IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Philip A. Brimmer

Civil Action No. 11-cv-00642-PAB-NYW
(Consolidated with Civil Action No. 14-cv-01647-PAB)

Civil Action No. 11-cv-00642-PAB-NYW

UNITED STATES OF AMERICA *ex rel.* TERRY LEE FOWLER and LYSSA TOWL,

Plaintiff,

v.

EVERCARE HOSPICE, INC., n/k/a Optum Palliative and Hospice Care, a Delaware corporation,
OVATIONS, INC., a Delaware corporation,
OPTUMHEALTH HOLDINGS, LLC, a Delaware limited liability corporation, and
UNITED HEALTHCARE SERVICES, INC., a Minnesota corporation,

Defendants.

Civil Action No. 14-cv-01647-PAB

UNITED STATES OF AMERICA *ex rel.* SHARLENE RICE,

Plaintiff,
v.

EVERCARE HOSPICE, INC.,

Defendant.

ORDER

This matter is before the Court on the Motion to Dismiss Rice's Complaint [Docket No. 154] filed by relators Terry Lee Fowler and Lyssa Towl. The Court has jurisdiction pursuant to 28 U.S.C. § 1331.

I. BACKGROUND[1]

This action arises under the False Claims Act ("FCA"), 31 U.S.C. § 3729 *et seq*. Relators Fowler and Towl (together, "movants") initiated a qui tam action on March 15, 2011, alleging that defendants knowingly submitted, or caused to be submitted, claims for Medicare hospice benefits for patients who were ineligible for such benefits. *See* Docket No. 1.

Movants' original complaint alleged a single claim for violation of the FCA against Evercare Hospice, Inc. ("Evercare"), Ovations, Inc., OptumHealth, LLC, United Healthcare Services, Inc., and United Health Group, Inc. *See* Docket No. 1. Movants alleged that, from 2006 to the present, defendants "defrauded the United States through the submission, or causing the submission of false or fraudulent claims to Medicare for ineligible hospice patients and/or by their failure to report past overpayments for ineligible patients and to reimburse Medicare for these overpayments." Docket No. 1 at 13, ¶ 53. Specifically, movants alleged that defendants created incentives for staff to admit and retain patients who were ineligible for hospice care, *id.* at 13-14, ¶ 56, set aggressive census targets for admission of hospice patients, *id.* at 15, ¶ 67, failed to provide adequate hospice eligibility training to its staff, *id.* at 14, ¶ 58, and pressured physicians to certify and recertify ineligible patients, *id.* ¶ 61, among other allegations. Movants also alleged that, when numerous patients were found by Evercare's carriers to be ineligible for hospice benefits, Evercare

[1]The Court recites only those facts necessary to resolve the instant motion. Additional factual background is recited in detail in the Court's order dated September 21, 2015. *See* Docket No. 120 at 2-11.

did not appeal the denial of benefits or argue that the patients were eligible for hospice benefits, but nevertheless kept those patients on hospice service, continued billing the government for those patients, and attempted to reverse-engineer the carriers' process of auditing cases in order to avoid detection of those patients in subsequent audits (the "audit avoidance theory"). *Id.* at 26-28, ¶¶ 120-129. Movants then alleged facts about 21 patients, identified as Patients 1-21, who Evercare allegedly fraudulently certified as eligible for hospice care. *See id.* at 28-36.

Relator Sharlene Rice filed a qui tam complaint in the United States District Court for the Northern District of Illinois on June 5, 2013. *See* Docket No. 154-2. Ms. Rice's case was transferred to this district on June 11, 2014. *See* Case No. 14-cv-01647 (Docket No. 2). Like movants' complaint, Ms. Rice alleged that Evercare "systematically enrolls, recertifies, and falsely bills the United States for hospice patients whose objective medical conditions belie a terminal diagnosis." Docket No. 154-2 at 5, ¶ 4. Specifically, Ms. Rice alleged that Evercare's Clinical Services Manager, Merilee Smith, instructed nurses to conceal patients' clinical characteristics that were at odds with hospice eligibility and "[v]ery frequently . . . altered patient information in order to obtain physician signatures on certifications of terminal illness ('CTIs')." *Id.* at 10, ¶ 21. Ms. Rice alleged that she frequently attended meetings at which Evercare's medical director signed entire stacks of CTIs without reviewing any clinical information. *Id.* ¶ 22. She also alleged that, in composing the narratives to support their CTIs, Evercare's medical directors relied on Ms. Smith, who "used false information in these narratives to create the fraudulent appearance of terminality." *Id.*

at 11, ¶ 23. Ms. Rice alleged facts about four patients, identified as B.C., T.N., J.E., and M.J, who Evercare fraudulently certified as eligible for hospice care. *See id.* at 11-14.

On June 18, 2014, the United States of America (the "government") moved to consolidate the two cases. Docket No. 27. The Court granted the government's motion. Docket No. 28. On August 25, 2014, the government partially intervened in this consolidated lawsuit. *See* Docket No. 34.

II. ANALYSIS

Movants seek dismissal of Ms. Rice's complaint as barred by movants' earlier-filed qui tam complaint. Docket No. 154.[2] The qui tam provision of the False Claims Act ("FCA") has "two basic goals: 1) to encourage private citizens with first-hand knowledge to expose fraud; and 2) to avoid civil actions by opportunists attempting to capitalize on public information without seriously contributing to the disclosure of the fraud." *United States ex rel. Precision Co. v. Koch Indus.*, *Inc.*, 971 F.2d 548, 552 (10th Cir. 1992). In furtherance of the second goal, the FCA contains a "first-to-file" bar, which states: "When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5). In the Tenth Circuit, the first-

[2]On July 28, 2016, the government, all three relators, and defendants filed a stipulation of dismissal and a proposed order, informing the Court that the government, the relators, and defendants have reached a settlement agreement. *See* Docket No. 169. In anticipation of the stipulated dismissal, movants filed an "Alternate Motion to Disqualify Relator Sharlene Rice as Being Eligible to Share in the Settlement Proceeds" [Docket No. 166] in the event that the Court considered the instant motion moot. Relators' second motion is duplicative of the instant motion. As such, this order will render that motion moot.

to-file bar is considered "a jurisdictional limit on the courts' power to hear certain duplicative qui tam suits." *Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1278 (10th Cir. 2004); *but see United States ex rel. Heath v. AT&T, Inc.*, 791 F.3d 112, 120-21 (D.C. Cir. 2015) (holding that the first-to-file bar is not jurisdictional but "bears only on whether a *qui tam* plaintiff has properly stated a claim").

A subsequently-filed qui tam action need not contain identical facts to an earlier-filed lawsuit to be barred by the first-to-file rule. "Rather, so long as a subsequent complaint raises the same or a related claim based in significant measure on the core fact or general conduct relied upon in the first qui tam action, the § 3730(b)(5) first-to-file bar applies." *Grynberg*, 390 F.3d at 1279; *see also United States ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 378 (5th Cir. 2009) ("a relator cannot avoid § 3730(b)(5)'s first-to-file bar by simply adding factual details or geographic locations to the essential or material elements of a fraud claim against the same defendant described in a prior complaint").

The Court first considers whether Ms. Rice's complaint is related to movants' complaint. "The first-to-file bar is designed to be quickly and easily determinable, simply requiring a side-by-side comparison of the complaints." *In re Natural Gas Royalties Qui Tam Litig. (CO2 Appeals)*, 566 F.3d 956, 964 (10th Cir. 2009) (citation omitted).[3]

[3] The first-to-file bar is examined as of the time the later-filed lawsuit was initiated. *Grynberg*, 390 F.3d at 1279. As such, the Court compares Ms. Rice's complaint to movants' original complaint [Docket No. 1], rather than the operative second amended complaint [Docket No. 86], which movants filed on February 24, 2015.

Ms. Rice argues that the two complaints are not related because "Ms. Rice made detailed factual allegations about specific patients for whose care Evercare submitted specific false claims" and "identified specific corporate actors who personally caused these specific false claims to be submitted." Docket No. 158 at 9. Merely alleging facts about additional patients who were not mentioned in movants' complaint, by itself, is insufficient. Such allegations are "merely additional facts and details about the same scheme" that do not exempt Ms. Rice from the first-to-file bar. *United States ex rel. Heineman-Guta v. Guidant Corp.*, 718 F.3d 28, 36 (1st Cir. 2013).

Ms. Rice argues that her complaint also alleges a "separate method," as compared to movants' complaint, by which Evercare submitted false claims. Docket No. 158 at 11. In this regard, she claims that this case is similar to *United States ex rel Pfeifer v. Ela Medical, Inc.*, No. 07-cv-01460-WDM-MEH, 2010 WL 1380167 (D. Colo. Mar. 31, 2010), in which the court analyzed two qui tam complaints involving a medical device manufacturer's alleged kickbacks to physicians for using the defendant's products, the purchase of which was reimbursed by Medicare. In *Pfeifer*, the court found the cases distinct because the original relator alleged kickbacks that occurred through "an elaborate scheme that compensated cardiologists, cardiac surgeons, and implantation physicians for using [defendant's] products by way of [a] patient monitoring program and one-day-per-month clinics in the cardiologists' offices," while the later-filed complaint alleged that the defendant "compensated doctors for entering into training agreements which ostensibly required physicians to provide training in exchange for the

receipt of training fees paid by [defendant], where no training was ever provided." *Id.* at *9.

Ms. Rice identifies the different method in her complaint as the "highly specific and detailed evidence of specific Evercare staff and managers knowingly continuing to admit and recertify specific ineligible patients over the objections of staff members and in direct contradiction to specific medical evidence in the patients' individual files." Docket No. 158 at 11. By contrast, she claims that the method identified in movants' complaint is limited to the audit avoidance theory. *Id.* Ms. Rice's focus on a specific theory in movants' complaint that is not mirrored in her own is misplaced. Evercare's alleged practice of intentionally subverting the audit process is one of several methods identified in movants' complaint by which Evercare fraudulently obtained reimbursement for services provided to ineligible patients. The Court, having compared the two relevant complaints, finds that movants' complaint put the government on notice of the fraud claims described in Ms. Rice's complaint such that the later-filed complaint is precluded by the first-to-file bar. *Grynberg*, 390 F.3d at 1279 ("Once the government is put on notice of its potential fraud claim, the purpose behind allowing qui tam litigation is satisfied"). Ms. Rice's complaint thus "raises the same or a related claim based in significant measure on the core fact or general conduct relied upon in the first qui tam action," *id.*, and the first-to-file bar applies.

Ms. Rice's complaint focuses on the actions of a specific Clinical Services Manager, Merliee Smith, and two medical directors, Drs. Oommen Bino and Karen Babos, who signed CTIs in reliance on false information that was either supplied by Ms. Smith or entered into patients' records at Ms. Smith's direction. *See* Docket No. 154-2

at 10-11, ¶¶ 21-24. Ms. Rice alleged that she witnessed Dr. Bino sign "entire stacks of CTI's without reviewing any clinical information . . ., exercising no clinical judgment whatsoever." *Id.* at 10-11, ¶ 22. In their complaint, movants alleged that "[d]efendants . . . did not discourage the practice of . . . physicians . . .certify[ing] and recertify[ing] patients these doctors had never examined or had not seen in many months, if not years" and that "[l]arge and inappropriate numbers of certifications and recertifications were completed without the physicians actually seeing the patient or having a working familiarity with the patient's condition or status." Docket No. 1 at 23-24, ¶ 109. Ms. Rice alleged that Drs. Babos and Bino opined "[o]n many occasions" that certain patients were not terminally ill and that Ms. Smith "rejected these physician judgments and ruled that the patients should be re-certified." Docket No. 154-2 at 11, ¶ 24. Similarly, movants alleged that, in late 2008 or 2009, Evercare "imposed a mandatory policy that any requests by physicians, nurses or other staff to live discharge an Evercare hospice patient had to be reviewed and approved" by one of two individuals, the "end result" of which "was that recommendations by R.N.s and physicians to discharge ineligible patients . . . were challenged or ignored." Docket No. 1 at 20, ¶¶ 93, 96. Given the similarity of these allegations, the Court finds that Ms. Rice's complaint merely provides specific instances of a scheme for which the government was already on notice.

Ms. Rice's complaint did allege one practice for which the Court finds no corresponding allegation in movants' complaint. Ms. Rice alleged that Ms. Smith "[v]ery frequently . . . altered patient information in order to obtain physician signatures on [CTIs]." Docket No. 154-2 at 10, ¶ 21. Ms. Rice's complaint contains no support for

this bare allegation, however. There are no examples among the four patients that Ms. Rice identifies in her complaint of Ms. Smith or any other Evercare employee altering records. To satisfy Rule 9(b)'s requirements in the FCA context (and thus to place the government and defendants on notice of the basis for the claim), a pleading must "show the specifics of a fraudulent scheme and provide an adequate basis for a reasonable inference that false claims were submitted as part of that scheme." *United States ex rel. Lemmon v. Envirocare of Utah, Inc.*, 614 F.3d 1163, 1172 (10th Cir. 2010) (citations omitted). Here, in each of the specifically-identified patients' cases, Ms. Rice alleged that the patient was certified despite a lack of evidence in the patient's chart that he or she was terminal. *See* Docket No. 154-2 at 11-14, ¶¶ 25(a) (patient B.C.'s chart indicated that B.C. did not have the requisite unintentional weight loss required for a diagnosis of hospice-eligible unspecified debility); 25(b) (T.N.'s chart did not indicate the presence of several conditions, "all of which [are] required by . . . Medicare standards for terminal cardiac disease"); 26(c) ("J.E.'s chart lacks any evidence of the required factors indicating end-stage lung disease"); 26(d) ("M.J.'s chart shows that M.J. did not have congestive heart failure . . . and did not have a prognosis of six months or less to live"). Ms. Rice's unsupported allegation is not sufficient to find the two complaints unrelated.

Ms. Rice argues that movants' motion should be denied because the government's intervention superseded Ms. Rice's complaint. Docket No. 158 at 3-6. Essentially, Ms. Rice argues that the Court cannot dismiss her complaint because that complaint became a legal nullity once the government filed its own complaint that duplicated Ms. Rice's claims. Ms. Rice's argument is a mere technicality that does not

affect movants' substantive argument that their earlier-filed complaint bars Ms. Rice from pursuing her own related qui tam lawsuit. While courts will, on occasion, dismiss superseded claims once the government intervenes, *see United States ex rel. Feldman v. City of N.Y.*, 808 F. Supp. 2d 641, 649 (S.D.N.Y. 2011) (dismissing relator's complaint as "superseded in its entirety by the Government's Amended Complaint"); *In re Pharm. Indus. Average Wholesale Price Litig.*, 2007 WL 4287572, at *4-5 (D. Mass. Dec. 6, 2007) ("once the government has intervened, the relator has no separate free-standing FCA cause of action"), Ms. Rice cites no case that holds that the government's intervention precludes a Section 3730(b)(5) challenge. The Supreme Court has clarified that "[a]n action brought by a private person does not become one brought by the Government just because the Government intervenes and elects to 'proceed with the action.'" *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 477 (2007). The Court finds that movants may raise Section 3730(b)(5) notwithstanding the government's intervention, and that such challenge may take the form of a motion to dismiss. *See United States ex rel. Hampton v. Columbia/HCA Healthcare Corp.*, 318 F.3d 214, 219 (D.C. Cir. 2003) (affirming dismissal of a case in which the government had intervened on Section 3730(b)(5) grounds).

Ms. Rice argues that Section 3730(b)(5) cannot operate against her because Section 3730(d)(1) "mandates that if the Government proceeds in an action brought by a qui tam plaintiff then the plaintiff is entitled to a share of the recovery." Docket No. 158 at 7. Section 3730(d)(1) states, in relevant part:

> If the government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this

> paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action.

31 U.S.C. § 3730(d)(1). The second sentence, which contains certain exceptions to a relator's entitlement to a share of the settlement proceeds, makes no reference to Section 3730(b)(5). *See id.*

Ms. Rice's argument was rejected by the United States Court of Appeals for the Third Circuit in *United States ex rel. Dhillon v. Endo Pharms.*, 617 F. App'x 208, 212 (3d Cir. 2015) (unpublished). In *Dhillon*, the relator argued that, "once the Government intervenes, it cannot deny a Relator his statutory share" pursuant to 31 U.S.C. § 3730(d)(1). *Id.* The court disagreed, holding that the first-to-file bar is a "threshold question" that applies whether or not the government has intervened. *Id.*

In *United States ex rel. Ortega v. Columbia Healthcare, Inc.*, 240 F. Supp. 2d 8, 14 (D.C. Cir. 2003), the United States Court of Appeals for the District of Columbia examined Section 3730(b)(5) in connection with other portions of Section 3730 relating to government intervention. In *Ortega*, a relator argued that Section 3730(b)(5) should be read in conjunction with Section 3730(e)(3), which bars qui tam actions that are "based upon allegations or transactions which are the subject of a civil suit . . . in which the Government is already a party." The relator argued that, because the government intervened in her lawsuit before intervening in two earlier-filed qui tam complaints, the relator's complaint was the first-filed for Section 3730(b)(5) purposes. *Id.* The *Ortega* court noted that the presence of the two provisions was confusing, but held: "there is no indication that § 3730(e)(3) was intended to limit the application of § 3730(b)(5); the

simple language of § 3730(b)(5) in no way implicates government intervention as a significant fact." *Id.*

The Court finds that *Ortega*'s logic applies with equal force to Section 3730(d)(1). Section 3730(b)(5) states clearly that subsequent related complaints are prohibited. The Tenth Circuit construes this language as a jurisdictional limit on the Court's authority to hear cases brought by subsequent relators. *Grynberg,* 390 F.3d at 1278. Thus, consistent with the Third Circuit's decision in *Dhillon* and the D.C. Circuit's reasoning in *Ortega*, the Court finds that Section 3730(b)(5) is a threshold question that precludes recovery for subsequent relators and that "government intervention is irrelevant" to its application. *Ortega*, 240 F. Supp. 2d at 14.

Finally, Ms. Rice argues that movants' complaint is "legally infirm" and thus cannot preempt Ms. Rice's later-filed action. Docket No. 158 at 11-14. Specifically, Ms. Rice argues that movants have not alleged a factual basis for specifically-identified false claims. *Id.* at 12. Citing the Court's September 21, 2015 order, Ms. Rice argues that, because each of the fourteen patients for which movants' allegations were sufficient under Fed. R. Civ. P. 9(b) contained information about a carrier's denial of benefits for those patients and defendants' attempt to avoid detection of those patients' bills during subsequent audits, the audit avoidance theory is the only valid claim in movants' complaint. Docket No. 158 at 12-13. Ms. Rice mischaracterizes the Court's order. Although the Court held that certain of movants' allegations that implicated the audit avoidance theory satisfied Rule 9(b)'s requirements, the Court did not dismiss movants' complaint with respect to any of movants' theories. The only portion of

movants' complaint that was dismissed was movants' alter ego theory of liability against defendants Ovations, Inc. and OptumHealth Holdings, LLC. *See* Docket No. 120 at 35. The Court denied defendants' motion to dismiss in all other respects. *Id.* Thus, Ms. Rice's claim that the law of the case limits movants' complaint to the audit avoidance theory is without merit. As previously discussed, the Court finds that movants' complaint put the government on notice of all of the material allegations in Ms. Rice's subsequently-filed complaint. As such, movants' motion to dismiss will be granted.

III. CONCLUSION

For the foregoing reasons, it is

ORDERED that relators Terry Lee Fowler and Lyssa Towl's Motion to Dismiss Rice's Complaint [Docket No. 154] is **GRANTED**. It is further

ORDERED that relator Sharlene Rice is dismissed from this lawsuit pursuant to 31 U.S.C. § 3730(b)(5). It is further

ORDERED that relators Terry Lee Fowler and Lyssa Towl's Alternate Motion to Disqualify Relator Sharlene Rice as Being Eligible to Share in the Settlement Proceeds [Docket No. 166] is **DENIED** as moot. It is further

ORDERED that Case No. 14-cv-01647-PAB is dismissed in its entirety.

DATED September 15, 2016.

BY THE COURT:

s/Philip A. Brimmer
PHILIP A. BRIMMER
United States District Judge