of the complaint.

G. Kaiser Agrees that a Reversed Judgment is Not Entitled to Preclusive Effect

The district court held that REACH, which was a party to both this case and the Florida case, was collaterally estopped from pursuing its claims (the ATV Claim, the Hemorrhage Claim, and the Tractor Claim) based on the Florida judgment. ROA.24-20204.1876. Plaintiffs do not dispute the district court's decision to apply collateral estoppel. Thus, as long as the judgment in the Florida case remains undisturbed, the district court's decision in the instant case to dismiss REACH's claims on collateral estoppel grounds must be affirmed.

Plaintiffs argue that, if the Eleventh Circuit were to reverse the judgment in the Florida case before this Court decides the instant appeal, that judgment would no longer have preclusive effect and would no longer be a basis for affirming the judgment as to REACH. AOB 70-72. Kaiser agrees. Of course, the Court may affirm on any basis supported by the record. *Inclusive Communities*, 920 F.3d at 899. So even if the Eleventh Circuit were to reverse, this Court can and should still affirm the judgment as to all Plaintiffs for the reasons discussed throughout this brief.

VII. CONCLUSION

For the foregoing reasons, the Court should affirm the district court's judgment.

Dated: October 7, 2024 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By *s/Moe Keshavarzi*

MOE KESHAVARZI
JOHN F. BURNS
MATTHEW G. HALGREN
MEGAN MCKISSON
Attorneys for Defendant and Appellee
KAISER FOUNDATION
HEALTH PLAN, INC.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the word limit of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2, this document contains 12,315 words.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman size 14 font.

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By *s/Moe Keshavarzi*

MOE KESHAVARZI
JOHN F. BURNS
MATTHEW G. HALGREN
MEGAN MCKISSON
Attorneys for Defendant and Appellee
KAISER FOUNDATION
HEALTH PLAN, INC.