UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

AMSURG GLENDALE, INC., and AMSURG CORP.,	)	
Petitioners,	)	
v.	)	**NO. 3:16-cv-00862**
	)	**JUDGE CRENSHAW**
GLENDALE SURGERY PARTNERS and RICHARD WEISE, M.D.,	)	
Respondents.	)	

MEMORANDUM OPINION

On May 9, 2016, petitioners AmSurg Glendale, Inc., ("ASGI") and AmSurg Corp. ("ASC") (collectively, "AmSurg") filed a Petition and Application for Confirmation of Arbitration Award (Doc. No. 1) against Glendale Surgery Partners ("GSP") and Dr. Richard Weise, M.D., (collectively, "Respondents"). GSP filed a Motion to Dismiss for Lack of Personal Jurisdiction (Doc. No. 12) as well as a placeholder Conditional Motion to Vacate Arbitration Award (Doc. No. 21) intended to reserve its right to challenge the arbitration award if the Court concluded that it had personal jurisdiction in this matter. The Court denied the Motion to Dismiss (Doc. No. 33), and GSP filed a renewed Motion to Vacate Arbitration Award (Doc. No. 36). AmSurg has filed a Motion for Post-Award, Prejudgment Interest. (Doc. No. 34.)

Also pending before the Court are three motions involving argumentation in this matter. AmSurg's Motion for Leave to File Sur-Reply (Doc. No. 43) and GSP's Motion for Leave to File Final Response to Sur-Reply (Doc. No. 45) are **GRANTED**. GSP's Motion to Set Oral Argument (Doc. No. 39) is **DENIED** as moot. For the reasons discussed below, GSP's Motions to Vacate Arbitration Award are **DENIED** and AmSurg's Motion for Post-Award, Prejudgment Interest is

GRANTED as modified. The arbitration award is **CONFIRMED** and Respondents are **ORDERED** to pay post-award prejudgment interest calculated at a rate of 5% per annum starting on February 25, 2016.

I. BACKGROUND

GSP is a California general partnership formed in 2000 by a group of physicians including Dr. Weise and Dr. R. Philip Doss. (Doc. No. 1 at ¶ 3; Doc. No. 36-2 at ¶ 4.) ASC and ASGI are Tennessee corporations, and ASC is the whole owner of ASGI. (Doc. No. 1 at ¶¶ 1–2; Doc. No. 3.) On January 21, 2000, ASGI and GSP formed a limited partnership under the name The Glendale Ophthalmology ASC, L.P, for the purpose of operating an ambulatory surgical center in Glendale, California ("Glendale Center"). (Doc. No. 1-1 at 1–2; Doc. No. 1-4 at 1, 3–4.) Under the partnership agreement, ASGI served as general partner and GSP as limited partner. (Doc. No. 1-4 at 3.) The agreement requires "[a]ll disputes relative to the interpretation of the provisions of" the agreement to be resolved by binding arbitration in Los Angeles. (Id. at 14.) The agreement's choice-of-law provision, however, provides that it should be construed pursuant to Tennessee law. (Id.)

Under the partnership agreement, "[t]he management and control of the [p]artnership and its business" was granted exclusively to ASGI as general partner, subject to oversight by an operating board including representatives of both partners. (Id. at 7.) At the beginning of the partnership, the board consisted of six members: three chosen by AmSurg, two by Dr. Weise, and one by Dr. Doss. Dr. Doss has stated that this structure was specifically envisioned to prevent Dr. Weise from being able to direct partnership actions unilaterally, because the AmSurg-selected board members and Doss's selected board member would, if acting in concert, control a majority

of the board. The board was later reduced to four members, with AmSurg selecting two, Dr. Weise one, and Dr. Doss one. (Doc. No. 36-2 at ¶¶ 7–8.)

From 2000 to 2012, the AmSurg/GSP partnership profitably operated the Glendale Center at the location originally contemplated by the parties. (Id. at ¶ 10.) In 2012, however, the Glendale Center's landlord opted to terminate the Center's lease, making it necessary for the partnership to find a new location if it wished to continue operations. (Id. at ¶ 11.) The partnership failed to do so, and the question of why is the heart of the arbitration at issue here. The arbitration panel ("Panel") found that, while AmSurg attempted to work with GSP to find a new location for a surgical center, Dr. Weise, unbeknownst to AmSurg, was seeking a location to open a new surgical center without AmSurg's involvement. (Doc. No. 1-1 at 9, 17.) By July 10, 2013, Dr. Weise had entered into an agreement to purchase an allegedly suitable building. (Id. at 9.) When AmSurg finally learned of Dr. Weise's purchase of the property, AmSurg proposed that it be the location of the new jointly operated surgical center. Four days later, GSP demanded arbitration, seeking a determination that the non-compete clause of the parties' partnership agreement—which would prevent the operation of a competing surgical center so close to the Glendale Center—was invalid. (Id. at 13.) AmSurg filed counter- and cross-claims against GSP and several GSP physicians alleging wrongful withdrawal from the partnership and violation of the duty of good faith and fair dealing. The claims against of the physicians except for Dr. Weise were dismissed before an arbitration award was rendered. (Id. at 14.)

The majority of the Panel concluded that GSP had wrongfully attempted to withdraw from the partnership and that GSP, acting through Dr. Weise, violated the duty of good faith and fair dealing. (Id. at 16–21.) The Panel concluded that GSP and Dr. Weise's actions "essentially destroyed the . . . partnership business" and granted AmSurg damages of $9 million, approximately

half the value of the venture. (Id. at 25–26.) One member of the Panel authored a dissenting opinion, concluding that GSP did not violate its duty of good faith and fair dealing because it had no underlying duty to perform with regard to the search for a new location, and that GSP never wrongfully withdrew from the partnership. (Id. at 32, 34.)

In the arbitration, GSP and Dr. Weise were both represented by attorneys from Robins Kaplan LLP ("Robins Kaplan"). GSP does not dispute that it signed a conflict waiver letter related to the dual representation, but argues that Robins Kaplan and Dr. Weise failed to make adequate disclosures to allow GSP to informedly consent to dual representation. (Doc. No. 36 at 6.) Specifically, GSP argues that Robins Kaplan, among other things, "failed to disclose that Dr. [Weise] was already a client of the Robins Kaplan firm"—including with regard to the real estate and business activities underlying the allegations against GSP—"or that there was a longtime personal and professional relationship between [Dr. Weise] and" Robins Kaplan attorney David Veis. (Id.) GSP now contends that Robins Kaplan failed to adequately present and pursue a defense based on the theory that Dr. Weise's allegedly wrongful actions were performed *ultra vires* any authorization or ratification on behalf of GSP, and that he alone, if anyone, is responsible for the resultant damages. (Doc. No. 36 at 6.)

II. ANALYSIS

A. Standard of Review

"The Federal Arbitration Act ('FAA') expresses a presumption that arbitration awards will be confirmed." Uhl v. Komatsu Forklift Co., 512 F.3d 294, 305 (6th Cir. 2008) (quoting Nationwide Mut. Ins. Co. v. Home Ins. Co., 429 F.3d 640, 643 (6th Cir. 2005)). "When courts are called on to review an arbitrator's decision, the review is very narrow; it is one of the narrowest standards of judicial review in all of American jurisprudence." Samaan v. Gen.

Dynamics Land Sys., Inc., 835 F.3d 593, 600 (6th Cir. 2016) (quoting Uhl, 512 F.3d at 305). "An arbitration award can be vacated under the FAA in only four situations," id.:

> (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); see also Tenn. Code Ann. § 29-5-313(a). "Courts must refrain from reversing an arbitrator simply because the court disagrees with the result or believes the arbitrator made a serious legal or factual error." Samaan, 835 F.3d at 600 (quoting Solvay Pharm., Inc. v. Duramed Pharm., Inc., 442 F.3d 471, 476 (6th Cir. 2006)). While the Sixth Circuit has previously suggested that a court may vacate an arbitration award on "a separate judicially created basis . . . where the arbitration award was made in manifest disregard of the law," the continued viability of that non-statutory ground for vacatur has been brought into question by the Supreme Court's decision in Hall Street Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 581–82 (2008). Samaan, 835 F.3d at 600–01.

B. Corruption, Fraud, or Undue Means

GSP argues that the arbitration award should be vacated as it applies to GSP because it was "procured by corruption, fraud, or undue means," 9 U.S.C. § 10(a)(1), in light of Robins Kaplan's wrongful dual representation of Dr. Weise and GSP. Specifically, GSP argues that Robins Kaplan concealed the extent of the conflicts of interest between GSP and Dr. Weise, as well as the extent of Robins Kaplan's own involvement in Dr. Weise's underlying dealings, and that Robins Kaplan failed to present facts and arguments at the arbitration that would have exculpated GSP for Dr.

Weise's *ultra vires* conduct. AmSurg responds that GSP is effectively urging the Court to create an extra-statutory "ineffective assistance of counsel" basis for vacatur of an arbitration award, and that, even if the "corruption, fraud, or undue means" ground can theoretically be invoked based on the malfeasance of one's own attorney, such a step is not justified in this case.

As a preliminary matter, GSP argues that the Court should consider GSP's challenge under California law—despite the fact that the agreement between the parties has a Tennessee choice-of-law provision—because applying California law "makes sense" in light of the fact that the arbitration took place in California. (Doc. No. 36 at 18.) GSP does not premise its argument on any established rule governing choice-of-law issues in this Court and is therefore unpersuasive. In any event, an argument seeking to set aside an arbitration award as procured by corruption, fraud, or undue means is governed by the FAA, not the peculiarities of the law of any particular state. "The FAA governs all aspects of arbitration procedure and preempts inconsistent state law." Stout v. J.D. Byrider, 228 F.3d 709, 716 (6th Cir. 2000) (citing Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 688 (1996); Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24 (1983)).

The Sixth Circuit has endorsed a three-part test for evaluating a claim that an arbitration award must be set aside because it was procured by corruption, fraud, or undue means: "(1) the plaintiff must establish fraud by clear and convincing evidence; (2) the fraud must not have been discoverable upon the exercise of due diligence prior to or during the arbitration; and, (3) the petitioner must demonstrate that the fraud materially related to an issue in the arbitration." Pontiac Trail Med. Clinic, P.C. v. PaineWebber, Inc., 1 F.3d 1241 (table), 1993 WL 288301, at *3 (6th Cir. July 29, 1993) (citing Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378, 1383 (11th Cir.

1988)). Another judge in this district recently considered whether a party can obtain vacatur under 9 U.S.C. § 10(a)(1) based on misconduct of its own counsel and rejected such a claim, writing:

> [The party seeking vacatur] can point to no case law, however, nor is the court aware of any, in which an arbitration award was vacated on the basis of misconduct by the losing party's own counsel. To allow [his] claim to proceed, the court would have to invent whole cloth an entirely new category of grounds for vacatur of an arbitration award, not provided for in the FAA or by any other legal precedent.

Kelly v. Morgan Stanley Smith Barney, LLC, No. 3:15-CV-1110, 2016 WL 741940, at *3 (M.D. Tenn. Feb. 25, 2016). While Judge Trauger acknowledged that there was evidence to suggest that the relevant counsel's "representation . . . was probably compromised," the court denied the motion to vacate because the movant's counterparty played no role in any underlying fraud. Id.

Perhaps sensing the difficulties attendant to convincing the Court to set aside an award based solely on the wrongdoing of its own former counsel, GSP argues that AmSurg and its counsel have unclean hands with regard to Robins Kaplan's conflict of interest. GSP argues that AmSurg's counsel "remained silent" as Robins Kaplan failed to rebut evidence that tended to incriminate GSP and Weise jointly and faults AmSurg's counsel for the fact that the arbitration record omitted evidence that, against AmSurg's interests, would have tended to exonerate GSP. (Doc. No. 36 at 22–23.) GSP seems to suggest that AmSurg's counsel had an obligation to discern that Robins Kaplan was representing GSP inadequately, to assume that Robins Kaplan's litigation decisions were not made in adequate consultation with GSP, and to intervene. Even if such an obligation can arise in some situations, GSP has not shown that it did so here, and GSP has certainly failed to show that AmSurg was a participant in or complicit in any fraud.

GSP also argues that counsel for AmSurg itself had an impermissible conflict of interest because of its involvement in the formation of the parties' original partnership. Insofar as this argument—which appears primarily in GSP's Reply (Doc. No. 41 at 19–21)—is properly before

the Court, the Court notes that such a conflict could not form the basis for vacatur under 9 U.S.C. § 10(a)(1), because any such conflict was known to GSP, and therefore GSP cannot satisfy the three-factor Pontiac Trail test for corruption, fraud, or undue means. 1993 WL 288301, at *3

What remains, then, is the question of whether GSP is entitled to vacatur of the arbitration award based solely on Robins Kaplan's alleged wrongdoing for the benefit of Dr. Weise. Even if one assumes that such a challenge is tenable in theory and this Court would give that theory life, GSP again runs afoul of the Pontiac Trail test. A district court will only set aside an arbitration award for corruption, fraud, or undue means if the relevant wrongdoing was not "discoverable upon the exercise of due diligence prior to or during the arbitration." Pontiac, 1993 WL 288301, at *3. Much of the conflict between Dr. Weise's interests and GSP's would have been apparent to anyone who paid attention to the arbitration proceedings. While the other GSP doctors may have been ignorant about some details of Robins Kaplan's past relationship with Dr. Weise, GSP has presented no reason why they could not have discovered those details through simple inquiry or investigation. Rather, it appears that the other doctors voluntarily chose not to concern themselves with the details of the arbitration until it was too late.

The question of whether Robins Kaplan appropriately handled the question of potential conflicts of interest in this matter may be a legitimate issue for another proceeding. Here, however, the Court is called on only to consider the narrow question of whether GSP is entitled to have the arbitration award against it set aside based on it having been procured by corruption, fraud, or undue means. Because (1) AmSurg was not complicit in the alleged wrongdoing and (2) GSP has not shown that due diligence would have failed to uncover the conflicts of interest, GSP is not entitled to have the award set aside.

C. Pre-judgment interest

AmSurg asks the Court to order GSP and Weise to pay prejudgment interest at a rate of 10% per annum, calculated from the date on which the arbitration panel entered its interim award to the date of this Court's judgment. GSP argues that an award of prejudgment interest would be inequitable, and that, if the Court does award such interest, it should be calculated from May 6, 2016, which GSP identifies as the true date of the final award in the arbitration proceedings. GSP also asks for an interest rate not exceeding 5% per annum.

"A district court confirming an arbitration award has discretion to include post-award, prejudgment interest." Krystal Co. v. Caldwell, No. 1:11-CV-81, 2012 WL 876793, at *10 (E.D. Tenn. Mar. 13, 2012) (citing Dealer Comput. Servs., Inc. v. Dale Spradley Motors, Inc., No. 11–11853, 2012 WL 72284, at *6 (E.D. Mich. Jan.10, 2012)). "In diversity cases in [the Sixth] Circuit, federal law controls postjudgment interest but state law governs awards of prejudgment interest." F.D.I.C. v. First Heights Bank, FSB, 229 F.3d 528, 542 (6th Cir. 2000) (citing Clissold v. St. Louis–San Francisco Rwy. Co., 600 F.2d 35, 39 n. 3 (6th Cir. 1979)). Under Tennessee's general prejudgment interest statute, prejudgment interest "may be awarded by courts or juries in accordance with the principles of equity at any rate not in excess of a maximum effective rate of ten percent (10%) per annum." Tenn. Code Ann. § 47-14-123. "[T]he purpose of awarding the interest is to fully compensate a plaintiff for the loss of the use of funds to which he or she was legally entitled, not to penalize a defendant for wrongdoing." Myint v. Allstate Ins. Co., 970 S.W.2d 920, 927 (Tenn. 1998) (citing Mitchell v. Mitchell, 876 S.W.2d 830, 832 (Tenn. 1994); Otis v. Cambridge Mut. Fire Ins. Co., 850 S.W.2d 439, 446 (Tenn. 1992)). GSP has not identified any persuasive reason why prejudgment interest should not be awarded here, choosing instead to premise its opposition primarily on reiterating its arguments for vacatur. (Doc. No. 37 at 3–8.) For every day that AmSurg has gone without the funds owed it to it, AmSurg has lost the

investment value of those funds. Interest is as necessary to compensate for that loss as it would be in any case.

AmSurg, however, has not shown that it is entitled to a rate as high as 10% per annum. AmSurg argues that such an aggressive rate is supported by the equities in light of GSP's alleged delays in the underlying litigation. The perception of this Court, however, is that both parties—at least since the arbitration award was entered—have litigated this matter aggressively but not dilatorily. The Court therefore will award an interest rate of 5% per annum. See MAKS Gen. Trading & Contracting Co. v. Sterling Operations, Inc., No. 3:10-CV-443, 2014 WL 297291, at *2 (E.D. Tenn. Jan. 27, 2014) ("The Court has considered the parties' positions, and the Court finds that the appropriate rate for calculating prejudgment interest is 5% per annum."), report & recommendation adopted, No. 3:10-CV-443-TAV-HBG, 2014 WL 688102 (E.D. Tenn. Feb. 20, 2014); Nat'l Fitness Ctr., Inc. v. Atlanta Fitness, No. 3:09-CV-133, 2013 WL 6231774, at *3 (E.D. Tenn. Dec. 2, 2013) ("The Court, however, finds that the request that the interest be calculated at a rate of 10% per annum is unreasonable under the circumstances. . . . The Court finds that a more appropriate interest rate is 5% per annum . . . .").

AmSurg asks that interest be calculated from February 25, 2016, the date on which the Panel entered its interim award in AmSurg's favor; GSP argues that it should be calculated from May 6, 2016, when the arbitration award became unambiguously final. "Generally, interest should be awarded from the date of the arbitration award." Krystal, 2012 WL 876793, at *12 (citing Marion Mfg. Co. v. Long, 588 F.2d 538 (6th Cir.1978)). Based on the Court's review of the Panel's orders of both February 25, 2016, and May 6, 2016, it appears that the order of February 25, 2016, conclusively resolved the question of GSP's liability, and the order of May 6, 2016

merely resolved a non-meritorious motion seeking reconsideration. (Doc. No. 1-1; Doc. No. 1-2.) The Court will accordingly award interest from February 25, 2016.

CONCLUSION

AmSurg's Motion for Leave to File Sur-Reply and GSP's Motion for Leave to File Final Response to Sur-Reply are **GRANTED**. GSP's Motion to Set Oral Argument is **DENIED** as moot. For the reasons discussed above, GSP's Motions to Vacate Arbitration Award are **DENIED** and AmSurg's Motion for Post-Award Prejudgment Interest is **GRANTED as modified**. The arbitration award is **CONFIRMED** and Respondents are **ORDERED** to pay post-award prejudgment interest calculated at a rate of 5% per annum starting on February 25, 2016.

The Court will enter an appropriate order.

WAVERLY D. CRENSHAW, JR.
UNITED STATES DISTRICT JUDGE