

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

GUARDIAN FLIGHT, LLC,

Plaintiff,

v.

AETNA HEALTH, INC., and MEDICAL
EVALUATORS OF TEXAS ASO, LLC,

Defendants.

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CIVIL ACTION NO. 4:22-cv-03805
Hon. Alfred H. Bennett

REACH AIR MEDICAL SERVICES LLC,
CALSTAR AIR MEDICAL SERVICES, LLC
and GUARDIAN FLIGHT, LLC,

Plaintiffs,

v.

KAISER FOUNDATION HEALTH PLAN
INC., and MEDICAL EVALUATORS OF
TEXAS ASO, LLC,

Defendants.

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CIVIL ACTION NO. 4:22-cv-03979
Hon. Andrew S. Hanen

PLAINTIFF GUARDIAN FLIGHT, LLC’S OPPOSED MOTION TO CONSOLIDATE

Pursuant to Federal Rule of Civil Procedure 42 and LR7.6, Plaintiff Guardian Flight, LLC (“Guardian Flight”) respectfully requests that this Court consolidate the related case, *REACH Air Medical Services LLC et al., v. Kaiser Foundation Health Plan, Inc. et al.*, Civ. Act. No. 4:22-cv-03979 (“Related Case”) with this case. Plaintiff would respectfully show the Court as follows:

INTRODUCTION

This case and the Related Case are two of the first cases in the nation brought under the No Surprises Act (“NSA”). Both seek judicial review of Independent Dispute Resolution (“IDR”) awards procured through misrepresentations and undue means, and through the application of an illegal standard previously vacated by a Texas federal court. The cases were filed as related cases in this District because they involve common parties, common facts, and require interpretation of the same provisions of the NSA, which to Plaintiffs’ knowledge have not been addressed by any court in the country.

The NSA, which went into effect January 1, 2022, created the IDR process, by which healthcare providers and payors must settle out-of-network payment disputes for emergency services by submitting individual payment offers to a federal contractor (an “IDR entity”). The IDR entity evaluates the parties’ submitted payment offers in accordance with specific statutory factors and chooses one of the offers as the appropriate payment. The complaints in this case and the Related Case allege that the payors in each instance misrepresented to the IDR entity their qualified payment amount (“QPA”), a statutorily created calculation, on specific claims. Both complaints also allege that the IDR entity adjudicating the IDR disputes applied an illegal presumption in favor of the payors’ misrepresented QPAs. Resolving the two cases requires a court to determine the judicial review available for IDR determinations under the NSA.

Because the NSA was enacted recently, no court has had the opportunity to opine on the scope of judicial review under the NSA. Further, this action and the Related Case involve common parties and common issues of fact and law. Thus, consolidation of these cases will not result in risk of prejudice or confusion of the issues, but instead will preclude the risk of inconsistent rulings

on a novel issue of law. This case should be consolidated with the Related Case in the interest of judicial economy and justice.¹

BACKGROUND

Guardian Flight filed this case on November 1, 2022, against Aetna Health, Inc. (“Aetna”) and Medical Evaluators of Texas ASO, LLC (“MET”). Soon after, on November 16, 2022, Guardian Flight and its affiliates filed the Related Case against MET and Kaiser Foundation Health Plan, Inc. (“Kaiser”). Both cases assert identical claims and requests for relief: vacatur of the IDR awards and a court order mandating a rehearing. *Compare* Dkt. 1 at 16-20 (4:22-cv-3805) and Dkt. 1 at 20-24 (4:22-cv-3979). The Defendants in both cases moved to dismiss, making virtually identical arguments. *Compare* Dkt. 8 (4:22-cv-3805) and Dkt. 24 (4:22-cv-3979); Dkt. 12 (4:22-cv-3805) and Dkt. 25 (4:22-cv-3979). This Court then held a pretrial conference on March 3, 2023 and set a hearing on the pending motions to dismiss and this Motion to Consolidate for April 21, 2023. During the hearing, this Court suggested consolidation may be appropriate given the similar issues of law common to both cases.

LEGAL STANDARD

“Rule 42 of the Federal Rules of Civil Procedure permits a court to consolidate cases if the actions ‘involve a common question of law or fact.’” *State of Tex. v. United States*, 2021 WL 3171958, at *2 (S.D. Tex. July 26, 2021) (citing FED. R. CIV. P. 42(a)). Consolidation under Rule

¹ Plaintiff could have amended its complaint in this case, the first-filed, to assert its claims against Kaiser up until December 27, 2022. *See* FED. R. CIV. P. 15(a); *see also* *Bowling v. Dahlheimer*, 2019 WL 5880590, at *2 (E.D. Tex. Aug. 7, 2019) (“the ability to amend as of right concludes 21 days after the first defendant files a responsive pleading or motion under Rule 12(b), (e), or (f).”). Here, the first defendant to file a responsive pleading or motion under Rule 12 was MET when it moved to dismiss Plaintiff’s complaint on December 6, 2022. But Plaintiff and its affiliates filed the Related Case even before then as a related proceeding with the expectation that it would be assigned to the same judge, thereby removing the risk of inconsistent rulings. That did not happen. Accordingly, Plaintiff believes that consolidation is now warranted.

42(a) is “entirely within the discretion of the district court as it seeks to promote the administration of justice.” *Gentry v. Smith*, 487 F.2d 571, 581 (5th Cir. 1973). A “district court may order consolidation even where the parties are opposed to it.” *In re Enron Corp. Sec., Derivative & “ERISA” Litig.*, 2007 WL 446051, at *1 (S.D. Tex. Feb. 7, 2007) (citing *In re Air Crash Disaster at Florida Everglades on Dec. 29, 1972 v. Eastern Air Lines, Inc.*, 549 F.2d 1006, 1013 (5th Cir. 1977)). The Fifth Circuit has urged courts to “make good use of Rule 42(a). . . in order to expedite the trial and eliminate unnecessary repetition and confusion.” *In re Air Crash Disaster*, 549 F.2d at 1013.

“The party moving for consolidation bears the burden of demonstrating that consolidation is proper.” *State of Tex.*, 2021 WL 3171958, at *2 (citing *Frazier v. Garrison I.S.D.*, 980 F.2d 1514, 1532 (5th Cir. 1993)). When deciding whether consolidation is appropriate, district courts may consider factors such as “(1) whether the actions are pending before the same court, (2) whether common parties are involved in the cases, (3) whether there are common questions of law and/or fact, (4) whether there is risk of prejudice or confusion if the cases are consolidated, and if so, is the risk outweighed by the risk of inconsistent adjudications of factual and legal issues if the cases are tried separately, and (5) whether consolidation will conserve judicial resources and reduce the time and cost of trying the cases separately.” *Wharton v. U.S. Department of Housing and Urban Development*, 2020 WL 6749943, at *1 (S.D. Tex. Mar. 3, 2020). Pursuant to LR7.6, motions to consolidate are to be considered by the court in the first filed case.

ARGUMENT

As this Court correctly observed during the parties’ March 3, 2022, pretrial conference, this case is ripe for consolidation with the Related Case. All of the relevant factors under Rule 42 favor consolidation and would eliminate confusion while promoting judicial economy.

I. The Cases are Pending in the Same Court, at the Same Stage, and Include Common Parties

The first two factors support consolidation. Both cases are pending in the Houston Division of the Southern District of Texas.² Both cases share common parties. MET, the IDR entity that issued the IDR award at issue in each case, is a defendant in both actions, and Guardian Flight is a plaintiff in both actions. And the other plaintiffs in the Related Case are all affiliates of Guardian Flight and share the same parent entity, Global Medical Response Inc. Finally, the parties in both cases have just finished briefing motions to dismiss.³ Accordingly, these factors favor consolidation.

II. The Cases Involve Both Common Issues of Law and Fact

The third factor supports consolidation as well because both this case and the Related Case involve common issues of law and fact.

The court adjudicating these cases must decide threshold issues of law—issues that will influence future challenges brought under the NSA. Both actions require the court to determine the availability and scope of judicial review over IDR awards under the NSA; whether a federal contractor such as MET is entitled to arbitral immunity; whether the application of an illegal presumption that has been vacated by the federal judiciary is grounds for vacatur under the NSA; and whether misrepresentation of a payor’s qualified payment amount (“QPA”) is grounds for vacatur under the NSA.

The court presiding over these cases must also decide common issues of fact. Both complaints allege MET applied an illegal presumption in favor of a payor’s QPA, and that payors

² “Under the first factor, courts have interpreted ‘same court’ as the same [judicial] district.” *Tex. Gen. Land Office v. Biden*, 2021 WL 5588160, at *2 (S.D. Tex. Nov. 29, 2021) (internal quotations omitted).

³ Consolidation “may properly be denied in instances where the cases are at different stages of preparedness for trial.” *Mills v. Beech Aircraft Corp.*, 886 F.2d 758, 762 (5th Cir. 1989).

submitted purported QPAs that were not properly calculated in accordance with the NSA. Accordingly, this factor strongly favors consolidation.

III. Consolidation Reduces the Risk of Prejudice and Confusion

The fourth factor favors consolidation as well. Consolidation of this action and the Related Case present no risk of prejudice or confusion; in fact, consolidation will reduce the risk of both by lowering the risk of inconsistent rulings. Both cases involve the same claims and relief sought, and consolidation will not introduce new facts or law that could confuse the issues. And to the extent that some facts are unique to this case or the Related Case, this Court retains wide discretion to protect the rights of the parties. Accordingly, this factor strongly supports consolidation.

IV. Consolidation Will Conserve Judicial Resources

The last factor also points to consolidation. The Court here and the court in the Related Case are both being asked to rule on identical legal issues in similar motions to dismiss filed by defendants. Only one Court needs to delve into the details of the NSA and the voluminous, similar briefing submitted by the parties on how the statute should be interpreted and challenges to IDR awards proceed. In addition, parallel discovery, including likely parallel discovery disputes, briefing, and trials of identical claims between this case and the Related Case, would unduly burden the common parties in these cases.

For example, this Court has allowed certain discovery to proceed against Aetna. In the Related Case, Kaiser has moved to stay discovery entirely, even though a scheduling order with discovery deadlines has already been entered. Already, there is potential for this case to diverge from the Related Case, resulting in additional confusion. Accordingly, this factor strongly favors consolidation.

CONCLUSION

For all these reasons, Plaintiff Guardian Flight, LLC requests that the Court grant the Motion to Consolidate.

Dated: March 13, 2023

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CERTIFICATE OF CONFERENCE

Pursuant to Local Rule 7.1(D), the undersigned has conferred with counsel for Defendants regarding the relief requested in this Motion. Aetna Health, Inc. is opposed to the requested relief and Medical Evaluators of Texas ASO, LLC is unopposed.

CERTIFICATE OF SERVICE

I certify that on March 13, 2023, 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

UNITED STATES DISTRICT COURT
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CIVIL ACTION NO. 4:22-cv-03805
Hon. Alfred H. Bennett

ORDER

Before the Court is Plaintiff Guardian Flight, LLC’s Motion to Consolidate and all responses and replies thereto. The Court has determined that the Motion should be **GRANTED**.

IT IS THEREFORE ORDERED that the Related Case *REACH Air Medical Services LLC et al. v. Kaiser Foundation Health Plan, Inc. et al.*, Civ. Act. No. 4:22-cv-03979 is consolidated with this action, and that all further proceedings shall occur in this action.

It is so **ORDERED**.

Date

The Honorable Alfred H. Bennett
United States District Judge