IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

UNITED STATES OF AMERICA ex rel. ROBERT A. CUTLER,	)	
Plaintiff,	)	
v.	)	**Case No. 3:21-cv-00748**
	)	**Judge Richardson/Frensley**
CIGNA CORP. et al.,	)	
Defendants.	)	

ORDER

I. INTRODUCTION

This qui tam action was filed in the Southern District of New York by Relator Robert Cutler alleging that Cigna Corp. and associated entities (collectively, "Cigna") violated the Federal False Claims Act ("FCA") (31 U.S.C. §§ 3729-33) through actions related to "false and fraudulent risk adjustment claims that were submitted to The Centers for Medicare & Medicaid Services ('CMS') by Cigna-HealthSpring between 2012 and 2017 using improper diagnostic codes under the International Classification of Diseases, Clinical Modification system ('ICD Codes')." Docket No. 94, p. 2. The case was later transferred to this District. Docket No. 127. The United States ("the Government") then filed a complaint-in-intervention. Docket No. 178. Cigna has filed a "Motion to Dismiss the United States' Complaint-in-Intervention Pursuant to Rule 12(b)(6)" and a "Motion to Dismiss Relator's Amended Complaint Pursuant to Rule 12(b)(6)," both of which are pending. Docket Nos. 195, 198.

This matter is now before the Court upon Cigna's Motion to Stay Discovery. Docket No. 205. Cigna has also filed a Supporting Memorandum. Docket No. 206. The Government and Mr. Cutler have both filed Responses in Opposition. Docket Nos. 210, 211. Cigna has filed a Reply. Docket No. 218. For the reasons set forth below, Cigna's Motion (Docket No. 205) is DENIED.

II. LAW AND ANALYSIS

A. Motions to Stay

"District courts have broad discretion and power to limit or stay discovery until preliminary questions which may dispose of the case are answered." *Bangas v. Potter*, 145 F. App'x 139, 141 (6th Cir. 2005), *citing Hahn v. Star Bank*, 190 F.3d 708, 719 (6th Cir. 1999). Further, "[l]imitations on pretrial discovery are appropriate where claims may be dismissed 'based on legal determinations that could not have been altered by any further discovery.'" *Sevier v. Apple, Inc.*, No. 3:13-cv-0607, 2014 U.S. Dist. LEXIS 18402, at *10 (M.D. Tenn. Feb. 13, 2014), *quoting Gettings v. Bldg. Laborers Local 310 Fringe Benefits Fund*, 349 F.3d 300, 304 (6th Cir. 2003) (internal quotation marks omitted).

At the same time, "[t]he mere fact a party has filed a case-dispositive motion is usually deemed insufficient to support a stay of discovery." *Collabera v. Ligget*, No. 3:21-cv-00123, 2021 WL 6496801, 2021 U.S. Dist. LEXIS 250832, at *2 (M.D. Tenn. June 21, 2021), *quoting Stirling v. Hunt*, No. 12-2737, 2012 WL 12899060, 2012 U.S. Dist. LEXIS 163371, at *1 (W.D. Tenn. Nov. 15, 2012) (internal quotation marks omitted). And the Local Rules of this District specifically advise that "[d]iscovery is not stayed, including during the pendency of dispositive

motions, unless specifically authorized by Fed. R. Civ. P. 26(d) or by order of the Court, or with regard to e-discovery, as outlined in Administrative Order 174-1."[1] LR 16.01(g).

Accordingly, "unless the motion raises an issue such as immunity from suit, which would be substantially vitiated absent a stay, or unless it is patent that the case lacks merit and will almost certainly be dismissed, a stay should not ordinarily be granted to a party who has filed a garden-variety Rule 12(b)(6) motion." *Williams v. New Day Farms, LLC*, No. 2:10-cv-0394, 2010 U.S. Dist. LEXIS 98934, 2010 WL 3522397, at *2 (S.D. Ohio Sept. 7, 2010). While the Court has the inherent discretionary power to stay proceedings as part of its ability to manage its docket, it must "tread carefully" in granting a motion to stay, because every party has a "right to a determination of its rights and liabilities without undue delay." *Ohio Envtl. Council v. USDC S.D. of Ohio*, 565 F.2d 393, 396 (6th Cir. 1977), *citing Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936); *see Gray v. Bush*, 628 F.3d 779, 785 (6th Cir. 2010) (same).

B. Cigna's Motion to Stay

Cigna moves the Court for an order staying discovery in this matter until the Court decides Cigna's pending Motions to Dismiss. Docket No. 206, p. 1. Cigna contends that "each claim is subject to dismissal on threshold grounds" and that the Government has already sought and received voluminous discovery documents and deposition testimony through civil investigative demands. *Id.* at 1-5, 11-12. Cigna further maintains that "[a] short stay indeed will not prejudice or cause a tactical disadvantage to the Government or Cutler here, but denial of a stay would inflict a hardship on Cigna by requiring potentially expansive discovery that would

[1] Rule 26(d), which provides that "[a] party may not seek discovery from any source before the parties have conferred as required by Rule 26(f)," is not implicated here. Similarly, the Parties are not in a dispute about e-discovery.

be rendered moot if Cigna's motions to dismiss are granted." *Id.* at 12, *quoting Gibly v. Best Buy Co.*, 2022 WL 2413906, at *3 n.5 (D.N.J. Mar. 7, 2022) (cleaned up).

The Government responds that Cigna's motions to dismiss are not a sufficient basis to stay discovery, that the resolution of those motions is unlikely to narrow discovery, and that the balance of harms does not favor Cigna. Docket No. 210. Specifically, the Government contends that Cigna has only made "garden-variety" arguments for dismissal, that "this is not a case with several factually unrelated causes of action or theories of liability, where partial dismissal would likely significantly limit discovery," and that "the relevant harm is the delay to these proceedings." *Id.* at 14-21.

In Reply, Cigna argues that there are at least five reasons to stay discovery until the motions to dismiss are resolved: 1) the Complaints "are subject to dismissal on legal grounds that would avoid the need for discovery altogether"; 2) "Cutler's claims in particular are subject to dismissal under the FCA's public disclosure bar and Rule 9(b)'s heightened pleading standard—threshold defenses designed to *limit* discovery by relators"; 3) "the Government has no urgent need for discovery" due to the preceding years of investigation; 4) "even if some claims proceed, resolving Cigna's motions to dismiss will likely substantially narrow the issues requiring discovery"; and 5) "the harm to Cigna from expansive and needless discovery outweighs any minimal prejudice to the Government or Cutler from a limited stay . . . ." Docket No. 218, p. 1 (emphasis in original). Cigna further argues that because Mr. Cutler's Response joins and incorporates that of the Government, "there is no substantive rebuttal at all from Cutler to the need to limit discovery as to his complaint . . . ." *Id.* at 12.

As discussed above, a stay of discovery is the exception, not the rule, even when a dispositive motion is pending. LR 16.01(g); *Collabera*, 2021 U.S. Dist. LEXIS 250832, at *2.

In order to appropriately utilize judicial resources and maintain the case deadlines and schedule set by the Court, including trial dates, generally parties must continue to pursue their case so that they are prepared for trial if a dispositive motion fails. Additionally, discovery gives both sides a better understanding of their own position and that of their adversary, such that settlement may be more likely.

It is nevertheless appropriate to stay discovery when a defense such as immunity from suit has been raised, because such immunity would be "substantially vitiated absent a stay" or if it is "patent that a case lacks merit and will almost certainly be dismissed." *Williams,* 2010 WL 3522397, at *2. Neither is the case here. The "threshold grounds" upon which Cigna believes each claim is subject to dismissal ("including that it fails to satisfy core pleading requirements, conflicts with agency guidance, and in Cutler's case is foreclosed by the FCA's public disclosure bar") are not "issue[s] such as immunity from suit, which would be substantially vitiated absent a stay." Docket No. 206, p. 2; *Williams*, 2010 WL 3522397, at *2. Immunity from suit is vitiated absent a stay of discovery because one of the primary purposes of the immunity is to protect the defendant from "the rigors of litigation itself, including the potential disruptiveness of discovery." *Everson v. Leis*, 556 F.3d 484, 491 (6th Cir. 2009).

In contrast, pleading requirements, including those imposed by Rule 9, do not exist for the purpose of preventing discovery. Rather, their purpose is to "provide fair notice to Defendants and enable them to prepare an informed pleading responsive to the specific allegations of fraud." *United States ex rel. Bledsoe v. Cmty. Health Sys.* (*Bledsoe I*), 342 F.3d at 643 (6th Cir. 2003) (internal quotation marks and citation omitted). In the context of the FCA, Rule 9(b) requires that a complaint "allege specific false claims with particularity." *United States ex rel. Bledsoe v. Cmty. Health Sys.* (*Bledsoe II*), 501 F.3d 493, 509 (6th Cir. 2007).

Cigna does not explain, and the Court does not perceive, how "conflicts with agency guidance" might implicate a right to be protected from discovery. *See* Docket Nos. 205, 206, 218. Whether the FCA's public disclosure bar provides a basis for granting a stay is a closer question. The cases cited by Cigna for the proposition that a stay of discovery is "particularly appropriate" in an FCA case are entirely out-of-district (and almost entirely out-of-Circuit). The two 6th Circuit Court of Appeals cases cited (*Bledsoe II* and *Bryant*) do not address stays of discovery (or even discovery generally) at all. *See Bledsoe II*, 501 F.3d 493; *U.S. ex rel. Bryant v. Cmty. Health Sys., Inc.*, 24 F.4th 1024 (6th Cir. 2022). But the 6th Circuit has noted that the methods adopted by Congress "to discourage opportunistic plaintiffs from bringing parasitic lawsuits" include "the first to file bar of 31 U.S.C. § 3730(b)(5) and the public disclosure bar of 31 U.S.C. § 3730(e)(4)(A)." *Walburn v. Lockheed Martin Corp.*, 431 F.3d 966, 970 (6th Cir. 2005).

The public disclosure bar is jurisdictional and instructs that:

> (4)(A) The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed—
>
> > (i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;
> >
> > (ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or
> >
> > (iii) 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) For the purposes of this paragraph, "original source" means an individual who either (1) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) 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).

The inquiry necessary to make a determination as to the application of the public disclosure bar may, in some instances, depend upon information that would emerge from the discovery process. Further, the existence of the public disclosure bar does not imply that discovery should necessarily be stayed; rather, it instructs that failure to clear the bar is a basis for granting a motion to dismiss. Neither of the 6th Circuit cases cited by Cigna hold otherwise. *See Bledsoe II*, 501 F.3d 493; *Bryant*, 24 F.4th 1024. Additionally, even if application of the public disclosure bar were to ultimately result in the dismissal of Mr. Cutler's non-intervened claim, it has no application to the Government's claims, and Cigna has not persuaded the Court that the discovery is not overlapping. Given the clear instructions of LR 16.01(g) and the other factors discussed herein, the Court will not grant a stay in this matter based on the FCA's public disclosure bar.

Nor does it appear to the Court that it is "patent that [this] case lacks merit and will almost certainly be dismissed." *Williams*, 2010 WL 3522397, at *2. In the context of motions to amend, this Court has noted the difficulty of assessing the likelihood that claims will be dismissed, since "[a] Magistrate Judge cannot ordinarily rule on a motion to dismiss, *see* 28 U.S.C. § 636(b)(1)(A)" and therefore, "it is usually a sound exercise of discretion to permit the claim to be pleaded and to allow the merits of the claim to be tested before the District Judge by

way of a motion to dismiss." *O'Connor v. Lampo Grp.*, No. 3:20-628, 2021 WL 6500712, 2021 U.S. Dist. LEXIS 250867, at *9-10 (M.D. Tenn. May 14, 2021) (internal quotation marks and citation omitted). Similarly, the Court finds here that the claims are at least colorable. The Motions to Dismiss are pending and will be addressed by the District Judge in due course.

As to Cigna's contention that resolution of the Motions to Dismiss may limit or even obviate the need for discovery, that is the case anytime a dispositive motion is pending. As previously discussed, the Local Rules nevertheless instruct that a pending motion is not a justification for staying discovery. LR 16.01(g).

Regarding Cigna's assertion that the "balance of the harms" favors a stay (alternatively posed as the Government's lack of need for a stay), the Court finds that the harms identified by Cigna ("significant—and potentially needless—costs to collect, review, and produce additional discovery") are no more than the ordinary burdens attendant to discovery. Docket No. 206, p. 2; *see Kendell v. Shanklin*, No. 2:20-985, 2020 WL 6748505, 2020 U.S. Dist. LEXIS 98181, at *5 (S.D. Ohio Jun. 4, 2020) ("the standard time and expense required to respond to discovery requests is not an undue burden") (internal quotation marks and citation omitted).

Further, it is not the Government's burden to demonstrate that a stay would cause harm; rather, it is Cigna's burden as the movant to show that a stay would *not* cause harm. *See Ohio Envtl. Council*, 565 F.2d at 396. Of course, to the extent that the Government's subsequent discovery requests seek information that has already been provided, Cigna is free to respond by identifying the already-produced material. Cigna also retains the right to bring a motion for a protective order, should it perceive that one is warranted, in response to specific requests. *See* Fed. R. Civ. P. 26(c).

As to Cigna's argument that Mr. Cutler has not substantively responded to the Motion, the Court finds that Mr. Cutler's Response incorporating and adopting the arguments made by the Government in its Response is sufficient, particularly as Mr. Cutler adds that additional arguments related to the likelihood of success of the Motion to Dismiss his Complaint are contained in his Response to the Motion to Dismiss. Docket No. 211, p. 1. Moreover, Cigna has the burden on its Motion, and the Court has found that the burden has not been met. Thus, a stay would not be granted even in the complete absence of a response by Mt. Cutler.

Additionally, the Court finds that Cigna has not met its burden to demonstrate: (1) a pressing need for delay; and (2) that neither the other party nor the public will suffer harm from entry of the order." *See Ohio Envtl. Council*, 565 F.2d at 396. "A stay is not a matter of right, even if irreparable injury might otherwise result." *Indiana State Police Pension Tr. v. Chrysler LLC*, 556 U.S. 960, 961 (2009) *quoting Nken v. Holder*, 556 U.S. 418 433-34 (2009) (internal quotation marks omitted). "It is instead an exercise of judicial discretion, and the party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.* For the reasons discussed, Cigna has not met that burden here.

III. CONCLUSION

For the foregoing reasons, Cigna's Motion (Docket No. 205) is DENIED.

IT IS SO ORDERED.

Jeffery S. Frensley
United States Magistrate Judge