

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
MDL No. 1334**

MASTER FILE NO.: 00-1334-MD-MORENO

IN RE:
MANAGED CARE LITIGATION

THIS DOCUMENT RELATES TO
PROVIDER TRACK CASES

CASE NO. 03-22804-CIV-MORENO

DR. JEFFREY SOLOMON; DR. ORLAND ARMSTRONG;
DR. ROBERT VRANES; DR.ALLEN KNECHT;
DR. LAVERNE A. SABOE, JR.; DR. DAVID MILROY;
DR. AMY HOFFMAN; DR. ROBIN O'NEAL;
HUBBARD HEALTH CLINIC; AMERICAN PODIATRIC
MEDICAL ASSOCIATION; FLORIDA CHIROPRACTIC
ASSOCIATION; CALIFORNIA PODIATRIC
MEDICAL ASSOCIATION; FLORIDA PODIATRIC
MEDICAL ASSOCIATION; TEXAS PODIATRIC
MEDICAL ASSOCIATION; FLORIDA PSYCHOLOGICAL
ASSOCIATION; ARIZONA CHIROPRACTIC SOCIETY
on their own behalf and in their associational
capacity on behalf of their members;

Plaintiffs,

vs

ANTHEM, INC.; HEALTH NET, INC.;
HUMANA, INC.; HUMANA HEALTH PLAN,
INC.; PACIFICARE HEALTH SYSTEMS, INC.;
PRUDENTIAL INSURANCE COMPANY OF
AMERICA; UNITEDHEALTH GROUP; UNITED
HEALTHCARE; COVENTRY HEALTH CARE,
INC.; WELLPOINT HEALTH NETWORKS,
INC.; WELLPOINT, INC.;AETNA, INC.; and AETNA-USHC, INC.,

Defendants.

**PLAINTIFFS' MOTION FOR AN ORDER RESTORING CASE
TO ACTIVE DOCKET, AND LIFTING STAY FOR THE
LIMITED PURPOSE OF ALLOWING PLAINTIFFS LEAVE
TO FILE A SECOND AMENDED COMPLAINT AND
MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT
AND MEMORANDUM OF LAW IN SUPPORT**

Plaintiffs in *Solomon, et al. v. Anthem, et al.*, Case No. 03-22804-Civ-Moreno (“*Solomon*”) respectfully move for entry of an order lifting the stay imposed by this Court and restoring *Solomon* to the active docket for the limited purpose of allowing leave to file Plaintiffs’ Second Amended Complaint.¹ The requested relief from the stay for the limited purpose of seeking leave to file an amended complaint and granting leave to file the Second Amended Complaint² will not prejudice any party, cause undue delay or disruption to the proceedings, and will promote the efficient use of judicial resources.

I. Introduction

On October 17, 2003, the *Solomon* Plaintiffs³ filed that action in the Southern District of Florida on behalf of Healthcare Providers⁴ against several managed care payors, including Aetna, Cigna, Anthem, Inc., Health Net, Inc., Humana, Inc., Humana Health Plan, Inc., Pacificare

¹ Pursuant to Local Rule 7.A.3, Plaintiffs’ Counsel attempted to contact United’s Counsel prior to filing this motion, but was unsuccessful.

² Plaintiffs’ proposed Second Amended Complaint is attached hereto as Exhibit A and proposed Order is attached as Exhibit B.

³ The *Solomon* Plaintiffs consist of representative provider plaintiffs and national and state healthcare professional associations, including the American Podiatric Medical Association, California Podiatric Medical Association, Texas Podiatric Medical Association, Florida Podiatric Medical Association, and Florida Chiropractic Association.

⁴ The term "Healthcare Providers" refers to all Healthcare Providers who bill one or more of the defendants individually, or as part of a Healthcare Provider Organization or Healthcare Provider Group, and not through a hospital or Medical Doctor Taxpayer Identification Number, and use CPT codes or HCPCS Level II Codes, including but not limited to podiatrists, psychologists (including psychotherapists and psychoanalysts), chiropractors, physical therapists, optometrists, opticians, masters or certified social workers, nurse practitioners, certified therapists and counselors, prosthetists, occupational therapists, nurse midwives, dieticians, nutritionists, speech pathologists, audiologists, orthotists and acupuncturists - who or which, at any time after October 15, 1993, provided covered services to any member of a health care plan sponsored by any Defendant and submitted claims to any Defendant on a fee-for-service basis. Healthcare Professionals expressly excludes Medical Doctors ("MDs"), Doctors of Osteopathy ("DOs"), hospitals or other facilities, dentists, DMEPOS providers and test procedures, including x-ray, lab or other testing, and employees of any Defendant. (See *Solomon* Complaint at 2 n.1).

Health Systems, Inc., Prudential Insurance Company of America, United Health Group, United Health Care, Coventry Health Care, Inc., and Wellpoint Health Networks, Inc.⁵ Although originally assigned to Judge Jordan, upon stipulation by the parties, the Court transferred and consolidated *Solomon* as part of the *Shane* Litigation. (Order entered December 16, 2003 (Solomon D.E. 39)). The Court determined that *Solomon* was substantially related to *Knecht, et al. v. Cigna, et al.*, originally filed on behalf of a class of chiropractors on May 8, 2003 in the District of Oregon and transferred to the *Shane* Litigation as a tag-along action. (*Id.*)

Upon consolidation, the Court deemed *Solomon* a tag-along action to the Provider Track Litigation and, like other Provider Track tag-along cases, closed the case for statistical purposes and placed *Solomon* in the civil suspense file. (Order dated December 19, 2003 (Solomon D.E. 40); *see also* Order Staying Provider Track Tag –Along Cases, dated August 21, 2003 (MDL D.E. 2264) (staying all Provider Track tag-along actions “until ten calendar days after the Court issues its omnibus opinions on the Main Track motions to compel arbitration and motions to dismiss”). In its December 19, 2003, Stay Order, the Court made clear that *Solomon* “shall be restored to the active docket upon motion by a party if the circumstances change the action, so that it may proceed to final disposition; the Order shall not prejudice the rights of the parties to this litigation.” (*Id.* at 4).

II. Granting Relief from the Stay to Allow Plaintiffs to Amend their Complaint is Proper.

Plaintiffs seek to lift the stay for the limited purpose of asking the Court to allow Plaintiffs leave to amend their complaint to add two additional association plaintiffs – American Chiropractic Association (“ACA”) and Connecticut Chiropractic Association (“CTCA”) – and three additional defendants – United HealthCare Services, Inc., ACN Group, Inc., and its wholly-

⁵ *Solomon* names the same defendants as the Physician Provider Plaintiffs in the *Shane* Litigation.

owned subsidiary, ACN Group of California, Inc (ACN Group, Inc. and ACN Group of California are collectively referred to herein as “ACN”). ACN Group, Inc. is a wholly-owned subsidiary of United Healthcare Services, Inc. and part of the family of companies owned by Defendant UnitedHealth Group, Inc.⁶

The two additional Association Plaintiffs assert their claims only against the United and ACN Defendants and their claims arise out of the same set of facts as those previously alleged by the existing Plaintiffs. Granting the *Solomon* Plaintiffs’ request to lift the stay for the limited purpose of adding three Defendants – who are affiliated with existing Defendants – and two additional Association Plaintiffs – whose claims arise out of the same or similar facts as alleged in the existing complaint – will not delay, disrupt or prejudice any of the Defendants or the active litigation by the Physician Provider Plaintiffs. Denying the Plaintiffs’ motions, however, will cause substantial prejudice and hardship to the Association Plaintiffs who seek to join this litigation as the statutes of limitations continue to run. *See Soler v. G&U, Inc.*, 86 F.R.D. 524, 526-27 (S.D.N.Y. 1980) (lifting stay for limited purpose of allowing plaintiff leave to file amended complaint adding additional claims and parties because resolving motion for leave will not disturb the policy reasons for implementing the stay and allowing the “expeditious joinder of claims and parties should not be unduly delayed,” especially considering that the statute of limitations continues to run on plaintiffs’ claims).

Adding these parties will not cause prejudice to either the existing or new Defendants because, with the action being stayed since its inception, no responsive pleadings have been filed and no discovery has occurred. Thus, the addition of these parties will not delay or otherwise disrupt the proceedings in this action. Moreover, lifting the stay for the limited purpose of

⁶ United HealthCare Services, Inc. is a wholly-owned subsidiary of Defendant UnitedHealth Group, Inc. In addition, Defendant United Healthcare, Inc. is a wholly-owned subsidiary of United HealthCare Services, Inc.

allowing Plaintiffs leave to amend their Complaint will not adversely affect the proceedings against the remaining two defendants in the active litigation by the Physician Providers.

Lifting the stay for the limited purpose of granting leave to file an amended complaint would be an appropriate exercise of the Court's discretion. It is a deeply-embedded principle that a court has broad and inherent power over its own process in order to prevent imposition of hardship or injustice on any party.⁷ See *Gumbel v. Pitkin*, 124 U.S. 131, 144 (1888). In *Walsh Securities, Inc. v. Cristo Property Management, Ltd.* No. Civ.A. 97-3496-WGB, 2006 WL 166491 (D.N.J. Jan. 23, 2006), the court addressed a similar situation as exists in the present case. In *Walsh*, the court imposed a stay and removed the case from the active docket pending resolution of a related criminal investigation. When imposing the stay, the court noted that it was not indefinite and invited the parties to petition the court for relief from the stay if a change in circumstance warranted it. *Id.* at **3-4, 6. Upon conclusion of the criminal investigation, the *Walsh* court restored the case to the active docket and the plaintiff moved for leave to file an amended complaint to assert an additional claim against one of the defendants. Defendant moved to dismiss the claim arguing that the claim was time-barred, which plaintiff refuted by arguing that the limitations period was tolled during the stay. *Id.* at *5. Rejecting the plaintiff's argument, the court held that the stay did not automatically toll the statute of limitations and that nothing prevented the plaintiff at any time from asking the court to lift the stay in order to amend the complaint. *Id.* at 6. The court pointed out that its stay order specifically invited the parties to make such a request. *Id.*

Similar to *Walsh*, this Court's stay order notes that the stay is not indefinite and invites the parties to move for relief from the stay if a change in circumstance warrants such a request.

⁷ The Court's Show-Cause Order dated May 17, 2006, provides further support for Plaintiffs' request to lift the stay in that it appears that restoration of this case to the active docket is imminent apart from this motion. (MDL Doc. No. 4955). If the Court re-opens this case while Plaintiffs' motions are pending, Plaintiffs' motion to lift the stay would be moot, but the Court should still allow the Plaintiff to file their Second Amended Complaint.

In order to protect their claims against ACN and United and to avoid prejudicing the Plaintiffs' rights, the Court should grant relief from the stay for the limited purpose of allowing Plaintiffs leave to file their Second Amended Complaint.

III. Leave to Amend Is Freely Given.

Plaintiffs' request for leave to add new parties is made pursuant to Rules 15 and 21 of the Federal Rules of Civil Procedure. Rule 21, Fed. Civ. P., allows parties to "be . . . added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just." When considering a motion to add parties under Rule 21, the Court is guided by "the same standard of liberality afforded to motions to amend pleadings under Rule 15." *Fair Hous. Dev. Fund Corp. v. Burke*, 55 F.R.D. 414, 419 (E.D.N.Y. 1972).

Rule 15, Fed. Civ. P., provides that leave to amend pleadings "shall be freely given when justice so requires." In *Forman v. Davis*, 371 U.S. 178 (1962), the Supreme Court described the liberal standard of review that should be accorded motions for leave to amend:

Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded. See generally, 3 Moore, Federal Practice (2d ed. 1948), 15.08, 15.10. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason--such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.--the leave sought should, as the rules require, be freely given.

Forman, 371 U.S. at 182. *Accord Bryant v. Dupree*, 252 F.3d 1161 (11th Cir. 2001).

In *Dussuoy v. Gulf Coast Investment Corp.*, 660 F.2d 594 (5th Cir. 1981), the Fifth Circuit further clarified the principles governing Rule 15 previously announced in *Forman*:

"Discretion" may be a misleading term, for Rule 15(a) severely restricts the judge's freedom, directing that leave to amend shall be freely given when justice so requires. It evinces a bias in favor of granting leave to amend. The policy of the federal rules is to permit liberal amendment to facilitate determination of claims

on the merits and to prevent litigation from becoming a technical exercise in the fine points of pleading.

Dussouy, 660 F.2d at 597-98.

Plaintiffs' proposed amendment seeks to add Defendants who are subsidiary or affiliated corporations to Defendants already in the litigation and Plaintiffs who allege claims against the United and ACN Defendants, which arise out of the same or similar facts as the existing Plaintiffs' claims. The proposed amendments do not alter the substantive allegations raised by Plaintiffs and do not prejudice any of the parties. Allowing the amendment fulfills the mandate of the federal rules to facilitate determination of claims on the merits." *Id.*

Moreover, none of the grounds for refusing amendment applies in this case. Plaintiffs are not guilty of serial amendments or any repeated failure to cure substantive deficiencies. Plaintiffs have previously amended their Complaint pursuant to this Court's order requiring the parties to file amended complaints to conform to the Court's previous orders. (MDL Doc. No. 4622). Likewise, Defendants cannot point to any prejudice or undue delay relating to the proposed amendment. This case has been stayed since its filing in 2003. No responsive pleading or discovery has occurred to date. Finally, Plaintiffs are not guilty of any bad faith or dilatory motive.

IV. Conclusion

For all the foregoing reasons, Plaintiffs respectfully request that their Motion For An Order Restoring Case To Active Docket, And Lifting Stay For the Limited Purpose Of Allowing Plaintiffs Leave To File A Second Amended Complaint and Motion For Leave To File Second Amended Complaint be granted by allowing the filing of Plaintiffs' Second Amended Class Action Complaint, attached hereto as Exhibit A.

Respectfully submitted this 12 day of June, 2006.



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CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2006, a true and correct copy of the foregoing was served of the following in the manner indicated:

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All counsel on the Court's 2/8/2005 Joint Email Service List were served by electronic mail.

