IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ACADEMY OF ALLERGY & ASTHMA IN PRIMARY CARE, ET AL.,	)	
Plaintiffs,	)	
V.	)	**CIVIL ACTION NO. SA-17-CA-1122-FB**
SUPERIOR HEALTHPLAN, INC.; and PARKLAND COMMUNITY HEALTH PLAN, INC.,	)	
Defendants.	)	

ORDER ACCEPTING REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Before the Court is the Report and Recommendation of the United States Magistrate Judge (docket no. 74) concerning Defendant Superior HealthPlan, Inc.'s Motion to Compel Arbitration and Alternative Motion to Dismiss. (Docket no. 9). To date, no objections to the Report and Recommendation have been received.[1]

Because no party has objected to the Magistrate Judge's Report and Recommendation, the Court need not conduct a de novo review. *See* 28 U.S.C. § 636(b)(1) ("A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings and recommendations to which objection is made."). The Court has reviewed the Report and Recommendation and finds its reasoning to be neither clearly erroneous nor contrary to law. *United States v. Wilson,* 864 F.2d 1219, 1221 (5th Cir.), *cert. denied,* 492 U.S. 918 (1989).

[1] Any party who desires to object to a Magistrate's findings and recommendations must serve and file his, her or its written objections within fourteen days after being served with a copy of the findings and recommendation. 28 U.S.C. § 635(b)(1). If service upon a party is made by mailing a copy to the party's last known address, "service is complete upon mailing." FED. R. CIV. P. 5(b)(2)(C). If service is by electronic means, "service is complete upon transmission." *Id.* at (E).

IT IS THEREFORE ORDERED that the Report and Recommendation of the United States Magistrate Judge (docket no. 74) is accepted pursuant to 28 U.S.C. § 636(b)(1) is ACCEPTED such that Defendant Superior HealthPlan, Inc.'s Motion to Compel Arbitration and Alternative Motion to Dismiss (docket no. 9) is GRANTED IN PART, DENIED IN PART and DENIED AS MOOT IN PART. The motion is GRANTED as to the claims of Plaintiff Academy of Allergy & Asthma in Primary Care against defendant Superior. The motion is DENIED as to the claims of Plaintiff United Biologics, LLC d/b/a United Allergy Services against Superior. To the extent the motion seeks to compel arbitration of claims against Defendant Parkland, it is likewise DENIED. Finally, the motion is DENIED AS MOOT as to the claims of the Provider Plaintiffs (the physicians, a physician-assistant, and other medical service providers) against Superior, and as to Superior's Motion to Dismiss Plaintiffs' original complaint.

It is so ORDERED.

SIGNED this 23rd day of July, 2018.

FRED BIERY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ACADEMY OF ALLERGY & ASTHMA IN PRIMARY CARE; DAVID A. RAMOS, MD; BETTY JEAN RAMOS-DORBY, PA-C; DAVID A. RAMOS, M.D., P.A.; JUSTIN AMARO, D.O.; AMARO INTEGRATIVE MEDICINE; AMARILLO PEDIATRIC CLINIC, PLLC; AHAMMED HASHIM, M.D.; NACOGDOCHES PULMONARY AND SLEEP ASSOCIATES P.A.; and UNITED BIOLOGICS, LLC d/b/a UNITED ALLERGY SERVICES,	§	SA-17-CV-1122-FB (HJB)
Plaintiffs,	§	
v.	§	
SUPERIOR HEALTHPLAN, INC. and PARKLAND COMMUNITY HEALTH PLAN, INC.,	§	
Defendants.	§	

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

To the Honorable Fred Biery, U.S. District Judge:

This Report and Recommendation concerns the Motion to Compel Arbitration and Alternative Motion to Dismiss filed by Defendant Superior HealthPlan, Inc. ("Superior"). (Docket Entry 9.) This case has been referred to the undersigned for consideration of pretrial matters. (*See* Docket Entry 13.) For the reasons set out below, I recommend that the Motion to Compel Arbitration and Alternative Motion to Dismiss be **GRANTED IN PART, DENIED IN PART** and **DENIED AS MOOT IN PART**.

I. Jurisdiction.

Plaintiffs have brought this action under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202; Section 1 of the Sherman Act, 15 U.S.C. § 1; the Texas Free Enterprise and Antitrust Act, TEX. BUS. & COMM. CODE ANN. § 15.05 (West 2011), and Texas common law. (Docket Entry 19, at 2.) Subject matter of jurisdiction over Plaintiffs' claims is asserted pursuant to 28 U.S.C. §§ 1331 and 1337, 15 U.S.C. §§ 15 and 26, and 28 U.S.C. § 1367(a). (*Id.*) I have authority to make this Report and Recommendation pursuant to 28 U.S.C. § 636(b).

II. Background.

This case concerns payments for allergy and asthma treatments. Plaintiffs include physicians, a physician-assistant, and other medical-service providers (hereinafter referred to as "Provider Plaintiffs"), along with Allergy & Asthma in Primary Care ("AAAPC"), a non-profit physician association, and United Biologics, LLC d/b/a United Allergy Services ("UAS"), a company that provides equipment and support services for physicians practicing allergy testing and allergen immunotherapy. (Docket Entry 19, at 2–5, 8.) Defendants are Superior and Parkland Community Health Plan, Inc. ("Parkland"), two managed care organizations ("MCOs") which, in contract with the State of Texas, are paid to administer federally funded health insurance programs like Medicaid and the Children's Health Insurance Program ("CHIP"). (Docket Entry 19, at 16.)

Plaintiffs allege that Defendants have engaged in an illegal conspiracy regarding reimbursement for certain allergy testing and allergen immunotherapy in Texas, by allowing such reimbursement only for board-certified allergists and other specialists, and excluding other physicians and health providers. (Docket Entry 19, at 13.) Plaintiffs bring causes of action for

declaratory judgment, antitrust violations under 15 U.S.C. § 1, and a variety of state-law claims. (*Id.* at 37–52.)

Plaintiffs filed their suit in the 45th Judicial District Court of Bexar County, Texas, on September 29, 2017. (Docket Entry 1-5.) Superior removed the case to this Court on November 3, 2017. (Docket Entry 1.) A week later, Superior filed the instant motion to compel arbitration, or alternatively to dismiss. (Docket Entry 9.) In its motion, Superior asserted that it had contracts with six of the Provider Plaintiffs (or their agents), contracts which included agreements to arbitrate their disputes. (*Id.* at 4–5, 8.) With regard to the remaining Plaintiffs, Superior argued that these Plaintiffs are "bound to the same extent[ ] as the signatories and their agents, because these remaining Plaintiffs have sought direct benefits under the Agreements and because their claims are indistinguishable from and necessarily intertwined with arbitrable claims." (*Id.* at 8.) In the alternative, Superior sought dismissal of the claims of all Plaintiffs as barred by limitations. (*Id.* at 10–19.)

Subsequent to the filing of Superior's motion, all of the Provider Plaintiffs filed a demand for arbitration of their claims against both Superior and Parkland. (*See* Docket Entry 30–1.) Plaintiffs AAAPC and UAS responded in opposition to Superior's motion to compel, and all Plaintiffs filed an amended complaint. (Docket Entries 19, 30.) Parkland also responded to Superior's motion, stating its opposition to being compelled to have its claims submitted to arbitration. (Docket Entry 23.) Superior responded to clarify that it did not contend that Parkland was required to participate in its arbitration with Plaintiffs. (Docket Entry 51.)[1]

[1] Although Parkland was originally named in the Provider Plaintiffs' arbitration demand, it has since been withdrawn from the arbitration proceeding by agreement.

Superior also moved to dismiss Plaintiff's amended complaint, renewing its limitations arguments and making other arguments. (*See* Docket Entry 28.)

The undersigned held a motions hearing in this case on April 24, 2018. At that hearing, the undersigned ordered that all proceedings in this case be stayed until the pending arbitration was resolved. (*See* Docket Entry 73.) Because Superior's motion to compel would determine the parties to the arbitration, however, that motion was excepted from the stay and taken under advisement. (*See id.*)

III. Analysis.

Before addressing the merits of Superior's motion, it is important to set out the limited issues that remain before the Court at this time. First, with the exception of proceedings on the motion, all proceedings in this case have been stayed pending the outcome of the ongoing arbitration proceeding. Second, since the filing of the motion to compel, all the Provider Plaintiffs have filed demands in the arbitration proceeding; thus, as to the Provider Plaintiffs' claims, Superior's motion is moot. Finally, Superior's motion is likewise moot as to the relief of dismissing the original complaint; that complaint has been superseded by the amended complaint. (*See* Docket Entry 20 (recommending denial as moot of the motion to dismiss Plaintiffs' original complaint filed by Parkland)). Because dismissal of the original complaint is moot, this Report and Recommendation addresses only the motion to compel arbitration.[2]

As noted above, all Plaintiffs' claims against Superior have been submitted to arbitration, except for the claims of Plaintiffs AAAPC and UAS. As to these two Plaintiffs, Superior concedes that it has no contractual agreement to arbitrate disputes. (*See* Docket Entry 9, at 8.)

[2] I note that Superior and Parkland both have motions pending to dismiss the amended complaint, but proceedings on these motions have been stayed. (*See* Docket Entries 28, 33, and 73.)

Accordingly, the Court must determine whether, although they are not signatories to an arbitration agreement, Plaintiffs AAAPC and UAS may nevertheless be compelled to arbitrate their disputes with Superior.

Under the Federal Arbitration Act (FAA),[3] state contract law determines which claims must be submitted to arbitration. *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630–31 (2009). State law applies even when the parties resisting arbitration are not signatories to an agreement. *Hays v. HCA Holdings, Inc.*, 838 F.3d 605, 609 & n.1 (5th Cir. 2016). Accordingly, in determining whether AAAPC and UAS must submit their claims to arbitration, the Court must consider Texas law. *Id.* However, to the extent the issue is unclear, "both federal and state jurisprudence dictate that any doubt as to whether a controversy is arbitrable should be resolved in favor of arbitration." *McKee v. Home Buyers Warranty Corp.*, 45 F.3d 981, 985 (5th Cir. 1995) (considering scope of arbitration clause); *cf. Royston, Rayzor, Vickery, & Williams, LLP v. Lopez*, 467 S.W.3d 494, 499 (Tex. 2015) (arbitration "strongly favored" under Texas law); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) ("[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.").

As a general rule, the FAA "does not require parties to arbitrate when they have not agreed to do so." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 293 (2002); *see also In re Merrill Lynch Trust Co. FSB*, 235 S.W.3d 185, 192 (Tex. 2007) (same). Superior does not dispute the general rule. However, it argues that Plaintiffs AAAPC and UAS are nevertheless equitably estopped from avoiding arbitration for two reasons: (a) they have sought "direct benefits" under

[3] *See* 9 U.S.C. § 1 *et seq.*

the agreements that apply to Provider Plaintiffs; and (b) their claims are indistinguishable from, and necessarily intertwined with, the arbitrable claims. (Docket Entry 9, at 9.) Each of these arguments is addressed below.

A. *"Direct Benefits" Estoppel.*

"Direct benefits" estoppel applies when a plaintiff's claim depends on the contract's existence and would be "unable to 'stand independently' without the contract." *G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 528 (Tex. 2015) (quoting *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 739 (Tex. 2005)). "Whether a claim seeks a direct benefit from a contract containing an arbitration clause turns on the substance of the claim, not artful pleading." *G.T. Leach Builders*, 458 S.W.3d at 527. Accordingly, the doctrine does not apply "'when the substance of the claim arises from general obligations imposed by state law, including statutes, torts and other common law duties, or federal law,' rather than from the contract," even when "the claim refers to or relates to the contract." *Id.* at 528 (quoting *In re Morgan Stanley & Co., Inc.*, 293 S.W.3d 182, 184 n.2 (Tex. 2009)).

Superior claims that Plaintiffs AAAPC and UAS are in substance seeking to enforce obligations under the Participating Provider Agreements that the Provider Plaintiffs executed with Superior—agreements which include arbitration provisions. In support of this claim, Superior argues that AAAPC's and UAS's claims either (1) "directly reference" the Participating Provider Agreements or (2) "implicitly rely upon the Agreements to create the relationship upon which the claims rely." (Docket Entry 9, at 10.)

Superior's "direct reference" argument may be resolved by looking to Plaintiffs' complaint. Superior's motion refers to the original complaint, which has since been amended;

nevertheless, as Superior pointed out at the hearing before the undersigned, the amended complaint includes specific reference to the Agreements at issue, in its request for declaratory judgment (*see* Docket Entry 19, at 39–40 (repeatedly referring to improper actions under "the Physician Participation Agreement"[4]); in a breach of contract claim (*see id.* at 43–44); in a Texas Prompt Pay Act claim (*see id.* at 44–45); and in a request for injunctive relief (*see id.* at 52). A number of these claims are specifically joined by Plaintiff AAAPC; none of them, however, are joined by UAS.[5] Thus, while AAAPC makes claims in "direct reference" to the agreements at issue, UAS does not.

Superior nevertheless argues that UAS, like AAAPC, must be compelled to arbitrate because, like AAAPC, it "seek[s] relief based upon rights and obligations created by the Agreements." (Docket Entry 35, at 5; *cf.* Docket Entry 9, at 10.) As to UAS, this argument fails. The complaint does not indicate that UAS seeks payment for services under Superior's agreements with the Provider Plaintiffs; instead, it alleges that UAS provides the Provider Plaintiffs with "support services" for the "allergy testing and allergen immunotherapy" that is at issue in the dispute between the Provider Plaintiffs and Superior. (*See* Docket Entry 19, at 4.) Contrary to Superior's suggestion, this once-removed reliance on the Provider Plaintiffs' contracts is not sufficient to support a finding of "direct benefits" estoppel.

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[4] The parties have not suggested that, for purposes of the arbitration issue, there is any difference between a "Participating Provider" Agreement and a "Physician Participation" Agreement.

[5] Superior argued in its motion that "Plaintiffs' Petition draws no distinction between any of the Plaintiffs and any of the claims; Plaintiffs jointly advance the same claims and seek the same relief." (Docket Entry 9, at 10.) While this may have been true of the original complaint, it is not true of the amended complaint. The amended complaint clearly sets out which claims are brought by which Plaintiffs.

The Texas Supreme Court's decision in *Kellogg Brown* is instructive in this regard. In that case, a contractor subcontracted part of a contract to build elevator trunks for two cruise ships. 166 S.W.3d at 734. That contract has an arbitration clause. The subcontractor then subcontracted part of its job to another subcontractor, in an agreement without an arbitration clause. When claims between the contractor and first-tier subcontractor were submitted to arbitration, the first-tier subcontractor argued that the second-tier contractor should be required to submit its *quantum meruit* claims to arbitration as well. *Id.* at 736.

The Supreme Court rejected the argument. The Court acknowledged that, in performing its work, the second-tier subcontractor necessarily relied on specifications in the first-tier contract that included the arbitration provision. 166 S.W.3d at 740. In such circumstances, "[t]he work to be performed under a second-tier subcontract will inherently be related to and, to a certain extent, defined by contracts higher in the chain." *Id.* This, however, was insufficient to require estoppel. Even though "a non-signatory's claim may relate to a contract containing an arbitration provision, that relationship does not, in itself, bind the non-signatory to the arbitration provision." *Id.* at 741. "Instead, a non-signatory should be compelled to arbitrate a claim only if it seeks, through the claim, to derive a direct benefit from the contract containing the arbitration provision." *Id.* (citing *Washington Mut. Finance Group, LLC v. Bailey* 364 F.3d 260, 268 (5th Cir. 2004)). "The benefits must be direct—which is to say, flowing directly from the agreement." *Kellogg Brown*, 166 S.W.3d at 741 (quoting *MAG Portfolio Consult., GMBH v. Merlin Biomed Group LLC*, 268 F.3d 58, 61 (2d Cir. 2001)).

Under the reasoning in *Kellogg Brown*, UAS cannot be compelled to arbitrate its claims under the direct-benefits-estoppel theory. Although the injuries of which UAS complains are

related to the Providers Plaintiffs' agreements with Superior, UAS does not seek a direct benefit from those agreements. "Equitable estoppel is inapplicable . . . when the benefit is merely indirect." *In re Morgan, Stanley & Co.*, 293 S.W.3d at 184 n.2 (citing cases). Because the substance of UAS's claims arise from general obligations "imposed by state law, including statutes, torts and other common law duties, or federal law," rather than directly from the contract, equitable estoppel does not apply. *G.T. Leach Builders*, 458 S.W.3d at 528 (citation omitted).

B. *Intertwined Claims.*

Superior also argues that "the doctrine of 'intertwined claims' estoppel" compels arbitration here. (Docket Entry 9, at 9.) Superior's invocation of this doctrine is curious: as it notes in its motion, the "intertwined claims" theory is one used against non-signatory *defendants*, not non-signatory *plaintiffs*. *See id.* ("'intertwined claims' theory governs motions to compel arbitration when a signatory-plaintiff brings an action against a nonsignatory-defendant") (quoting *Janvey v. Alguire*, 847 F.3d 231, 242 (5th Cir.), *cert. denied*, 138 S. Ct. 329 (2017)); *see also Hays*, 838 F.3d at 610 (same). If anything, application of this theory would suggest that, if Superior must submit claims to arbitration, Defendant Parkland should also be compelled to do so. Indeed, it its reply on the motion to compel, Superior asserted that the intertwined claims doctrine applied to "claims asserted against both Superior and Parkland," and it argued that "[t]he combined effect of the direct benefits and intertwined claims doctrines is to compel arbitration of *all* claims against *all* parties." (Docket Entry 35, at 5–6 (emphasis added)).

Despite its statements regarding the "intertwined claims" theory in its reply, Superior subsequently filed a "Notice of Clarification," in which it stated that it "*does not* contend that

Parkland should be compelled into an arbitration proceeding between Plaintiffs and Superior." (Docket Entry 51, at 3 (emphasis in original).) At the motion hearing, Superior persisted in its "intertwined claims" argument, but it could not adequately explain how this argument jibed with its "clarified" position concerning Parkland.

The Court should reject Superior's novel attempt to apply the "intertwined claims" theory against a non-signatory Plaintiff. Even if the doctrine could apply to plaintiffs, as well as defendants, it would hardly be equitable to require UAS to arbitrate claims as a non-signatory while allowing Parkland to avoid arbitration on the same or closely related claims. Given that all parties agree that Parkland should not be compelled to arbitrate its claims, Superior's invocation of "intertwined claims" theory of estoppel against UAS cannot stand.

IV. Conclusion and Recommendation.

For the reasons set out above, Superior's Motion to Compel Arbitration and Alternative Motion to Dismiss (Docket Entry 9) should be **GRANTED IN PART, DENIED IN PART** and **DENIED AS MOOT IN PART**. The Motion should be **GRANTED** as to the claims of Plaintiff AAAPC against Defendant Superior. The Motion should be **DENIED** as to the claims of Plaintiff UAS against Superior. To the extent the Motion seeks to compel arbitration of claims against Defendant Parkland, it should likewise be **DENIED**. Finally, the Motion should be **DENIED AS MOOT** as the claims of the Provider Plaintiffs against Superior, and as to Superior's Motion to Dismiss Plaintiffs' original complaint.

V. Instructions for Service and Notice for Right to Object.

The United States District Clerk shall serve a copy of this Report and Recommendation on all parties by either (1) electronic transmittal to all parties represented by attorneys registered

as a "filing user" with the clerk of court, or (2) by mailing a copy to those not registered by certified mail, return receipt requested.

Written objections to this report and recommendation must be filed **within fourteen (14) days after being served** with a copy of same, unless this time period is modified by the district court. 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b). The party shall file the objections with the clerk of the court, and serve the objections on all other parties. A party filing objections must specifically identify those findings, conclusions or recommendations to which objections are being made and the basis for such objections; the district court need not consider frivolous, conclusive or general objections. A party's failure to file written objections to the proposed findings, conclusions and recommendations contained in this report shall bar the party from a de novo determination by the district court. *Thomas v. Arn*, 474 U.S. 140, 149–52 (1985); *Acuña v. Brown & Root, Inc.*, 200 F.3d 335, 340 (5th Cir. 2000). Additionally, failure to file timely written objections to the proposed findings, conclusions and recommendations contained in this report and recommendation shall bar the aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428–29 (5th Cir. 1996) (en banc).

SIGNED on May 1, 2018.

Henry J. Bemporad
United States Magistrate Judge