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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

United States of America, States of California, Washington, Arizona, and Utah *ex rel.* John Orten, Plaintiffs, v. North American Health Care Inc., John Sorensen, Defendants.	Case No. 14-CV-02401 WHO **STATEMENT OF INTEREST BY THE UNITED STATES**

Relator John Orten filed a *qui tam* action pursuant to the Federal False Claims Act, 31 U.S.C. §§ 3729-33, against Defendants North American Health Care (NAHC) and John Sorensen, the Chief

Executive Officer of NAHC. Pursuant to 31 U.S.C. § 3730(b)(4)(B), the United States declined to intervene in the action. Defendant John Sorensen filed a motion to dismiss on July 17, 2015. Docket No. 55.

Although the United States has not intervened in this case and is not a formal party, it remains the real party in interest. *United States ex rel. Eisenstein v. City of New York, New York*, 556 U.S. 928, 930 (2009). The False Claims Act is the United States' primary tool used to redress fraud on the government. As such, the statute should be read broadly to reach all fraudulent attempts to cause the government to pay out sums of money. *United States v. Neifert-White*, 390 U.S. 228, 233 (1968). Thus, the United States has a keen interest in the development of the law in this area and in the correct application of the law in this, and similar, cases. Accordingly, pursuant to 28 U.S.C. § 517,[1] the United States respectfully submits this Statement of Interest concerning an issue relating to Defendant Sorenson's Motion to Dismiss.

Specifically, in his response to Sorenson's motion, relator Orten noted in a footnote that "Sorenson does not appear to address the upcoding and unnecessary treatment allegations," citing to paragraphs 3 and 26-27 of his Second Amended Complaint (SAC). Docket No. 63, n. 1. In his reply, Sorensen noted that the SAC does not identify the "'upcoding and unnecessary treatment allegations'" as a bases for any of Relator's claims." Docket No. 65 at 10. Even if the SAC does identify such a basis for the False Claims Act claim, he argues, the "upcoding" allegations fail to state a claim against Sorenson and are subject to the False Claims Act's public disclosure bar. *Id*. To the extent relator's SAC can be read to allege a distinct claim that defendants Sorenson and North American Health Care (NAHC) overbill the government by upcoding unnecessary rehabilitation therapy services, the United States agrees that such a claim is subject to the False Claims Act's public disclosure bar and should be dismissed. The United States takes no position on the other issues and arguments raised in Defendant's motion, or on the overall merits of the motion.

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[1] This provision authorizes the Attorney General of the United States to attend to the interests of the United States in any action in federal or state court.

BACKGROUND

From 2007 through 2011, relator John Orten was an administrator of Ramona Nursing and Rehabilitation Center (Ramona), a NAHC operated nursing home located in El Monte, California. SAC, ¶ 14.

On March 29, 2010, the Washington Post reported on NAHC's alleged Medicare overbilling. *See* "Review heightens concerns over Medicare billing at nursing homes," Washington Post, March 29, 2010 (attached as Exhibit 1 to Declaration of Jonathan Madore in Support of Statement of Interest by United States ("Madore Decl."). The article asserted that NAHC billed Medicare excessively for rehabilitation therapy services at the highest Resource Utilization Group (RUG) levels and that the U.S. Department of Health and Human Services, Office of the Inspector General (HHS-OIG), was investigating NAHC's actions. Relator received a copy of the article while employed at NAHC. *See* John Orten email dated April 7, 2010 (attached as Exhibit 2 to Madore Decl.).

In December 2011, NAHC transferred relator to another facility located in Utah. SAC, ¶ 43. After his transfer, relator purportedly learned from Ramona employees that NAHC was paying physicians to refer patients to Ramona and to illegally "regenerate," or renew, the Medicare benefit period of existing patients. *See, e.g., Id.* ¶¶ 50-51. He reported these allegations in a submission to the HHS-OIG in November 2012. *Id.* ¶ 60. He also reported that NAHC was providing false information to CMS in order to inflate its Star Quality Rating. NAHC terminated relator's employment in January 2013. *Id.* ¶ 63.

In the November 2012 submission to HHS-OIG, relator stated: "As you are already aware, [NAHC] is already under investigation by the O.I.G. for Medicare billing fraud. This report is not directly related to the current investigation, and represents what I believe to be additional categories of fraud." *See* SAC, Exhibit 19; Madore Decl. ¶ 4. In April 2013, HHS-OIG interviewed relator, in response to his November 2012 submission and the government's ongoing investigation of NAHC. *See* SAC, ¶ 66; Madore Decl. ¶ 4. Relator noted at the interview that he was aware of the government's investigation of Medicare billing fraud, but he did not otherwise provide information to the government regarding overbilling for rehabilitation therapy services or providing medically unnecessary therapy

services. Madore Decl. ¶ 4. *See also* SAC, ¶ 66 ("OIG had been investigating RUG upcoding at NAHC since 2008").

On January 17, 2014, relator filed a *qui tam* complaint against defendants NAHC and Sorensen and filed an amended complaint on March 25, 2014. Relator's original and amended complaint, as did his submission to HHS-OIG, alleged that defendants provided false information to CMS in order to inflate the CMS Star Quality Rating of their facilities and paid physicians for patient referrals and for helping defendants "regenerate," or renew, the Medicare benefit period of existing patients. Relator also alleged retaliation claims and other counts relating to his termination of employment from NAHC.

The government interviewed relator pursuant to his *qui tam* complaint on July 11, 2014. *See* Madore Decl. ¶ 5. During that interview, and despite knowing about the government's existing investigation into NAHC's billing of rehabilitation therapy services at high reimbursement rates, relator provide the government with limited information relating to its ongoing investigation of NAHC's upcoding rehabilitation therapy services. However, none of the information added to what the government already garnered from other sources. *Id*. On October 16, 2014, relator filed his SAC, adding the upcoding information he relayed at the interview and alleging that NAHC maximizes Medicare reimbursement rates and provides medically unnecessary services.

The government declined to intervene in relator's *qui tam* suit on April 14, 2015.

DISCUSSION

To the extent relator's SAC alleges a distinct claim that NAHC overbills the government for unnecessary rehabilitation therapy services, the United States agrees with defendant Sorenson that the claim is subject to the False Claims Act's public disclosure bar, 31 U.S.C. § 3730(e)(4), and should be dismissed.[2]

In March 2010, the Patient Protection and Affordable Care Act ("PPACA") amended Section

[2] Any claim that is dismissed pursuant to Sorenson's motion should be without prejudice as to the United States. The United States is not subject to the public disclosure bar. The United States also did not prepare relator's complaints and should not be prejudiced if relator has failed to meet the requirements of Federal Rule of Civil Procedure 9(b) or 12(b)(6). The United States should not be precluded from bringing a future civil action based on new or different evidence.

3730(e)(4). Because the amendment made no mention of retroactivity, the conduct alleged in relator's complaint should be "assessed under the law that existed when the conduct took place." *Hughes Aircraf. Co. v. United States ex rel. Schumet*, 520 U.S. 939, 946 (1997) (internal quotation marks omitted). Relator's SAC does not specify the time period for his newly added allegations of overbilling the government for unnecessary rehabilitation therapy services. *See* SAC, ¶¶ 26-29. He makes reference to his time at Ramona in these paragraphs; he was at that facility from 2007-2011. To the extent his alleged conduct occurred before March 2010, the prior 1986 version of the FCA's public disclosure bar provided that:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) . . . "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government *before filing an action* under this section which is based on the information.

See 31 U.S.C. § 3730(e)(4) (1986) (emphasis supplied). When the 1986 version of the public disclosure bar applies, his claim should be dismissed under 31 U.S.C. § 3730(e)(4), and for lack of jurisdiction under Fed. R. Civ. P. 12(b)(1). *See, e.g., United States ex rel. Biddle v. Board of Trustees of Leland Stanford, Jr. University*, 161 F.3d 533 (9th Cir. 1998).

A public disclosure of the allegation at issue occurred on March 29, 2010, while relator was employed by NAHC. As noted above, the Washington Post issued a news story on that day relating to NAHC's alleged Medicare overbilling. Madore Decl. ¶ 2. The article asserted that NAHC billed Medicare excessively for rehabilitation therapy services at the highest RUG levels and that the government was investigating NAHC's actions.[3] *Id*. Relator received a copy of the article on April 7,

[3] *See also* Life Care, Carlyle Nursing Homes Focus of Medicare Inquiry, Bloomberg, by Alex Wayne, March 14, 2011 (discussing a list of facilities HHS-OIG identified for possible recovery of Medicare overpayments for the 2006-2008 period for keeping patients longer than necessary and

2010, while employed by NAHC. *Id.* at ¶ 3. In his November 2012 submission to HHS-OIG, relator stated: "As you are already aware, [NAHC] is already under investigation by the O.I.G. for Medicare billing fraud. This report is not directly related to the current investigation, and represents what I believe to be additional categories of fraud." SAC, Exhibit 19. And relator informed the government that he read this article while employed at NAHC and knew that the government was investigating NAHC for excessive Medicare billing. Madore Decl. ¶ 5.[4]

When there is a public disclosure, the case must be dismissed unless the relator is an "original source of the information." 31 U.S.C. § 3730(e)(4)(B). The Ninth Circuit has adopted two requirements for qualification as an original source under the 1986 version of the public disclosure bar: "(1) he must have direct and independent knowledge of the information on which his allegations are based; (2) he must have voluntarily provided that information to the government before filing his lawsuit . . . ." *United States ex rel. Hartpence v. Kinetic Concepts, Inc.*, 792 F.3d 1121, 1127 (9th Cir. 2015) (en banc).[5]

> To show direct knowledge, the relator must show that he had firsthand knowledge of the alleged fraud, and that he obtained this knowledge through his own labor unmediated by anything else. A relator has independent knowledge when he knows about the allegations before that information is publicly disclosed.

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charging for unneeded treatments; NAHC is discussed in the article as being on HHS-OIG's list). The government has been unable to locate this article online.

[4] Another potential public disclosure occurred at this interview, during which the government informed relator of its investigation of NAHC for alleged excessive Medicare billing for rehabilitation therapy services. Madore Decl. ¶ 4. Relator, who was no longer employed by NAHC at that time, was asked about NAHC's overbilling for rehabilitation services, but he did not provide specific information on this subject to the government. *Id. See Seal 1 v. Seal A*, 255 F.3d 1154, 1162 (9th Cir. 2001) (government disclosure of information to an individual during an investigation was considered a public disclosure to that individual where the person sought "to take advantage of the information by filing an FCA action").

[5] This case overruled *Chen-Cheng Wang ex rel. United States v. FMC Corp.*, 975 F.2d 1412 (9th Cir. 1992) to the extent that the court in *Wang* included a third prong to the original source test. *Hartpence*, 792 F.3d 1121, 1128. The third prong in *Wang* stated that a relator "must have had a hand in the public disclosure of allegations that are a part of one's suit." *Id.* at 1127.

United States ex rel. Meyer v. Horizon Health Corp., et al., 565 F.3d 1195, 1202 (9th Cir. 2009) (quotations and citations omitted), *overruled in part by Hartpence*, 792 F.3d 1121 at 129 n.6 (overruling *Meyer* "to the extent that it reaffirmed the test we announced in *Wang*.")

Relator's SAC does not establish that he had any independent knowledge of his allegations prior to the 2010 public disclosure. He also did not provide the information to the government prior to filing his *qui tam* lawsuit. Significantly, despite the government asking about NAHC's billing practices for its rehabilitation therapy services in April 2013, relator did not provide the government with the information he now alleges in his SAC. Madore Decl. ¶ 4. It was not until his relator interview with the government in July 2014 – well over four years after the Washington Post article, more than a year after his April 2013 interview, and seven months after filing his initial complaint – that relator alleged that NAHC was overbilling for unnecessary rehabilitation therapy services for an unspecified time. The government informed relator and his counsel that it was aware of relator's allegations from other sources and had been investigating them, yet relator nevertheless added the publicly disclosed allegations to his SAC. Madore Decl. ¶ 4 and 5. Relator has not provided any new or meaningful information to the government's existing investigation. Madore Decl. ¶ 5.

To the extent the alleged conduct occurred after March 2010, the PPACA amended the public disclosure bar to require that courts "shall" dismiss a *qui tam* action or claim if "substantially the same allegations" were publicly disclosed from the news media, in a federal investigation, or in several other enumerated ways. 31 U.S.C. § 3730(e)(4)(A)(i)-(iii) (2010). As noted above, "substantially the same allegation[]" at issue here was publicly disclosed via the news media and the government's earlier interview of the relator. PPACA amended the "original source" provision in the public disclosure bar to as a person who either prior to a public disclosure has "voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based," or who "has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section." 31 U.S.C. § 3730(e)(4)(B) (2010). Relator does not meet the first prong because he did not disclose information to the government about NAHC's alleged overbilling prior to the public disclosures. The

public disclosures occurred in March 2010 and April 2013; relator did not make any statements about NAHC's use of excessive rehabilitation therapy services until his July 2014 interview after he had filed his action. And, relator does not meet the second prong because, as noted above, he failed to provide the information to the government prior to filing his action. Nor has he shown "knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions." The government has extensively investigated NAHC actions for several years and nothing relator states in his SAC regarding excessive billing for rehabilitation services "materially add[s]" to the publicly disclosed allegations (or the government's investigation). Therefore, relator is not an "original source" under the 2010 amendment of 31 U.S.C. § 3730(e)(4).

In sum, relator's allegations regarding overbilling for rehabilitation services (SAC ¶¶ 26-29) are subject to dismissal under 31 U.S.C. § 3730(e).

Respectfully submitted,

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DATED: October 6, 2015

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