

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

TEXAS MEDICAL ASSOCIATION, *et al.*,

Plaintiffs,

v.

U.S. DEPARTMENT OF HEALTH AND HUMAN
SERVICES,

U.S. DEPARTMENT OF LABOR,

U.S. DEPARTMENT OF THE TREASURY,

OFFICE OF PERSONNEL MANAGEMENT,

and the

CURRENT HEADS OF THOSE
AGENCIES IN THEIR OFFICIAL
CAPACITIES,

Defendants.

Lead Case: No. 6:22-cv-00372-
JDK

**PLAINTIFFS LIFENET, INC. AND EAST TEXAS AIR ONE, LLC'S
OPPOSITION TO DEFENDANTS' MOTION TO STRIKE AMENDED COMPLAINT
AND
MOTION, IN THE ALTERNATIVE, FOR LEAVE TO FILE AMENDED COMPLAINT**

INTRODUCTION

LifeNet’s Amended Complaint makes just one material change: It adds East Texas Air One, LLC—another air ambulance company—as a co-Plaintiff. The Amended Complaint does not change the requested relief. And the new co-Plaintiff does not seek to file its own separate motion for summary judgment, but instead joins LifeNet’s motion. ECF 66.

This new co-Plaintiff, unlike LifeNet, currently participates in the IDR process. *See* ECF 64-2 (Declaration of East Texas Air One’s President). Therefore, East Texas Air One is not subject to most of the standing challenges made against LifeNet in Defendants’ motion for summary judgment, filed on November 9. That is why Defendants seek to prevent East Texas Air One from joining this lawsuit.

The Court should deny Defendants’ Motion to Strike because Plaintiffs filed their Amended Complaint as of right on November 10, just one day after Defendants filed their first and only substantive motion. Defendants had stipulated, and the Court had ordered, that Defendants would not file an Answer but would instead make all “threshold objections” in this dispositive motion. Defendants’ motion included a Rule 12(b)(1) claim that this Court lacked subject matter jurisdiction due to supposed problems with LifeNet’s standing. Therefore, Rule 15(a)(1) authorized Plaintiffs to amend their complaint as of right.

In the alternative, Plaintiffs respectfully request leave to amend their complaint pursuant to Rule 15(a)(2). Each of the five relevant factors weighs in favor of granting leave. During the meet-and-confer that led up to Defendants’ motion to strike, Plaintiffs *agreed to stipulate to a separate schedule for supplemental briefing* on any discrete issues raised by East Texas Air One’s participation. Defendants rejected that offer, which would fully address their claims of prejudice.

ARGUMENT

I. Rule 15 Permitted Plaintiffs to Amend Their Complaint as of Right

On November 9, 2022, Defendants filed their omnibus Cross Motion for Summary Judgment, which contained their challenge to LifeNet’s standing. ECF 63, at 20-22. Defendants had previously explicitly reserved their “right to raise threshold objections . . . in” this “dispositive briefing.” Joint Mtn. to Consolidate, ECF 3, at 3 (emphasis added); *see also* Order on Summary Judgment Briefing, ECF 7, at 2 (“Defendants’ obligation to answer the complaints in these actions is waived”).

One day after Defendants filed their Cross Motion for Summary Judgment, Plaintiffs filed their Amended Complaint, ECF 64 (filed November 10, 2022). The *only* material change is the addition of a new co-Plaintiff, East Texas Air One. Rule 15 governs the amendment of a complaint even where, as here, the only substantive amendment is the addition of a new plaintiff.¹

Rule 15(a)(1) authorized Plaintiffs to file an Amended Complaint within 21 days after the filing of “a motion under Rule 12(b).” Fed. R. Civ. P. 15(a)(1). Section I.B of Defendants’ Cross-Motion is a “motion under” Rule 12(b)(1) because Section I.B is entirely based on this Court’s supposed “lack of subject-matter jurisdiction.” Fed. R. Civ. P. 12(b)(1). Specifically, Section I.B contends that LifeNet lacks standing and bases those contentions on the facts alleged and

¹ Although adding a plaintiff also implicates Rule 21, the Rule 15 standards continue to apply. *See Jackson v. N.A.A.C.P.*, 575 F. App’x 256, 260 (5th Cir. 2014) (Rule 15 takes precedence over Rule 21 when a party “falls within Rule 15 confines”); *McLellan v. Mississippi Power & Light Co.*, 526 F.2d 870, 873 (5th Cir. 1976), *vacated in part on other grounds*, 545 F.2d 919 (5th Cir. 1977) (holding Rule 15(a) “takes precedence” over Rule 21); *Martinez v. U.S. Postal Serv.*, No. CIV.A. B-06-186, 2007 WL 1468773, at *1 (S.D. Tex. May 18, 2007) (“The standard that is applied to an amendment that seeks to add new parties is the same under either Rule 15(a) or Rule 21.”). Defendants, moreover, do not argue that Plaintiffs’ Amended Complaint violated Rule 21: Defendants do not mention the rule at all.

incorporated in the original Complaint.² Even if Section I.B were to rely on evidence outside the Complaint (it does not), that would not mean that Section I.B would cease to be a “motion under Rule 12(b).” A motion under Rule 12(b)(1) may include a “factual attack” based on “affidavits, testimony, or other evidentiary materials.” *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981); *see also Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) (noting that resolution of a Rule 12(b)(1) motion may require “the court’s resolution of disputed facts”).

II. In the Alternative, the Court Should Grant Plaintiffs Leave to File Their Amended Complaint.

In the alternative, Plaintiffs respectfully request that the Court grant them leave to file their Amended Complaint under Rule 15(a)(2).³ Rule 15(a)(2) “requires the trial court to grant leave to amend ‘freely,’ The district court must have a substantial reason to deny a request for leave to amend.” *Lyn-Lea Travel Corp. v. Am. Airlines, Inc.*, 283 F.3d 282, 286 (5th Cir. 2002) (citations omitted). Five factors are relevant: “1) undue delay, 2) bad faith or dilatory motive, 3) repeated

² The contract between LifeNet and Air Methods is quoted and discussed in the Complaint, and therefore would be before the Court regardless of whether Defendants’ motion were considered a motion to dismiss or a motion for judgment. *See Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 322 (2007) (“[C]ourts must consider . . . documents incorporated into the complaint by reference” when adjudicating motion to dismiss); *see also In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (“[B]ecause the defendants attached the contracts to their motions to dismiss, the contracts were referred to in the complaints, and the contracts are central to the plaintiffs’ claims, we may consider the terms of the contracts in assessing the motions to dismiss.”).

³ The Court may also construe Plaintiffs’ filing of their Amended Complaint as a motion for leave. *Grp. 1 Auto. Inc v. Aetna Life Ins. Inc.*, No. 4:20-CV-01290, 2022 WL 1607841, at *2 (S.D. Tex. May 20, 2022) (construing filing of amended complaint as motion for leave to amend); *Jacuzzi, Inc. v. Franklin Elec. Co.*, No. CIV.A.33:07-CV-1090D, 2008 WL 2185209, at *4 (N.D. Tex. May 27, 2008) (collecting cases in which “courts have construed the filing of an unauthorized amended complaint as an implied motion for leave to amend” and “constru[ing] Jacuzzi’s second amended complaint as an implied motion for leave to amend.”); *see also Mid-Continent Cas. Co. v. JTH Customs, Inc.*, No. 1:21-CV-00520-LY, 2022 WL 2441855, at *6 (W.D. Tex. July 4, 2022) (“Although Defendants JTH and Turner did not file a motion for leave to amend, the Court construes their response to the Motion to Strike as including a motion seeking leave to amend pursuant to Rule 15.”).

failure to cure deficiencies by previous amendments, 4) undue prejudice to the opposing party, and 5) futility of the amendment.” *Smith v. EMC Corp.*, 393 F.3d 590, 595 (5th Cir. 2004). All five factors weigh in favor of granting LifeNet leave to amend.

First, Plaintiffs did not “unduly delay” amending their complaint. Plaintiffs filed their Amended Complaint just one day after Defendants renewed their challenge to LifeNet’s standing based on LifeNet’s contract with Air Method.⁴ The Amended Complaint directly responds to that challenge by adding a new plaintiff, East Texas Air One, LLC, which currently earns revenue directly from the IDR process. *See* LifeNet’s and East Texas Air One’s Reply Br., ECF 83, at 16. This filing occurred 27 days before Defendants’ reply briefs are due under the operative scheduling order, and 40 days before oral argument is to be held.

At page 6 of their brief, Defendants rely on *Gill v. Michelin North America, Inc.*, 3 F. Supp. 3d 579, 586 (W.D. Tex. 2013) for the proposition that Plaintiffs unduly delayed amendment. But *Gill* applied an entirely different test than the one applicable here because *Gill* concerned joinder of a non-diverse party to defeat diversity jurisdiction and thwart removal. 3 F. Supp. 3d at 583 (applying four-factor equitable balancing test set forth in *Hensgens v. Deere & Co.*, 833 F.2d 1179, 1182 (5th Cir. 1987)). As *Gill* explained, “[a] district court, ‘when faced with an amended pleading naming a new nondiverse defendant in a removed case, should scrutinize that amendment more closely than an ordinary amendment.’” *Id.* (quoting *Hensgens*, 833 F.2d at 1182). *Gill* expressly contrasted that more exacting standard with the much more lenient standard applicable here, to ordinary motions made under Rule 15(a)(2). *Id.* at 586. And in *Gill*, unlike this case, the plaintiff

⁴ In order to inflate their case, Defendants accuse LifeNet of a “half-year delay” by counting from LifeNet’s filing of a *different* lawsuit, *LifeNet, Inc. v. United States Department of Health & Human Services.*, No. 6:22-CV-162-JDK, 2022 WL 2959715 (E.D. Tex. July 26, 2022). Defs. Mot. to Strike, ECF 81 at 6. In fact, Plaintiffs filed their Amended Complaint less than seven weeks after initiating this lawsuit on September 23, 2022.

had already amended once, and the court perceived the proposed amendment (intended to defeat jurisdiction) to be without any factual basis. *Id.*

Second, Plaintiffs' amendment does not reflect bad faith or dilatory motive. As noted, Plaintiffs offered their amendment in direct response to Defendants' summary judgment motion filed a day earlier.

The third factor also weighs in favor of granting leave to amend. Plaintiffs have not previously amended their complaint.

Fourth, granting leave to amend would not prejudice Defendants. Plaintiffs' substantive allegations are unchanged, and East Texas Air One has simply joined LifeNet's existing motion for summary judgment. Notice of Joinder, ECF 66, at 1. Defendants claim to be "depriv[ed]" of "the chance to address any deficiencies" in East Texas Air One's standing. Br. at 7. But Defendants do not explain what "deficiencies" they would seek to "address." Defendants say they need time to determine whether East Texas Air One "participated in any of the underlying rulemaking proceedings, and, if so, took any positions contrary to the ones it wishes to advance here." Br. at 7. But they need only have asked: East Texas Air One did not submit any comments. Moreover, Plaintiffs already offered to stipulate to a separate briefing schedule to permit Defendants to raise objections relating to East Texas Air One, and *the Defendants refused*. Ex. 1, Shepard Decl., ¶¶ 2-3. East Texas Air One asks only that such briefing occur on an expedited schedule, so as not to delay this Court's decision on the merits.

Defendants incorrectly cite *Dueling v. Devon Energy Corp.*, 623 F. App'x 127, 130 (5th Cir. 2015) for the proposition that amendment is *per se* prejudicial after "dispositive motions have been filed." Defendants' Br. at 6. But in *Dueling*, no motion for summary judgment was at issue, and the Fifth Circuit *reversed* the district court's denial of leave to amend. 623 F. App'x at 130

(finding, despite “ample evidence of delay,” that that the delay did not “unduly prejudice[]” the defendant). Moreover, ample authority establishes that the pendency of a motion for summary judgment does not result in *per se* prejudice. *E.g.*, *Aforigho v. Tape Prod. Co.*, 334 F.R.D. 86, 91 (S.D. Tex. 2020) (granting leave to amend following filing of motion for summary judgment); *Christopher v. Mobil Oil Corp.*, 149 F.R.D. 539, 546 (E.D. Tex. 1993) (granting leave to amend six months after defendant moved for summary judgment); *see also Little v. Liquid Air Corp.*, 952 F.2d 841, 846 n.2 (5th Cir. 1992), *on reh'g en banc*, 37 F.3d 1069 (5th Cir. 1994) (“a pending motion for summary judgment does not *in itself* extinguish a plaintiff’s right to amend a complaint”).⁵

Finally, Plaintiffs’ amendment is not futile. On the contrary, Defendants admit that East Texas Air One could “file its own suit in the original course.” Br. at 8.

CONCLUSION

Plaintiffs LifeNet and East Texas Air One respectfully ask the Court to deny Defendants’ motion to strike or, in the alternative, grant them leave to file the Amended Complaint.

Dated: December 6, 2022

BY:

/s/ Steven M. Shepard
Steven M. Shepard (*pro hac vice*)
Stephen Shackelford, Jr. (EDTX Bar No.
24062998)
J. Craig Smyser (*pro hac vice*)
Max I. Straus (*pro hac vice*)

⁵ Defendants’ citation of *Taa v. Chase Home Finance, L.L.C.*, No. 5:11-CV-00554 EJD, 2011 WL 4985379 (N.D. Cal. Oct. 19, 2011), is also misplaced. *Taa* merely deferred the court’s decision whether to allow amendment. The court’s denial of leave to amend was “without prejudice” and the court even “clarified that Plaintiffs’ ability to amend their pleading would be revisited in connection with Defendants’ dismissal motion.” *Id.* at *1; *see also id.* at *2 (clarifying that court did not “definitively prevent Plaintiffs from ever amending” and noting that “a determination of whether Plaintiffs will be granted leave to amend will be taken up within Defendants’ Motion to Dismiss since Plaintiffs requested such relief in their written opposition.”).

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CERTIFICATE OF SERVICE

I certify that on December 6, 2022, the foregoing document was filed electronically and served upon all counsel of record via the Court's CM/ECF filing system in accordance with the Federal Rules of Civil Procedure.

s/ Steven M. Shepard
Steven M. Shepard (*pro hac vice*)

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DECLARATION OF STEVEN SHEPARD

1. My name is Steven M. Shepard. I am a partner at Susman Godfrey LLP, and am counsel to Plaintiffs LifeNet, Inc. and East Texas Air One LLC.

2. On Thursday, November 16, 2022, I participated in a telephonic meet-and-confer with counsel for Defendants, regarding Defendants' contention that my clients' Amended Complaint was improper and prejudicial to Defendants. Counsel for the Texas Medical Association also participated in this phone call. During the call, I proposed that the parties agree to a separate supplemental briefing schedule regarding any challenges Defendants wished to make

regarding East Texas Air One. I stated that my clients would be willing to accommodate any reasonable requests, regarding timing and page limits, that Defendants might make.

3. On Monday, November 21, counsel for Defendants informed me by email that Defendants had rejected the proposal of supplemental briefing, and that if East Texas Air One did not withdraw the Complaint, then Defendants would move to strike it.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: December 6, 2022

BY:

/s/ Steven M. Shepard
Steven M. Shepard (*pro hac vice*)

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[PROPOSED] ORDER

Before the Court are i) Defendants' Motion to Strike LifeNet's Amended Complaint and ii) Plaintiffs' Motion, in the Alternative, for Leave to File Amended Complaint.

[ORDER DENYING DEFENANTS' MOTION: Having fully considered Defendant's motion and Plaintiffs' opposition thereto, it is HEREBY ORDERED that Defendants' motion is DENIED. Plaintiffs' motion is hereby DENIED as moot.]

[ORDER GRANTING ALTERNATIVE RELIEF SOUGHT BY PLAINTIFFS: Having fully considered Plaintiffs' motion and any opposition or responses thereto, it is HEREBY

ORDERED that Plaintiffs' motion for leave to file the Amended Complaint, already docketed as ECF No. 64, is GRANTED. Defendants' motion is hereby DENIED as moot.]

IT IS SO ORDERED.