

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, ex :
rel. ROBERT J. MERENA, :
Plaintiff : CIVIL ACTION
: :
v. :
SMITHKLINE BEECHAM CORPORATION, :
SMITHKLINE BEECHAM CLINICAL :
LABORATORIES, INC., :
Defendants : No. 93-5974
:

UNITED STATES OF AMERICA, ex :
rel. GLENN GROSSENBACHER, and :
CHARLES W. ROBINSON, JR., : CIVIL ACTION
Plaintiffs :
: :
v. :
: :
SMITHKLINE BEECHAM CLINICAL :
LABORATORIES, INC., : No. 95-6953
Defendant :
:

UNITED STATES OF AMERICA, ex :
rel. KEVIN J. SPEAR, THE :
BERKELEY COMMUNITY LAW CENTER, : CIVIL ACTION
JACK DOWDEN, :
Plaintiffs :
: :
v. :
: :
SMITHKLINE BEECHAM :
LABORATORIES, INC., : NO. 95-6551
Defendant :
:

MEMORANDUM AND ORDER

VanArtsdalen, S.J.

February 23, 1998

Movant and Relator Robert J. Merena is a qui tam plaintiff in an action (Civil Action 93-5974) filed against SmithKline Beecham Clinical Laboratories, Inc. ("SBCL") alleging violations of the False Claims Act, 31 U.S.C. § 3729-3733.

Relator Merena has filed, under seal, a Motion for Partial Summary Judgment (filed document #110) pursuant to Federal Rule of Civil Procedure 56(c). Relator Merena moves for entry of judgment against the United States government (the "government") in the amount of \$10,385,412, which represents 16% of the government's \$64,908,828 settlement recovery from SBCL on what the government argues are six of Relator Merena's unique qui tam allegations.

Factual Background

Relator Merena filed a qui tam action on November 12, 1993 against SBCL alleging various violations of the False Claims Act, 31 U.S.C. § 3729-3733. Two other actions also were filed by additional qui tam plaintiffs for violations of the same federal statute.¹ The government subsequently took over the litigation pursuant to 31 U.S.C. § 3730 (b)(2), (b)(4)(A), (c)(1), and (c)(2)(A). Prior to formally intervening in the actions, the government negotiated a settlement with SBCL on behalf of the qui tam plaintiffs (collectively the "Consolidated Plaintiffs").

The Settlement Agreement and Release signed by all of the parties, including the Consolidated Plaintiffs, the

¹Relators Charles W. Robinson and Glenn Grossenbacher filed Civil Action 95-6953, and Relators Kevin J. Spear, The Berkeley Community Law Center, and Jack Dowden filed Civil Action 95-6551. Three other individuals (William St. John LaCorte, Jeffrey Scott Clausen, and Donald Miller) also filed qui tam actions prior to the settlement of the aforementioned actions, however, they were not parties to the settlement and are not included in the group of qui tam plaintiffs referred to as the "Consolidated Plaintiffs."

government, and SBCL, settled all of the Consolidated Plaintiffs' claims for a total of \$325,000,000. Among Relator Merena's numerous claims, he alleges that SBCL defrauded the government through over billing the government for various medical tests. Specifically, Relator Merena made allegations involving SBCL's automated chemistry tests, and he made six other allegations which the government has determined were not made by any other qui tam plaintiff. These allegations have been referred to during the litigation as Merena's "new allegations", his "Merena-only allegations", or as his "six new allegations." These six, so-called "new" claims involve fraud in the following areas: 1) urinalysis tests; 2) prostate specific antigen ("PSA") tests; 3) pap smear tests; 4) tests performed for end stage renal disease patients ("ESRD"); 5) tests not performed ("TNP"); and 6) kickbacks.

Under the False Claims Act, depending on the value of their contributions to the ultimate resolution of the action or actions, qui tam plaintiffs are entitled to a share of the proceeds of an action or settlement of a claim in the range of 15-25%. 31 U.S.C. § 3730(d). This share is referred to as the relators' share. The Consolidated Plaintiffs have reached an agreement as to how they will allocate the settlement proceeds once their relators' share is disbursed. There is a dispute, however, between the Consolidated Plaintiffs and the government as to the exact percentage or amount of the overall settlement

proceeds that should be designated as a relators' share.² The government has filed a motion to dismiss the Consolidated Plaintiffs' "automated chemistry" allegations and contends that the relators are jurisdictionally barred from recovery on these claims, and thus are entitled to less than the normal statutory share of 15-25% of the total recovery.

The government has conceded, however, that Relator Merena is entitled to a normal statutory recovery, in the range of 15-25%, on his six "new" or "non-automated chemistry" allegations. The recovery from SBCL for these allegations has been valued by the government at \$64,908,828. Specifically, the government has recommended that Relator Merena recover 16% of this \$64,908,828. Relator Merena argues that his statutory share should be at least 18% of the total settlement proceeds, less the agreed upon deduction for the Spear parties, rather than 16% of the amount of the recovery for only the non-automated chemistry claims as allocated and offered by the government. Nevertheless, Relator Merena has filed the current motion seeking recovery in the amount of \$10,385,412, which is the 16% of the non-automated chemistry claims the government has previously offered as a proposed allocation for these qui tam claims. For the reasons

²The parties have already reached an agreement on the issue of relators' share as it relates to the Spear parties (Civil Action 95-6551). The government and the Consolidated Plaintiffs have agreed that \$13.9 million of the total settlement funds be allocated to the claims of the Spear parties, and that the Spear parties receive 15% of that amount, or \$2,085,000 as their qui tam share. The other Consolidated Plaintiffs, including Relator Merena, have agreed to that sum.

set forth below, Relator Merena's Motion for Partial Summary Judgment will be granted in part and denied in part.

Analysis

The Federal Rules of Civil Procedure provide that summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). A "genuine issue of material fact exists where a reasonable jury could return a verdict in favor of the nonmoving party. See Anderson, 477 U.S. at 248. A court must consider the evidence, and all inferences drawn therefrom, in the light most favorable to the nonmoving party. Tigg Corp. v. Dow Corning Corp., 822 F.2d 358, 361 (3d Cir. 1987). When more than one claim for relief is presented in an action, the court may direct the entry of a final judgment as to one or more, but fewer than all, of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. Fed. R. Civ. Pro. 54(b).

The government agrees that at least \$64,908,828 of the settlement proceeds can be allocated to Relator Merena's six so-

called "new" allegations, and that this sum is subject to the normal statutory share of 15-25%. Although the government has suggested that Relator Merena be paid a percentage of 16% of the settlement of the six "new allegations", that 16% allocation is subject to an overall determination of the remaining issues. Therefore, it is appropriate at this time to enter judgment for Relator Merena for the minimum 15% of the \$64,908,828 that has been allocated by the government to the "non-automated chemistry allegations", as there is no dispute as to that amount. Evidence may establish that Relator Merena's share actually should be more. Judgment will presently be entered without prejudice to the right of the qui tam relators to make a claim for and to obtain a larger percentage share and/or a larger share of the total settlement proceeds.

During a conference on February 12, 1998, the government argued that a granting of partial summary judgment would "have no practical effect" because the government would not be responsible for post-judgment interest. The government also indicated that it had no intention of paying the funds to Relator Merena until all appeals have been exhausted. Relator Merena has filed a post-conference submission in further support of his motion for partial summary judgment (filed document #120). In this submission, Relator Merena argues, contrary to the government's contention, that, pursuant to 28 U.S.C. § 1304, 1961, and 2414, the government would be liable for post-judgment interest from the date of the filing of the transcript of the

judgment through the day before the United States Court of Appeals for the Third Circuit affirms the judgment.

Further, Relator Merena argues that entry of judgment would have a significant "practical effect" for Relator Merena and his family. He contends that he could use the judgment to "assuage creditors, to borrow additional money or to provide additional collateral for his mortgage." (Filed document #120, p. 4). He argues that this judgment would be an asset even if the government were to appeal an entry of partial summary judgment.

It appears to me that entry of a partial summary judgment in favor of Relator Merena would have a certain practical effect for him, as a final judgment entered in his favor for such a substantial amount of money would appear to favorably enhance his financial status. Further, it does not appear to me that entry of partial summary judgment would prejudice the government as the government has already admitted liability for at least the minimum of 15% of the \$64,908,828 allocated to Relator Merena's six unique claims.

For the forgoing reasons, I think it is appropriate to enter partial summary judgment at this time in the amount of \$9,736,324.20, which represents 15% of \$64,908,828, the undisputed sum to which Relator Merena is entitled. Therefore, Relator Merena's Motion for Partial Summary Judgment will be granted in part and denied in part.

An appropriate Order follows.

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ORDER

For the reasons set forth in the accompanying
Memorandum, it is **ORDERED** that Relator Robert J. Merena's Motion
for Partial Summary Judgment is denied in part and granted in
part.

There is no reason to delay entry of judgment on this portion of the claims, and therefore,

JUDGMENT is entered in favor of Robert J. Merena and against the United States of America in the sum of \$9,736,324 (15% of \$64,908,828) without prejudice to the right of Robert J. Merena and/or other of the "Consolidated Plaintiffs" to seek and claim, in this litigation, additional compensation as a qui tam share in the total proceeds of the settlement between the United States of America and SmithKline Beecham Corporation, SmithKline Beecham Clinical Laboratories, Inc.

BY THE COURT,

Donald W. VanArtsdalen, S.J.

February 23, 1998