IN THE UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

UNITED STATES OF AMERICA *ex rel.* THOMAS JOSEPH,	
Plaintiff-Relator,	Civil Action No. 2:13-CV-00055
v.	Judge William K. Sessions III
THE BRATTLEBORO RETREAT,	
Defendant.	

DEFENDANT THE BRATTLEBORO RETREAT'S
REPLY IN SUPPORT OF MOTION TO DISMISS

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PRELIMINARY STATEMENT

The Brattleboro Retreat (the "Retreat") filed a motion to dismiss Relator Thomas Joseph's *qui tam* Complaint, which alleges that the Retreat violated the False Claims Act ("FCA") by making false claims for reimbursement from federal payers, making false statements in connection with such claims, and improperly retaining overpayments received from federal payers. As to his allegations that the Retreat made false claims and false statements regarding such claims, Mr. Joseph effectively concedes that he has failed to identify any particular false claim that was actually submitted to a government payer. His claims, instead, are premised on allegations that the Retreat submitted false quarterly refund reports and annual cost reports to Medicare. He also concedes, however, that he has never seen a quarterly or annual cost report submitted by the Retreat and has no knowledge of the content of any such report, and is instead asking the Court to infer that *every* quarterly and annual report *must have* been false. Generalized and speculative allegations of this sort are insufficient under Rule 9(b) of the Federal Rules of Civil Procedure.

His FCA claim premised on his belief that the Retreat improperly retained overpayments fares no better. He fails to identify any actual overpayments and instead relies upon assumptions he draws from internal accounting codes allegedly used by the Retreat. The examples supposedly demonstrating the Retreat's alleged retention of overpayments lack any specificity, are convoluted, and/or are well outside the FCA's six-year statute of limitations. Because he has failed to state viable FCA claims, his Complaint must be dismissed.

ARGUMENT

I. Relator has failed to establish that the FCA claims based on reimbursement for claims outside the six-year statute of limitations are timely.

The Retreat moved to dismiss the Complaint's FCA claims with respect to 22 of the 32 separate Patient Account Numbers identified in the Complaint because those claims involved allegations of wrongdoing and/or alleged overpayments more than six years prior to the date of the

filing of this action on April 12, 2013, or involved unspecified dates. As the Retreat explained, the FCA's six-year statute of limitations bars Mr. Joseph's FCA claims concerning these Patient Account Numbers. *See* 31 U.S.C. § 3731(b)(1).

Mr. Joseph's sole response is his contention that the FCA's statute of limitations should be tolled until such time as he gained knowledge of the allegations in the Complaint. The FCA's only tolling provision, which is set forth in § 3731(b)(2), however, does not apply to relators such as Mr. Joseph. Indeed, the view that the FCA's tolling provision does not apply to relators "is decidedly the majority approach in federal courts of appeals, where no circuit court has accepted [the] view that Section 3731(b)(2) extends the limitations period in *qui tam* actions regardless of how long the relator has known of the material facts." *U.S. ex rel. Sanders v. N. Am. Bus. Indus., Inc.*, 546 F.3d 288, 296 (4th Cir. 2008). Rather, § 3731(b)(2) applies only to FCA claims brought by the United States. *See, e.g.*, *U.S. ex rel. Finney v. NextWave Telecomm., Inc.*, 337 B.R. 479, 486 (S.D.N.Y. 2006) ("[B]ecause the United States elected not to intervene in the case at bar, Relator cannot avail herself of subsection (b)(2)'s lengthier limitations period.").[1]

Mr. Joseph's argument against dismissal of his untimely FCA claims otherwise is convoluted and unpersuasive. It begins with a citation to a district court case, *U.S. ex rel. Thistlethwaite v. Dowty Woodville Polymer Ltd.*, 6 F. Supp. 2d 263 (S.D.N.Y. 1998), that reaches exactly the *opposite* conclusion that Mr. Joseph represents the Second Circuit has adopted. In *Thistlethwaite*, the district court unequivocally explained that "[b]y the clear statutory language, the Relator's time is not extended to three years after the United States official learns of the violation.

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[1] While the Second Circuit does not appear to have considered this issue, the considerable weight of authority is squarely against the argument advanced by Mr. Joseph, as courts have concluded that § 3731(b)(2) does not apply to *qui tam* suits in which the government has not intervened. *See, e.g.*, *U.S. ex rel. Sikkenga v. Regence BlueCross BlueShield of Utah*, 472 F.3d 702, 725-26 (10th Cir. 2006); *U.S. ex rel. Gale v. Omnicare, Inc.*, 2012 U.S. Dist. LEXIS 138150, at *13-14 (N.D. Ohio Sept. 26, 2012); *U.S. ex rel. Gonzalez*, 2010 U.S. Dist. LEXIS 37636, at *18-19 (W.D. Tex. Jan. 21, 2010), *aff'd*, 689 F.3d 470 (5th Cir. 2012); *U.S. ex rel. Bauchwitz v. Holloman*, 671 F. Supp. 2d 674, 694-95 (E.D. Pa. 2009); *U.S. ex rel. Amin v. George Washington Univ.*, 26 F. Supp. 2d 162, 172-73 (D.D.C. 1998).

That provision only applies to the government." *Id.* at 265.[2] Mr. Joseph then tacks in the opposite direction, arguing that § 3731(b)(2) *does not* apply to his claims, stating, "The first prong [of § 3731(b)], as discussed above, is the one that properly applies here." (Opp'n at 10.) The first prong of § 3731(b), however, is the very six-year statute of limitations upon which the Retreat relies in moving for dismissal of the Patient Account Numbers at issue.

The FCA claims concerning Patient Account Numbers 1, 2, 10, 11-14, 31, and 32, involve allegations of wrongdoing outside of the FCA's six-year statute of limitations and fail as a matter of law. *See* 31 U.S.C. § 3731(b)(2). The FCA claims concerning Patient Account Numbers 17-29 likewise fail as a matter of law because the Complaint fails to plead any facts that would even remotely suggest that his claims concerning Patient Account Numbers 17-29 are timely (and, indeed, the Complaint pleads no facts regarding those Patient Account Numbers whatsoever). *See Foster*, 140 F. App'x at 907 (dismissing FCA claims as time barred and explaining that "failure to comply with the statute of limitations may be raised on a motion to dismiss for failure to state a claim for which relief can be granted under Fed. R. Civ. P. 12(b)(6), when failure to comply with the statute of limitations is plain on the face of the complaint").

II. The Complaint fails to state claims under 31 U.S.C. §§ 3729(a)(1)(A) or (a)(1)(B).

With respect to the FCA claims asserted under §§ 3729(a)(1)(A) and (a)(1)(B), the Complaint falls well short of the particularity required by Rule 9(b) because: (1) it fails to identify any claims actually submitted to the government for payment; and (2) otherwise fails to plead specific facts demonstrating the falsity of any such claim or of any false statement associated with the submission of any such claim. Mr. Joseph does not dispute the foregoing. Rather, he urges the

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[2] The language quoted in Mr. Joseph's opposition as setting forth the Second Circuit's interpretation of § 3731(b) is actually taken from a parenthetical in *Thistelthwaite* identifying *contrary* authority from the Middle District of Alabama, *see id.* (citing *U.S. ex rel. Sanders v. E. Ala. Healthcare Auth.*, 953 F. Supp. 1404, 1413 (M.D. Ala. 1996)), which itself is inconsistent with a later holding by the United States Court of Appeals for the Eleventh Circuit, *see Foster v. Savannah Commc'n*, 140 F. App'x 905, 907 (11th Cir. 2005).

Court to excuse the paucity of facts pleaded in his Complaint and adopt a pleading standard that would be far more lenient than what Rule 9(b) actually demands.

Contrary to the impression which Mr. Joseph's opposition hopes to create, district courts within the Second Circuit have routinely dismissed FCA claims where a relator has failed to plead the submission of an actual claim or identify any actual specific false billing record. *See Ping Chen ex rel. U.S. v. EMSL Analytical, Inc.*, 966 F. Supp. 2d 282, 2013 U.S. Dist. LEXIS 117030, at *47 (S.D.N.Y. Aug. 16, 2013) ("Nowhere in the Complaint . . . does Plaintiffs identify a particular false claim that was submitted to the government for payment by any Defendant. Dismissal is appropriate on this basis."); *U.S. ex rel. Blundell v. Dialysis Clinic, Inc.*, 2011 U.S. Dist. LEXIS 4862, at *34-36 (N.D.N.Y. Jan. 19, 2011) (dismissing complaint where relator "fail[ed] to identify even one, specific fraudulent claim"); *Wood ex rel. U.S. v. Applied Research Assocs., Inc.*, 328 F. App'x 744, 747 (2d Cir. 2009) (affirming dismissal where relator failed to plead "a single identifiable record or billing submission" claimed to have been false); *see also U.S. ex rel. Klein v. Empire Educ. Corp.*, 959 F. Supp. 2d 248, 257 (N.D.N.Y. 2013); *U.S. ex rel. Mooney v. Americare, Inc.*, 2013 U.S. Dist. LEXIS 48398, at *15-16 (E.D.N.Y. Apr. 3, 2013); *Johnson ex rel. U.S. v. Univ. of Rochester Med. Ctr.*, 686 F. Supp. 2d 259, 266-67 (W.D.N.Y. 2010); *U.S. ex rel. Polansky v. Pfizer, Inc.*, 2009 U.S. Dist. LEXIS 43438, at *12-13 (E.D.N.Y. May 22, 2009). The Complaint here suffers from the same deficiencies as those which justified dismissal in the foregoing cases.

Faced with this fatal shortcoming, Mr. Joseph resorts to the Complaint's allegations regarding Patient Account Number 8 and his contention that each and every Form CMS-838 quarterly report and annual cost report submitted to Medicare by the Retreat must have been false. Neither allegation is sufficient to salvage his claims under §§ 3729(a)(1)(A) or (a)(1)(B).

The Complaint's allegations regarding Patient Account Number 8 fall well short of Mr. Joseph's assertion that these allegations "show with jarring specificity the manner in which the

Retreat duplicately billed the Government for services." (Opp'n at 13.) To the contrary, these allegations are nothing more than a confusing set of unsupported conclusions supposedly drawn from entries in the Retreat's accounting system. These allegations certainly do not identify the "who," "what," "when," "where" and "how" of the alleged fraud, as Rule 9(b) requires.

For example, Mr. Joseph inexplicably alleges that certain accounting entries were made prior to the date of service at issue. (*Compare* Compl. ¶ 131 (alleging a date of service of Aug. 29, 2011 through Sep. 25, 2011) *with id.* ¶ 132 (alleging accounting entries for "the above-mentioned range" made on June 7, 2011); *see also id.* ¶ 136 (alleging payments posted on April 30, 2011, for the foregoing dates of service).) How such a result even would be possible is entirely unclear from the Complaint.

The Complaint's allegation that the Retreat falsely billed federal and/or state payers regarding Patient Account Number 8 otherwise appears to be based on Mr. Joseph's belief that the Retreat eventually received an overpayment from a state payer. That belief is not supported by any facts pleaded in the Complaint, but rather, only by Mr. Joseph's supposition, which he has drawn not from actual claims or bills, but from his interpretation of certain accounting entries. This sort of speculation has been rejected by the very authority upon which Mr. Joseph himself relies in his opposition. *See, e.g.*, *Johnson*, 686 F. Supp. 2d at 266 ("[T]he plaintiffs' fraud claims do not state a claim, but merely *speculate* that a claim might exist.") (cited in Opp'n at 12).[3]

Mr. Joseph's reliance on the argument that all Form CMS-838 quarterly reports or annual cost reports filed by the Retreat with Medicare must have been false fares no better. Courts have

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[3] Mr. Joseph also asserts that paragraphs 100 and 101 show that "[t]he Complaint here supplies ample specific instances in which the Retreat has fraudulently billed for services." (Opp'n at 13.) Those two paragraphs, however, simply contain the general and conclusory assertion that "[w]hen CMS, through its carrier or fiscal intermediary," issues a partial denial of payment, "the Retreat recodes and resubmits all charges, including those for which payments have previously been received from CMS, and then resubmits the full claim, causing Medicare or Medicaid to make duplicate payments for the same services." (Compl. ¶¶ 100-01.) No specific examples of such alleged recoding and resubmitting are given; nor is there any explanation of why a claim of this nature would be false or fraudulent.

routinely rejected efforts by relators to satisfy Rule 9(b) with blanket allegations of falsity applicable to "all claims" or "all cost reports." *See, e.g.*, *Wood*, 328 F. App'x at 749-50; *see also U.S. ex rel. Ge v. Takeda Pharm. Co.*, 737 F.3d 116, 124 (1st Cir. 2013) ("[Relator] attempts to satisfy Rule 9(b) requirements with a per se rule that if sufficient allegations of misconduct are made, it necessarily follows that false claims and/or material false information were filed. We reject that approach, which violates the specificity requirements of Rule 9(b)."). (*See also* Retreat's Mem. of Law at 15 n.9 (citing cases).) Mr. Joseph offers no response to this argument.

Mr. Joseph's own allegations otherwise demonstrate the deficiency with respect to the sort of pleading upon which he relies. He pleads no first-hand knowledge about any alleged false claims or the Retreat's submission of Form CMS-838 quarterly reports or annual cost reports; he pleads no facts regarding the dates of the submission of any claims or reports; he pleads no facts regarding who submitted any such claims or reports; and he pleads no facts regarding the contents of any such claims or reports that would have rendered them false. This is a far cry from Rule 9(b)'s requirement that the relator "'set forth the who, what, when, where and how of the alleged fraud.'" *Ping Chen*, 966 F. Supp. 2d 282, at __, 2013 U.S. Dist. LEXIS 117030, at *46 (quoting *Polansky*, 2009 U.S. Dist. LEXIS 43438, at *11); *cf. U.S. ex rel. Rector v. Bon Secours Richmond Health Corp.*, 2014 U.S. Dist. LEXIS 52161, at *30-31 n.8 (E.D. Va. Apr. 14, 2014) ("While [Relator] alleges that Defendants submitted CMS-855 forms, he does not provide any actual copies of CMS forms submitted by Defendants nor does he have any firsthand knowledge that Defendants submitted such forms.").

Finally, no court has endorsed the sort of watered-down pleading standard that would allow a relator to satisfy Rule 9(b)'s pleading requirements with nothing more than the sort of conclusory allegations and speculation upon which the Complaint in this action is based. *See Johnson,* 686 F. Supp. 2d at 267 (citing *Wexner v. First Manhattan Co.*, 902 F.2d 169, 172 (2d Cir. 1990)). Under

even the most lenient pleading standard, "the claim must still allege a factual nexus between the improper conduct and the resulting submission of a false claim to the government." *Id.* at 266. Facts establishing such a nexus are plainly absent from the Complaint here.[4]

Rule 9(b) clearly requires greater particularity than what Mr. Joseph has pleaded. It would entirely defeat the purpose of Rule 9(b) if Mr. Joseph were permitted to circumscribe its requirements by claiming a lack of access to information (Opp'n at 12), or summarily asserting that the fraud of which he claims to have intimate knowledge was complex or extensive (*id.* at 8), or that he has not had the opportunity to conduct discovery (*id.* at 9). Indeed, "[t]he danger of permitting unsupported and insufficiently alleged fraud claims to proceed based solely on a party's lack of evidence is obvious." *Johnson*, 686 F. Supp. 2d at 267. Rule 9(b) serves the purposes of "preventing conclusory allegations of fraud from serving as a basis for strike suits and fishing expeditions, and protecting defendants from groundless charges that may damage their reputations." *Id.* (quotation marks and citation omitted). Accordingly, "in the absence of reliable allegations indicating that particulars of fraudulent claims exist plaintiffs are not entitled to receive a 'ticket to the discovery process' in order to meet Rule 9(b)'s particularity requirement." *Id.* Because the Complaint fails to plead claims under §§ 3729(a)(1)(A) and (a)(1)(B) with the particularity required by Rule 9(b), these claims must be dismissed.

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[4] On the rare occasions when a relaxed standard has been applied by other district courts, it has typically been "where the plaintiff-relator never had access to billing information." *Mooney*, 2013 U.S. Dist. LEXIS 48398, at *17. Here, by contrast, Relator alleges that he worked in the department "responsible for handing [sic] billing and accounting for receipts, reimbursements and refunds," and was personally responsible "for about 1,800 patient accounts, records that included the patients' past Medicare or Medicaid payments." (Opp'n at 3.) Thus, Relator purports to be an insider whose allegations are based on his own review of the Retreat's billing records, and yet he also requests unusual lenience for his failure to identify any specific false claims or false cost reports that were submitted to a government payer. *See Mooney*, 2013 U.S. Dist. LEXIS 48398, at *17-18 (refusing to apply relaxed standard where relator "worked in the billing department" of the defendant company and claimed to have had access to billing information); *Ping Chen*, 966 F. Supp. 2d 282, at __, 2013 U.S. Dist. LEXIS 117030, at *50 n.14 (refusing to apply relaxed standard where relator could not identify a specific false claim despite having worked at the defendant corporations).

III. The Complaint fails to state a claim under 31 U.S.C. § 3729(a)(1)(G).

A. The Complaint fails to state a claim with respect to overpayments pre-dating FERA's amendment of the FCA.

As the Retreat previously explained, prior to FERA's enactment, "retention of [an] overpayment did not create an obligation under the former provisions of the FCA," within the meaning of the reverse-false-claims provision of the FCA. *See U.S. ex rel. Yannacopoulos v. Gen. Dynamics*, 636 F. Supp. 2d 739, 752 (N.D. Ill. 2009), *aff'd*, 652 F.3d 818 (7th Cir. 2011); *see also U.S. ex rel. Stone v. OmniCare, Inc.*, 2011 U.S. Dist. LEXIS 73123, at *8 (N.D. Ill. July 7, 2011) ("The parties agree that there was no liability for 'retention of an overpayment' prior to FERA's amendments to the FCA."). As such, where the retention of a purported overpayment is alleged to have occurred prior to FERA's effective date of May 20, 2009, "the liability for retention of an overpayment [under the FCA] cannot attach." *Stone*, 2011 U.S. Dist. LEXIS 73123, at *12.

In response, Mr. Joseph's opposition cites *Yannacopoulos* and its discussion of both the pre-FERA definition of "obligation" and FERA's legislative history. But, he cannot dispute the district court's ultimate conclusion that this very "[legislative] history indicates that retention of [an] overpayment did not create an obligation under the former provisions of the FCA." *Yannacopoulos*, 636 F. Supp. 2d at 752. Instead, he relies on dicta from *U.S. ex rel. Body v. Blue Cross & Blue Shield of Alabama*, 156 F.3d 1098 (11th Cir. 1998), which was not a reverse false claims case at all, but rather, a case about FCA *immunity* of fiscal intermediaries. The alleged retention of any overpayments received prior to FERA's effective date simply may not form the basis of liability under § 3729(a)(1)(G).

B. The Complaint fails to state a claim under § 3729(a)(1)(G).

The Retreat previously analyzed the pleading deficiencies of the Complaint's allegations regarding both prong's of the FCA's post-FERA reverse false claims provision, § 3729(a)(1)(G). And, as discussed, the Complaint fails to plead facts with the requisite particularity that would be

sufficient to show either: (1) that the Retreat made or used a false statement to avoid an obligation to pay money to the government; or (2) that the Retreat knowingly concealed or knowingly and improperly avoided or decreased an obligation to pay money to the government. (Retreat's Mem. of Law at 17-25.)

In response, Mr. Joseph points to his deficient allegations regarding the Retreat's submission of Form CMS-838 quarterly reports to Medicare, asserting that "every fraudulent manipulation detailed in the Complaint pertaining to Medicare must be reflected in each CMS-838 report corresponding to that date. Each of these CMS-838 reports must therefore contain false statements material to an obligation to pay money to the Government." (Opp'n at 19.) Not a single specific false Form CMS-838 quarterly report is identified, no specific dates of any reports are pleaded, and no specific false statements within any such reports are identified. As discussed above, this is the very sort of speculative, inferential pleading that court's routinely reject as insufficient to satisfy the particularity demanded by Rule 9(b). *See Wood*, 328 F. App'x at 749-50 (listing a general allegation that "[t]he various cost reports . . . all contained false claims for reimbursement and made false statements" as an example of "allegations [that] are plainly insufficient under Rule 9(b)"); *U.S. ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 233-34 (1st Cir. 2004) (finding complaint to be inadequate under Rule 9(b) where relator "did not set forth the specifics of any one single cost report, or bill, or piece of paper that was sent to the Government to obtain funding" (internal quotation marks and ellipsis omitted)); *U.S. ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 501 F.3d 493, 512-13 (6th Cir. 2007) ("Absent any information as to when the [cost] reports were filed, or for how much they were inflated, Relator has failed to set forth a specific FCA violation."); *U.S. ex rel. Hebert v. Dizney*, 295 F. App'x 717, 722 (5th Cir. 2008) (generalized allegations that all cost reports were false were insufficient to satisfy Rule 9(b)).

Mr. Joseph otherwise cites to his allegations regarding Patient Account Numbers 1 and 3 as examples of improperly retained overpayments. Patient Account Number 1 involves an alleged overpayment received in April 2006, prior to FERA's amendment of the FCA, and well beyond the FCA's six-year statute of limitations. (*See* Compl. ¶¶ 106, 107.) Mr. Joseph's reliance upon his allegations regarding Patient Account Number 3 as evidence that the Retreat must have submitted false Form CMS-838 quarterly reports to Medicare fares no better. In addition to the deficiencies previously noted by the Retreat (Retreat's Mem. of Law at 20-21), this argument again demonstrates nothing more than Mr. Joseph's supposition that the Retreat must have committed fraud. This is insufficient as a matter of law to satisfy Rule 9(b).

IV. Dismissal of the Complaint should be with prejudice.

Mr. Joseph requests leave to amend if the Court were to grant the Retreat's motion to dismiss. (Opp'n at 21.) He makes no effort, however, to demonstrate how he would amend his Complaint to cure any of the deficiencies identified by the Retreat. His time-barred claims and his assertion that all claims or all quarterly and annual reports must have been fraudulent and must have resulted in a violation of the FCA would never satisfy Rule 9(b). Moreover, his entire theory of FCA liability is premised not upon his knowledge of any actual claims submitted to government payers by the Retreat, nor the retention of any actual overpayments by the Retreat, nor the making of any actual false statements by the Retreat, nor any actual quarterly or annual reports submitted by the Retreat to Medicare. Rather, it is based exclusively upon inferences he has drawn from certain codes used in the Retreat's accounting system. There is no indication whatsoever that affording Mr. Joseph another bite at the apple under these circumstances would be anything other than futile.

CONCLUSION

For the reasons set forth herein, the Retreat therefore respectfully requests that its Motion to Dismiss be granted and that the Complaint be dismissed with prejudice.

Dated this 24th day of April 2014.

Respectfully submitted:

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CERTIFICATE OF SERVICE

This is to certify that I have caused a copy of the foregoing to be filed electronically on this 24th day of April 2014. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt and below. All other parties will be served by regular U.S. Mail. Parties may access this filing through the Court's electronic filing system.

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