IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re ACCREDO HEALTH, INC. SECURITIES LITIGATION	)	
	)	**Civil No. 03-2216-D/P**
This Document Relates To:	)	**CLASS ACTION**
ALL ACTIONS	)	

ORDER DENYING PLAINTIFFS' MOTION TO CONSOLIDATE

Before the court, by orders of reference, is plaintiffs Louisiana School Employees' Retirement System ("LSERS") and Debra Swiman's Motion to Consolidate (D.E. 202 in case number 03-2216 and D.E. 16 in case number 06-2214). The plaintiffs move, pursuant to Fed. R. Civ. P. 42(a) and the court's June 18, 2003 Consolidation Order entered in case number 03-2216, to consolidate for all purposes Civil Action No. 06-2214, assigned to District Judge Samuel H. Mays, Jr., into Civil Action No. 03-2216, a consolidated class action assigned to District Judge Bernice B. Donald. For the reasons below, the motion to consolidate is denied.

I. BACKGROUND

Beginning on April 8, 2003, various plaintiffs filed seven separate securities fraud class action lawsuits in the Western District of Tennessee against defendant Accredo Health, Inc. ("Accredo"), David D. Stevens, and Joel R. Kimbrough (collectively the "Accredo Defendants"). The plaintiffs filed an eighth complaint on June 9, 2003, styled Debra Swiman v. Accredo Health,

Inc., Civil Action No. 03-2425, and on June 10, 2003, amended the complaint to add Ernst & Young LLP ("E&Y") as a defendant. The complaints alleged that the Accredo Defendants and E&Y violated provisions of the Securities and Exchange Act of 1934 and SEC Rule 10b-5, through the issuance of false and misleading financial statements due to Accredo's failure to timely write-off approximately $60 million in uncollectible accounts receivable. Specifically, plaintiffs alleged that on June 16, 2002, the Accredo Defendants began issuing a series of false and misleading statements to the public about the financial condition of Accredo and its acquisition of Gentiva Health Services, Inc.'s Specialty Pharmaceutical Services Division. Plaintiffs point to the Accredo Defendants' announcements in press releases, analyst conference calls, and SEC filings, in which Accredo represented that it had amassed record financial results in the fourth quarter and year ending June 30, 2002, first quarter of 2003, and second quarter of 2003. Plaintiffs contended that these false statements caused Accredo stock to trade at artificially inflated prices between June 16, 2002 and April 7, 2003. With respect to E&Y, plaintiffs alleged that E&Y issued an unqualified audit opinion on Accredo's fiscal year 2002 financial results and approved Accredo's reporting of its quarterly financial statements, and as a result, E&Y falsely communicated to the market and investors that E&Y's audit had been performed in accordance with Generally Accepted Auditing Standards.

On June 18, 2003, Judge Donald entered a consent order consolidating the eight complaints into Civil Action No. 03-2216

("the Consolidated Action").[1] The Consolidation Order provides that

> Any and all other cases that have been or will be filed against any of the Defendants arising out of the same nucleus of operative facts as those alleged in the above-styled action shall, until further Order of this Court, be consolidated for all purposes pursuant to Rule 42(a) of the Federal Rules of Civil Procedure as one action (the "Consolidated Action") before the Honorable Bernice B. Donald. The Clerk is directed to inform counsel in any such other case of this Order.

On September 14, 2004, the plaintiffs and E&Y entered into a tolling agreement. On September 15, 2004, the plaintiffs filed their Consolidated Complaint against the Accredo Defendants without naming E&Y as a defendant. In March 2006, plaintiffs and E&Y agreed to extend the tolling agreement until April 13, 2006, and further agreed that E&Y would not object to plaintiffs adding E&Y as a new party to the Consolidated Action after the March 31, 2006 deadline set forth in the scheduling order. On April 13, 2006, the plaintiffs instead filed a separate complaint against E&Y alleging violations of the federal securities laws similar to those alleged in the Consolidated Action ("E&Y action").[2]

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[1]According to E&Y, the motions to consolidate (which were filed June 9, 2003) and proposed consent consolidation order presented to Judge Donald were submitted without the consent or involvement of E&Y or its counsel. E&Y was not added as a defendant until June 10, 2003, and E&Y's counsel did not file their notice of appearance until July 3, 2003.

[2]When the plaintiffs filed the E&Y complaint, they indicated on the civil cover sheet that the action was related to Stein v. Accredo Health, Inc., Civil Action Number 03-2226-D, which was one of the eight original complaints filed against the Accredo Defendants assigned to Judge Donald. The Clerk of Court, however, randomly assigned the E&Y case to District Judge J. Daniel Breen. After

II. ANALYSIS

As a threshold matter, the court finds that the June 18 consolidation order does not mandate consolidation of the E&Y action into the Consolidated Action. E&Y is not listed as a defendant on the case caption, was not a named defendant at the time the motions which lead to the June 18 consolidation order were filed, was not a party to the proposed consent consolidation order submitted to Judge Donald, and was not named as a defendant in the consolidated amended complaint filed September 15, 2004.

However, even though the June 18 order does not mandate consolidation, this court may nevertheless order consolidation under Rule 42(a) in cases involving a common question of law or fact. See Fed. R. Civ. P. 42(a). Here, the court finds that the Consolidated Action and the E&Y case are based on substantially similar operative facts and share common questions of law. Both actions contain nearly identical factual allegations of accounting fraud and false and misleading statements. The class members and class periods are identical, as are the claims for violations of the federal securities laws. In addition, the same attorneys represent the Lead Plaintiffs in the Consolidated Action and the

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Judge Breen recused himself, the case was reassigned to Judge Mays. According to plaintiffs' motion to consolidate, the issue of judicial assignment of the E&Y case was raised during a May 12, 2006 status conference with Judge Breen. However, the record does not reflect, nor do the parties discuss in their briefs, what if any further discussion was had with Judge Breen regarding this issue. The present motion to consolidate does not address the issue of whether the E&Y case should be transferred (even if not consolidated) under Local Rule 83.3(a)(3) as a companion case to the Consolidated Action.

plaintiffs in the E&Y case.

In deciding whether to consolidate these actions, however, the court should also consider the impact that consolidation will have on judicial economy as well as the risks of prejudice and possible confusion. Cantrell v. GAF Corp., 999 F.2d 1007, 1011 (6th Cir. 1993). At this time, the actions are at two significantly different stages of litigation. The underlying lawsuits which form the Consolidated Action have been pending since 2003; nearly two years have passed since the court denied the Accredo Defendants' motion to dismiss; and the court has already certified the matter as a class action. The scheduling order in this action, which has been amended on prior occasions and as recently as February 1, 2007, provides for the completion of fact discovery by June 22, 2007.

By contrast, the E&Y complaint was filed April 13, 2006, the parties have not engaged in discovery, and in light of E&Y's pending motion to dismiss, the parties will not engage in discovery until the motion is decided. [3] According to the Joint Case

[3]The Private Securities Litigation Reform Act of 1995 provides as follows:

> In any private action arising under this chapter, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

15 U.S.C. § 78u-4(b)(3)(B). The parties do not dispute that discovery should be stayed in the E&Y action, as was the case in the Consolidated Action while the Accredo Defendants' motion to dismiss was pending. Moreover, the minutes from the September 15,

Management Statement filed on September 29, 2006, the parties have not yet agreed on issues relating to class certification briefing and discovery, issues which are not insignificant since the Consolidated Action has already been certified. Consolidation of these two actions may prejudice E&Y both in terms of not having had the benefit of participating in prior discovery in the Consolidated Action, and perhaps more importantly, an inability to fully participate in the remaining discovery while the motion to dismiss is pending. The court, balancing the interests of and potential prejudice to the parties, concludes that consolidation at this stage of the litigation is not warranted under Rule 42(a).

III. CONCLUSION

For the reasons above, plaintiffs' motion to consolidate is denied.

IT IS SO ORDERED.

s/ Tu M. Pham

TU M. PHAM

United States Magistrate Judge

March 9, 2007

Date

2006 status conference before Judge Mays reflects that discovery is stayed until the motion to dismiss is decided.