



FILED IN DISTRICT COURT
OKLAHOMA COUNTY

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

JAN 16 2024

DALE NIDA and SHERRI NIDA,

Plaintiffs,

v.

STATE FARM FIRE & CASUALTY
COMPANY, and SHERYL MANDEVILLE,

Defendants.

RICK WARREN
COURT CLERK

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Case No. CJ-2020-4453

Judge: Hon. Aletia H. Timmons

**DEFENDANT STATE FARM FIRE & CASUALTY'S RESPONSE IN OPPOSITION
TO PLAINTIFFS' MOTION FOR REASSIGNMENT AND CONSOLIDATION**

Counsel for Plaintiffs in this action ("*Nida*") has sought out and pursued litigation not just against State Farm Fire and Casualty Company ("State Farm") but also nine separate agents across nine cases against whom they make individual fraud allegations, all of which they now seek to consolidate for discovery in this Court.¹ Consolidation should be denied because Plaintiffs have not met—and cannot meet—the burden placed on them to demonstrate that: (1) consolidation will benefit judicial economy without causing delay, undue expense, prejudice, or confusion; and (2) sufficient common questions of law or fact exist, particularly as to the agents sued in each case.²

INTRODUCTION AND BACKGROUND

Consolidation of the cases urged herein is not permitted because the issues are neither identical issues as required by Local Rule 9 nor common as required by 12 O.S. § 2018. But the Court need not even get to that substantive prong of the analysis, because Plaintiffs are not simply asking the Court to combine the causes of action against State Farm, but nine separate causes of action against the agent Defendants arising from entirely different and unique facts. Further, the cases are of varying ages and in different litigation postures governed by different discovery orders. The disparity among the cases both factually and procedurally negates any perceived efficiency and reveals the delay, confusion, and prejudice to the individual agent Defendants, State Farm, and the judicial system that will result.

To facilitate the Court's comparison of the different procedural postures and discovery status of each case, State Farm has prepared the chart attached hereto as **EXHIBIT 1**. (*See* Procedural Posture Chart, **EXHIBIT 1**.) In summary, these nine Consolidation Cases were filed over

¹ Plaintiffs' Motion to Consolidate seeks consolidation of discovery only, but Plaintiffs suggest they may later seek consolidation of trials. State Farm equally objects to consolidation of trials but reserves its specific separate objections until such request is made.

² The nine cases are identified in Plaintiff's Motion and in the charts attached hereto as **EXHIBIT 1** and **EXHIBIT 2** and are referred to as a group herein as the "Consolidation Cases."

the course of more than two years and vary widely as to the amount of discovery completed. For example, *Nida*, arises from a hail claim made more than four years ago and has been on file since September 2020, while *Fletcher* still has pending motions to dismiss with answers not yet due. Likewise, in *Nida*, *Hosier*, and *Kyger*, extensive institutional discovery has already occurred, while initial discovery requests have not even been served in *Fletcher*. As to most of the others, they are in varying stages of non-“native” document production made subject to protective orders entered by the judges in those cases with greater protections than have been ordered in the cases before this Court. Each of the cases where discovery has taken place have different discovery rulings by different judges that would need to be addressed one by one and reconciled in a consolidation by this Court that would take extensive motion practice as well as hearings. Given the different procedural postures of these cases and Plaintiffs’ unexplained delay in moving for consolidation, granting Plaintiffs’ Motion would be prejudicial to the Defendants, delay efficient and prompt adjudication of cases that does not benefit any party, and benefits only Plaintiffs’ Counsel.

The absence of a “common question of law or fact” also negates consolidation. 12 O.S. § 2018(C). Indeed, those making the rules for this Court chose to allow consolidation only if the issues are “*identical*,” Oklahoma County R. 9. The questions of law and fact in these nine cases are neither identical nor common enough to satisfy the prerequisite for consolidation. To further facilitate the Court’s comparison of the facts of each case, State Farm has prepared a second chart attached hereto as **EXHIBIT 2**. (See Factual Summary Chart, **EXHIBIT 2**.)

Critically, these cases include not just State Farm, but nine individual agents who had no part in the claim determination for which State Farm is sued. The agents are instead sued under negligent procurement and fraud theories, the outcomes of which will turn entirely on what each Plaintiff said to his or her respective agent and what his or her agent said to each Plaintiff. Indeed,

the agent issues veer entirely into policy issuance and underwriting questions and are not at all about the claim handling for which Plaintiffs pursue institutional discovery from State Farm. Some of the conversations on which the Plaintiffs sue agents occurred close to 20 years ago. Plaintiffs sued these agents because they are resident defendants and thus destroy diversity jurisdiction. Having done that, Counsel cannot simply ignore them when seeking consolidation.

As to the claims against State Farm, the Consolidation Cases involve nine different disputes about whether nine different houses were damaged by nine different weather events and to what degree. All nine have different dates of loss, ranging from October 6, 2019, in *Nida* to October 14, 2021, in *Kelly*, implicating differences in training and claim handling procedures. The nine properties are located across seven towns, nearly half of which are not even in Oklahoma county. As to Plaintiffs' theme that State Farm enforced a scheme for denying hail claims, the hail determinations in *Christy*, *Kelly*, and *Fletcher* were made by third-party inspectors not trained by State Farm or bound by its operational guidelines, and *McDow* involved an external claims resource adjuster who was also not trained by State Farm. In addition to the third-party inspectors, more than 20 different State Farm adjusters were involved, meaning training material produced in one case may not be relevant to another. Further, there were 13 different contractors. *Fletcher* and *Christy* involve rental policies rather than homeowner policies. Because the facts specific to each claim vary, the claim decisions also vary: only one claim was denied; State Farm made payments in four cases; and in three cases, although damage was identified, payments were not made because the estimated cost of repairs fell below the total deductible and depreciation.

Plaintiffs' Counsel's attempt to create the impression of commonality, through cookie-cutter allegations of bad faith and nearly identical, and often inapplicable, discovery requests, does not substitute for the commonality required for consolidation under Oklahoma law and the rules

of this Court. Consequently, State Farm objects to consolidation of discovery in these nine Consolidation Cases, and Plaintiffs' Motion to Consolidate should be denied.

ARGUMENT AND AUTHORITY

A Party Moving for Consolidation Has the Burden of Demonstrating: (1) Consolidation Will Benefit Judicial Economy Without Causing Delay, Undue Expense, Prejudice, Or Confusion; and (2) Sufficient Common Questions of Law or Fact Exist.

Courts, including federal courts interpreting the equivalent Federal Rule 42,³ are uniformly in agreement that a party moving for consolidation has the burden of demonstrating that: (1) consolidation will benefit judicial economy without causing delay, undue expense, prejudice, or confusion; and (2) sufficient common questions of law or fact exist. *See, e.g., Ulibarri v. Novartis Pharms. Corp.*, 303 F.R.D. 402, 404 (D.N.M. 2014) ("The party moving for consolidation bears the burden of proving that consolidation is desirable"); *Blagg v. Line*, 09-CV-0703, 2012 WL 90439, at *1 (N.D. Okla. Jan. 11, 2012) ("The party requesting consolidation bears the burden to show judicial economy is not outweighed by the possibility of delay or prejudice to the opposing party"); *see also* 9A Arthur R. Miller, *Federal Practice and Procedure* § 2383, n. 16 (3d ed. 2023) (compiling cases regarding the burden of proof for consolidation motions).

I. JUDICIAL ECONOMY WILL NOT BE SERVED BY CONSOLIDATION WHICH WILL INSTEAD CREATE DELAY, CONFUSION, AND UNFAIR PREJUDICE TO DEFENDANTS.

The point of consolidation is to create judicial economy if it can be done without delay confusion or undue prejudice to the objecting parties. Thus, even if sufficient common questions

³ The Committee Comment to Section 2018 explicitly confirms the intent to conform Section 2018 to Rule 42: "Subsections C [Consolidation] and D of Section 2018 **are identical to Federal Rule of Civil Procedure 42** except that the reference to the Seventh Amendment has been deleted from subsection D." (emphasis added). As such, Oklahoma courts consistently look to the federal consolidation rules for guidance. *See, e.g., A-Plus Janitorial & Carpet Cleaning v. Employers' Workers' Comp. Ass'n*, 1997 OK 37, ¶ 23, n.42, 936 P.2d 916, 927, n.42 (Relying on federal precedent while affirming that "[t]he terms of 12 O.S. § 2018(C) and (D) are identical to Federal Rule 42, Fed. R. Civ. P.").

of law or fact exist (and here they do not), *the key question is whether consolidation will improve judicial economy, and consolidation should be denied if delay, undue expense, prejudice, or confusion will result.* See, e.g., *Exch. Tr. Co. v. Palmer*, 1933 OK 210, 163 Okla. 33, 20 P.2d 897, 899 (“We believe that wide discretion should be allowed a trial court in the consolidation of actions, but believe that *consolidation is improper where the issues are unduly complicated thereby.* The purpose of consolidation should be to simplify the work of the trial court as far as possible”) (emphasis added); *Barcelo v. Brown*, 78 F.R.D. 531, 536 (D.P.R. 1978) (“The paramount objective of consolidation is the accomplishment of great convenience and economy in the administration of justice”); *State v. One Thousand Two Hundred Sixty-Seven Dollars*, 2006 OK 15, ¶ 15, n. 19. 131 P.3d 116, 122 n. 19 (finding that a court abuses its discretion in consolidating cases if a “substantial right of a party has been prejudiced by the consolidation”) (citing *Appeal of Nat’l Bank of Commerce of Tulsa*, 1957 OK 203, ¶ 13, 316 P.2d 175, 179). Indeed, consolidation of cases “is neither mandatory nor a matter of right.” *One Thousand*, 2006 OK 15, ¶ 15 (citing *Jewell v. Huddleston*, 1961 OK 119, ¶ 26, 362 P.2d 103, 106).

A. Consolidation will not serve judicial efficiency, because the cases are in different procedural postures as a result of Plaintiffs’ Counsel’s delay in seeking consolidation.

Consolidation is especially disfavored where the cases to be consolidated are in different procedural postures. See, e.g., *Servants of Paraclete, Inc. v. Great Am. Ins. Co.*, 866 F. Supp. 1560, 1573 (D.N.M. 1994) (“Federal courts have declined to consolidate cases involving common questions of law or fact where the cases were at different stages of preparedness for trial and where consolidation would delay the case ready for disposition”). As a recent case from a court in the 10th Circuit explained while denying a motion for consolidation:

This matter has progressed for more than two years, discovery is complete or nearly there, and the Court has resolved numerous dispositive motions. On the other hand, Case No. 21-cv-01821 was filed two years later, on July 2, 2021, and only one motion has been filed, a motion to strike affirmative defenses, which has yet to be

resolved. *Given that these matters are in such different procedural postures, the Court finds that judicial efficiency would not be served by consolidation and that consolidation would not result in a more expeditious or efficient resolution of the parties' claims and defenses.*

Overhead Sols., Inc. v. A1 Garage Door Serv., L.L.C., No. 19-CV-01741, 2021 WL 4145999, at *4 (emphasis added).⁴ Moreover, denial of consolidation is particularly appropriate where the party seeking consolidation delayed moving for consolidation. *See, e.g., Watkinson v. Great Atl. & Pac. Tea Co.*, 585 F. Supp. 879, 883 (E.D. Pa. 1984) (denying a motion for consolidation where "Plaintiff offer[ed] no explanation for why he has waited one and one-half years to bring Super Fresh into the present action"); *Petromanagement Corp. v. Acme-Thomas Joint Venture*, 835 F.2d 1329, 1334 (10th Cir. 1988) (denying a motion for consolidation where the motion was raised "more than fifteen months after filing the initial complaint").⁵

Here, each of the Consolidation Cases are in different procedural postures as illustrated in EXHIBIT 1. The oldest, *Nida*, has been filed since November 2020 and the most recent, *Fletcher*, is pending a ruling on motions to dismiss, with no answers on file or discovery requests issued. Although *McDow*, *Sexton*, and *Shira*, have been on file longer than *Kyger*, significantly more discovery has been completed in *Kyger*, because Plaintiffs' Counsel have chosen to advance discovery in the three cases pending before this Court, *Nida*, *Hosier*, and *Kyger*, while only sporadically pursuing the others. As a result, extensive institutional discovery has been requested and objected to in this Court but not pursued in the other cases. However, as to most of the others, each Judge has entered an umbrella protective order under which document production is ongoing

⁴ *See also Ulibarri*, 303 F.R.D. at 404 (denying a motion for consolidation on the grounds that "the *Sage-Allison* case [wa]s in a completely different procedural posture from the cases of *Ulibarri* and *Plotner*").

⁵ *See also* 9A Arthur R. Miller, *Federal Practice and Procedure* § 2383, n. 11 (3d ed. 2023) (compiling cases regarding denial of consolidation motions due to differing procedural postures).

and none have ordered “all native” production as directed by this Court in *Kyger* nor entered and ESI Protocol that governs the discovery and productions in *Hosier*.

These procedural disparities are of Plaintiffs’ making as evidenced by the above choices and the fact that Plaintiffs’ Counsel delayed requesting consolidation for so long. Seven of the cases, *Nida*, *Hosier*, *McDow*, *Sexton*, *Shira*, *Kyger*, and *Christy* have been on file for 39, 32, 20, 17, 16, and 15 months respectively. *Fletcher* is in its early stages but only because Plaintiff first filed it on March 17, 2022, did not serve it and so dismissed it on January 25, 2023, refiled it on March 17, 2023, and then still did not serve it until after the second 180 days to serve expired. Yet, all indicators are that Plaintiffs have intended to attempt consolidation for well more than a year because four of the nine cases involve houses, insureds and agents far removed from Oklahoma County and which would be more conveniently and logically pursued in their home county.⁶

Plaintiffs have used that time to create discovery disputes as grounds for consolidation by serving the same discovery across its favored cases and then blaming State Farm for inefficiencies when it employs the Discovery Code to object. (*See Mot. to Consolidate*, p. 12.) The duplicate notices to depose Section Manager Sharon Arnold (who had no direct involvement in any claim) were issued simultaneously in five of their favored cases, some on back-to-back days with as little as 10 days’ notice and no advance effort at agreement on dates. This was not a legitimate request for discovery. It was designed to inflict maximum inconvenience on State Farm and Ms. Arnold, to create the precise duplicative motion practice that it evoked, and to create the illusion that consolidation was necessary. If Plaintiffs’ Counsel’s concerns for judicial economy and efficiency

⁶ *Sexton* relates to an insured, a house, and an insurance agent located in Woodward County, more than 100 miles northwest of Oklahoma City. *Shira*, *Christy*, and *Fletcher* relate to insureds, houses, and insurance agents located in Rogers, Tulsa, and Creek Counties, more than 100 miles northeast of Oklahoma City.

were sincere, they would have deposed Ms. Arnold once in a single case to investigate whether she was in fact a managing agent as alleged and whether her testimony supported their institutional theories against State Farm, creating a factual record to present courts to consider whether her deposition should be taken or shared in other cases.

These stratagems of selective advancement and delay should not now be used as a ground for consolidation. Consolidation at this stage would require this Court to undertake a lengthy process of addressing the inconsistencies and unique procedural aspects of each case and reconcile each one of them for consolidation that effectively may reverse the Courts' pre-consolidation discovery orders, and upend work by both parties and the Courts in other cases. Further, as to cases like *Nida*, *Hosier*, and *Kyger*, where the institutional discovery topics are well advanced, inserting the cases where Plaintiffs have delayed strategically would only slow resolution of those cases, in the face of a frequent argument by Plaintiff to this Court that State Farm's discovery delays are prejudicing resolution of their clients' roof claims. That argument is alone negated by the record showing how long these attempted consolidated cases have been on file without advancement and how long Plaintiffs' waited to serve them. Taking them at their word that what they want is swift resolution for their clients, consolidating nine different cases is not the way to achieve it. Setting discovery deadlines and a concrete trial date for each case would more effectively accomplish the goal of efficiency. It also creates unfair prejudice for the agent Defendants and State Farm as expanded upon below. As such, consolidation will raise more issues and will not serve the goal of judicial efficiency or result in a more expeditious disposition of the Consolidation Cases.

B. Confusion resulting from consolidation will prejudice Defendants, particularly the agents, where critical facts are not shared among the Consolidation Cases.

There is a great risk of confusion, whether in discovery or at trial, when evidence is not commonly relevant to *all* the actions. See, e.g., *Flintkote Co. v. Allis-Chalmers Corp.*, 73 F.R.D.

463, 465 (S.D.N.Y. 1977) (“[T]he possible prejudice to defendant due to the likelihood of confusion” generated by conflation of evidence “outweighs the benefit of any possible convenience or economy to be obtained from consolidation.”); *see also Thomas v. E-Z Mart Stores, Inc.*, 2004 OK 82, ¶ 26, 102 P.3d 133, 140 (emphasizing the potential for confusion in simultaneously addressing liability arising from a non-delegable duty and liability of a third party). Plaintiffs’ Counsel already tend to conflate both the bad faith issues in one case with the bad faith issues in every other case, and the bad faith theories against State Farm with negligence theories against the defendant agents. The unfair prejudice resulting from confusion is why consolidation is not permitted in cases that do not involve common questions of law and fact.

For State Farm’s fact witnesses who were involved in the subject claims, consolidation increases the likelihood they will be examined about training materials, claim handling manuals, facts of loss, or claims decisions that have nothing to do with claims they handled, lengthening the depositions and the cases. The prejudice from these tactics is not hypothetical. Plaintiffs’ Counsel already employ these strategies with documents they have obtained from other cases. By blurring the lines between each case, even in discovery, consolidation creates the appearance that the reasons for each Plaintiffs’ dissatisfaction with the handling of their own claim is somehow related to the others. Not only is this factually incorrect, but as a matter of due process, State Farm and each of the nine agent Defendants must have the cases against them decided on their own merits without the confusion created by Plaintiffs’ efforts to unite their distinct claims in a common suit. This is precisely the mandate of the Oklahoma Supreme Court which has held repeatedly that the determination of whether an insurer has violated the duty of good faith and fair dealing is highly particularized and based on the facts and circumstances of each unique claim. *See, e.g., Badillo v. Mid Century Ins. Co.*, 2005 OK 48, ¶ 25, 121 P.3d 1080, 1093.

C. Consolidation will result in more burdensome and less efficient and discovery.

First, consolidation creates a risk that the Court will permit a much broader scope of institutional discovery under a consolidated discovery scheme than would have been permitted if the discovery needs of each case were decided on their own merits. Plaintiffs suggest lack of consolidation will result in inconsistent rulings with respect to their use of identical institutional discovery requests. Just because Plaintiffs' Counsel recycles the same discovery request in every case, irrespective of the differences from one claim to the next, does not mean any and all institutional discovery is relevant or proportional to the needs of each and every case. *See* 12 O.S. § 3226(B)(1)(a). When the facts and circumstances at issue in each case vary, as they do in the Consolidation Cases, the courts' discovery decisions with respect to relevance and proportionality, and whether to allow or prohibit discovery, should also vary. However, if these cases are consolidated, it suggests proportionality should be determined, not based on the facts nor needs of the individual case as it should be, but based on the exaggerated weight of the consolidated claims. Presumably, that is Plaintiffs' Counsel's goal in seeking consolidation, in which case discovery would not be more efficient, only broader and more burdensome to Defendants.

Second, Consolidation also creates undue burden on witnesses preparing for depositions. Even without consolidation, State Farm knows from experience that Plaintiffs' Counsel frequently question its witnesses regarding documents or testimony irrelevant to the insurance claim to which the witness is testifying with the goal of using out of context testimony to benefit one of their many other cases against State Farm. Consolidation seemingly validates this dubious strategy and forces corporate representatives and fact witnesses to prepare to testify to fact patterns in nine cases which very likely have no applicability in the case in which he/she is actually a witness.

For example, a corporate witness testifying to training of claims personnel would be required to prepare for questions about different training undergone by the more than 20 different

claims personnel involved in the Consolidation Cases, whose training will differ based on their respective dates of employment and the date of loss for the claim at issue. Similarly, a corporate witness testifying to claim handling procedures will have to prepare to testify to claim procedures in effect ranging from October 6, 2019, in *Nida*, to October 14, 2021, in *Kelly*. Training and procedures change, and each case should be examined based on those in effect during the timeframe at issue in each case and for example training made available in October 2021 may be relevant to *Kelly* but has not relevance to the *Nida* claim.

Consolidation will make it nine times more challenging for a corporate representative to testify on topics related to nine separate insurance claims spanning a period of more than two years. Even with exhaustive preparation, attempting to meet those expansive demands is near impossible and certain to lead to more discovery disputes.

II. THE CONSOLIDATION CASES ARE NEITHER COMMON IN FACTS NOR LAW.

Consolidation of cases that do not involve “a common question of law or fact,” 12 O.S. § 2018(C), is *statutorily impermissible*. *One Thousand*, 2006 OK 15, ¶ 15 (“The terms of [Section] 2018(C) provide for consolidation of pending actions that **deal with common questions of law or fact.**”) (emphasis in original). Local Rule 9 provides stricter language restricting consolidation to “cases involving *identical* issues[.]” Oklahoma County R. 9. Only if a court finds that the prerequisite commonality exists does the court “ha[ve] broad discretion in performing its task of orderly processing of litigation to allow (or to refuse) consolidation of proceedings for trial and disposition.” *One Thousand*, 2006 OK 15, ¶ 15, 131 P.3d at 122.⁷

⁷ See also *Thomas*, 2004 OK 82, ¶ 26 (“A trial court has broad discretion in consolidating proceedings . . . *when they involve common questions of law or fact*”) (emphasis added). Contrary to Plaintiffs’ arguments that the Court’s discretion is “full,” judicial discretion is not unbounded and a finding of common issues of law, common issues of fact, or both, is a necessary prerequisite for exercise of that discretion. See generally 8 James W. Moore, *Moore's Federal Practice - Civil*

As abundant case law demonstrates, “common questions of fact or law” require more than a joint defendant and similar types of allegations. *See, e.g., Servants of Paraclete*, 866 F. Supp. at 1572 (denying a motion for consolidation where the actions involved “several separate factual issues, parties, and legal questions”); *Flintkote*, 73 F.R.D. at 465 (denying a motion for consolidation and holding that “the mere fact that two cases assert similar theories of recovery does not constitute a common question of law so as to warrant consolidation”). In most situations a **common transaction** involving the same individuals is necessary. *See, e.g., Redcorn, Jr. v. Knox*, 2014 OK CIV APP 109, ¶ 19, 345 P.3d 392, 397 (finding that consolidation was not an abuse of discretion where “[t]he cases involve two transactions involving the same individuals and a common core of alleged facts and law”).⁸ Even a common transaction may be insufficient if there are only common facts, not common **questions** of fact. *See, e.g., Constr. Res. Corp. v. Cts., Ltd.*, 1979 OK CIV APP 1, ¶ 18, 591 P.2d 335, 339 (“In all cases where the transaction is the same there will be peripheral facts in common. If that is all that is required, we do not need the added language. Notably, the statute requires ‘common Questions of fact.’ Where the common facts are not common questions, joinder under [the predecessor statute] is not permitted”).

A. The Consolidation Cases lack commonality in questions of law.

Critically, Plaintiffs’ Counsel chose to sue a different agent in each case, each of whom are Oklahoma residents and thus who destroy diversity jurisdiction. Plaintiffs’ ***assert disparate negligence and fraud theories against nine separate agent Defendants arising from nine***

§ 42.10 (2023) (“It is an abuse of discretion to consolidate two actions that contain no common issues of law or fact, and the only common factual thread running through such actions is the fact that the same person is the defendant in both the actions.”)

⁸ *See also Puckett v. Cook*, 1978 OK 108, ¶¶ 5–6, 18, 586 P.2d 721, 722–23 (finding that consolidation was not an abuse of discretion where the two cases under consideration involved a husband and wife who filed separate cases for injuries resulting from the same bus accident and were represented by the same attorneys and planned to use the same medical witnesses).

different relationships with nine different insureds. These are entirely separate theories of recovery from the breach of contract and bad faith theories alleged against State Farm with respect to its performance of its non-delegable duties under an insurance contract. Indeed, the legal issues in the actions against the agent Defendants are so distinct from those involved in the actions against State Farm arising from its non-delegable duties, (*see e.g. See Trinity Baptist Church v. Brotherhood Mut. Baptist Ins. Servs., LLC*, 2014 OK 106, ¶ 29, 341 P.3d 75), the agent Defendants should not have been joined in any of the actions against State Farm in the first place. In *Thomas*, for example, the Oklahoma Supreme Court reversed the district court's grant of consolidation on a premises liability claim against a store owner, arising from the plaintiff's slip-and-fall on a mat in the store, with a contributory negligence claim for indemnity against the third-party supplier of the mat. *See Thomas*, 2004 OK 82, ¶¶ 2–4. The Court explained that the claims should be decided separately because the premises liability claim was based upon the store owner's non-delegable duty to the plaintiff, while the negligence claim against the supplier was based upon a separate duty arising on a contract of indemnity. *Id.* at ¶¶ 10–11, 15, 26.

Even if the Consolidation Cases only involved breach of contract and bad faith theories of recovery against State Farm, consolidation would still be improper. Contrary to Plaintiffs' argument, these common theories of recovery do not constitute common questions of law for purposes of consolidation. *See Flintkote Co.*, 73 F.R.D. at 464–65 (“the mere fact that two cases assert similar theories of recovery does not constitute a common question of law so as to warrant consolidation”). Under Plaintiffs' theory, any case against a specific insurance carrier alleging a policy breach or bad faith would be subject to consolidation. As evidenced by the Oklahoma appellate cases, something more is required.

The claims against the agents create questions of law about their alleged duties as insurance agents based on nine separate agent-client relationships, to which State Farm was not a party, based on acts that occurred when the agents first procured or renewed insurance policies. The claims

against State Farm creates questions of law about State Farm's non-delegable duties under insurance contracts, to which agents are not parties, based on actions that occurred during the separate evaluations of each of the nine claims. Thus, requisite commonality of law does not exist.

B. Common theories of recovery do not constitute common questions of fact.

The factual difference between the claims against State Farm, between the claims against the different agents, and between the claims against State Farm and the agents are set forth more fully below. But, given the heavy reliance of Plaintiffs on the notion that State Farm has argued and conceded that these cases are the same because of Plaintiffs' Counsel's strategic use cookie-cutter petitions and identical discovery requests, State Farm first shows the court that Plaintiffs cannot create common questions of fact by alleging common theories of recovery.

In *One Thousand*, the Oklahoma Supreme Court affirmed the district court's refusal to consolidate two cases pursuant to Section 2018(C) because the occurrences involved in the cases, while strikingly similar and between identical parties, were distinct—"two separate claims to money which arose out of discrete events." 2006 OK 15, ¶ 16; *accord Cities Serv. Co. v. Gulf Oil Corp.*, 1990 OK CIV APP 19, ¶ 12, 797 P.2d 1009 (holding actions that "do not arise from the *same transaction or occurrence* . . . are not properly joined" in rejecting joinder of action brought by plaintiff company against defendant company for termination of merger agreement and action brought by plaintiff company's shareholders against same defendant corporation for breach of tender offer and fraud since plaintiffs "are claiming under *different agreements, entered into at different times and between different parties* upon different terms and conditions."). In *One Thousand*, a claimant sought consolidation of two forfeiture actions in which he sought release of money seized by the State upon his arrest, with another forfeiture action in which he sought release of money seized by the State in a separate arrest. 2006 OK 15, ¶ 4. "In the orderly processing of this litigation the trial court limited itself here to the case before it." *Id.* at ¶ 16. In rejecting the

proposition that the district court erred in refusing to consolidate the actions, the Oklahoma Supreme Court reasoned that “[t]here is here absolutely no showing of some predominant equitable consideration that demands a joint trial of the two separate claims to money which arose out of discrete events.” *Id.*⁹

Similarly, the court in *Flintkote* declined to consolidate actions asserting the same theory of recovery, breach of contract, against the same defendant arising out of two different contracts for the design and installation of two different cement plants. The court rejected the plaintiff’s contention “that there are common questions of fact” based upon the defendant’s use of “a common process and technology.” 73 F.R.D. 463, 465. It is “the factual issues as framed by the complaint and subsequent proceedings” that are determinative of the issue of consolidation. *Id.* The court found “there is practically no overlap” in this regard as to the cases sought to be consolidated. *Id.* Here, Plaintiffs conflate common allegations with common facts. If common allegations and discovery requests were the standard, nearly every first-party insurance bad faith lawsuit could be subject to consolidation.

State Farm’s arguments about Plaintiffs’ Counsel’s use of cookie-cutter petitions as a basis for removal *is precisely the opposite of what Plaintiffs’ Counsel tell this Court*. State Farm has consistently argued that it is not believable that every agent sued by Plaintiffs’ Counsel made precisely the same oral misrepresentation using the exact same words to every insured represented by Plaintiffs’ Counsel as they allege in every petition they file. To plead as such is evidence of fraudulent joinder as was recognized by Judge Heaton in the Western District in denying remand

⁹ See also *Jewell*, 1961 OK 119, ¶ 26 (affirming district court’s decision not to consolidate different actions arising out of different claims brought against same defendant).

in three of these many cookie-cutter cases alleging fraud against the agents.¹⁰ Nonetheless, Plaintiffs' counsel continue to allege that State Farm and the agent's objections to these parroted allegations of oral misrepresentations by the agents is a concession to their uniformity when the truth is precisely the opposite. The need to resort to such pretense suggests the absence of a good faith argument for consolidation.

C. The Consolidation Cases lack commonality in questions of fact.

Even if Plaintiffs' allegations were based in fact, EXHIBIT 2 demonstrates that the Consolidation Cases involve different agents, different insurance policies, different properties, different roofing materials and appurtenances, different dates of loss, different types of damage, different claim handlers, different claim investigations, and different claim decisions.

That the cases sought to be consolidated involve claims against both State Farm and the agent Defendants alone negates the factual commonality necessary for consolidation. The negligence and fraud claims against the agent Defendants arise out of nine different agent-client

¹⁰ The Honorable Joe Heaton found the list of false representations contained in Plaintiffs' Counsel's "cookie cutter" petitions were lengthy and constituted actual fraud in the pleading of jurisdictional facts. (See *Baltasar* Order at pp. 3-4, EXHIBIT 3) (declining to "play plaintiff's—more accurately plaintiff's counsels'—game" and finding that, "[p]lainly, many of the central allegations here as to [the agent] not only lack evidentiary support—they are simply false." "In other circumstances, the court might pursue sanctions against plaintiff's counsel based on the false representations involved."); (See *Goebel* Order at p. 5, EXHIBIT 4) ("[T]here are multiple allegations in the petition which are simply false" that cannot adequately be explained away, given "the nature and extent of the false allegations here, particularly when viewed against the backdrop of the same formulaic, cookie-cutter allegations used in this and dozens of other similar cases."); (See *Marino* Order at p. 2, EXHIBIT 5) ("[T]he use of substantially identical, cookie-cutter allegations as to the claimed role of local State Farm agents, included in petitions filed in dozens of cases by the same group of lawyers, at the very least raises substantial questions as to whether a good faith basis exists for claims asserted here against the non-diverse agent."). The Honorable Patrick Wyrick similarly concluded their agent allegations had "no basis in fact." (See *Steinkamp* Order, p. 8, fn. 23, EXHIBIT 6.) Even where the Honorable David Russell granted their motion to remand, he still noted his "discomfort with these nearly identical allegations." (See *Shira* Order at p. 3, fn. 2, EXHIBIT 7.)

relationships each constituting a separate transaction related to procuring and renewing insurance for each of the nine houses at issue years apart. The focus of these factual inquiries will be the oral and written communications each of the 13 Plaintiffs had with their respective agents, some of which occurred close to 20 years ago. The factual issues involved in *Sexton* to determine whether Kevin Cansler's agency in Woodward is liable to Tonya Sexton for negligence and/or fraud with regard to insurance first issued in February 2002 are entirely different from the factual issues involved in *Kyger* to determine whether Chuck Davis's agency in Oklahoma City is liable to the Kygers in procuring insurance on their behalf in November 2018, and so it goes for the seven other unique agent-client relationships at issue.

And there is, if possible, even less factual commonality as to the claims against the agents and State Farm. State Farm is sued for breach of contract and bad faith for claim decisions in which the agents had no involvement and no control. The agents are not sued, and cannot be liable for, State Farm's claim decisions. Instead, the agents are sued for alleged statements and actions occurring years earlier based on individual conversations with individual plaintiffs and claims that the agent made misrepresentations about the condition of the house and failed to acquire the right policy. This is an entirely different lawsuit.

Even if the Plaintiffs in the Consolidations Cases had only sued State Farm, the rule that cases may not be consolidated absent commonality of fact is not set aside even when the only defendant is an insurance company. A bad faith cause of action is inherently dependent upon the specific factual circumstances of each case. A prima facie element of this theory, which must be proven by the plaintiff, is that the actions of the insurer "were unreasonable *under the circumstances*[" *Badillo*, 2005 OK 48, ¶ 25 (emphasis added); see, e.g., *Duensing v. State Farm Fire & Cas. Co.*, 2006 OK CIV APP 15, ¶¶ 39, 41, 131 P.3d 127, 138 (noting elemental requirement that insurer's "refusal to pay the claim in full" be "unreasonable under the

circumstances" in finding "[t]he facts in this case demonstrate only that Insurer's conduct in withholding payment of the claim was reasonable."). The reasonableness of State Farm's conduct must be judged by the factual circumstances unique to each property, each weather event, each item of damage, each repair estimate, each claim investigation, and each claim decision.

Courts have declined to consolidate cases brought against an insurer by policyholders asserting denial of claims for benefits under a common line of insurance, on the ground the claims involve different facts. In *Holiday v. Progressive Ins. Co.*, for example, the court refused to consolidate cases brought by multiple insureds against the same insurance company defendant for breach of contract and bad faith in denying claims for personal injury protection benefits, because the cases "arose from different factual circumstances." 2:21-CV-173, 2021 WL 1753570, at *2 (D. Utah May 4, 2021). "[T]he matters involve two separate insurance policies and two separate car accidents," thus the plaintiff "has not demonstrated that common facts and law predominate." *Id.*

As **EXHIBIT 2** demonstrates, the surrounding facts and circumstances involved in the claims against State Farm vary far more than Plaintiffs' summary would lead the Court to believe. None of the cases involve the same weather event. There are nine different losses ranging from October 6, 2019, in *Nida* to October 14, 2021, in *Kelly*, implicating differences in claim handling procedures. The nine properties are located across seven different cities or towns, including as far away from this venue as Woodward, Collinsville, Bristow, and Bixby. While most of the policies are Homeowner policies, *Kelly* and *Fletcher* involve Rental Dwelling policies. There are 13 different roofing contractors. Only one case, *Christy*, involves two engineering firms retained by the Plaintiff and State Farm respectively. Only one case, *Nida*, involves participation of a public adjuster. The currently known contractual damages alleged vary from \$8,670.22 in *Kelly* to \$158,519.45 in *Nida*. There are about 20 different adjusters involved in handling the nine claims, and the background, experience, and training undergone will vary for each of them. That is

especially true for the cases that involved external adjusters, *McDow*, *Christy*, *Kelly*, and *Fletcher*, to whom State Farm's training and guidelines have little relevancy, if any. *Nida* involves a clay tile roof, which has entirely different criteria for hail damage determination than the others. The age and condition of the roofs range from 3 years to 30 years, which changes the determinations with respect to attributing damage to wear and tear. Three cases involve interior damage, *McDow*, *Sexton*, and *Kelly*. The cases also vary as to claims handling outcome: only *Nida* was denied entirely; in *Hosier*, *Sexton*, *Shira*, and *Kyger*, State Farm estimated for hail damage, but no payments were made once depreciation and deductibles were applied; State Farm made payments in *McDow*, *Christy*, and *Kelly*.

Because a cause of action for bad faith is inherently case-specific as set forth in *Badillo*, the Consolidation Cases do not involve common questions of fact. Plaintiffs' argument that their cases are united by State Farm's common process for denying hail claims, is no different than the argument rejected in *Flintkote*. Their argument that the cases are united by State Farm's denial of claims under a common line of insurance is the same argument rejected in *Holiday*. Their argument that they claim money from the same Defendant is the same argument rejected in *One Thousand*. There is no basis for the Court to accept these failed arguments here where the differences in the Consolidation Cases are even greater than the differences that resulted in the rejection of consolidation in *One Thousand*, *Flintkote*, and *Holiday*.

Plaintiffs' Counsel argue consolidation will aid their investigation into State Farm's alleged "institutional misconduct and its agency force[.]" (Plfts.' Mot. to Consolidate, p. 4.) For years, Plaintiffs' Counsel have vigorously pursued discovery across many cases, several not at issue here, in an effort to identify factual support for their institutional allegations. This Court is familiar with three active examples, *Nida*, *Hosier*, and *Kyger*, where extensive motions, hearings, corporate representative depositions, document production, and metadata discovery have taken place to

facilitate Plaintiffs' Counsel's investigation. Nonetheless, when required to show the Court that these nine cases have a common question of fact justifying consolidation, Plaintiff's Counsel refer only to the allegations in their petitions and facts unique to each of the nine insurance claims. It is telling that **Plaintiffs' Counsel have not cited a single piece of evidence discovered during the wealth of institutional discovery they have obtained in these cases to support their theory that these nine cases are united by a common institutional scheme.** The Court should infer that, despite the depth of discovery in those cases, Plaintiff's Counsel have not uncovered evidence of the institutional misconduct and agency force they allege. The vast majority of admissible evidence necessary to prove Plaintiffs' causes of action will be case-specific, and it follows that the vast majority of discovery should be equally case-specific.

As such, the cases Plaintiffs' Counsel seek to consolidate plainly do not involve "common question of law or fact" necessary for consolidation under Section 2018(C), let alone "identical issues" necessary for consolidation in this Court pursuant to Rule 9. For this reason, consolidation is prohibited and the Motion should be denied.

CONCLUSION

For the reasons outlined above, Defendants respectfully request that the Court deny the motion for reassignment and consolidation.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "L. Leffel", written over a horizontal line.

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CERTIFICATE OF MAILING

I do hereby certify that on the 16th day of January 2024, a true, correct, and exact copy of the above and foregoing document was served by placing same in the United States mail, with proper postage thereon duly prepaid, to those parties as listed below:

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