UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROBERT P. KANE,
By and on Behalf of the United States of America,
Relator,

State of New York, *ex rel.*
Robert P. Kane, Relator,

State of New Jersey, *ex rel.*
Robert P. Kane, Relator,

vs.

HEALTHFIRST, INC., *et al.*,

Defendants.

Civil Action No. 11-2325 (ER)

ECF CASE

UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

vs.

CONTINUUM HEALTH PARTNERS, INC.; BETH ISRAEL MEDICAL CENTER d/b/a MOUNT SINAI BETH ISRAEL; and ST. LUKE'S-ROOSEVELT HOSPITAL CENTER d/b/a MOUNT SINAI ST. LUKE'S and MOUNT SINAI ROOSEVELT,

Defendants.

REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT IN INTERVENTION OF THE UNITED STATES OF AMERICA

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PRELIMINARY STATEMENT

The Government's response to Defendants' Motion to Dismiss relies entirely on Robert Kane's cryptic February 4, 2011 email that attached a list of 900 claims that, as the Complaint notes (¶ 7), "may have been wrongly submitted to and paid by Medicaid" as a result of a third-party computer glitch. Kane's email did not suggest that he had identified the overpaid claims in the e-mail. Indeed, as the Government admits, it turned out that approximately half of the claims on the list attached to Kane's email (which Kane himself described as preliminary), were not submitted to or paid by Medicaid. And there is no allegation that, when Kane sent his email, Defendants knew which, if any, of the claims on his list were overpaid. These allegations are not sufficient to establish that Defendants violated the False Claims Act (the "FCA") by knowingly and improperly avoiding an obligation to pay or transmit money to the federal Government.

Under the plain language of the FCA, only an "established duty" can be an "obligation" to the Government. Knowledge of a *potential* overpayment does not create an "established duty". Rather, the Affordable Care Act ("ACA") provides that an overpayment from a federal health care program creates an obligation if it is not reported and returned within 60 days of the date it is "identified".

The Government's argument that as a matter of public policy the term "identified" should be interpreted to mean "could have been known with 'reasonable diligence'" (U.S. Br. 18) cannot override the language of the statute, as supported by the legislative history, which makes it clear that actual knowledge of an overpayment is required to trigger the 60-day clock to report and return the overpayment. There are other statutory and regulatory requirements regarding the need for robust compliance programs that preclude providers from ignoring *potential* overpayments. However, these requirements must not be confused with the ACA requirement

that money actually "identified" as overpaid be promptly returned. They are different rules for different circumstances.

The Government's remaining arguments against dismissal also fail, as discussed in detail below.

ARGUMENT

I.
THE COMPLAINT FAILS TO ALLEGE THAT DEFENDANTS HAD AN "OBLIGATION"

A. Notice of a Mere *Potential* Overpayment Does Not Create an Established Duty

Pursuant to 31 U.S.C. § 3729(a)(1)(G), it is a violation of the FCA to knowingly conceal or to knowingly and improperly avoid or decrease an "obligation" to pay or transmit money or property to the Government. By definition, only an "established duty" to pay can be an "obligation". *See* 31 U.S.C. § 3729(b)(3). Kane's cryptic email and an attached schedule of payments, which Kane described as a preliminary list of *potential* overpayments, did not create an "established duty", and thus did not create an "obligation" to make a refund. Indeed, the Government admits the tentative nature of Kane's list when it refers to it as a list of claims that "may have been wrongly submitted to and paid by Medicaid" (Cmplt. ¶7) and characterizes the list as one of "affected claims", not of overpayments (Cmplt. ¶8).

To support its assertion that Kane's email created an "obligation", the Government erroneously and misleadingly cites to a discussion in a Senate Report of an earlier version of the bill that became the Fraud Enforcement and Recovery Act of 2009 ("FERA"). (U.S. Br. at 22-24) (*citing* S. Rep. 111-10, at 23 (Mar. 23, 2009)). The bill discussed in the report was later amended to narrow the definition of an "obligation". *See* S. 386, 111th Cong. (as introduced by the Senate Apr. 28, 2009). When the Senate Report was issued, the bill defined an obligation as

"a fixed duty, *or a contingent duty* arising from an express or implied contractual, quasi-contractual, grantor-grantee, licensor-licensee, statutory, fee-based, or similar relationship, and the retention of an overpayment." *See* S. Rep. 111-10, at 23 (Mar. 23, 2009) (emphasis added). The amendment changed the definition to provide: "the term obligation means *an established duty*, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of an overpayment". *See* S. 386, 111th Cong. (as introduced by the Senate Apr. 28, 2009) (emphasis added). Thus, the amendment eliminated contingent duties from the definition of an obligation, and specifically narrowed the definition to include only "established dut[ies]".[1]

The Government's position is further undermined by subsequent legislative action. Less than a year after enacting FERA, Congress enacted 42 U.S.C. § 1320a-7k(d), which the Government has admitted was intended, among other things, to address what constitutes an overpayment that must be refunded to avoid reverse FCA liability. (*See* Cmplt. ¶ 27; NY Br. at 3-4, 8). Had Congress understood and intended 31 U.S.C. § 3729(a)(1)(G) to create liability for the failure to report and return an overpayment after receipt of notice of a *potential* overpayment, there would have been no need to provide in 42 U.S.C. § 1320a-7k(d)(3) that an overpayment retained after the deadline for reporting and returning under 42 U.S.C. § 1320a-7k(d)(2) is an obligation under the FCA. *See, e.g.*, *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1178 (2013) (The "canon against surplusage is strongest when an interpretation would render superfluous

[1] The sponsor of the amendment, Senator Kyl, was very clear that the change in the language was intended to narrow the definition of an "obligation". *See* 155 Cong. Rec. S4531-01 (daily ed. Apr. 22, 2009) (statement of Sen. Kyl concerning Amendment No. 985). He noted that the change grew out of concerns about including contingent obligations in the definition of an obligation. In particular, Senator Kyl expressed concern about the potential use of the FCA by whistleblowers to bring actions based on alleged attempts to evade fines "before the duty to pay the fine has been formally *established*". *Id.* (emphasis added).

another part of the same statutory scheme."); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2002) (a statute should not be construed in a manner that would render any word superfluous).

The Court should also not rely on *United States ex rel. Keltner v. Lakeshore Med. Clinic, Ltd.*, No. 11-CV-00892, 2013 WL 1307013 (E.D. Wis. Mar. 28, 2013). The Wisconsin district court discussed the law applicable to reverse false claims in three conclusory sentences, and neither reviewed the statutory next nor considered its legislative history or applicable precedent. Remarkably, *Keltner* failed to consider 42 U.S.C. § 1320a-7k(d)(2) and (3) in determining whether the relator sufficiently alleged a reverse FCA violation. There is, therefore, no reason to rely on *Keltner*.

While there is a duty to have a robust compliance program to locate and report overpayments, which is discussed below, and health care providers can be subject to sanctions for failure to comply with that duty, liability for a reverse false claim is not triggered by an inadequate review of *potential* overpayments. The FCA defines "obligation" in a manner that respects the distinction between a duty to repay a known overpayment and the duty to have a robust compliance program. Toward this end, the reverse FCA rule only applies where the overpayment has actually been specifically "identified", not merely raised as a *potential* liability.

B. A Failure to Report and Return An Overpayment Within 60 Days of Receipt of Notice of a *Potential* Overpayment Does Not Give Rise to an Obligation Under 42 U.S.C. § 1320a-7k(d)(3)

As set forth in Defendants' initial brief, Congress rejected a proposal to require health care providers to report and return overpayments within 60 days of the receipt of notice of potential overpayments. Instead, it enacted a requirement to report and return within 60 days only overpayments that have been "identified". 42 U.S.C. § 1320a-7k(d). As it does with the

definition of "obligation", the Government ignores the statutory language and legislative history. Instead, it focuses exclusively on policy arguments.

The Government's policy arguments are unavailing for two reasons. First, policy arguments cannot override the plain language of a statute. *See Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 538 (1994) ("[E]quities cannot dictate a result that is contrary to the statutory language. Our task is to apply the text, not to improve upon it.") (internal quotations and citation omitted). Second, there is no merit to the Government's contention that unless notice of a *potential* overpayment triggers the 60-day repayment obligation, health care providers will be free to "forever forestall [their] obligation to return an overpayment". (U.S. Br. at 18.) There are, in fact, many reasons for health care providers to respond diligently to notice of a potential overpayment. First, health care providers who have knowledge of the occurrence of an event affecting their right to payment may be subject to criminal liability for concealing or failing to disclose the event with the intent to fraudulently secure the payment. *See* 42 U.S.C. § 1320a-7b(3).

Second, under the ACA, all providers throughout the country must maintain compliance programs, *see* 42 U.S.C. § 1395cc(j), and, under New York law, Medicaid providers must maintain compliance programs which include "a system for . . . refunding overpayment". 18 N.Y.C.R.R. § 521.3(c)(7). The Office of Medicaid Inspector General guidance concerning hospital compliance programs further provides that the required system for refunding overpayments must include a process to ensure that "overpayments are identified, promptly repaid, and not rebilled", and, when appropriate, reported to federal or state authorities. *See Compliance Program Guidance for General Hospitals*, New York State Department of Health, Office of the Medicaid Inspector General, at 33 (May 11, 2012) (available at

http://www.omig.ny.gov/images/stories/compliance/compliance_program_guidance-general_hospitals.pdf) (last visited November 22, 2014). The Commissioner of the Department of Health and the Medicaid Inspector General are authorized to impose sanctions based on a finding that a provider's compliance program is not satisfactory. *See* 18 N.Y.C.R.R. § 521.4.

The Government's reliance on CMS's May 23, 2014 final rule related to the Medicare Advantage ("MA") and Medicare Prescription Drug Benefit programs (the "MA and Part D Final Rule") is also misguided. On their face, these rules only apply to MA organizations and Medicare Part D prescription drug plan sponsors. The rules do not apply to health care providers like Defendants, and the Government cites to no authority that would support their application here. There is also no reason to assume that CMS's interpretation of the term "identified" for the purpose of its rules relating to overpayments to MA organizations and Part D Plans, which is based solely on a policy judgment, is applicable to health care providers for whom different policy considerations may apply.

The Government's reliance on the regulations for MA organizations and Part D prescription drug plan sponsors is further undermined by the fact that CMS proposed separate rules under 42 U.S.C. § 1320a-7k(d) applicable to Medicare (but not Medicaid) overpayments to health care providers and suppliers. *See* Medicare Program; Reporting and Returning of Overpayments, 77 Fed. Reg. 9179, 9179-9187 (Feb. 16, 2012). These proposed rules generated hundreds of critical comments, and were never adopted.[2] As a mere proposal, these rules have no legal effect. *See, e.g.*, *Sweet v. Sheahan*, 235 F.3d 80, 87 (2d Cir. 2000) (noting that it is an "established point of law that proposed regulations . . . have no legal effect").

[2] *See* Regulations.gov, Comments to Reporting and Returning of Overpayments, CMS-2012-0020, http://www.regulations.gov/#!docketBrowser;rpp=25;po=0;dct=PS;D=CMS-2012-0020 (accessed December 3, 2014).

II.
THE COMPLAINT FAILS TO ALLEGE THAT THE DEFENDANTS KNOWINGLY CONCEALED OR KNOWINGLY AND IMPROPERLY AVOIDED OR DECREASED AN OBLIGATION

The Complaint does not allege that Defendants acted affirmatively to conceal, avoid, or decrease an obligation. Nor does the Government contest that an overpayment can only be concealed or decreased through affirmative conduct. (*See* U.S. Br. at 19-20.) Instead, the Government incorrectly asserts that an obligation can be avoided through inaction (*see* U.S. Br. at 19), relying entirely on the Senate Report discussed above that addresses a version of FERA that was never enacted. Given the substantial and material changes to FERA after the Senate Report was issued, *compare* S. 386, 111th Cong. (as introduced by the Senate March 5, 2009) *with* S. 386, 111th Cong. (as introduced by the Senate Apr. 28, 2009) (codified at 31 U.S.C. § 3729(a)(1)(G)), the report offers no support for the Government's position.[3]

III.
THE COMPLAINT FAILS TO ALLEGE THAT DEFENDANTS HAD AN OBLIGATION TO PAY OR TRANSMIT MONEY TO THE FEDERAL *"GOVERNMENT"*

As the Supreme Court held in *Allison Engine Co. v. United States ex rel. Sanders*, "the Government" means the federal Government and not a recipient of federal funds. *See* 553 U.S. 662, 670 (2008). Therefore, there is no basis for the Government's position that Medicaid overpayments are actionable under the provision of the FCA at issue here, which provides that it is a violation of the FCA to "knowingly conceal[] or knowingly and improperly avoid[] or

[3] Additionally, avoiding an obligation only violates the FCA if it is done knowingly and improperly. *See* 31 U.S.C. § 3729(a)(1)(G). The legislative history of FERA reflects that a person acts knowingly and improperly only if he or she "acted with bad intent or that he employed means that are inherently tortious or illegal". *See* 155 Cong. Rec. S4531-01 (daily ed. Apr. 22, 2009) (statement of Sen. Kyl concerning Amendment No. 985). The Government does not allege that Defendants acted with bad intent or employed means that were inherently tortious or illegal. As the Government's Opposition makes clear, it alleges only that Defendants intentionally or recklessly failed to act. (*See* U.S. Br. at 18-19.)

decrease[] an obligation to pay or transmit money or property *to the Government*". *See* 31 U.S.C. § 3729(a)(1)(G) (emphasis added).

Although the definition of an overpayment in the statute requiring identified overpayments to be reported and returned within 60 days includes Medicaid overpayments, (*see* U.S. Br. at 21) (citing 42 U.S.C. § 1320a-7k(d)(4)(B)), that statute does not modify the language of the reverse false claim provision of the FCA. Rather, the section of the FCA at issue here applies to an "an obligation to pay or transmit money or property *to the Government*". *See* 31 U.S.C. § 3729(a)(1)(G) (emphasis added). Thus, while an identified Medicaid overpayment may become an "obligation" if it is not reported and returned within 60 days of its identification pursuant to 42 U.S.C. § 1320a-7k(d)(3), under the FCA, that "obligation" is not an actionable "obligation" because it is not an "obligation" to the federal Government.

Notably, the Supreme Court rejected a nearly identical argument by the Government in *Allison Engine*. *See* 553 U.S. at 670. The United States argued that the term "claim" was defined under the FCA to include claims made by contractors and others if the payment would be made or reimbursed out of federal funds. Thus, the United States argued that making, using or causing the use or making of a false record or statement to get a false claim paid or approved by a federal contractor was actionable under 31 U.S.C. § 3729(a)(2). The Court rejected this argument, noting that while "a request or demand may constitute a 'claim' even if the request is not made directly to the Government, [] under § 3729(a)(2) it is still necessary for the defendant to intend that a claim be 'paid . . . by the Government' and not by another entity". *Allison Engine*, 553 U.S. at 670. The analogous argument made by the Government here is doomed by the same logic.

Allison Engine cannot be distinguished on the basis that the FCA provisions that it addressed, former 31 U.S.C. § 3729(a)(2) and (3), required the use of a false record or statement or a conspiracy "to get" a false claim paid. (U.S. Br. at 23.) Nor can *Allison Engine* be distinguished on the basis that it involved the payment of claims by a federal contractor, not Medicaid. (*Id*. at 24). The holding of *Allison Engine* is clear—the phrase "paid or approved by the Government" does not mean "paid by Government funds". *See* 553 U.S. at 673. As the Court explained: "[h]ad Congress intended subsection (a)(3) to apply to anyone who conspired to defraud a recipient of Government funds, it would have so provided". *Id*. The phrase "an obligation to pay or transmit money or property to the Government" in the provision of the FCA at issue here should be interpreted in the same manner. Had Congress intended for the second clause of § 3729(a)(1)(G) to apply to obligations to recipients of Government funds such as Medicaid programs, it could have so provided.

It bears emphasis that, as noted above, the definition of "claim" under the FCA specifically includes claims "made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest, and if the United States Government (I) provides or has provided any portion of the money or property requested or demanded; or (II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded". *See* 31 U.S.C. § 3729(b)(2). The omission of similar language in 31 U.S.C. § 3729(a)(1)(G), a provision enacted after *Allison Engine*, is particularly significant because "[w]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate

inclusion or exclusion". *Allison Engine*, 553 U.S. at 671 (internal quotations and citation omitted).

With respect to the amendment of the FCA after *Allison Engine*, while Congress amended the provisions at issue in *Allison Engine* so that they could be applied in cases involving payments made by federal contractors and other recipients of federal funds, it did not employ similar language when it enacted the section of the FCA at issue here. The second clause of 31 U.S.C. § 3729(a)(1)(G) continues to refer to "an obligation to pay or transmit money or property to the Government".

Finally, while the Government points to legislative history reflecting intent for Medicaid *claims* to be actionable under the FCA (U.S. Br. at 22-3), it cites no legislative history reflecting any intent for *obligations* to Medicaid to be actionable. Even if the legislative history reflected such intent, the language of the statute cannot be reconciled with that intent, and a court can abrogate the text of a statute only upon the most extraordinary showing of contrary intentions. *See, e.g., Garcia v. United States*, 469 U.S. 70, 75 (1984). No such showing has been made here.

In sum, there is no basis to hold that an obligation to a state Medicaid program arising out of a Medicaid overpayment is "an obligation to pay or transmit money to the Government", and the Government's arguments to the contrary are unavailing.

CONCLUSION

For the foregoing reasons, the Court should dismiss the Complaint in its entirety with prejudice.

Dated: New York, New York
December 8, 2014

Respectfully submitted,

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