U.S. Department of Justice

United States Attorney
Southern District of New York

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April 20, 2020

BY ECF
Hon. Andrew L. Carter
United States District Judge
Thurgood Marshall Federal Courthouse
40 Foley Square
New York, New York 10007

Re: *United States v. Anthem, Inc.*, 20 Civ. 2593 (ALC)

Dear Judge Carter:

This Office ("SDNY-USAO") represents the United States (the "Government") in the above-referenced case alleging violations of the False Claims Act ("FCA"), 31 U.S.C. § 3729 *et seq*. On April 14, defendant Anthem, Inc. filed a pre-motion conference letter in anticipation of seeking a transfer of venue on convenience grounds to the Southern District of Ohio ("S.D. Ohio") under 28 U.S.C. § 1404(a). *See* ECF No. 15 (the "PMC Letter"). In accordance with Your Honor's Individual Rule 2.A, we respectfully submit this letter to (*i*) clarify the controlling legal standard; (*ii*) correct the record as to Anthem's mischaracterizations of the crux of the Government's fraud allegations, (*iii*) set forth the factual and legal basis for litigating this case in this District, and (*iv*) explain why, in the Government's view, Anthem's § 1404(a) motion will be futile — namely, because Anthem cannot "mak[e] out a strong case for transfer" that satisfies the "clear and convincing evidence standard" needed to overcome plaintiff's forum choice, *N.Y. Marine & Gen. Ins. Co. v. Lafarge N. Am., Inc.*, 599 F.3d 102, 114–15 (2d Cir. 2010).

A. The Standard of Review for a Motion to Transfer under 28 U.S.C. § 1404(a)

While the PMC Letter nominally discusses the legal standard for a § 1404(a) motion, Anthem fails to acknowledge – let alone address – the controlling standard of review in this Circuit. Specifically, where, as here, a case could be litigated in two different judicial districts, "the Second Circuit has held that 'courts should give deference to a plaintiff's choice of forum,'" and the moving party must "show[] by 'clear and convincing' evidence that the balance of convenience favors transfer." *Starr Indem. & Liability Co. v. Brightstar Corp.*, 324 F. Supp. 3d 421, 431 (S.D.N.Y. 2018) (quoting *Lafarge*, 599 F.3d at 114).

To help district courts assess whether to grant a motion to transfer, the Second Circuit has identified seven relevant factors — "(1) the plaintiff's choice of forum, (2) the convenience of witnesses, (3) the location of relevant documents and relative ease of access to sources of proof, (4) the convenience of parties, (5) the locus of operative facts, (6) the availability of process to compel the attendance of unwilling witnesses, and (7) the relative means of the parties." *Lafarge*, 599 F.3d at112. In addition, "[c]ourts in this district have also considered 8) the forum's familiarity with the governing law, and (9) trial efficiency and the interest of justice." *Starr Indem.*, 324 F. Supp. 3d at 431 (internal quotation marks omitted).

B. Anthem's Risk-Adjustment Fraud Principally Involved Decisions by Its Senior Managers, Not the Ministerial Tasks Carried Out by the Columbus Office

Under Medicare Part C, "CMS calculates the payments [to Medicare Advantage Organizations like Anthem] based on various risk adjustment data." *U.S. ex rel. Swoben v. United Healthcare*, 848 F.3d 1161, 1166 (9th Cir. 2016). The MAOs, in turn, must attest that their risk-adjustment data is accurate "as an express condition of receiving payment." *Id*.

This case is about Anthem, one of the largest health insurers in the U.S., choosing to profit at the expense of Medicare by disregarding its attestations and promises about the accuracy of its risk-adjustment data submissions. *See* Compl. ¶ 9 [ECF No. 1]. Specifically, the Government alleges that senior managers at Anthem – including the president of its Medicare business, a vice president heading its Medicare Revenue and Reconciliation ("R&R") group, and other compliance and finance executives – knowingly structured Anthem's retrospective chart review program as a "new revenue generating" tool and a "cash cow," while "turning a blind eye to negative results where chart review could not substantiate the diagnosis codes that Anthem had previously submitted to CMS." *Id.* ¶¶ 6–8; *see also id*. ¶¶ 128–146 (describing that, in order to profit from chart review, various Medicare, compliance, and finance executives at Anthem knowingly disregarded the obligation to notify CMS of erroneous risk-adjustment data).

In its letter, Anthem misleadingly asserts that the fraud here is "fundamentally" about how Anthem's "offices in Columbus, Ohio" operated the "chart review program." *See* PMC Letter at 2. But even a cursory reading of the Complaint dispels this conceit. As noted above, the Government is not accusing Anthem of having violated the FCA due to the ministerial acts of its line-level employees in Columbus; instead, the Complaint alleges that senior managers opted to structure Anthem's chart review in a way that knowingly contravened the company's attestations and promises to the Government. Put simply, the majority of key Anthem witnesses will be its senior executives and managers who made decisions about the structure of chart review, rather than the line-level employees implementing those decisions.

Location-wise, Anthem records and public sources like LinkedIn indicate that few, if any, of these senior executives and managers are located in Ohio. Rather, several of these key witnesses reside on the East Coast,[1] while others are dispersed throughout the country in states like California, Nevada, Colorado, and Kentucky. In short, Anthem's claim that Columbus "is the 'center of gravity' of [this] litigation," *see* PMC Letter at 2-3, is simply incorrect. It is as illogical as positing that the main focus of a case involving an allegedly unsafe drug should be on individual drug sales representatives, instead of the formulation and safety decisions made by corporate executives. *Cf. Legg v. Wyeth*, 428 F.3d 1317, 1324-25 (11th Cir. 2015).

C. Conduct Relevant to the Alleged Fraud Occurred in and Impacted This District

Contrary to Anthem's claim that the "only apparent connection between this [D]istrict and the Plaintiff's claims is that Plaintiff's attorneys work here," *see* PMC Letter at 3, this case is substantially connected to this District in three regards. First, one of Anthem's largest Medicare Advantage plans, Empire MediBlue HMO, operated in this District and is part of in the alleged

[1] For example, the president of Anthem's Medicare business, who signed the attestations regarding data accuracy, *see* ECF No. 1-9, resides in Connecticut. The vice president in charge of Anthem's Medicare R&R group resides in Florida. Other key Anthem witnesses on the East Coast include a compliance manager who signed one of the key agreements on behalf of Anthem (Virginia) and a director in the Medicare R&R group responsible for data submissions (Maine).

fraud. *See* Compl. ¶¶ 11-12, Ex. 1. Each year, Anthem submitted claims to Medicare for tens of thousands of New Yorkers enrolled in Empire MediBlue and received hundreds of millions of dollars in risk-adjustment payments. Anthem's fraud, in turn, rendered thousands of those claims false and inflated the amounts of the payments from Medicare.

Second, Anthem engaged in specific conduct in this District that is directly relevant to the alleged fraud. Specifically, Anthem sent flyers and other communications to healthcare providers in this District to misrepresent the purpose and structure of its chart review program — falsely suggesting that it would verify the accuracy of diagnosis data through chart review while actually intending to turn a blind eye to inaccurate data. *See* Compl. ¶¶ 108-112; Ex. 11 (flyer for New York providers who treated patients enrolled in Empire MediBlue). Those providers, accordingly, are likely to be witnesses in this case.

Third, another court in this District has already supervised the investigation resulting in this lawsuit. Specifically, in 2018, the Government sought judicial relief to compel Anthem to provide testimony pursuant to an investigative subpoena. Magistrate Judge Fox issued a report and recommendation to enforce that subpoena, after which Anthem stipulated to provide the testimony sought subject to agreements as to scope and timing. *See United States v. Anthem, Inc.*, 18 Misc. 379 (GBD)(KNF), Dkt. Nos. 26, 41.

D. Anthem Cannot Make the Showing Necessary to Meet Its Burden under § 1404(a)

Anthem does not, and cannot, dispute that venue is proper here because the FCA expressly authorizes the Government to file suit "in any [] district in which the defendant … transacts business or in which any [prescribed] act [] occurred." 31 U.S.C. § 3732(a). Anthem, therefore, bears "a weighty burden" to demonstrate that the Government's "forum choice should be disturbed." *U.S. ex rel. Westrick v. Second Chance Body Armor*, 771 F. Supp. 2d 42, 47 (D.D.C. 2011). Under the standard in this Circuit, it must "show[] by 'clear and convincing' evidence that the balance of convenience favors transfer." *Starr Indem.*, 324 F. Supp. 3d at 431.

Anthem will not be able to satisfy this standard. Specifically, to the extent that the core premise of its § 1404(a) motion will be that Columbus, Ohio is the "center of gravity," that assertion is at odds with the crux of the Government's claims and the nature of the fraud alleged. *See supra* at 2; *see generally* Compl. ¶¶ 128-146.

Further, because the key Anthem witnesses are dispersed throughout the country, and because the FCA expressly authorizes nationwide service of subpoenas on witnesses, *see* 31 U.S.C. § 3731(a), this District is at least as convenient a forum – if not more so – as the S.D. Ohio. *See* 17 MOORE'S FEDERAL PRACTICE - CIVIL § 111.13 (2020) ("If both parties' witnesses are scattered throughout states not in either district, or are evenly divided between the two districts, then this factor will be considered a "wash," and a balancing of the other factors will determine the transfer motion.").

Finally, insofar as Anthem attempts to rely on *United States v. Nature's Farm Prods., Inc.*, 00 Civ. 6593 (SHS), 2004 WL 1077968 (S.D.N.Y. May 13, 2004), the differences between this case and *Nature's Farm* far outweigh any superficial similarity. In *Nature's Farm*, there was no concrete connection to this District at the time of transfer, 2004 WL 1077968 at *1, and "the core of the allegedly fraudulent scheme" occurred in the transferee forum, *see id.* at *5. Here, by contrast, and as noted above, conduct directly relevant to Anthem's fraud occurred in this District, and Anthem submitted false claims concerning tens of thousands New Yorkers.

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We thank the Court for its consideration of this letter.

Respectfully submitted,

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