UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

GUARDIAN FLIGHT, LLC, et al. Plaintiffs, v. AETNA HEALTH, INC. et al, Defendants.	§ § § § § § § § § § §	CIVIL ACTION NO. 4:22-cv-03805 Hon. Alfred H. Bennett

PLAINTIFFS' MOTION TO PARTIALLY RECONSIDER DISMISSAL AGAINST INSURER DEFENDANTS AND TO CERTIFY DISMISSAL ORDER FOR APPEAL

Plaintiffs Guardian Flight, LLC ("Guardian"), CALSTAR Air Medical Services, LLC ("CALSTAR"), and REACH Air Medical Services, LLC ("REACH," collectively "Plaintiffs") file this Motion asking the Court to: 1) partially reconsider its January 6, 2024 Order ("Dismissal Order) granting the motions to dismiss filed by Insurers Aetna Health, Inc. ("Aetna") and Kaiser Health Plan, Inc. ("Kaiser," collectively "Insurer Defendants"); and 2) allow an immediate appeal by either certifying the Dismissal Order under 28 U.S.C. 1292(b) or certifying final judgments against the Insurer Defendants under Rule 54(b).

Plaintiffs file this motion with the aim of furthering the efficient resolution of the numerous novel legal issues addressed by the Court in its Dismissal Order. Specifically, this Court held that Plaintiffs' allegations that the Insurer Defendants had made misrepresentations of fact in the Independent Dispute Resolution ("IDR") process under the No Surprises Act ("NSA") did not state a legally valid claim for vacatur of the IDR determination; but that Plaintiffs *did* state a potentially viable claim that if Defendant MET exceeded its power under the NSA by applying an illegal presumption. The Court further denied MET's claim that arbitrator immunity protected it

from suit. The Court dismissed all claims against the Insurer Defendants but denied MET's motion to dismiss. MET has since filed a notice of appeal on the question of arbitrator immunity, invoking 28 U.S.C. § 1291 and the "collateral order doctrine" of *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541 (1949).

It would promote judicial efficiency for the Fifth Circuit to consider all of the novel legal issues addressed in the Dismissal Order, not solely the issue of arbitrator immunity on which MET has appealed. Plaintiffs now seek an order from this Court to facilitate that contemporaneous appellate review.

However, there is a threshold issue to be resolved first. In its Dismissal Order, the Court ruled that the IDR awards at issue herein can be vacated if Defendant MET exceeded its power under the No Surprises Act ("NSA") by applying an illegal presumption as alleged by Plaintiffs. That means Plaintiffs stated a viable claim against the Insurer Defendants as well as against MET. Put differently, the Insurer Defendants are necessary parties to Plaintiffs' claim that the IDR awards—which also bind the Insurer Defendants—are invalid because MET applied the wrong standard. Accordingly, Plaintiffs ask this Court to reconsider its Dismissal Order insofar as it dismissed all claims against the Insurer Defendants and reinstate Plaintiffs' claims against them based on the illegal presumption. It should then certify its Dismissal Order for immediate appeal pursuant to 28 U.S.C. § 1292(b), because it "involves a controlling question of law as to which there is substantial ground for difference of opinion[,] and … an immediate appeal from the order [will] materially advance the ultimate termination of the litigation." In the alternative, if this Court disagrees that Plaintiffs' claims against the Insurer Defendants based on the illegal presumption should be reinstated, Plaintiffs ask this Court to enter final judgment against the Insurer Defendants under Federal Rule of Civil Procedure 54(b). Either path will allow the Fifth Circuit to decide

both the key merits issues and MET's assertion of arbitrator immunity in the same consolidated appeal.

In support of this motion, Plaintiffs respectfully show the Court as follows:

PROCEDURAL HISTORY

On May 10, 2023, this Court consolidated *REACH Air Medical Services, LLC, et al. v. Kaiser Foundation Health Plan Inc., et al.*, No. 4:22-cv-3979 with this case. Doc. #35. Before consolidation, Kaiser and Aetna moved to dismiss, raising essentially the same legal arguments. *See* Doc. #12; Doc. #25 in 3979. Similarly, IDR entity and Defendant Medical Evaluators of Texas ASO, LLC ("MET") filed motions to dismiss in both proceedings. *See* Doc. #8; Doc. #24 in 3979. On November 1, 2023, Chief Judge Corrigan issued a ruling in the Middle District of Florida dismissing complaints raising some similar legal issues. *See* Order in Case Nos. 3:22-cv-1077 and 3:22-cv-1153 (hereafter "Florida Decision"). On January 15, 2024, the Florida Decision was appealed to the Eleventh Circuit Court of Appeals. *See Med-Trans Corporation v. Capital Health Plan, Inc., et al,* No. 24-10134 (11th Cir.); *REACH Air Medical Services LLC v. Kaiser Foundation Health Plan Inc., et al,* No. 24-10135 (11th Circ.).

On January 6, 2024, this Court issued its Dismissal Order, ruling on various pending motions, including the motions to dismiss. Doc. #76. It agreed with much, but not all, of the Florida Decision's reasoning. In particular, this Court disagreed that IDR entity MET was not subject to suit herein. *Id.* at p. 14. It further ruled that applying an illegal presumption that violated the NSA when making payment determinations would exceed MET's authority and trigger judicial review. *Id.* at p. 15. Accordingly, the Dismissal Order granted the Insurer Defendants' motions to dismiss but denied MET's motion.

On February 5, 2024, MET filed a notice of appeal to the Fifth Circuit of *a portion* of the Dismissal Order. In particular, it seeks review of the Court's ruling on arbitrator immunity under 28 U.S.C. § 1291 and the "collateral order" doctrine.

In its Dismissal Order, the Court provided Plaintiffs forty-five (45) days to amend their complaints. Plaintiffs are not doing so because they have no additional factual allegations to make. Instead, they are seeking the relief requested herein.

In particular, Plaintiffs ask the Court to reconsider its *complete* dismissal of the Insurer Defendants' complaints because their claim that the IDR awards at issue should be vacated because MET exceeded its powers under the NSA is a claim against all Defendants, not just MET. Put differently, the Insurer Defendants are necessary parties to Plaintiffs' claim that MET exceeded its powers. In addition, Plaintiff asks this Court to certify its Dismissal Order for appeal so that the Fifth Circuit can consider at once all of the novel legal issues of first impression addressed in the Dismissal Order. An immediate appeal is available under 28 U.S.C. § 1292(b) if this Court grants Plaintiffs' motion to reconsider and provides the relief requested or under Rule 54(b) if it does not.

STANDARD OF REVIEW

Reconsideration. This Court has the power to reconsider or revise its interlocutory orders "at any time before the entry of final judgment." FRCP 54(b). In this context, the exacting standards under Rule 59 and Rule 60 do not apply, leaving the Court with the discretion to reconsider or revise the Order as justice requires. *See Austin v. Kroger Tex., L.P.*, 864 F.3d 326, 336 (5th Cir. 2017). It may "reconsider and reverse its decision for any reason it deems sufficient, even in the absence of new evidence or an intervening change in or clarification of the substantive law." *Id.* This flexibility is premised on "the interlocutory presentation of new arguments as the case evolves." *Id.*

Certification under 28 U.S.C. § 1292(b). By its terms, Section 1292(b) allows interlocutory appeals before a final judgment where: (1) the trial court's order involves a controlling question of law; (2) there is ground for substantial disagreement regarding this question; and (3) an immediate appeal will materially advance the ultimate termination of the litigation. *See Rico v. Flores*, 481 F.3d 234, 238 (5th Cir. 2007). In explaining the adoption of section 1292(b), the Fifth Circuit stated:

> [T]here are occasions which defy precise delineation or description in which as a practical matter orderly administration is frustrated by the necessity of a waste of judicial time while the case grinds through to a final judgment as the sole medium through which to test the correctness of some isolated identifiable point of fact, of law, of substance or procedure, ***upon which in a realistic way the whole case or defense will turn.*** The amendment [section 1292(b)] was to give the appellate machinery of § 1291 through § 1294 a ***considerable flexibility*** operating under the immediate, sole and broad control of Judges so that within reasonable limits disadvantages of piece-meal and final judgment appeals can be avoided.

Hadjipateras v. Pacifica, S.A., 290 F.2d 697, 703 (5th Cir. 1961) (emphasis added). Jurisdiction under § 1292(b) extends only to interlocutory orders that involve controlling questions of law, which are reviewed *de novo*. *Fisher v. Halliburton*, 667 F.3d 602, 609 (5th Cir. 2012); *Louisiana Patients' Comp. Fund Oversight Bd. v. St. Paul Fire & Marine Ins. Co.*, 411 F.3d 585, 588 (5th Cir. 2005). A question of law is properly deemed "controlling" when it is "serious to the conduct of the litigation, either practically or legally." *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir. 1974). A substantial ground for difference of opinion exists "where reasonable jurists might disagree on an issue's resolution, not merely where they have already disagreed." *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011).

Entry of Final Judgment under Rule 54(b). Whether a final judgment under Rule 54(b) should be certified for immediate appeal is a discretionary determination that can be based on "any factor that seems relevant to a particular action." 10 Charles Alan Wright et al., Federal Practice & Procedure § 2659 (Wright & Miller). As the Supreme Court has stated, "the task of weighing

and balancing competing factors is peculiarly one for the trial judge, who can explore all facets of the case." *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 12 (1980). Courts have taken into account many factors, including "the relationship between the adjudicated and the unadjudicated claims," "the possibility that the reviewing court might be obliged to consider the same issue a second time" and miscellaneous factors such as delay. *See, e.g.*, *Akers v. Alvey,* 338 F.3d 491, 495 (6th Cir. 2003). Rule 54(b) "reflects a balancing of two policies: avoiding the 'danger of hardship or injustice through delay which would be alleviated by immediate appeal' and 'avoid[ing] piecemeal appeals.'' *See Eldredge v. Martin Marietta Corp.*, 207 F.3d 737, 740 (5th Cir. 2000) (quoting *PYCA Indus. v. Harrison County Waste Water Mgmt. Dist.*, 81 F.3d 1412, 1421 (5th Cir.1996)).

ARGUMENT AND ANALYSIS

A. The Prevailing Party is a Proper Party to a Lawsuit Seeking to Vacate an IDR Award, Regardless of the Grounds

Plaintiffs' complaints against the Insurer Defendants should not be completely dismissed because this Court has ruled that Plaintiffs have stated a claim to vacate the IDR awards on the ground that MET exceeded its powers by applying an illegal presumption in the IDR proceedings. Doc #76 at p. 16. If Plaintiffs ultimately prevail on this claim, the IDR awards at issue will be vacated. The Insurer Defendants were the adverse parties to Plaintiffs in the IDR proceedings and have a clear interest in whether the IDR awards are vacated or left in place. Indeed, both Aetna and Kaiser briefed this issue in their motions to dismiss, arguing that the awards could not be vacated on that basis. *See* Doc. #12 at p. 10; Doc. Doc. #25 in 3979 at p. 16. This Court contemplates further proceedings on Plaintiffs' claim that MET exceeded its authority; presumably Aetna and Kaiser will wish to defend the favorable awards they won in the IDR proceedings. In fact, if Plaintiffs had originally sued *only* MET and not the Insurer Defendants, they would

arguably have run afoul of Rule 19's requirement that a plaintiff join persons who "claim[] an interest relating to the subject of the action and [are] so situated that disposing of the action in [their] absence may … impair or impede the person's ability to protect the interest." Fed. R. Civ. P. 19(a)(1)(B)(i). Accordingly, Plaintiffs' surviving claim under the NSA to vacate the IDR awards runs against both the Insurer Defendants and MET. Indeed, in the legally distinct but, for this purpose, analogous context of arbitration, the party who prevailed and secured a favorable award is always a proper party to a lawsuit seeking to vacate that award. *See, e.g.*, *Houston Lighting & Power Co. v. Int'l Broth. of Elec. Workers, Local Union No. 66*, 71 F.3d 179, 184 (5th Cir. 1995) (party who lost arbitration sued prevailing party claiming arbitrator exceeded his powers under the applicable collective bargaining agreement); *Int'l Bancshares Corp. v. Lopez*, 57 F. Supp. 3d 784, 787 (S.D. Tex. 2014) (party who lost arbitration sued prevailing party claiming arbitrator exceeded his powers by violating the arbitration agreement); *Bain v. Whitney Bank*, 919 F. Supp. 2d 735, 737 (E.D. La. 2013), *aff'd sub nom. Bain v. Bank*, 539 Fed. Appx. 485 (5th Cir. 2013) (bank who lost arbitration sued prevailing customer claiming arbitrator exceeded his powers by incorrectly interpreting agreement).

C. Appeal is Warranted Under Either 28 U.S.C. § 1292(b) or Rule 54(b)

For the foregoing reasons, this Court should grant Plaintiffs' request for reconsideration of its Dismissal Order and reinstate Plaintiffs "exceeded-authority" claim against the Insurer Defendants. Next, in order to facilitate and orderly and efficient appeal of the novel issues in the Dismissal Order, this Court should certify it for interlocutory review under § 1292(b). If, however, the Court does not agree that the Insurer Defendants should remain parties to this lawsuit alongside MET to adjudicate whether the IDR awards should be vacated because MET exceeded its authority under the NSA, then Plaintiffs request that this Court direct entry of final judgment against the

Insurer Defendants under Rule 54(b), which would similarly allow for an immediate appeal to the Fifth Circuit.

1. Interlocutory Appeal Under 28. U.S.C. § 1292(b)

If the Court grants Plaintiffs' motion to partially reconsider its dismissal of the claims against the Insurer Defendants and agrees there remains one viable claim against them to vacate the IDR awards at issue (*i.e.* if MET exceeded its authority under the NSA), interlocutory appeal of the Dismissal Order is appropriate under 28 U.S.C. § 1292(b). As reflected by the substantial amount of briefing in these consolidated cases, the Dismissal Order involves a controlling question of law as to which there is substantial ground for difference of opinion. Specifically, the Dismissal Order addressed the questions on whether and when review or vacatur of an IDR award is available under 42 U.S.C. § 300gg-111(c)(5)(E)(i) if a party to the IDR alleges that a misrepresentation of fact was made to the IDR entity.[1]

This is a "controlling question of law" within the meaning of § 1292(b) because it is dispositive of one of Plaintiffs' two central theories for why they are entitled to relief. *See Katz*, 496 F.2d at 755 (3d Cir. 1974) (A controlling question of law is one that is "serious to the conduct of the litigation, either practically or legally."). There is also "substantial ground for difference of opinion." 28 U.S.C. § 1292(b). This Court was only the second district court in the United States to directly address the application of § 300gg-111(c)(5)(E)(i) and the first one in the Fifth Circuit. Judge Corrigan's Florida Decision, which this Court adopted in large part, acknowledges that the analysis of this new statute is "admittedly complicate[d]." *Med-Trans Corp. v. Cap. Health Plan, Inc*., No. 3:22-CV-1077-TJC-JBT, 2023 WL 7188935, at *7 (M.D. Fla. Nov. 1, 2023). Reasonable

[1] Plaintiffs do not seek interlocutory review of the Court's decision on collateral estoppel. Nor is Plaintiff REACH asking the Court to reconsider its conclusion that its claims against Kaiser are collaterally estopped. REACH does reserve its right to appeal on that issue when there is a final judgment disposing of it.

jurists could disagree as to how to best construe this complicated statutory scheme for review of mandatory IDR decisions (especially where mandatory IDR, as distinct from voluntary arbitration, is itself unprecedented).

Finally, it cannot be disputed that an immediate appeal may materially advance the ultimate termination of the litigation. "Review under § 1292(b) is available where decision on an issue would affect the scope of the evidence in a complex case, even short of requiring complete dismissal." *See Garner v. Wolfinbarger*, 430 F.2d 1093, 1097 (5th Cir. 1970); *McCollum v. Livingston*, No. 4:14-cv-3253, 2017 WL 2215627, at *5 (S.D. Tex. May 19, 2017) (noting that review under Section 1292(b) "is not limited to those situations in which decision on an issue would result in a complete dismissal"). Once the Fifth Circuit provides clarity on the novel legal question at issue, the Court will know the proper scope of this proceeding, the proper parties, the discovery needed, and which issues need to be tried.

The Dismissal Order made determinations "upon which in a realistic way the whole case or defense will turn." *Hadjipateras,* 290 F.2d at 703. And now that MET has compelled the parties to participate in an immediate appeal, allowing an immediate appeal of all the dismissal issues will conserve judicial resources and the parties' resources.[2]

2. Rule 54(b) Certification

If, on the other hand, this Court declines to reconsider its order dismissing all claims against the Insurer Defendants, Plaintiffs request entry of final judgment with respect to the Insurer Defendants under Rule 54(b). As noted above, there are many possible considerations in whether to certify a final judgment under Rule 54(b). Here, if the Insurer Defendants are dismissed, the remaining claims will involve different parties. *See Ackerman v. Fed. Deposit Ins. Corp.*, 973 F.2d

[2] If the Court grants the relief sought herein and an interlocutory appeal proceeds under § 1292(b), Plaintiffs will seek a stay of this case pending the Fifth Circuit's decision.

1221, 1225 (5th Cir.1992) (since the remaining claims "involve different parties" certification "was neither unreasonable nor an abuse of discretion"). Indeed, the presence of different parties in the dismissed claims as compared to the remaining claims is "a significant factor supporting the immediate appealability of dismissed claims." *See Zavala v. Wal-Mart Stores, Inc.*, No. 03-5309(JAG), 2007 WL 1134110, at *3 (D.N.J. April 16, 2007) (unpublished); *Halliburton Energy Services, Inc.*, 2008 WL 2697345 at *6. Moreover, the legal issues in this proceeding are important not just to Plaintiffs, but to healthcare providers across the country.

Similarly, entering an immediately appealable judgment against the Insurers does not create a likelihood that the Fifth Circuit will be obliged to consider the same issues a second time. *Akers,* 338 F.3d at 495. Instead, as set forth in this Motion, it will facilitate the orderly resolution of dispositive issues in a consolidated appeal. And the remaining claim against MET (whether the award should be vacated because it applies an illegal presumption) is a different legal question that requires proof of substantially different facts than the dismissed claims (whether the award should be vacated due to misrepresentations made by the Insurer Defendants to MET). *See, e.g.*, *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 292 (7th Cir. 1992) (explaining that legal theories sufficiently distinct that they call for proof of substantially different facts may be different claims for purposes of Rule 54(b)); *Hudson River Sloop Clearwater, Inc. v. Dep't of the Navy*, 891 F.2d 414, 418 (2d Cir. 1989) (holding that different "legal questions" can inform the determination of whether "the certified claims may be considered separate claims under Rule 54(b)"). Moreover, given the fact the Fifth Circuit already will be considering the facts of this case and the relevant portions of the NSA in connection with the MET appeal, now is the appropriate time for it consider all of the Court's dismissal rulings in that same order.

CONCLUSION

For the reasons stated herein, Plaintiffs ask this Court to partially reconsider its Dismissal Order because the claim that MET exceeded its authority under the NSA is a claim against all Defendants. Plaintiffs further request permission to join MET on appeal so that the Fifth Circuit can consider and provide guidance on all of the novel legal issues addressed in the Dismissal Order. An immediate appeal is available under either 28 U.S.C. 1292(b) if the Court agrees with Plaintiffs' motion to partially reconsider or under Rule 54(b) if it does not.

Dated: February 15, 2024

NORTON ROSE FULBRIGHT US LLP

/s/ Adam T. Schramek
Adam T. Schramek, Lead Counsel
Texas Bar No. 24033045
Federal ID: 431403
98 San Jacinto Boulevard
Suite 1100
Austin, TX 78701-4255
Telephone: (512) 474-5201
Facsimile: (512) 536-4598
adam.schramek@nortonrosefulbright.com

Abraham Chang
Texas Bar No. 24102827
Federal ID: 3831625
Dewey J. Gonsoulin III
Texas Bar No. 24131337
Federal ID: 3805035
1301 McKinney, Suite 5100
Houston, TX 77010-3095
Telephone: (713) 651-5151
Facsimile: (713) 651-5246
abraham.chang@nortonrosefulbright.com
dewey.gonsoulin@nortonrosefulbright.com

Attorneys for Plaintiffs

CERTIFICATE OF CONFERENCE

I certify that I conferred with counsel for Defendants on the relief requested herein. Defendant MET is unopposed to such relief while Defendants Aetna and Kaiser are opposed to it.

/s/ Adam T. Schramek
Adam T. Schramek

CERTIFICATE OF SERVICE

I certify that on February 15, 2024, a true and correct copy of the foregoing was served via the Court's ECF system on all counsel of record.

/s/ Adam T. Schramek
Adam T. Schramek