UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA and STATE OF CALIFORNIA *ex rel.* JAMES M. SWOBEN,

Plaintiffs,

v.

SCAN HEALTH PLAN, *et al.*,

Defendants.

CASE NO. CV 09-5013 JFW (JEMx)

Statement of Decision Denying the United States of America's Motion to Consolidate

INTRODUCTION

The United States (the "Government") filed a motion to consolidate this case ("*Swoben*") with a separate case recently transferred from the Western District of New York: *United States ex rel. Poehling v. UnitedHealth Group et al.*, 2:16cv8697 (C.D. Cal.) ("*Poehling*"). The Government has not filed its complaint-in-intervention in either case. Defendant UnitedHealth opposed the motion on grounds that it is premature. Defendant HCP also opposed the motion. Because the Government has not met its burden in demonstrating that consolidation should occur at this early stage of the litigation, the Government's motion to consolidate is denied.

FACTS

There are three separate actions relevant to the Government's motion to consolidate: (1) the *Swoben qui tam* action, (2) the *Poehling qui tam* action, and (3) an Administrative Procedure Act action pending in the United States District Court for the District of Columbia. Each case addresses whether UnitedHealth has an obligation to actively seek out and delete diagnosis codes associated with the medical condition of its beneficiaries in certain circumstances.

I. The *Swoben* Action

Relator James Swoben filed his original complaint in 2009 under seal in the Central District. (Docket No. 1.) Initially, he alleged violations of the False Claims Act arising from billing practices by two defendants who are no longer parties, Scan Health Plan and Senior Care Action Network ("SCAN"), where he was an employee from 2004-2006. (*Id.* at 3-7; Docket No. 133 at 9.)

Through a series of amended complaints, Swoben later added allegations against UnitedHealth arising from a retrospective review process of patient medical charts that UnitedHealth employed to ensure it was receiving proper payment from the federal government under the Medicare Advantage ("MA") program (*i.e.*, a review of the patient medical charts done at some point after the

provider initially provided diagnosis codes to the Medicare Plan). (*See* Docket No. 37 at 23-27.) In essence, Swoben alleged that the process used to perform the retrospective reviews in California was "biased" in favor of adding information which might enhance reimbursement to UnitedHealth without simultaneously reviewing the medical charts to see whether any diagnosis codes previously submitted by physicians were adequately documented.

The Government initially opted not to intervene in support of Swoben's claims against UnitedHealth, and the action was dismissed with prejudice in 2013. (*See* Docket No. 133 at 10.) Swoben appealed, and the parties briefed and argued the case before the Ninth Circuit. The United States did not initially participate in the appeal, but after oral argument, it filed an amicus brief arguing that the certification required UnitedHealth to exercise "due diligence" to identify and delete from its claims data diagnostic codes that were not supported in the underlying medical charts. *See* Brief of United States 6-7, *United States ex rel. Swoben v. United Healthcare Ins. Co.*, No. 13-56746 (9th Cir. Apr. 18, 2016).

In August 2016, the Ninth Circuit reversed the dismissal of Swoben's claims against UnitedHealth, and remanded the case to this Court. *See United States ex rel. Swoben v. United Healthcare Ins. Co.*, 832 F.3d 1084 (9th Cir. 2016), *amended on rehearing*, 848 F.3d 1161 (9th Cir. 2016). On March 13, 2017, Swoben filed his Fourth Amended Complaint. (No. 09-5013 (C.D. Cal.), Docket No. 251.) That complaint repeats his earlier allegations about UnitedHealth's chart review efforts. (*Id.* at 3-15.) According to the Government, Swoben's claims properly extend only to UnitedHealth's Medicare Advantage plan in California, and not to separate chart review efforts for other UnitedHealth plans throughout the country. (*See* U.S. Mot. 20 n.13.) The Government has also indicated that Swoben's claims are properly limited to the 2005-2006 time period. (*See* Docket No. 259 ¶ 4.)

In March, the Government moved to intervene in the case and this Court ordered it to file its complaint-in-intervention by May 1, 2017.

II. The *Poehling* Action

The second action relevant to this motion was filed under seal in the Western District of New York in 2011. In that case, Relator Benjamin Poehling, a former UnitedHealth employee, alleges that the national Chart Review Program that he helped to develop and operate for UnitedHealth starting in 2007 had resulted in the submission of false claims. (*See, e.g.*, *Poehling* Compl. ¶¶ 16-17, 109, 114-66, No. 11-cv-258 (W.D.N.Y.), at Ex. 3 to Docket No. 271-2.)

Poehling's case remained under seal in the Western District of New York for more than five years while the Government investigated his allegations. The Government did not seek transfer, however, until November 2016, when it filed an *ex parte* motion to have the case transferred to the Central District of California, which was granted. Because the case remained under seal, UnitedHealth was not given the opportunity to respond to that motion. (No. 16-cv-8697 (C.D. Cal.), Docket No. 50.) The Government moved to intervene in *Poehling* after it was transferred. (*See id*., Docket No. 78.) Judge Fitzgerald has ordered the Government to file its complaint-in-intervention in that case by May 16, 2017, and has authorized Poehling to file an amended complaint by that date. (*Id.*, Docket No. 93.)

III. The APA Action

In January 2016, while *Poehling* was still under seal and *Swoben* was pending before the Ninth Circuit, UnitedHealth filed an action in the U.S. District Court for the District of Columbia. *See* *UnitedHealthcare Ins. Co. v. Price*, No. 1:16-cv-00157-RMC, slip op. (D.D.C. Mar. 31, 2017), Docket No. 25. This action concerns a new regulation (known as the "Overpayment Rule") promulgated by the Centers for Medicare and Medicaid Services in 2014, purporting to implement a provision added to the Medicare Act by the Affordable Care Act of 2010. (*Id.* at 5-6.) The new statutory provision requires Medicare Advantage plans that identify an overpayment to report and return it to CMS no later than sixty days after the

overpayment was identified. 42 U.S.C. § 1320a-7k(d). To enforce the new requirement, the statute provides that any overpayment that is not returned within the sixty-day period is an "obligation" under the False Claims Act, which can serve as the basis for a reverse false claims action. *See* 31 U.S.C. § 3729(a)(1)(G). In the Overpayment Rule, CMS has provided that the rule applies to overpayments that result from errors in MA plans' diagnostic codes. *See* 42 C.F.R. § 422.326(a).

In the APA action, UnitedHealth contends that the Overpayment Rule violates CMS's statutory mandate to "'ensure[] actuarial equivalence' between Medicare and Medicare Advantage plans." *Price*, slip op. at 2 (quoting 42 U.S.C. § 1395w-23(a)(1)(C)(i)). By requiring MA plans to exercise "reasonable diligence" to identify and delete diagnostic codes that are unsupported by underlying medical charts, without accounting for the fact that CMS does not itself exercise such diligence to identify and delete unsupported diagnostic codes from the diagnostic data of FFS beneficiaries, UnitedHealth contends that CMS is failing to ensure actuarial equivalence. (*See, e.g.*, Compl. ¶ 4, *UnitedHealthcare Ins. Co. v. Burwell*, No. 16-cv-157 (D.D.C. Jan. 29, 2016).) Accordingly, UnitedHealth has requested that the Overpayment Rule be set aside, and that the court grant a declaratory judgment that it is not required to undertake "reasonable diligence" efforts unless CMS imposes the same validation standard on itself.

On March 31, 2017, the district court denied the Government's motion to dismiss, holding that UnitedHealth had standing to challenge the Overpayment Rule's direct regulation of its conduct and that the 2014 Overpayment Rule's requirement that MA plans exercise "reasonable diligence" to identify and delete unsupported diagnostic codes "imposes (for good reason or not) new obligations" that did not previously exist in any other regulation or statute. (*See Price*, slip op. at 13.) Accordingly, the district court will soon be hearing UnitedHealth's challenge to the legal underpinnings of the Government's arguments in this case—namely, that UnitedHealth was required to review and analyze the accuracy of

codes submitted by providers under a "due diligence" standard that the Government allegedly does not undertake itself.

DISCUSSION

I. Consolidation At This Time Would Be Premature

Federal Rule of Civil Procedure 42(a) gives a district court discretion to consolidate actions that "involve a common question of law or fact." That discretion is "broad," *Pierce v. County of Orange*, 526 F.3d 1190, 1203 (9th Cir. 2008), and is to be exercised in a manner that "balance[s] the efficiency of consolidation against the possible inconvenience, delay or prejudice to the parties," *Avetisyan v. Equifax Info. Servs. LLC*, No. CV 14-00161-AB (ASx), 2015 WL 12669875, at *2 (C.D. Cal. May 13, 2015). Thus, "[a] common nucleus of operative facts between . . . two cases only addresses the threshold issue of consolidation" and a court "must still weigh the administrative issues that may emerge and any prejudice to the parties." *Id*.

A. The Extent To Which The Swoben And Poehling Matters Will Involve Common Questions Is Presently Unknown

The Government has yet to file its complaints-in-intervention in either *Poehling* or *Swoben*, which will determine the scope and focus of both lawsuits. As the Ninth Circuit has recognized, a relator cannot "have a claim separate from the government's." *United States ex rel. Barajas v. Northrop Corp.*, 147 F.3d 905, 910 (9th Cir. 1998). Accordingly, the parties recently agreed that once the Government files its complaint-in-intervention in this case, its "complaint-in-intervention will then be the operative pleading for those claims against UnitedHealth to the extent such claims overlap those in Swoben's complaint." (Docket No. 268 at 3.) The same will be true in the *Poehling* case, where the Government has been ordered to file its complaint-in-intervention by May 16, 2017.

Although the Government's complaints-in-intervention, and UnitedHealth's defenses, may share some commonalities, at this stage it is premature to determine whether that will *in fact* be true and how significant any potential overlap might be. As an initial matter, the Government concedes that Poehling's current complaint names more than a dozen other defendants who are not parties to the *Swoben* matter, and acknowledges that it "does not know whether Poehling will continue to pursue his FCA claims against" those defendants. (U.S. Mot. 10.) If Poehling does, his claims against them would not be superseded by the Government's complaint-in-intervention against UnitedHealth, but would need to be litigated alongside it. The presence of more than a dozen parties in one case but not the other would significantly complicate the prospect of consolidation.

It is not just Poehling's complaint that remains uncertain. Because the Government's complaints-in-intervention have yet to be filed, it is impossible for this Court to review them in order to assess the overlap between the cases. Moreover, based on the Government's statements to date, it appears that the complaints might have far less in common than they have differences: the Government has indicated that it believes the *Swoben* case is limited to chart reviews by HCP in California for a relatively short period beginning in 2005, while the *Poehling* case is about a national Chart Review Program that started at a later date.

The conventional way of evaluating factual overlap for purposes of a consolidation motion is to compare filed complaints, not compare the parties' predictions about what they might allege in complaints they plan to file in the future. *See, e.g.*, *Gerber Plumbing Fixtures, LLC v. Amerifreight, Inc.*, Nos. 2:15-cv-04146-ODW(RAO), 2:15-cv-02926-ODW(GJS), 2015 WL 7259717, at *3 (C.D. Cal. Nov. 16, 2015) (consolidating actions because "the respective complaints involve common issues of law and fact, and . . . the two actions share key witnesses and evidence"); *Angeletti v. Lane*, No. 12-00503-BAJ-SCR, 2013

WL 4546828, at *3 (M.D. La. Aug. 28, 2013) (denying motion to consolidate because "a review of *all* eleven complaints reveals more differences than similarities"); *In re Facebook Privacy Litig.*, Nos. C 10-02389-JW, C 10-05301-BZ, 2010 WL 5387616, at *1 (N.D. Cal. Dec. 21, 2010) (consolidating cases "[u]pon review of the Complaints in both Actions"); *Grainger v. Solomon*, No. 3:07-cv-91, 2008 WL 3823734, at *2 (E.D. Tenn. Aug. 12, 2008) (consolidating cases after "examination of the complaint").[1] The Government has identified no persuasive reason to depart from that convention here.

B. *Consolidating The Matters At This Time Would Create Inefficiencies and Complications*

In addition to the uncertainty created by the unavailability of the relevant complaints, UnitedHealth has identified persuasive reasons why consolidating now would affirmatively create complications that outweigh any theoretical benefits consolidation might bring over the next few months. First, *Swoben* and *Poehling* are at different stages of litigation: *Swoben* was unsealed nearly four years ago, and has already gone through a round of motion-to-dismiss briefing, an appeal, and a remand. In contrast, *Poehling* was unsealed less than three months ago, shortly after being transferred to this district via an *ex parte* transfer motion, and involves claims that have never been briefed in any court. As a result, the Court may need to address preliminary issues in *Poehling* that have already been completed in *Swoben*, which favors deferring consolidation until preliminary motions can be

[1] In arguing that the Court should not wait to consider the filed complaints, the Government cites four New York state cases from the 1920s to the 1950s, none of which even involved Federal Rule of Civil Procedure 42(a). U.S. Reply, 5. And in the one federal case the Government cites, the court specifically relied on the fact that "[t]he complaints are based upon the same allegations of fraud and conspiracy." *Schultz v. Manufacturers & Traders Trust Co.*, 29 F. Supp. 37, 38 (W.D.N.Y. 1939). The case—like the treatise to which the Government also points—simply stands for the proposition that consolidation based on common questions of law or fact is sometimes appropriate even before "[i]ssue has been joined" on those common questions. *Id.* It does not undermine the wisdom of waiting until the complaints have been filed.

resolved. *See, e.g., Thompson v. City of St. Peters*, No. 4:15CV404 RLW, 2016 WL 1625373, at *2 (E.D. Mo. Apr. 21, 2016) (noting that "judicial efficiency is best served by deciding the pending motions [for judgment on the pleadings and summary judgment] prior to any consolidation"); *Rock v. NCAA*, No. 1:12-cv-1019-JMS-DKL, 2014 WL 4722527, at *3 (S.D. Ind. Sept. 23, 2014) (denying consolidation based in part on a "forthcoming motion to dismiss [the other case] on alleged legal defects not present" in the case before the court); *Oliver v. Dow*, Civ. No. 10-1542 (DMC)(JAD), 2012 WL 1883921, at *2 (D.N.J. May 22, 2012) (noting prior denial of motion to consolidate as "premature in light of the . . . pending Motion to Amend the Complaint in the present action").

Second, UnitedHealth has indicated that it anticipates filing two motions that might be more efficiently addressed if the *Swoben* and *Poehling* cases remain separated. The first motion UnitedHealth may file is a motion to transfer the *Poehling* matter. *Poehling* was initially brought in the Western District of New York in 2011 and has minimal connections to the Central District of California. *See supra* at 4-5. The transfer of *Poehling* to the Central District of California occurred *ex parte* and without UnitedHealth's input, which this circuit strongly disfavors. *United States v. Thompson*, 827 F.2d 1254, 1258-59 (9th Cir. 1987) ("ex parte proceedings are anathema in our system of justice."); *see also Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70*, 415 U.S. 423, 439 (1974). UnitedHealth has stated that once it has seen the operative complaints in that case, it will request that Judge Fitzgerald determine which venue would be most appropriate for hearing its nationwide claims.

UnitedHealth alleges that none of the policy decisions and certifications at issue in the *Poehling* action's nationwide allegations were made in the Central District of California. Instead, UnitedHealth argues that the District of Columbia or Minnesota may be more appropriate venues given that the contracts and certifications at issue in *Poehling* were submitted in the Washington, D.C. area, the

policy decisions implicated by this case were reached primarily in or around those locations, and the vast majority of likely witnesses and documents are located in or near Washington, D.C. and Minnesota. In addition, transferring litigation of the Government's nationwide claims to Washington, D.C. would allow them to be consolidated with the pending APA action about whether it would violate the statutory mandate of "actuarial equivalence" in the Medicare Act to require MA plans to exercise "reasonable diligence" to identify and delete unsupported diagnostic codes, without accounting for unsupported codes in the diagnostic data of fee-for-service beneficiaries.

Whether to grant a transfer is a question properly left to the sound discretion of Judge Fitzgerald, and this Court makes no determination about whether transferring *Poehling* to the District of Columbia will conserve judicial resources, avoid inconsistent judicial decisions, and serve the interests of justice. However, in the event the motion was ultimately granted, consolidating the cases before that transfer motion is heard would create a myriad of difficulties because the Court and parties would then have to unravel the administrative interconnections created by consolidation. The fact that the Government has not asked this Court to formally "merge" the cases does not eliminate this concern, because the very object of consolidation is to combine aspects of multiple cases—a combination that must be undone if one of those cases is transferred out of the district.

The second motion that UnitedHealth anticipates filing is a motion to dismiss *Poehling*. *Poehling* was unsealed less than three months ago, and it implicates programs and time periods that were not directly at issue in the earlier *Swoben* complaints. (*See* U.S. Mot. 20 & n.13.) UnitedHealth has not yet had a chance to test the legal sufficiency of the allegations about those programs in Poehling's complaint or the Government's upcoming complaint-in-intervention. If that motion is granted, the issue of consolidation will be moot. And if the cases

have *already* been consolidated when that motion is granted, it will again create additional complications and administrative burdens as the parties and the Court are forced to sort through which aspects of the consolidated proceeding remain unchanged and which aspects have been dismissed.

II. The Government Has Not Justified Immediate Consolidation

Given the complications that immediate consolidation would produce, the Government bears the burden to persuade the Court that there are significant advantages to be gained from consolidating the cases now rather than waiting and revisiting the issue in a few months. The Government has not met that burden.

The Government claims immediate consolidation is warranted because this Court is moving the *Swoben* action quickly and consolidating it with *Poehling* will allow the Court to continue at its pace and because certain pre-trial activities may need to be repeated if *Swoben* is not stayed. (U.S. Mot. 18.) The Court disagrees. Consolidating *Swoben and Poehling* might actually slow the pace of *Swoben* while the Court works to resolve any preliminary motions in *Poehling*.

CONCLUSION

For the foregoing reasons, the Government's request for immediate consolidation is **DENIED without prejudice** to a new motion to consolidate after the complaints-in-intervention have been filed and the preliminary motions discussed above have been resolved.

IT IS SO ORDERED.

Dated: April 27, 2017

UNITED STATES DISTRICT JUDGE