UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Guardian Flight, LLC, Plaintiff, v. Aetna Health Inc., et al., Defendants.	§	LEAD CIVIL ACTION NO. 4:22-cv-03805
Reach Air Medical Services, LLC, et al., Plaintiffs, v. Kaiser Foundation Health Plan Inc., et al., Defendants.	§	*Consolidated with:* Case No. 4:22-cv-03979

DEFENDANT KAISER FOUNDATION HEALTH PLAN INC.'S OPPOSITION TO PLAINTIFFS' MOTION TO PARTIALLY RECONSIDER DISMISSAL AGAINST INSURER DEFENDANTS AND TO CERTIFY DISMISSAL ORDER FOR APPEAL

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Defendant Kaiser Foundation Health Plan, Inc. ("Kaiser") submits this brief in opposition to Plaintiffs' Motion To Partially Reconsider Dismissal Against Insurer Defendants And To Certify Dismissal Order For Appeal [Dkt. 79].

I. INTRODUCTION

There is nothing "efficient" about Plaintiff's attempt to relitigate this Court's Order dismissing the health plan defendants from this lawsuit. After months of briefing and oral argument, on January 6, 2024, the Court issued its Order finding that Plaintiffs' allegations failed to meet the four highly limited exceptions for vacatur of an arbitration award under the Federal Arbitration Act ("FAA"), which are expressly incorporated into the No Surprises Act ("NSA") governing air ambulance reimbursement disputes and the statutory independent dispute resolution ("IDR") arbitration process. Dkt. 76; 42 U.S.C. § 300gg-111(c)(5)(E)(i); 9 U.S.C. § 10(a). Specifically, this Court found that Plaintiffs' allegations that Kaiser and Aetna misrepresented their qualifying payment amounts ("QPAs") "fall woefully short of alleging fraud or undue means," and that nothing else in Plaintiffs' complaint suggested that Kaiser or Aetna "engaged in immoral or illegal behavior." Dkt. 76. Thus, because "any allegations about either [Kaiser or Aetna] behaving in bad faith are conclusory, at best, and are not factually supported," the Court ruled that Plaintiffs' allegations did not qualify for judicial review under the FAA's limited exceptions, and dismissed Plaintiffs' claims against the health plan entities. *Id.*

In Plaintiffs' parallel lawsuits filed in the Middle District of Florida, Judge Corrigan came to the same conclusion, recognizing that the FAA exceptions for judicial review are so "narrow[]" that challenges to IDR awards "may rarely succeed." *Med-Trans Corp. v. Cap. Health Plan, Inc.*, 2023 WL 7188935, at *6–7 (M.D. Fla. Nov. 1, 2023). Under this framework, the Court ruled that

Plaintiffs "face[d] an uphill battle" meeting the "extremely narrow" section 10(a) exceptions—which require "measures ***equal in gravity to bribery, corruption, or physical threat to an arbitrator***." *Id.* at *6, 8 (emphasis added).

Plaintiffs offer no justifiable reason to depart from these rulings here. They completely disregard numerous decisions issued by this very Court instructing that a motion for reconsideration is only appropriate to allow a party to correct a manifest error of law or fact or to present newly discovered evidence, even under Rule 54(b). Plaintiffs' entire motion is premised on the argument that Kaiser and Aetna must remain parties to the lawsuit if the Court agrees with Plaintiffs' arguments that MET exceeded its authority in the underlying IDR. But even if Plaintiffs prevail against MET, the remedy is simply vacatur of the underlying IDR awards. Just because Kaiser may be joined to an action to vacate an award does not mean it must be joined. Under Rule 19, Kaiser is not a necessary party for this Court to determine Plaintiffs' claims against MET. Indeed, counsel for Kaiser is not aware of any case in any court holding that a ***dismissed defendant*** is necessary for a court to rule on an issue involving a separate defendant—and Plaintiffs certainly cite none. In addition, each individual plaintiff's claims against Kaiser are barred by collateral estoppel because they are all sister entities to the plaintiffs in the Florida suit. For all of these reasons, this Court should not disturb its Order.

II. PLAINTIFFS' MOTION SHOULD BE DENIED

A. Plaintiffs' Motion Conflates Separate Legal Issues.

As a preliminary matter, although Plaintiffs style their motion for certification for appeal pursuant to 28. U.S.C. § 1292(b) as contingent upon their motion for reconsideration, these two requests involve entirely unrelated legal issues—which Plaintiffs admit. Mot., 10 ("[T]he . . . 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 [against Kaiser and Aetna] (whether the award should be vacated due to the misrepresentations made by the Insurer Defendants to MET).").

In short, Plaintiffs ask this Court to reconsider its ruling on one issue (whether MET applied an illegal presumption by giving too much weight to Kaiser's QPA) while attempting to certify a ***completely separate*** issue for appeal under section 1292(b) (whether Plaintiffs' allegation that Kaiser misrepresented its QPA qualifies for one of the four narrow bases for appeal under the FAA). Plaintiffs improperly characterize these issues as conditional upon each other—they are not. Plaintiffs present one specific, insular question on appeal under section 1292(b): "[W]hether 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." Mot., 8. Separately, Plaintiffs seek to reinstate Kaiser and Aetna as defendants to a wholly distinct legal theory: "[whether] the IDR awards . . . are invalid because MET applied the wrong standard." *Id.,* 2. In sum, Plaintiffs attempt to ***both*** install Kaiser as a defendant as to Plaintiffs' claim against MET which remains pending in the district court, while ***simultaneously*** allowing Plaintiffs to appeal this Court's ruling regarding Kaiser's allegedly misrepresented QPA. Below, Kaiser demonstrates why each request is independently meritless.

B. Plaintiffs Cannot Meet the Standard for Reconsideration.

Plaintiffs fail to demonstrate that reconsideration is "necessary under the circumstances." *Dallas County v. MERSCORP, Inc.*, 2 F. Supp. 3d 938, 950 (N.D. Tex. 2014). Plaintiffs argue that the Court should reconsider the dismissal order under the less stringent framework of Rule 54(b), rather than Rules 59 or 60. It is true that reconsideration of interlocutory orders is governed by Rule 54(b). *Iturralde v. Shaw Group, Inc.*, 512 F. App'x 430, 432 (5th Cir. 2013);

Hebert v. FMC Techs., Inc., 2022 WL 17422642, at *3 (S.D. Tex. Sept. 28, 2022) (Bennett, J.) ("Although there is no Federal Rule of Civil Procedure that specifically provides for motions for reconsideration, this Court has held that motions for reconsideration of interlocutory orders are governed by [Rule] 54(b)."). Plaintiffs cite *Austin v. Kroger Tex., L.P.,* 864 F.3d 326 (5th Cir. 2017) to argue that this Court may reconsider its order for any reason under Rule 54(b). However, Plaintiffs do not acknowledge that "[e]ven though the standard for evaluating a motion to reconsider under Rule 54(b) would appear to be less exacting than that imposed by Rules 59 and 60 . . . ***considerations similar to those under Rules 59 and 60 inform the Court's analysis***." *Dallas County*, 2 F. Supp. 3d at 950 (emphasis added) (internal citations omitted). Rules 59 and 60 make clear that "[m]otions for reconsideration have a narrow purpose and are only appropriate to allow a party to correct a manifest error of law or fact or to present newly discovered evidence." *Id.* Indeed, this very Court has considered the stricter standards of Rules 59 and 60 even when ruling on a motion for reconsideration of an interlocutory order. *Hebert*, 2022 WL 17422642 at *3 ("While the Court has discretion to reconsider its decision under Rule 54(b), similar considerations to those under Rules 59 and 60 bear on the Court's review, such as whether the movant is attempting to rehash its previously made arguments or is attempting to raise an argument for the first time without justification . . . ***The party moving for reconsideration must establish a manifest error of law or fact or newly discovered evidence***.") (internal citations omitted); *LeVy v. Unum Grp.*, 2022 WL 21714341 (S.D. Tex. Nov. 28, 2022) (Bennett, J.) (denying a motion for reconsideration of a dismissal order prior to final judgment, and holding that "[a] motion for reconsideration must clearly establish either a manifest error of law or fact or must present newly discovered evidence . . . it cannot be used to raise arguments which could, and should, have been made before judgment was entered.").

Accordingly, this Court has refused to reconsider its prior orders when "[t]he legal reasoning articulated by the court . . . remains valid despite the parties' additional briefing," and when the prior order was "sound[]" and "requires no additional clarification." *First Nat'l Petro. Corp. v. Tyumenneftegaz, No.* 4:19-CV-97, 2021 WL 8945132, at *1 (S.D. Tex. Mar. 11, 2021) (Bennett, J.); *DeRoche v. Saybolt LP*, 2015 WL 13936922 (S.D. Tex. Dec. 14, 2015) (Bennett, J.). Both are true here. Yet Plaintiffs wholly ignore this precedent and instead ask this Court to consider "new arguments as the case evolves." Mot., 4. Plaintiffs do not even attempt to demonstrate "a manifest error of law or fact" or "newly discovered evidence," which this Court considers even under a Rule 54(b) analysis. *Hebert*, 2022 WL 17422642, at *3. Because they cannot. The Court's order is sound and requires no further clarification. Thus, Plaintiffs fail to demonstrate that reconsideration is warranted, even under Rule 54(b).

C. Kaiser is Not a Necessary Party to Plaintiffs' Claims Against MET.

Plaintiffs argue that reconsideration is warranted because Kaiser and Aetna are necessary parties to Plaintiffs' remaining claim against MET. Plaintiffs are wrong. If a party demonstrates any of the four standards warranting judicial review set forth in the NSA, the remedy is simply vacatur of the underlying award. 42 U.S.C. § 300gg-111(c)(5)(E)(i) (incorporating 9 U.S.C. § 10(a)). Tellingly, Plaintiffs ignore Rule 19, which instructs that a party is only necessary if: (1) a court "cannot accord complete relief among the existing parties;" or (2) if disposing of the action in that party's absence would "impede [that party's] ability to protect the[ir] interest," or would "leave an existing party subject to . . . inconsistent obligations because of the interest." Fed. R. Civ. P. 19. None of these situations apply to Kaiser here. Indeed, counsel for Kaiser is not aware of any case in any court holding that ***a dismissed defendant*** is necessary for a court to rule on an issue involving a separate defendant—and Plaintiffs cite no authority demonstrating such.

The Fifth Circuit has recognized that "it is obvious that Rule 19 does not contemplate joinder of any party who might possibly be affected by a judgment in any way." *Shelton v. Exxon Corp.,* 843 F.2d 212, 218 (5th Cir. 1988). If this Court vacates the IDR awards, Plaintiffs can simply refile their claims in statutory arbitration, and Kaiser will again participate in the IDR process outlined in the NSA. 42 U.S.C. § 300gg-111(c)(5)(B). Releasing Kaiser from this lawsuit does not "impede [Kaiser's] ability to protect [its] interest," nor does it leave Kaiser subject to "inconsistent obligations." Plaintiffs themselves admit that their remaining claim against MET involves "a different legal question that requires proof of substantially different facts than the dismissed claims." Mot., 10. Thus, there is no reason this Court cannot "accord complete relief" among the remaining parties (Plaintiffs and MET) per Rule 19.

Plaintiffs cite several inapposite cases to argue that Kaiser and Aetna must be parties to this lawsuit for the Court to rule on the issue of whether MET exceeded its authority. None of these cases stand for the proposition that Kaiser and Aetna must be reinstated as defendants for the Court to rule. *See Houston Lighting & Power Co. v. IBEW, Local Union No. 66*, 71 F.3d 179 (5th Cir. 1995) (deciding whether an arbitrator exceeded his authority under a collective bargaining agreement, but never considering whether the prevailing party in arbitration was a necessary—or even proper—party to the lawsuit); *Int'l Bancshares Corp. v. Lopez*, 57 F. Supp. 3d 784 (S.D. Tex. 2014) (deciding whether an arbitrator exceeded its powers under Section 10(a) of the FAA, but again, never discussing whether the prevailing party in arbitration must be named as a defendant for the Court to rule on the motion to vacate the award); *Bain v. Whitney Bank,* 919 F. Supp. 2d 735 (E.D. La. 2013), *aff'd sub nom. Bain v. Bank,* 539 F. App'x 485 (5th Cir. 2013) (again, considering whether vacatur of an arbitration award was appropriate because an arbitrator exceeded his powers, but never discussing whether the prevailing party must be

named as a party for the court to rule on that issue). None of these cases demonstrate that Kaiser and Aetna need to remain in this lawsuit for this Court to determine whether MET's IDR awards should be set aside. The Court should deny the relief Plaintiffs seek.

D. Plaintiffs Do Not Meet the Requirements for an Interlocutory Appeal.

Interlocutory appeals pursuant to section 1292(b) are appropriate only in "exceptional" circumstances. *Clark-Dietz & Associates-Engineers, Inc. v. Basic Constr. Co.,* 702 F.2d 67, 69 (5th Cir. 1983). Plaintiffs fail to meet the threshold requirements for this type of appeal, which "assuredly does not lie simply to determine the correctness of a judgment of liability." *Id.* at 68. Under section 1292(b), Plaintiffs must present "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Plaintiffs' "mere disagreement" with this Court's ruling—namely, that Plaintiffs' allegations "fall woefully short" of the narrow bases for judicial review set forth in the FAA—is insufficient to demonstrate the statutory requirements for appeal under section 1292(b). *Coates v. Brazoria County Tex.*, 919 F. Supp. 2d 863, 868 (S.D. Tex. 2013); Dkt. 76.

Controlling question of law. First, Plaintiffs must demonstrate a controlling question of law, which must be purely legal in nature. 28 U.S.C. § 1292(b); *Malbrough v. Crown Equip. Corp.*, 392 F.3d 135, 136 (5th Cir. 2004) (recognizing that a "genuine issue of material fact . . . is not a question of law within the meaning of § 1292(b)." (internal citations omitted)). Here, the "controlling question of law" is whether a health plan's allegedly misrepresented QPA meets the extremely narrow exceptions under section 10(a) for judicial review—including fraud, or misconduct equal in gravity to bribery, corruption, or physical threat to an arbitrator. But "fraud is never imputed or presumed and the court should not sustain findings of fraud upon

circumstances which create at most only suspicion." *Toussaint v. Commissioner*, 743 F.2d 309, 312 (5th Cir. 1984). At the very least, Plaintiffs' controlling question of law is not one that the appellate court "could decide quickly and cleanly without having to study the record." *Speer v. Tow (In re Royce Homes LP),* 466 B.R. 81, 94 (S.D. Tex. Bankr. 2012). Thus, it is not a "controlling question of law" for purposes of section 1292(b).

Substantial ground for difference of opinion. Plaintiffs also cannot establish substantial ground for difference of opinion. "The threshold for establishing [this element] is higher than mere disagreement or even the existence of some contrary authority." *Coates*, 919 F. Supp. 2d at 868. This is a difficult standard to meet—"judges have not been bashful about refusing to find substantial reason to question a ruling of law." *Id.* (citing WRIGHT ET AL., FED. PRACTICE AND PROCEDURE § 3930 at 492 (3d ed. 2012)). Because the bar for "substantial ground for difference of opinion" is so high, the Fifth Circuit "strongly suggest[s]" that district judges "stat[e] more than an abstract description of the legal questions involved or a bare finding that the statutory requirements of section 1292(b) have been met" when certifying an order under this statute. *Linton v. Shell Oil Co.*, 563 F.3d 556, 558 (5th Cir. 2009) (denying application for leave to appeal under section 1292(b)). Plaintiffs cannot, and do not, identify more than "abstract legal question[s]" here. *Id.* This case does not involve a ruling "contrary to the rulings of all Courts of Appeals which have reached the issue, if the circuits are in dispute on the question and the Court of Appeals of the circuit has not spoken on the point." *Coates*, 919 F. Supp. 2d at 868. Indeed, ***no*** appellate court has yet to rule on this issue, and the only other district court to consider this issue arrived at the very same conclusion as this Court. *See Med-Trans Corp.*, 2023 WL 7188935. Nor does this issue involve "[c]omplicated questions aris[ing] under foreign law." *Coates*, 919 F. Supp. 2d at 868. While the issues presented in this case are novel,

"simply because a court is the first to rule on a question . . . does not qualify the issue as one over which there is substantial disagreement." *Id.* at 68–69. Plaintiffs fail to demonstrate a substantial ground for difference in opinion as required by section 1292(b).

Materially advancing the ultimate termination of the litigation. Finally, an interlocutory appeal under section 1292(b) must also materially advance the ultimate termination of the litigation. "The basic rule of appellate jurisdiction restricts review to final judgments, avoiding the delay and extra effort of piecemeal appeals." *Clark-Dietz & Associates-Engineers, Inc.* 702 F.2d at 69. A case must be "exceptional" to warrant departure from this general rule. *Id.* Plaintiffs demonstrate no such extraordinary circumstances here. To the contrary, Plaintiffs' request is fundamentally "piecemeal," as Plaintiffs seek to reinstate Kaiser and Aetna as defendants to its claim against MET, then certify the portions of the award involving Kaiser and Aetna's allegedly misrepresented QPAs for appeal under section 1292(b), while Plaintiffs seek to stay the remaining aspects of the case involving whether MET applied an illegal presumption. Mot., 9. As explained in Section II(a) above, this request is procedurally improper. Yet it demonstrates that Plaintiffs' request is inherently "piecemeal" in nature. *See id.* Thus, this appeal would not materially advance the ultimate termination of the litigation.

For all of these reasons, Plaintiffs fail to meet the requirements for an interlocutory appeal, and this Court should decline to certify it for appeal under that section 1292(b).

E. Plaintiffs' Claims Against Kaiser are Barred By Collateral Estoppel.

This Court correctly dismissed Plaintiffs' claims for the reasons set forth above. In addition, this Court also correctly dismissed Plaintiffs' claims under a theory of collateral estoppel. Collateral estoppel prevents a party from litigating an issue already raised in an earlier action between the same parties when (1) the issue at stake is identical to the one involved in the

earlier action, (2) the issue was actually litigated in the prior action, and (3) the determination of the issue in the prior action was a necessary part of the judgment in that action. *Matter of Amberson*, 73 F.4th 348, 351 (5th Cir. 2023). This Court correctly found that each of these elements is present here. Dkt. 76 at 9–10 ("[Plaintiffs] seek[] a ruling on the exact same issues that have been ruled upon by Judge Corrigan," and thus Plaintiffs had "a full and fair opportunity" to litigate their claims.).

Although the Court opted to consider the Plaintiffs separately in its order, the doctrine of privity provides an alternative basis justifying the Court's dismissal against all Plaintiffs. Dkt. 76 at 10. Collateral estoppel exists when there is privity between a party to the second case and a party who is bound by an earlier judgment—"[c]omplete identity of parties in the two suits is ***not required***." *Wehling v. Columbia Broad. Sys.*, 721 F.2d 506, 508 (5th Cir. 1983) (emphasis added). The Fifth Circuit has held that parties are in privity for the purposes of collateral estoppel when "they control an action, even if they are not parties to it." *McCoy v. Hernandez*, 203 F.3d 371, 374 (5th Cir. 2000). That is certainly true here. Plaintiffs are represented by the very same counsel from the Florida lawsuit—the ***very same counsel*** that also manages Plaintiffs' IDR submissions. Case No. 3:22-cv-01153 (M.D. Fla.), Dkt. No. 39-1, ¶ 2. The Fifth Circuit has found privity where parties were represented by the same counsel in suits involving the same legal issues. *Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.3d 665, 677 (5th Cir. 2003) ("Given that both . . . are represented by the same counsel, they are in privity with one another."). Indeed, in *Astron Industrial Associates, Inc. v. Chrysler Motors Corp.,* the Fifth Circuit found that a parent company was in privity with its wholly-owned subsidiary when the parent company authorized the prior lawsuit by the subsidiary, and hired its attorney. *Astron Indus. Assocs., Inc. v. Chrysler Motors Corp.*, 405 F.2d 958, 960–61 (5th Cir. 1968).

Given that Plaintiffs are represented by the exact same lawyers in every lawsuit regardless of the specific subsidiaries that initiated the suit, it follows that Plaintiffs' parent company Global Medical Response, Inc. ("GMR") authorized each individual lawsuit in Florida and Texas, and hired the exact same lawyers to litigate each suit. *See* Dkt. 6 (explaining GMR is the "parent corporation" of Plaintiffs).

In addition to *Astron,* The Fifth Circuit has repeatedly confirmed that privity exists when the prior lawsuit involved related entities. *Jose v. United Engineers & Constructors, Inc.*, 42 F.3d 640, n.1 (5th Cir. 1994) ("Raytheon, which was not a party to the earlier litigation, is in privity with United, its wholly owned subsidiary"); *Butler v. Endeavor Air, Inc.*, 805 F. App'x 274, 278 (5th Cir. 2020). Again, the affiliated entities that brought the several parallel actions in Texas and Florida are all subsidiaries of GMR. Dkt. 6. Thus, even if Plaintiffs could prove that reconsideration was warranted under any of the federal rules—and as explained above, they cannot—this Court should refuse to disturb its ruling because Plaintiffs' claims against Kaiser are entirely barred by collateral estoppel.

F. Kaiser Takes No Position Regarding Entry of Final Judgment.

Finally, because the Court correctly dismissed Plaintiffs' claims against Kaiser, Kaiser takes no position regarding Plaintiffs' request for entry of final judgment under Rule 54(b).

III. CONCLUSION

Plaintiffs' Motion yet again attempts to relitigate the merits of a fee dispute that was decided long ago in statutory arbitration. This Court should deny the relief that Plaintiffs seek.

Dated: March 21, 2024

/s/Megan McKisson

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 21st day of March 2024, a true and correct copy of the above and foregoing document has been served on all counsel of record who are deemed to have consented to electronic service via the Court's CM/ECF system. All others will be served via electronic mail.

/s/Elisabeth Walters
Elisabeth Walters