UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION
filed electronically

IN RE: CIVIL INVESTIGATIVE DEMANDS 18-13-EDKY, 18-02-EDKY, and 18-03-EDKY	)	CASE NO._____

Serve: Hon. Carrie B. Pond
Assistant United States Attorney
United States' Attorney's Office
Eastern District of Kentucky
260 W. Vine Street, STE 300
Lexington, KY 40507-1612

PETITION TO SET ASIDE CIVIL INVESTIGATIVE DEMAND

Come Lexington Foot and Ankle Center, PSC ("LFAAC"), and Michael C. Allen, DPM ("Dr. Allen"), (collectively referred to as the "Petitioner"), and in support of their Petition to Set Aside Civil Investigative Demands 18-13, 18-02, and 18-03, state as follows:

This is an action brought pursuant to 31 U.S.C. §3733(j)(2), petitioning this Court to set aside three civil investigative demands, CID 18-13-EDKY, 18-02-EDKY, and 18-03-EDKY (collectively, "the CIDs") issued by the United States Attorney for the Eastern District of Kentucky, as such CIDs were not issued in compliance with federal law.

1. Sometime on or about October 19, 2017, the acting United States Attorney of the Eastern District of Kentucky issued and served Civil Investigative Demand 17-37-EDKY upon Lexington Foot and Ankle Center, PSC c/o Michael C. Allen.

2. CID 17-37-EDKY [EX 1] was comprised of ten separate document demands and thirteen interrogatories. One of the documents requests demanded production of all medical records for entire courses of treatment for three hundred and seventy three (373) separate patients, which covered thousands of dates of service and over ten thousand total procedures.

3. Recognizing that such an extensive demand could not be produced in the requisite twenty days, Counsel for the Petitioners contacted the Assistant United States Attorney who was serving as the designee for the CID and asked why the United States was demanding such a large production, as opposed to seeking a more manageable "probe sample[1]" which, in Counsel's experience, seemed to be the more typical scale of request during the United States' preliminary investigation, and requested that the United States consider scaling back the request to make it more manageable for both production and for review of the records. The United States refused to scale back the demand and specifically refused to consider using a probe sample. The United States did agree, however, to allowing the Petitioners to comply with the CID on a rolling basis and proposed a rolling production schedule, which the Petitioners agreed to.

4. Over the following months, the Petitioners provided seven separate Responses to CID-17-37-EDKY, including supplemental responses. These Responses encompassed 21,299 pages of documents including medical records encompassing over eight thousand procedures provided to the Petitioners' patients, as well as emails, educations and training documents, policy documents, and financial records. The Petitioners also provided Answers, sometimes with

[1] When using a probe sample, a consultant will typically review ten to thirty records to determine whether good cause exists to expand the sample. It acts as a way to more economically review records in an expedient manner.

multiple clarifications and follow-ups, to all of the government's interrogatories. Indeed, the Petitioners were cooperative with the government's investigatory efforts even to the point of answering follow-up interrogatories and document requests without necessitating a new civil investigative demand, when it was apparent that the original requests were not drafted in such a way as to elicit the answer the government was actually trying to achieve.

5. By way of example, the United States' Interrogatory No. 10 sought, "For each year during the relevant time period, identify all money paid by Lexington Foot & Ankle to Michael C. Allen. Please categorize Your responses by salary, bonuses, distributions or owner draws, health care expenses, and other benefits." The Petitioners Answered this Interrogatory in full. The United States' also served a corresponding Document Request No. 10, which demanded "All documents You relied on to support Your answer to Interrogatory 10." The Petitioners responded to this Request, stating that it "utilized entries in its financial software, Quickbooks, as well as information supplied by Michael C. Allen, to ascertain the information necessary to answer Interrogatory 10." In a follow-up telephonic meet-and-confer, Counsel for the Petitioners explained that the Petitioners relied upon multiple sources for its answer to Interrogatory No. 10, and that there were multiple pages of spreadsheets in QuickBooks that were consulted to reach the answer. The United States agreed to furnish a clarifying email to describe what it sought. The United States again asked for "all documents You relied on to support Your answer to Interrogatory 10" and offered as examples a "custom report" from QuickBooks or "bank statements reflecting payments to Dr. All from Lexington Foot & Ankle" or "Lexington Foot & Ankle's and Dr. Allen's tax documents." The Petitioners responded that "LFAAC's and Dr. Allen's 'tax documents' [are] outside the scope of authority for the CID, and Dr. Allen and LFAAC cannot be compelled to produce such documents." The Petitioners also

again responded that they "did not utilize a 'custom report' from QuickBooks in responding to Interrogatory No. 10," nor did they "rely on 'bank statements reflecting payments to Dr. Allen' from LFAAC." Finally, following yet another meet-and-confer, the United States acquiesced that even though their Request demanded documents "relied on to support" the answer to Interrogatory 10, they were actually seeking documents "that otherwise corroborate LFAAC's answer to Interrogatory No. 10." After this clarification was made, the Petitioners provided the documents sought. The Petitioners provided said documents freely and without necessitating a new CID, even though the clarified Request was for items that were actually not responsive to the initial Request that the United State drafted and served upon the Petitioners.

6. At every stage of the government's investigation, the Petitioners remained cooperative and produced over 21,000 pages of records and documents and answered numerous interrogatories and requests for clarification. The government has also conducted numerous interviews of the Petitioners' current and former employees, and representatives at facilities for whom the Petitioners provide services.

7. Given the excessive amount of evidence the United States amassed in its investigation, the Petitioners were surprised to be served with an additional CID on April 4, 2018. This particular demand, CID 18-13-EDKY, [EX. 2] demanded the production of additional medical records for 81 patients, for their entire course of treatment with the Petitioners. Again, each patient could likely possess several dates of service and have received numerous procedures.[2]

[2] Equally surprising to the Petitioners is the fact that the United States chose to serve the CID upon the Petitioners at their office and in front of their patients, despite the fact that the United States was well aware that the Petitioners were represented by counsel and that Counsel had previously indicated that he would accept service of any compulsory documents.

8. What the Petitioners were not initially aware of when served with CID 18-13-EDKY on April 4, 2018, was that the United States' investigation was the result of a qui tam lawsuit alleging violations of the federal False Claims Act ("FCA"), and on February 9, 2018, almost two months *before* serving CID 18-13, the United States had filed a "Notice of the United States that It is Not Intervening at This Time." [EX 3]. The Petitioners became aware of this fact when they were served with a copy of the Relators' Complaint on April 9, 2018.[3]

9. The Relators filed their qui tam litigation, *United States ex. rel. Jeffrey Richardson, DPM and Ramona Brooks, DPM v. Lexington Foot & Ankle Center, PSC, et al.*, EDKY Case No. 5:17-CV-129-DCR, in this District under seal on March 15, 2017. It was during the ensuing months that the United States used civil investigative demands and other investigatory techniques to amass over 21,000 pages of medical records and documents, interrogatory responses and other statements and interviews from both the Petitioners, their current and former employees, as well as other providers and facilities who worked with or have knowledge of, the Petitioners' practice. The United States also retained consultants who reviewed the Petitioners' records and billing. After nearly a year of investigation, the Court refused to grant any additional extensions to the United States for its intervention decision. Despite the extensive investigation, the United States did not feel, as of the intervention decision deadline, that it possessed enough information to make a decision to intervene. Therefore the United States filed its declination notice. The United States did state within its Notice that its investigation was ongoing and reserved the right to intervene at a later time "for good cause."

10. It is uncontroverted that CID 18-13-EDKY was served upon the Petitioners on April 4, 2018, nearly two months *after* the United States tendered its declination notice. Then,

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[3] The Petitioners are filing a Motion to Dismiss that Complaint in that matter, 5:17-CV-129-DCR simultaneous to this Petition.

on April 18, 2018, the United States served the Petitioners with two additional civil investigative demands, CID 18-02-EDKY [EX 4] and CID 18-03-EDKY, [EX 5] both of which seek to compel oral testimony of two of the Petitioners' employees. These two CIDs were issued over nine weeks *after* the declination notice was filed.

11. The United States' ability to issue civil investigative demands is not absolute, and is instead a power limited only to the extent to which they are allowed by Congress. These powers are granted in 31 U.S.C. §3733, which limits when the United States can issue a civil investigative demand, stating:

> "Whenever the Attorney General, or a designee (for the purposes of this section), has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation, the Attorney General, or a designee, may, ***before commencing a civil proceeding under 3730(a) or other false claims law, or making an election under section 3730(b)***, issue in writing and cause to be served upon such person, a civil investigative demand requiring such person-
> (A) to produce such documentary material for inspection and copying,
> (B) to answer in writing written interrogatories with respect to such documentary material or information,
> (C) to give oral testimony concerning such documentary material or information, or
> (D) to furnish any combination of such material, answers, or testimony…

31 U.S.C. §3733(a)(1) [***emphasis added***].

12. The United States, in its "Notice of the United States That It Is Not Intervening At This Time," acknowledged that the Court had set February 12, 2018 as a deadline for the United States' intervention decision. The Court, in its February 12, 2018 Order unsealing the Complaint and other portions of the record, recognized that the United States' February 9, 2018 Notice as being the United States' "election not to intervene pursuant to the False Claims Act, 31 U.S.C. §3730(b)(4)." [EX 6]. As such, CIDs 18-13, 18-2, and 18-03 were clearly issued *after* the United States had "[made] an election under section 3730(b)."

13. Put simply, Congress has not bestowed upon the United States the ability to issue a CID after it has made its intervention decision under 31 U.S.C. §3730(b). This fact has been recognized by sister Circuits. In *Avco Corp. v. U.S. Department of Justice*, 884 F2d 621 (D.C. Cir. 1989), the Court of Appeals for the District of Columbia interpreted 31 U.S.C. §3733's former limitation that CIDs could only issue before the government "commenced an action" under the False Claims law, and acknowledged that "it is evident to anyone reading the statute—that the Attorney General may not employ the power granted by this section after he has commenced a false claims action." *Id.* at 623. The statute at that time did not contain an express limitation in the instance of CIDs issued post-intervention decision, however the D.C. Circuit opined that in such an instance, the CID should be set aside, and in an almost clairvoyant fashion stated "[i]f some future Attorney General should disagree with this interpretation and attempt to issue a CID after intervening…it is not unlikely that we would reject that new interpretation." *Id.* at 624.

14. The fact that the United States has declined intervention and is not currently a party to the action is irrelevant to the interpretation of 31 U.S.C. §3733(a)(1), as it has been recognized that the United States cannot issue a CID after the time limitations set forth in §3733(a)(1), even in instances where the United States is not in active False Claims litigation. *See United States v. Kernan Hospital*, 2012 WL 5879133 (D. Md.) (setting aside a civil investigative demand after FCA claim had been dismissed without prejudice.) Instead, the plain language of the statute makes it clear that the United States no longer possesses the power to issue CIDs after "making an election under section 3730(b)"—an action that occurred on February 9, 2018.

15. The United States cannot state that its declination decision left open the possibility of reserving the right to issue future CIDs by labeling its declination decision with an "at this time" caveat. 31 U.S.C. §3733(a)(1) does not allow for such a distinction, but instead is the codification of Congress' intent that the power to issue CIDs is not to be exercised indefinitely. Instead, §3733(a)(1) clearly extinguishes the government's power to issue CIDs once the United States has made its §3730(b) election. 31 U.S.C. §3730(b)(4) limits the government's intervention decision to two options:

> "Before the expiration of the 60-day period or any extensions…the Government shall-
> (A) proceed with the action, in which case the action shall be conducted by the Government; or
> (B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action."

31 U.S.C. §3730(b)(4). There is no third option, in which the government can skirt its deadlines and investigate the case indefinitely with unfettered powers. In the present case, the United States declined to intervene. The Court recognized this as the government's §3730(b)(4) decision. And now, the Relator is proceeding in conducting the action pursuant to §3730(b)(4)(B). The §3730(b) election has been made.

16. The United States did not have the authority under 31 U.S.C. §3733 to issue CIDs 18-13, 18-02, and 18-03 when those CIDs were issued, as the United States had already made its §3730(b) election. As such those CIDs, and any other CIDs the United States has issued involving this matter after February 9, 2018 must be set aside.

WHEREFORE, the Petitioners pray for the following relief:

A. That CID 18-13-EDKY, CID 18-02-EDKY, and CID 18-03-EDKY be set aside;

B. That any additional CIDs issued to any third parties after February 9, 2018 be identified and set aside;

C. That the Court enter an order declaring that the United States is precluded from issuing additional CIDs in the matter involving the Petitioners, specifically those matters involved in *United States ex. rel. Jeffrey Richardson, DPM and Ramona Brooks, DPM v. Lexington Foot & Ankle Center, PSC, et al.*, EDKY Case No. 5:17-CV-129-DCR;

D. That the Court enter judgment awarding the Petitioners all further legal, equitable and other relief to which they may appear to be entitled.

Respectfully submitted,

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