UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

Jonathan J. Hamdorf, Plaintiff, vs. United Healthcare Services, Inc. and UnitedHealth Group Incorporated, Defendants.	Case No. 2:23-mc-00215-HLT **DEFENDANTS' MEMORANDUM IN SUPPORT OF RENEWED MOTION TO CONFIRM THE ARBITRATOR'S INTERIM AWARD**

Defendants United Healthcare Services, Inc. and UnitedHealth Group Incorporated ("United"), by and through its undersigned counsel, bring this Renewed Motion to Confirm the Arbitrator's Interim Award ("Renewed Motion") in accordance with the Court's January 4, 2024 Memorandum and Order ("Order"). Because the Court has denied each of Jonathan J. Hamdorf's ("Hamdorf") arguments to vacate the Interim Award and this Court has the authority to confirm an interim award for injunctive relief, United respectfully requests that the Court grant its Renewed Motion and confirm the Interim Award.

BACKGROUND AND RELEVANT FACTS

On August 30, 2023, an American Arbitration Association ("AAA") arbitrator (the "Arbitrator") issued her Findings of Fact, Conclusions of Law, and Interim Award Granting Temporary Injunctive Relief ("Interim Award") in an arbitration against United's former employee, Jon Hamdorf (the "Arbitration"). (*See* Declaration of Michael Rudd in Support of Renewed Motion to Confirm Interim Award ("Rudd Decl."), Ex. A.) The Interim Award enjoins Hamdorf from violating his contractual obligations to United and the Arbitrator ordered that it

"shall remain in full force and effect until otherwise ordered by the Arbitrator or until such time as a Final Award is rendered in this arbitration." (*Id.* at pp. 37-38.)

On October 18, 2023, Plaintiff filed his Motion to Vacate the Interim Award under 9 U.S.C. § 10(a)(4) and to Stay Arbitration Proceedings, and corresponding memorandum in support thereof ("Motion to Vacate Interim Award") in this Court. (Dkts. 1–2.) On November 14, 2023, United filed its Memorandum in Opposition to and in Support of Defendants' Cross-Motion to Confirm Arbitration Award and Award Attorneys' Fees and Costs ("Motion to Confirm Interim Award"). (Dkt. 11.) Upon the cross-motions being fully briefed, on January 4, 2024, this Court issued its Memorandum and Order ("Order"). (Dkt. 24.)

First, as to Plaintiff's Motion to Vacate the Interim Award, this Court correctly rejected all of Hamdorf's arguments and denied the motion. Specifically, the Court found that "Hamdorf has waived arguments that there is no arbitration agreement or that the arbitrator could not decide issues of arbitrability. He has not shown that the arbitrator's substantive decision on arbitrability exceeded the scope of her authority. The motion to vacate is therefore denied." (Dkt. 24, Order at 1.)

Second, as to United's Motion to Confirm the Interim Award, the Court noted in its Order that "[n]either party addresses the circumstances under which an interim award can be confirmed, nor do the parties provide any indication as to when or whether a final award will be issued." (*Id.* at 12.) The Court stated it "does not suggest an interim award can never be confirmed," rather "neither party addresses whether it would be proper in this particular case given the nature of the award and the issue (if any) still left to be decided by the arbitrator." (*Id.* at 12, n.8.) Accordingly, the Court denied United's Motion to Confirm the Interim Award without prejudice, stating that by January 19, 2024, United may renew its motion. (*Id.* at 13.) Importantly, the Court held that, if

Hamdorf chooses to oppose United's Renewed Motion, "[a]ny brief in opposition should be limited to the propriety of confirming an interim award and should not rehash arguments for vacating the award." (*Id.*)

Pursuant to the Court's Order, United has filed the present Renewed Motion to address the issue of the Court's authority. For the sake of brevity, and because the Court has denied Hamdorf's arguments to vacate and ordered he cannot rehash those arguments in opposition here, United incorporates by reference the facts and background as set forth in its Motion to Confirm the Award and this Court's prior Order. (Dkts. 11, 24.)

ARGUMENT

I. THE INTERIM AWARD CAN BE CONFIRMED BY A UNITED STATES DISTRICT COURT.

Under Section 9 of the Federal Arbitration Act ("FAA"):

> [I]f the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.

9 U.S.C. § 9. The Arbitration Policy here states that "[a]ny party may bring an action in a court of competent jurisdiction to compel arbitration under this Policy, to enforce an arbitration award or to vacate an arbitration award." (Dkt. 3-4, Arbitration Policy at 8.) Thus, under Section 9 of the FAA, an arbitration award can be enforced in this district "within which [the] award was made."

II. THE INTERIM AWARD CAN BE CONFIRMED BECAUSE IT DISPOSES OF INDEPENDENT CLAIMS AND ISSUES.

That the Award is "interim" does not change the conclusion that the award is enforceable. Indeed, interim arbitration awards are subject to confirmation in federal district courts when "the arbitrator's decision was final, not interlocutory." *Blue Cross Blue Shield of Mich. v. Medimpact*

Healthcare Sys., No. 09-14260, 2010 WL 2595340, at *2 (E.D. Mich. June 24, 2010) (quoting *El Mundo Broad. Corp. v. United Steelworkers of Am., AFL-CIO CLC*, 116 F.3d 7, 9 (1st Cir. 1997)). An interim arbitral decision may be considered "final" for purposes of confirmation when it "finally and definitely disposes of a separate and independent claim." *Id.* (quoting *Island Creek Coal Sales Co. v. City of Gainesville*, 729 F.2d 1046, 1049 (6th Cir. 1984), *abrogated on other grounds by Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193 (2000)). Consistently, courts across the country have held that an interim award is "final" for the purposes of confirmation when, without confirmation, such award would have no vehicle for enforcement and thus have no "teeth" or render the award meaningless. *See, e.g., Arrowhead Glob. Sols., Inc. v. Datapath, Inc.*, 166 F. App'x 39, 44 (4th Cir. 2006) ("[A]rbitration panels must have the power to issue temporary equitable relief in the nature of a preliminary injunction, and district courts must have the power to confirm and enforce that equitable relief as 'final' in order for the equitable relief to have teeth."); *Publicis Commc'n v. True N. Commc'ns, Inc.*, 206 F.3d 725, 729 (7th Cir. 2000) ("Because the order was necessary to prevent the final award from becoming meaningless, we decided that the order was final and thus could be immediately challenged.") *Pac. Reinsurance Mgmt. Corp. v. Ohio Reinsurance Corp.*, 935 F.2d 1019, 1023 (9th Cir. 1991) ("[T]emporary equitable orders calculated to preserve assets or performance needed to make a potential final award meaningful . . . are final orders that can be reviewed for confirmation and enforcement by district courts under the FAA.").

Whether a court can enforce an interim award under Tenth Circuit law was analyzed in detail by the Northern District of Oklahoma in *Johnson v. Dentsply Sirona, Inc.* There, the *Johnson* court was evaluating an injunction order and explained the Tenth Circuit landscape as follows:

> Sections 9–11 of the FAA "substantiat[e] a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving

> disputes straightaway." Accordingly, to retain the "speed and inexpensiveness" that are "essential attributes of the arbitration process," an arbitration award "must be final" before a party may seek judicial review of the award. Said differently, a party generally may not seek judicial review of an arbitrator's "procedural decisions," or "preliminary rulings." The Supreme Court, however, has not provided "definitive guidance" on what types of awards may be considered final for the purposes of judicial review under FAA §§ 9–11. Neither has the Tenth Circuit. But several district and circuit courts have considered arbitrators' "partial awards" and "interim rulings" final, and thus subject to judicial review, and the Supreme Court has not prohibited this practice.

No. 16-CV-0520-CVE-PJC, 2017 WL 4295420, at *3 (N.D. Okla. Sept. 27, 2017) (citations omitted). Ultimately, the *Johnson* court rejected the plaintiff's various arguments trying to defeat the defendant's motion to confirm the interim arbitration award. The court determined that because "no Supreme Court or Tenth Circuit precedent provides a definitive answer to the question of whether a court can or cannot confirm an arbitrator's interim award of equitable relief," then "[t]he question before the Court, therefore, is whether it should join the district and circuit courts that have reviewed interim arbitral awards and confirm the [r]uling." *Id.* at *6. The *Johnson* court found in the affirmative and therefore affirmed the interim award before it. *Id.* The same reasoning applied in *Johnson*, applies here.

First, in supporting its reasoning, the *Johnson* court held that the interim ruling was not the type of relatively inconsequential "procedural decision" or "preliminary ruling" of which judicial review is disfavored. *Id.* "Rather, the [r]uling 'finally and definitely' disposes of an independent issue in the arbitration; *it enjoins plaintiff from breaching the confidentiality and non-compete provisions of the 2007 Agreement for the pendency of the arbitration*." *Id.* (emphasis added). The court explained that if the plaintiff breached his confidentiality and non-compete provisions during the pendency of the arbitration, "then any subsequent injunction requiring plaintiff to comply with these provisions for three years after the agreement's terminate date . . . would be of no, or

significantly less, value to defendant." *Id.* Next, the court found that "judicial confirmation of the [r]uling is especially appropriate, as the arbitrator awarded defendant preliminary injunction based on a finding of irreparable harm." *Id.* Finally, the *Johnson* court found that confirmation of the preliminary injunction did not prejudice the plaintiff, as the plaintiff stated he had no intention of violating the agreement enforced pursuant to the injunction. *Id.*

These are precisely the issues and conclusions present here. The Interim Award is not inconsequential, procedural, or preliminary. Indeed, practically speaking, the Interim Award is sufficiently final as it has disposed of the main issues in this case and has determined that Hamdorf was in breach of his contractual obligations and must be enjoined from continuing to breach his obligations.[1] This Court appears to agree, as it referred to "the issue (***if any***) still left to be decided by the arbitrator." (Dkt. 24, Order at 12 n.8.) Currently, the Interim Award is the only thing that is preserving the status quo to prevent Hamdorf from breaching his obligations for the pendency of the Arbitration, particularly in light of the active RFP process taking place in Kansas. When an interim award is necessary to preserve the status quo, confirmation is appropriate. *See, e.g.*, *RTI Connectivity Pte. Ltd. v. Gateway Network Connections, LLC*, No. CV 22-00302 LEK-RT, 2022 WL 2981518, at *7 (D. Haw. July 28, 2022) ("The 6/17/22 Interim Order is a final order as to the issue of what relief was necessary to maintain the status quo until the conclusion of the arbitration. This Court therefore concludes that it has jurisdiction to review the 6/17/22 Interim Order under the FAA."); *Vital Pharms. v. PepsiCo, Inc.*, 528 F. Supp. 3d 1304, 1309 (S.D. Fla. 2020) ("[I]t

[1] United reserves its right to seek attorneys' fees from the Arbitrator, as United concedes that Arbitration is the proper jurisdiction to determine the award of attorneys' fees and costs. In fact, in light of the Interim Award, and assuming Hamdorf has not violated or been violating the Interim Award, whether and in what amount to award attorneys' fees is the primary issue remaining for a final hearing in Arbitration. This further supports the finality of the Interim Award Court's authority to confirm the Award.

resolves the issue of whether the parties are required to maintain the status quo and continue to perform their contractual obligations during the pendency of the arbitration. District courts must have the power to confirm and enforce such injunctive relief as "final" for it to have teeth.").

Further, the Arbitrator entered the Interim Award based on a finding of irreparable harm, which is important because it underscores the harm United faced with Hamdorf's ongoing breaches. (Rudd Decl. Ex. A at ¶¶ 92–101.) Even with the RFP bid now having been submitted, the RFP process itself is not over and there are varying stages at which Hamdorf could (in violation of the Interim Award) participate. (*See id.* ¶¶ 8–10, 52–55, 96–98.) If that status quo is not maintained—a confirmation from the Court prohibiting Hamdorf from violating his obligations to United—and the Interim Award is not given any "teeth," it may render a subsequent injunction in this Arbitration "meaningless," as the provision could be moot by the time the Arbitration concludes. Finally, Hamdorf has testified in the Arbitration that he has no intention of violating any of his contractual obligations to United (*see id.* ¶¶ 38, 106), therefore enforcement of the Award until conclusion of the arbitration does not prejudice Hamdorf.[2]

Enforcing the Interim Award would be consistent with the overwhelming case law across the country, in which Interim Awards for preliminary injunctive relief—especially when enjoining a party from not adhering to its contractual obligations—are properly enforced by courts.

[2] In its Order, the Court notes that Hamdorf stated in his brief that the final hearing was "informally postponed." (Dkt. 24, Order at 12, n.9.) The Court also notes that there was "no indication as to when or if a final hearing was rescheduled." (*Id.*) To provide more context on the hearing postponement—the parties informally stayed discovery and postponed the final hearing to allow the parties to explore settlement in light of the entry of the Interim Award. During such settlement discussions, Hamdorf abruptly filed his Motion to Vacate the Interim Award. The parties have kept the AAA apprised of the status of this action and that matter is still pending. Undersigned counsel anticipates a ruling on the present Motion will likely have an effect on any settlement conversations between the parties that, depending upon the outcome of those discussions, may result in the Arbitration recommencing for purposes of scheduling depositions and a final hearing.

Arrowhead, 166 F. App'x at 44 (affirming confirmation of arbitrator's preliminary injunction award in accordance with "the other circuits to have addressed this issue"); *Vital Pharms.*, 528 F. Supp. 3d at 1308 ("[T]his Court and many others have found that confirmation of interim arbitral orders granting injunctive relief is appropriate under Section 9 of the FAA."); *Yahoo! Inc. v. Microsoft Corp.*, 983 F. Supp. 2d 310, 319 (S.D.N.Y. 2013) ("[I]f an arbitral award of equitable relief based upon a finding of irreparable harm is to have any meaning at all, the parties must be capable of enforcing or vacating it at the time it is made.")

CONCLUSION

United respectfully requests the Court grant United's Renewed Motion to Confirm the Interim Award.

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