UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHN S. ARTANDI and ADVANCED PAIN CARE OF NEW YORK, INC.,	02 Civ. 5759 (JCF)
Plaintiffs,	MEMORANDUM OPINION AND ORDER
- against -	
ARNALDO BUZACK, SCOTT DENETT, TIMOTHY BROWN, MARITZA JACOBO, FIRST HEALTH GROUP CORP. and SAM ASH MUSIC CORPORATION,	
Defendants.	

JAMES C. FRANCIS IV
UNITED STATES MAGISTRATE JUDGE

This is an action brought by a physician and the professional corporation through which he operates to recover payment for services rendered. The plaintiffs originally brought suit in New York State Supreme Court, New York County, against four former patients; their employer, Sam Ash Music Corporation ("Sam Ash"); and the entity that administered the Sam Ash group health plan, First Health Group Corp. ("First Health"). The defendants removed the case to this Court pursuant to 28 U.S.C. § 1441 on the basis of federal question jurisdiction, since it involves claims arising under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq. The parties then agreed that I would exercise jurisdiction over the action for all purposes pursuant to 28 U.S.C. § 636(c). The defendants have now moved for summary judgment, while the plaintiffs have cross-moved to disqualify defendants' counsel from continuing its joint representation of all defendants. For the reasons set forth below,

the defendants' motion for summary judgment is granted in part and denied in part, and decision on the plaintiffs' motion for disqualification is deferred pending a hearing.

Background

Plaintiff John S. Artandi is a physician licensed to practice in the State of New York. (Affidavit of John S. Artandi dated Feb. 25, 2004 ("Artandi Aff."), attached to Notice of Cross-Motion, at 4 & Exh. A). He practices as a physiatrist specializing in the field of physical medicine and rehabilitation, which is a medical discipline incorporating physical therapy. (Artandi Aff. at 4). Apparently, Dr. Artandi performs his services under the auspices of Advanced Pain Care of New York, Inc. ("Advanced Pain"). (Complaint ("Compl."), ¶ 12).

From December 1995 to November 1996, Dr. Artandi treated the four individual defendants in this action: Arnaldo Buzack, Scott Denett, Timothy Brown, and Maritza Jacobo. (Artandi Aff. at 5). At the time he provided the services, he obtained from each patient an assignment of insurance payments. (Affirmation of Douglas E. Rowe dated Feb. 5, 2004 ("Rowe Aff."), attached to Notice of Motion, ¶ 5 & Exh. C). Although some of the claims submitted to First Health on behalf of these patients were paid, the vast majority were not. According to Dr. Artandi, he is still owed $37,717.00 for treatment provided to Mr. Buzack, $33,866.00 for Mr. Denett,[1] $9,502.00 for Mr. Brown, and $18,534.00 for Ms. Jacobo.

[1] Although paragraphs 21, 22, and 24 of the Complaint refer to Mr. Buzack, these allegations apparently involve Mr. Denett, as indicated by the section heading.

(Compl., ¶¶ 15-34).

The group health insurance plan at issue here (the "Plan") was established by Sam Ash for its employees in 1992. (Affidavit of David Charles Ash dated Feb. 4, 2004 ("Ash Aff."), attached to Notice of Motion, ¶ 4). Because it is a self-insured plan, the funds to pay most claims come directly from Sam Ash itself. (Ash Aff., ¶ 4). In addition, Sam Ash maintains a stop-loss policy with Standard Security Life Insurance Company of New York, which pays the amount by which any covered claim exceeds $50,000.00 in one year. (Ash Aff., ¶ 4).

At the time the Plan was created, Sam Ash hired Comprehensive Benefit Services Co., Inc. ("Comprehensive") as a third-party administrator to process and adjudicate claims. (Ash Aff., ¶ 5). Thereafter, Comprehensive changed its name to EBP HealthPlans and was subsequently purchased by First Health. (Ash Aff., ¶ 6). First Health's role is defined by an Administration Agreement originally entered into between Sam Ash and Comprehensive. (Ash Aff., ¶¶ 6, 7).

When the various insurance claims at issue here were denied, Dr. Artandi and Advanced Pain brought this action against Sam Ash, First Health, and the four individual patients who, under the terms of their assignments, remain liable for payment for any services not covered by insurance. Discovery has been completed, and Sam Ash and First Health now move for summary judgment on a variety of grounds. First Health argues principally that as a third-party administrator, it is not a fiduciary of the Plan and therefore

cannot be held liable for unpaid benefits. Sam Ash contends that it, too, is not liable because it was never in privity with the plaintiffs, and the parties who did have a direct relationship with Sam Ash -- the patients -- only assigned to the plaintiffs their rights with respect to First Health. Further, Sam Ash maintains that the denial of the claims was proper because: (1) the Plan allowed for the provision of physical therapy services only by a physical therapist, not by a physician, (2) the services rendered were unnecessary and not in accordance with generally accepted medical standards, and (3) the charges exceeded those that are reasonable and customary.

The plaintiffs have opposed the defendants' motion and have cross-moved to disqualify the law firm of Certilman Balin Adler & Hyman, LLP (the "Certilman Firm") from representing all of the defendants jointly. According to the plaintiffs, the interests of the individual patients are so inconsistent with those of Sam Ash and First Health that ethical principles bar a law firm from representing both groups.

I will address each issue in turn and will discuss additional facts as appropriate to the analysis.

Discussion

A. Summary Judgment

1. Legal Framework

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with

the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); accord Marvel Characters, Inc. v. Simon, 310 F.3d 280, 285-86 (2d Cir. 2002); Andy Warhol Foundation for the Visual Arts, Inc. v. Federal Insurance Co., 189 F.3d 208, 214 (2d Cir. 1999). The moving party bears the initial burden of demonstrating "the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Where the moving party meets that burden, the opposing party must come forward with "specific facts showing that there is a genuine issue for trial," Fed. R. Civ. P. 56(e), by "a showing sufficient to establish the existence of [every] element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322.

In assessing the record to determine whether there is a genuine issue of material fact, the court must resolve all ambiguities and draw all factual inferences in favor of the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); Vann v. City of New York, 72 F.3d 1040, 1048-49 (2d Cir. 1995). But the court must inquire whether "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party," Anderson, 477 U.S. at 249 (citation omitted), and grant summary judgment where the nonmovant's evidence is conclusory, speculative, or not significantly probative. Id. at 249-50. "The litigant opposing summary judgment may not rest upon mere conclusory allegations or

denials, but must bring forward some affirmative indication that his version of relevant events is not fanciful." Podell v. Citicorp Diners Club, Inc., 112 F.3d 98, 101 (2d Cir. 1997) (internal quotations and citations omitted); accord Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986) (a nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts"); Goenaga v. March of Dimes Birth Defects Foundation, 51 F.3d 14, 18 (2d Cir. 1995) (nonmovant "may not rely simply on conclusory statements or on contentions that the affidavits supporting the motion are not credible"). In sum, if the court determines that "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Matsushita, 475 U.S. at 587 (quoting First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 288 (1968)).

2. First Health

ERISA governs:

> any plan, fund or program . . . established or maintained by an employer . . . to the extent that such plan, fund or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, . . . benefits in the event of sickness, accident, disability, death or unemployment[.]

29 U.S.C. § 1002. This broad definition encompasses the Sam Ash group health insurance plan at issue here. Once ERISA comes into play, it preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a); see Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41, 46

(1987) (ERISA's preemptive provisions are "deliberately expansive, and designed to establish pension plan regulation as exclusively a federal concern"); Snyder v. Elliott W. Dann Co., 854 F. Supp. 264, 273 (S.D.N.Y. 1994). Therefore, the plaintiffs' claims must be analyzed exclusively in the context of ERISA.

ERISA provides that a "participant or beneficiary" may bring an action "to recover benefits due . . . under the terms of [a] plan." 29 U.S.C. § 1132(a)(1)(B). In such a suit, monetary relief may be enforced only against the plan as an entity, unless individual liability is shown. 29 U.S.C. § 1132(d)(2); see Chapman v. ChoiceCare Long Island Term Disability Plan, 288 F.3d 506, 509-10 (2d Cir. 2002); Leonelli v. Pennwalt Corp., 887 F.2d 1195, 1199 (2d Cir. 1989) (administrators and trustees in their capacity as such may be liable). By contrast, an entity that is not a fiduciary for a plan is generally not liable under ERISA. See Reich v. Rowe, 20 F.3d 25, 29 (1st Cir. 1994); Kodes v. Warren Corp., 24 F. Supp. 2d 93, 100 (D. Mass. 1998).

ERISA defines a fiduciary as one who:

> (i) . . . exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) . . . renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) . . . has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C.§ 1002(21)(A). An entity that lacks such discretion is not a fiduciary and is not liable under ERISA. See Leonelli, 887 F.2d at 1199. Thus, "ERISA cannot be used to impose liability upon

third-party claim administrators who are not acting as fiduciaries within the meaning of ERISA." Buckley Dement, Inc. v. Travelers Plan Administrators of Illinois, Inc., No. 92 C 5946, 1993 WL 453466, at *3 (N.D. Ill. Nov. 4, 1993) (citing cases), aff'd, 39 F.3d 784 (7th Cir. 1994); see Terry v. Bayer Corp., 145 F.3d 28, 35 (1st Cir. 1998) ("[W]hen the plan administrator retains discretion to decide disputes, a third party service provider . . . is not a fiduciary of the plan, and thus not amenable to suit under [ERISA]."); Nicholson v. Prudential Insurance Co., 235 F. Supp. 2d 22, 26 (D. Me. 2003); Kodes, 24 F. Supp. 2d at 100-01. These principles are reflected in a Department of Labor advisory opinion, which holds that a third-party administrator lacking final authority to rule on claims is not a fiduciary and not subject to liability under ERISA. See 29 C.F.R. § 2509.75-8, D-2.

In this case, the Administration Agreement defines First Health's responsibilities as follows:

> The Contract Administrator [First Health] agrees to perform the following administrative services for the Plan Sponsor [Sam Ash]:
>
> (a) assist in the preparation and printing of a Master Plan Document, plan booklet, identification cards and other material necessary to the operation of the Plan;
>
> (b) process and adjudicate all claims presented for payment under the Plan, including but not limited to, reasonable investigatory work in determining claims eligibility within the framework of Plan policies, interpretations, rules and procedures made and approved by the Plan Sponsor;
>
> (c) process, issue and distribute claim checks, drafts and explanation of benefits to Plan members, providers of service, Plan Sponsor or others as applicable and document such disbursements;

(d) answer inquiries from the Plan Sponsor, Plan members and service providers concerning requirements, procedures or benefits of the Plan;

(e) review all applications for coverage under the Plan based upon underwriting guidelines established by the Contract Administrator, to determine eligibility for status as a Plan member;

(f) maintain all claim data for the Plan;

(g) prepare and provide to the Plan Sponsor monthly reports of funds received from the Plan Sponsor and all disbursements made from the Plan in accordance with the standard reporting procedures and schedules;

(h) provide to the Plan Sponsor all information in its possession that is necessary for the Plan Sponsor to prepare reports required by any local, state or federal government reports pertaining to the operation of the Plan to include the information necessary to complete the Schedule A for Form 5500.

(Ash. Aff., Exh. B, § 2.01). By contrast, Sam Ash, as the "Plan Sponsor," retains final authority with respect to all major decisions, including the determination of eligibility on any claim:

> The Plan Sponsor shall have final authority in determining benefit provisions and Plan language describing such benefit provisions as outlined in the Plan's Master Plan Document and Plan Booklet.
>
> The Plan Sponsor shall have final authority in determining the eligibility of claims to be paid by the Plan with the express understanding that any claim payment authorized by the Plan Sponsor as an exception to the eligibility or other terms and conditions of the Plan's Master Plan Document may not be eligible for reimbursement pursuant to the applicable stop loss policy.
>
> The Plan Sponsor shall have final authority in directing the Contract Administrator as to the use of Plan assets. . . .

(Ash Aff., Exh. B, §§ 1.01, 1.02, 1.03). Because First Health

lacks the discretion necessary to deem it a fiduciary, it cannot be liable for unpaid benefits under ERISA, and it is entitled to summary judgment.

3. Sam Ash

a. Standing

Sam Ash, having the authority that First Health lacks, could be liable. Indeed, the Plan explicitly identifies Sam Ash as the fiduciary. (Ash Aff., Exh. A at 27). However, Sam Ash argues that, as a threshold matter, it had no relation of privity with the plaintiffs and therefore cannot be sued by them.

While it is true that the plaintiffs' right of recovery runs directly against the individual defendants rather than against their insurer, the patients have assigned to Dr. Artandi their right to reimbursement. "The right to reimbursement under a health plan may be assigned by a patient covered by the health plan to a health care provider so long as the plan instrument does not specifically prohibit such assignments." Richstone v. Chubb Colonial Life Insurance, No. 97 Civ. 3481, 1999 WL 287332, at *5 (S.D.N.Y. May 7, 1999) (citation omitted); see Fisher v. Building Service 32B-J Health Fund, No. 96 Civ. 5526, 1997 WL 531315, at *4 (S.D.N.Y. Aug. 27, 1997); Renfrew Center v. Blue Cross and Blue Shield of Central New York, Inc., No. 94-CV-1527, 1997 WL 204309, at *3 (N.D.N.Y. April 10, 1997); Protocare of Metropolitan N.Y., Inc. v. Mutual Association Administrators, Inc., 866 F. Supp. 757, 761 (S.D.N.Y. 1994). Such an assignment provides standing to the health care provider to pursue an ERISA claim against the insurer

for unpaid benefits. See Richstone, 1999 WL 287332, at *5; Fisher, 1997 WL 531315, at *5; Protocare, 866 F. Supp. at 761. And here, not only does the Plan not prohibit assignment, it explicitly permits it. (Ash Aff., Exh. A at 67).

Nevertheless, Sam Ash contends that the assignments executed by the patients in this case cannot give the plaintiffs standing because those documents only assigned the right to receive payments made by First Health. (Rowe Aff., Exh. C). This argument is disingenuous. As the defendants themselves have maintained, First Health is only a conduit for payments made from Sam Ash funds pursuant to the final authority of Sam Ash. Thus, the assignments are fairly construed as providing the plaintiffs with standing to seek relief from the party with final authority and financial responsibility under the plan -- Sam Ash.

b. Covered Services

In the alternative, Sam Ash argues that the treatment provided by Dr. Artandi was not covered by the Plan. To the extent that the terms of the policy are clear and unambiguous, they must be enforced. See Village of Sylvan Beach v. Travelers Indemnity Co., 55 F.3d 114, 115 (2d Cir. 1995). However, if the policy language is ambiguous, it must be interpreted in favor of the insured. See Goldberger v. Paul Revere Life Insurance Co., 165 F.3d 180, 182 (2d Cir. 1999); Masella v. Blue Cross & Blue Shield of Connecticut, Inc., 936 F.2d 98, 107 (2d Cir. 1991).

According to the defendants, "[t]he Plan excludes expenses for physical therapy services performed by a doctor." (Memorandum of

Law of Defendant First Health Group Corp. and Sam Ash Music Corporation in Support of Their Motion for Summary Judgment Dismissing the Complaint at 10). This, however, is not an accurate characterization of the Plan's language. What it actually provides is that covered services include "[p]hysical therapy rendered by a qualified physical therapist." (Ash Aff., Exh. A at 41). The distinction is important. The defendants have not suggested that Dr. Artandi, a physiatrist, is not "qualified" to provide physical therapy. And, contrary to the defendants' suggestion, the Plan does not specifically exclude from coverage physical therapy services provided by a physician. Rather, the import of the Plan language seems to be that physical therapy is not covered if it is provided by someone who is not qualified -- the fitness instructor at the local gym, for example. At the very least, then, the Plan language is ambiguous and precludes summary judgment on this basis.

c. Necessity and Cost of Services

More persuasive is Sam Ash's argument that Dr. Artandi provided treatment that was, in large measure, not medically necessary, and that he charged fees well beyond those that are customary and reasonable for the services rendered. For example, Dr. Artandi treated Mr. Buzack on 57 occasions, of which Sam Ash found 11 to be medically necessary. (Ash Aff., ¶ 16). Charging $400 to $800 per session, Dr. Artandi billed Mr. Buzack $48,000 over the course of a year, first for treatment of a sprained ankle and then for lower back syndrome. (Ash Aff., ¶ 13).

These facts certainly suggest that Sam Ash's determinations to

decline coverage may have been justified. They do not, however, warrant summary judgment. The information provided by the defendants with respect to each patient is largely anecdotal and is not accompanied by any expert analysis of the medical records or billing practices. Indeed, the defendants' Statement of Undisputed Material Facts does not include any assertions relating to the necessity for or value of Dr. Artandi's services. At a minimum, then, the factual disputes underlying this issue preclude summary judgment, and defendants' motion with respect to San Ash must be denied.

B. Disqualification

Motions to disqualify counsel are generally disfavored. See, e.g., Felix v. Balkin, 49 F. Supp. 2d 260, 267 (S.D.N.Y. 1999). Courts are reluctant to grant such motions because they are often tactically motivated, cause undue delay, add expense, and have "an immediate adverse effect on the client by separating him from counsel of his choice. . . . " Board of Education v. Nyquist, 590 F.2d 1241, 1246 (2d Cir. 1979); accord Evans v. Artek Systems Corp., 715 F.2d 788, 791-92 (2d Cir. 1983); Feinberg v. Katz, No. 01 Civ. 2739, 2003 WL 260571, at *3 (S.D.N.Y. Feb. 5, 2003); Felix, 49 F. Supp. 2d at 267. While doubts should be resolved in favor of disqualification, the moving party must satisfy a "high standard of proof." Evans, 715 F.2d at 791 (citation omitted); accord Felix, 49 F. Supp. 2d at 267 (parties moving for disqualification of counsel must carry a "heavy burden"); Agee v. Paramount Communications, Inc., 853 F. Supp. 778, 783 (S.D.N.Y. 1994)

(subjecting motion to disqualify counsel to "heightened scrutiny"), rev'd in part on other grounds, 59 F.3d 317 (2d Cir. 1995).

In this case, the plaintiffs contend that the Certilman Firm cannot continue to represent all of the defendants because to do so would deny the individual defendants the opportunity to assert cross-claims against Sam Ash and First Health. The defendants respond that they have determined to present a unified defense; that merely hypothetical cross-claims are insufficient indicia of conflict; and that the individual defendants have, at any rate, made an informed decision to waive any potential conflict.

New York's Code of Professional Responsibility (the "Code") establishes appropriate guidelines for the professional conduct of attorneys in the United States District Courts in this state. See NCK Organization Ltd. v. Bregman, 542 F.2d 128, 129 n.2 (2d Cir. 1976); de Transport du Cocher, Inc., 290 F. Supp. 2d 344, 348 (E.D.N.Y. 2003); Sumitomo Corp. v. J.P. Morgan & Co., No. 99 Civ. 8780, No. 99 Civ. 4004, 2000 WL 145747, at *2 (S.D.N.Y. Feb. 8, 2000); Local Civil Rule 1.5(b)(5). In particular, Disciplinary Rule 5-105 ("DR 5-105") of the Code addresses attorney representation of clients with interests that may conflict.[2] DR 5-

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[2] DR 5-105 provides, in relevant part:

> (A) A lawyer shall decline proffered employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under [DR 5-105(C)].
>
> (B) A lawyer shall not continue multiple employment if the

105 indicates that joint representation is permitted even if the lawyer's professional judgment "will be or is likely to be adversely affected," provided that: (1) "a disinterested lawyer would believe that the lawyer can competently represent the interest of each [client]," and (2) each client consents to the joint representation after full explanation of "the advantages and risks involved." DR 5-105(A)-(C), 22 N.Y.C.R.R. § 1200.24. However, some conflicts are so severe that even an informed waiver is insufficient to avoid disqualification. See Bonner v. Guccione, No. 94 Civ. 7735, 1997 WL 91070, at *2 (S.D.N.Y. March 3, 1997); United States v. Rahman, 861 F. Supp. 266, 274 (S.D.N.Y. 1994). This is because courts have an obligation both to supervise members of the bar and to assure a fair trial to all litigants. See Dutton v. County of Suffolk, 729 F.2d 903, 909 (2d Cir. 1984).

Here, the conflict between Sam Ash as the insurer and the individual defendants as the insureds is significant. On the one hand, it is in the interest of Sam Ash to show that the services provided to the individual defendants by Dr. Artandi are not

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> exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the lawyer's representation of another client, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under [DR 5-105(C)].
>
> (C) In the situations covered by [DR 5-105(A) and (B)], a lawyer may represent multiple clients if a disinterested lawyer would believe that the lawyer can competently represent the interest of each and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved.

DR 5-105(A)-(C), 22 N.Y.C.R.R. § 1200.24.

covered by its group health plan. This is precisely what it attempted to do when it argued that the policy does not cover physical therapy treatment provided by a doctor. On the other hand, it is in the interest of the individual defendants to establish that the services are indeed covered so that Sam Ash would be responsible for paying Dr. Artandi's bills and they would be relieved of any liability. While the patients might agree with Sam Ash that Dr. Artandi overcharged them, it will do them little good to show that his charges are not customary and reasonable. Although such proof would relieve Sam Ash of liability under the Plan, the individual defendants specifically agreed that they would remain liable to Dr. Artandi for charges not covered by insurance. To be sure, proof that Dr. Artandi provided wholly unnecessary treatment might foreclose him from recovery against all of the defendants, but the chances are slim that this could be established for every office visit for each individual defendant.

There is no adequate proof that the individual defendants have knowingly waived this evident conflict. Although the Certilman Firm contends that the defendants agreed to present a "unified" defense, that defense has not been articulated, and the motion for summary judgment could only have benefitted Sam Ash and First Health. The only evidence of waiver is a conclusory statement by counsel that "[t]he defendants have been informed that this firm represents all of the defendants and have nevertheless waived any conflict and have authorized this firm to represent them in this action." (Affirmation of Douglas E. Rowe dated March 19, 2004, ¶

3). There is no indication that the individual defendants executed a written waiver. There is no indication that they obtained independent legal advice before waiving any conflict. And, there is no indication that they understood the implications of separate representation, including the opportunity to file cross-claims against Sam Ash.

Thus,

> [I]t is not clear from the record the extent to which counsel to the defendants has disclosed fully the implications of his continued simultaneous representation of all the defendants or that the defendants understand fully the risks involved in having a single attorney represent their respective, and potentially different interests. . . .

World Food Systems, Inc. v. BID Holdings, Ltd., No. 98 Civ. 8515, 2001 WL 246372, at *5 (S.D.N.Y. March 12, 2001). Under these circumstances, it is appropriate to conduct a hearing to determine whether the Certilman Firm should continue to represent all of the defendants. See Kara Holding Corp. v. Getty Petroleum Marketing, Inc., No. 99 Civ. 0275, 2002 WL 1684365, at *5 (S.D.N.Y. July 24, 2002) (hearing necessary where record does not establish whether joint representation is appropriate). Prior to the hearing, the Certilman Firm shall provide the individual defendants with a copy of this Memorandum Opinion and Order. Those defendants may, if they wish, seek the advice of independent counsel with respect to whether they should be separately represented. At the hearing, the defendants should be prepared to explain how their interests can be reconciled and what unified defense they will present. The individual defendants shall attend the hearing so that it can be

verified that any waiver on their part is knowing and voluntary. The question of whether the conflict here is so severe that it cannot be waived is reserved for determination after the hearing. The hearing shall be conducted on May 3, 2004 beginning at 9:30 a.m. unless the defendants advise me before that date that they have decided to retain separate counsel.

Conclusion

For the reasons set forth above, the defendants' motion for summary judgment is granted with respect to the claims against First Health and denied with respect to the claims against Sam Ash. Determination of the plaintiffs' motion to disqualify defendants' counsel from continued joint representation of the defendants is deferred pending the hearing described in this opinion.

SO ORDERED.

JAMES C. FRANCIS IV
UNITED STATES MAGISTRATE JUDGE

Dated: New York, New York
April 9, 2004

Copies mailed this date:

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