



November 19, 2020

BY EMAIL

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Re: United States, et al., ex rel. SW Challenger, LLC v. Evicore HealthCare et al.
Case No. 19-2501

Dear Mr. Freedman and Mr. Siegel:

We write pursuant to Judge Marrero's local rules in response to your November 12th pre-motion letter and in furtherance of our video conference earlier this week.

As a preliminary matter, we continue to discuss two issues which we believe may be resolved without the need for motion practice. The first is the unsealing of the initial complaint in this matter which was not unsealed by the Court's June 10, 2020 unsealing order. We discussing this issue with our clients and will get back to you before Monday of next week as to whether we have any objection to such unsealing. As I mentioned to you on the call, we believe that your suggestion that the Defendants could move to dismiss certain claims based on statutes of limitation is premature and not consistent with the law of this circuit. There is no question that the Second Amended Complaint (SAC) was filed within the applicable statutes of limitations and cannot be dismissed based on that ground. If anything, your point goes to the temporal scope of damages available, not whether the operative complaint's causes of action may be dismissed in their entirety. We also pointed out to you that recent case law supports the proposition that the Relators may avail themselves of the 10-year statute of limitations available to the government. All of these issues are highly fact intensive and not appropriate for a motion to dismiss. However, we believe if we can resolve the unsealing issues, that may resolve the issue.

The second issue that we discussed was the fact that the complaint currently named the two Relators as the original sources in this case as Jane Doe 1 and 2. This was done to protect their identities as they are still working in the healthcare industry and therefore prone to Defendant's substantial influence within the industry. As we further explained during our conference, it is our collective experience that relators who continue to work in the industry that is the subject of their whistleblowing are routinely and viciously subjected to black-balling and other harassment as a result of coming forward with their allegations of wrongdoing (even when their allegations are borne out in litigation). We would agree to provide you and your client with

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the names of the Relators if your client would allow the Relators to remain under seal for the present time with the understanding that if it was necessary to unseal their names in the future, we would join issue with you that time. In other words, we would agree to promptly disclose the Relators' identities pursuant to a protective order that would expressly preserve your client's future right to seek the public disclosure of those identities.

With respect to your remaining claims, as we discussed, we believe your assertion that the SAC does not satisfy Rule 9(b) is without merit. Numerous complaints alleging wide-spread schemes of healthcare fraud with less detail than that contained in the SAC have been approved by the Courts and found to satisfy Rule 9(b). *See, e.g., United States v. Huron Consulting Grp.*, No. 09-cv-1800, 2011 WL 253259, at *2–3 (S.D.N.Y. Jan. 24, 2011) (holding that complaint in a False Claims Act action for healthcare fraud satisfied Rule 9(b) where it alleged facts constituting “circumstantial evidence” of false claims). Your suggestion that a complaint which sets forth in detail a fraudulent scheme and identifies with detail the elements of that scheme needs to provide every document referenced in the complaint or describe in detail every contract mentioned, is inconsistent with the law of this circuit. *See, e.g., Rombach v. Chang*, 355 F.3d 164, 170 (2d Cir. 2004) (providing that, under Rule 9(b), a complaint need only “(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent”).

Your argument about worthless services is equally without merit. The claim in the complaint, which is highly factually based and must be considered true for purposes of the motion to dismiss, is that eviCore which was hired specifically to control healthcare costs was engaging in conduct which resulted in the opposite; i.e. it wasn't doing its job and was not providing the services that the government understood it would be providing. As you point out, under strikingly similar facts, the government extracted a multi-decamillion dollar settlement from CareCore, a predecessor of eviCore.

As to reverse false claims, the SAC alleges that eviCore was paid for services that it did not render and therefore is holding money illegitimately paid. *See, e.g., SAC ¶¶ 27, 56–58*. This is sufficient to state a reverse False Claims Act claim. *See, e.g., Kane ex rel. United States v. Healthfirst, Inc.*, 120 F. Supp. 3d 370, 394 (S.D.N.Y. 2015) (“[T]o retain—to not return—an overpayment constitutes a violation of the [False Claims Act].”).

Regarding the conspiracy claim, we believe the complaint adequately alleges that healthcare providers knowingly conspired with eviCore to provide medically unnecessary services which the government paid for. It is not required under the law that all conspirators to an alleged conspiracy be defendants in the case. *See, e.g., United States ex rel. Mikes v. Straus*, 84 F. Supp. 2d 427, 432 (S.D.N.Y. 1999) (noting that a plaintiff may bring a conspiracy to defraud claim under the False Claims Act where “the defendant conspired with one or more persons to get a false or fraudulent claim allowed or paid by the United States”).

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With respect to your argument regarding state law claims, the complaint sets forth a national fraudulent scheme which impacts healthcare practitioners and MCOs throughout the country. Specific States are set forth and the allegations in question clearly reach every State included as a Plaintiff. *See, e.g.*, SAC ¶¶ 195, 204, 213. This is no different than many other FCA national healthcare schemes that have been alleged in New York. Your reliance on one recent S.D.N.Y. case is not a binding precedent and we believe we will easily distinguish it if you file your motion.

Your sixth argument is plainly mistaken: that a previous false claims case related to a different time period and a predecessor company that was brought by current counsel is somehow a public disclosure of a later previously undisclosed fraud relating to different claims and different medical departments by a successor company. We note that you cite no case law to support this proposition as this legal doctrine would essentially immunize a previous fraudster from being prosecuted for a later fraud simply because they had previously committed fraud. We note in any event that, as is set forth in the complaint, that the two plaintiffs have direct personal knowledge of the allegations and qualify as original sources.

Finally, as to the retaliation claims, the SAC sufficiently alleges that eviCore took adverse action against Jane Does 1 and 2, including the imposition of “unreasonable and uncommon productivity requirements,” SAC ¶ 148, and the denial of managerial promotions, *id.* ¶ 155. Such actions constitute retaliation under the False Claims Act, as they “might have dissuaded a reasonable worker from engaging in the protected conduct.” *Difiore v. CSL Behring, U.S., LLC*, 171 F. Supp. 3d 383, 393 (E.D. Pa. 2016) (citing *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006)); *cf. also Mandell v. County of Suffolk*, 316 F.3d 368, 383 (2d. Cir. 2003) (holding that the denial of a promotion constitutes adverse action for purposes of a First Amendment retaliation claim).

The foregoing, respectfully, is a summary of our reasons why we believe you will be unsuccessful in your motion to dismiss. We, of course, raise the right to raise additional arguments, if and when you file a motion.

Very Truly Yours,

s/Stephen A. Weiss
Stephen A. Weiss

cc: Hon. Victor Marrero (Via ECF)
All Counsel of Record (Via ECF)
David S. Stone, Stone Magnanini (via email)