



⊕ United States ex rel. Marcus v. BioTek Labs, LLC, No. 8:18-cv-2915-WFJ-JSS, 2023 BL 22728, 2023 Us Dist Lexis 11987 (M.D. Fla. Jan. 24, 2023), Court Opinion

Printed By: JLOCASCIO10 on Mon, 30 Jan 2023 14:23:54 -0500

Pagination

* BL

Majority Opinion >

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION

UNITED STATES OF AMERICA, et al., Plaintiffs, ex rel. BEVERLY MARCUS, Relator, v. BIOTEK LABS, LLC; GEORGE BEAUCHAMP; BRIAN PANESSA; BIOTEK SERVICES, LLC; ANCILLARY SERVICE CONSULTANTS, LLC; and ALEMAR BILLING CONSULTANTS LLC, Defendants.

Case No: 8:18-cv-2915-WFJ-JSS

January 24, 2023, Filed

January 24, 2023, Decided

For Beverly Marcus, ex rel, Plaintiff: Brian J. McCormick, Jr, PRO HAC VICE, Ross Feller Casey LLP, Philadelphia, PA; Elaine J. Stromgren, Wilbanks and Gouinlock, LLP, Atlanta, GA.

For Biotek Labs, LLC, George Beauchamp, Brian Panessa, Biotek Services, LLC, Ancillary Service Consultants, LLC, Alemar Billing Consultants LLC, Defendants: Henry H. Bolz, IV, LEAD ATTORNEY, Polsinelli PC, Miami, FL; Dayna C. LaPlante, Kevin M. Coffey, PRO HAC VICE, Polsinelli PC, Chicago, IL; Jessica Andrade, PRO HAC VICE, Polsinelli PC, Seattle, WA.

For Edward J. Page, Mediator: Edward J. Page, Carlton Fields, PA, Tampa, FL.

For United States of America, Movant: Charles T. Harden, III, US Attorney's Office - FLM, Tampa, FL.

For State of Florida, Movant: Cedell Ian Garland, Office of the Attorney General, PL-01 - The Capitol, Tallahassee, FL.

WILLIAM F. JUNG, UNITED STATES DISTRICT JUDGE.

WILLIAM F. JUNG

ORDER

This matter comes before the Court on the above-styled Defendants' Motion to Dismiss, Dkt. 90. Relator Beverly Marcus filed a response in opposition, Dkt. 95, to which Defendants collectively replied, Dkt. 100. As interested parties to this action, the United States, Florida, Connecticut, Georgia, Illinois, Indiana, Tennessee, and Texas have filed limited responses to Defendants' motion, Dkts. 93 & 94, to which Defendants replied, Dkts. 98 & 99. The Court also received cogent oral argument from the parties on January 13, 2023. Dkt. 106. Upon careful consideration, the Court denies Defendants' Motion to Dismiss.

BACKGROUND

The Court at this stage accepts the allegations in the operant complaint as true. Defendants BioTek Labs, LLC and BioTek Services, LLC (collectively, the "BioTek Defendants") are Georgia limited liability companies that contract with medical providers to provide in-office allergy testing and treatment. Dkt. 85 ¶¶ 24, 26, 105. Defendants George Beauchamp and Brian Panessa serve as both companies' Chief Executive Officer and President, respectively. *Id.* ¶¶ 30-31. Beauchamp and Panessa also control Defendant Ancillary Services Consultants, LLC ("ASC"), a Georgia limited liability company and affiliate of BioTek Labs that hires individuals to market the BioTek Defendants' services. *Id.* ¶¶ 22, 34.

In March 2017, Relator Beverly Marcus began working for ASC as an independent contractor to market BioTek Labs and BioTek Services' allergy testing and treatment services to medical providers in certain areas of New York. *Id.* ¶¶ 22, 87. Specifically, Marcus marketed the BioTek Defendants' two business models: the "Labs/Employee Insertion" model offered by BioTek Labs and the "Services/Licensing" model offered by BioTek Services. *Id.* ¶ 112.

Under the Labs/Employee Insertion model, BioTek Labs purportedly supplies a medical provider with free training, equipment, [*2] personnel, and supplies needed to conduct in-office allergy testing and treatment. *Id.* ¶ 113. Medical providers contracting under this model allegedly receive 25% of the gross collections made through testing and treatment. *Id.* If a medical provider instead provides allergy testing and treatment under the Services/Licensing model offered by BioTek Services, the medical provider receives equipment, training, and supplies at low or no cost. *Id.* ¶¶ 118. However, the medical provider must directly employ personnel to conduct the testing and treatment. *Id.* ¶¶ 117-18. Under the Services/Licensing model, the medical provider purportedly retains the entire net profit earned through testing and treatment but pays BioTek Services agreed-upon amounts for each antigen dose utilized and each one-year supply of immunotherapy created for patients. *Id.* ¶¶ 118, 134.

Regardless of the selected model, the medical provider receives a royalty-free license to use the BioTek Defendants' intellectual property. *Id.* ¶¶ 113, 118. Additionally, under either model, billing is handled by Defendant Alemar Billing Consultants LLC ("Alemar"), a third-party medical billing coordinator based in Florida. *Id.* ¶¶ 38, 127.

While marketing the two business models in New York, Marcus contends that she witnessed and was taught

suspect "marketing practices and schemes" by ASC, BioTek Labs, BioTek Services, Beauchamp, and Panessa. *Id.* ¶¶ 92-98. These alleged practices and schemes included promoting the BioTek Defendants' provision of free or low-cost supplies, equipment, and other resources to medical providers who contracted to provide in-office allergy testing and treatment under either business model. *See id.* ¶¶ 92-100. Marcus contends that these free or low-cost resources amounted to illegal kickbacks. *Id.* ¶¶ 125-26, 241. According to Marcus, the BioTek Defendants knew they were offering medical providers illegal kickbacks and, at Beauchamp and Panessa's direction, caused Alemar to submit false claims for reimbursement to federal healthcare programs. *Id.* ¶ 138.

Based on these allegations, Marcus brings an eighteen-count Second Amended Complaint against Defendants. In Counts I-IV, Marcus asserts violations of the False Claims Act ("FCA"), 31 U.S.C. § 3729 *et seq.* Dkt. 85 ¶¶ 248-70. In Counts V-XVIII, Marcus alleges violations of false claims and/or insurance fraud statutes of the following states: California, Connecticut, Florida, Georgia, Illinois, Indiana, Massachusetts, New Jersey, New York, Tennessee, Texas, and Virginia. *Id.* ¶¶ 271-380. Defendants collectively move to dismiss pursuant to the FCA's public disclosure bar and Federal Rule of Civil Procedure 12(b)(6) . Dkt. 90.

LEGAL STANDARD

To survive a Rule 12(b)(6) motion to dismiss for failure to state a claim for which relief may be granted, a plaintiff must plead sufficient facts to state a claim that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662 , 678 , 129 S. Ct. 1937 , 173 L. Ed. 2d 868 (2009). This standard does not require detailed factual allegations but demands more than an unadorned accusation. *Id.* Additionally, a plaintiff's complaint must "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. [*3] v. Twombly*, 550 U.S. 544 , 555 , 127 S. Ct. 1955 , 167 L. Ed. 2d 929 (2007).

Where a plaintiff's alleges fraud, her claims are subject to the heightened pleading standards of Rule 9(b) . *Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301 , 1305 (11th Cir. 2002). Accordingly, a plaintiff bringing an FCA claim must allege "'facts as to time, place, and substance of the defendant's alleged fraud,' specifically 'the details of the defendants' allegedly fraudulent acts, when they occurred, and who engaged in them.'" *Hopper v. Solvay Pharms., Inc.*, 588 F.3d 1318 , 1324 (11th Cir. 2009) (quoting *Clausen*, 290 F.3d at 1310). Failing to meet Rule 9(b) 's pleading standards is grounds for dismissal under Rule 12(b)(6) . *See United States ex rel. Shurick v. Boeing Co.*, 330 Fed. App'x 781 , 783 (11th Cir. 2009) (citations omitted). On a 12(b)(6) motion, a complaint's factual allegations are accepted as true and construed in the light most favorable to the plaintiff. *Pielage v. McConnell*, 516 F.3d 1282 , 1284 (11th Cir. 2008).

ANALYSIS

In their present motion, Defendants assert that Marcus's Second Amended Complaint is due to be dismissed pursuant to the public disclosure bar of the FCA, as well as Rule 12(b)(6) for both failure to state a claim and failure to comply with Rule 9(b) 's heightened pleading standard. Dkt. 90 at 1-5. The Court considers these arguments in turn.

Concerning Defendants' first argument, the public disclosure bar applies when the relator's allegations are "substantially the same" as what has been publicly disclosed unless the plaintiff is "an 'original source' of the

information." 31 U.S.C. § 3730(e)(4) . However, the public disclosure bar cannot be used to dismiss FCA claims if the United States expresses opposition. *Id.* ("The court shall dismiss an action or claim under this section, *unless opposed by the Government*["]) (emphasis added). The same is typically true where a state government opposes that basis for dismissal of claims brought pursuant to that state's version of the FCA. *See, e.g.*, Fla. Stat. § 68.087(3) ("The court shall dismiss an action brought under this act *unless opposed by the department*["]) (emphasis added).

Here, the United States and several interested states oppose dismissal of Marcus's claims under the public disclosure bar, rendering Defendants' public disclosure argument largely moot. *See* Dkts. 93 & 94. Though other interested states in this action have not expressed the same opposition, the Court finds that dismissal of any of Marcus's claims under the public disclosure bar is unwarranted. Marcus's Second Amended Complaint suggests that she is an original source of her allegations, as she acquired personal knowledge of Defendants' purportedly suspect practices during the time she spent marketing the BioTek Defendants' business models. *See, e.g.*, Dkt. 85 ¶¶ 92-98 (discussing training, observations, and internal documents). Moreover, the purpose of the public disclosure bar is "to bar a subset of [false claims] . . . deemed unmeritorious or downright harmful." *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280 , 298 , 130 S. Ct. 1396 , 176 L. Ed. 2d 225 (2010). The Court does not find Marcus's claims to be "unmeritorious or downright harmful." Accordingly, the Court declines to dismiss Marcus's claims pursuant to the public disclosure bar.

The Court is left to consider whether Marcus's Second Amended Complaint [*4] survives dismissal under Rule 12(b)(6) . The Court finds that it does. Relying on AKS violations as a basis for her claims under the FCA and its state counterparts,¹ Marcus has sufficiently alleged that Defendants violated the AKS by offering and/or providing remuneration to medical providers to induce referrals to the BioTek Defendants' allergy testing and treatment services. For example, Marcus alleges that, in May 2018, BioTek Labs and a Georgia-based medical practice entered into a contract under which BioTek Labs offered the medical practice free supplies, personnel, training, and equipment, as well as a percentage of gross collections,² in exchange for the medical practice's referral of patients exclusively to BioTek Labs' in-office allergy testing and treatment. *See* Dkt. 85 ¶¶ 139-47. Marcus ties this alleged AKS violation to supposed FCA violations by offering representative claims submitted to government healthcare programs for reimbursement for allergy testing and treatment provided by that Georgia medical practice during its exclusive contract term with BioTek Labs. *Id.* ¶¶ 148-55. Marcus also notes the amount of reimbursement received from government healthcare programs for these representative claims. *Id.* ¶¶ 150, 153. Marcus raises similar, specific allegations concerning Defendants' dealings with medical practices in other states, such as Florida.³ *Id.* ¶¶ 156-227.

Construing all reasonable inferences in Marcus's favor, as this Court must at this stage, the Court finds that Marcus's Second Amended Complaint states plausible claims for relief that satisfy the heightened pleading standard of Rule 9(b) . If Marcus's claims are lacking in merit, as Defendants suggest, the matter is best resolved at summary judgment on a fuller record.

CONCLUSION

Based on the foregoing, Defendants' Motion to Dismiss (Dkt. 90) is **DENIED**. Defendants shall answer

Marcus's Second Amended Complaint within **fourteen (14) days**.

DONE AND ORDERED at Tampa, Florida, on January 24, 2023.

/s/ William F. Jung

WILLIAM F. JUNG

UNITED STATES DISTRICT JUDGE

fn

1

For purposes of the False Claims Act ("FCA"), 31 U.S.C. § 3729 *et seq.*, a claim for reimbursement that includes items or services resulting from a violation of the Anti-Kickback Statute ("AKS"), 42 U.S.C. § 1320a-7b (b), constitutes a "false claim." *Id.* § 1320a-7b(g) .

fn

2

While Defendants assert that Relator has not alleged remuneration, the Court notes that "Congress's intent in placing the term 'remuneration' in the [AKS] in 1977 was to cover the transferring of *anything of value in any form or manner whatsoever*." Dep't of Health & Hum. Res. Off. of Inspector Gen. Anti-Kickback Provisions, 56 Fed. Reg. 35952 , 35958 (July 29, 1991) (emphasis added).

fn

3

Where a plaintiff alleges a pattern of fraud by the same defendants across multiple states, she need not plead examples of that fraud in every state to survive dismissal. *See United States v. Curo Health Servs. Holdings, Inc.*, No. 3:13-cv-672, 2022 U.S. Dist. LEXIS 49561 , [2022 BL 94665], 2022 WL 842937 , at *11 (M.D. Tenn. Mar. 21, 2022) (citing *United States ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 501 F.3d 493 , 509 (6th Cir. 2007)).