

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

|                                  |   |              |
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| UNITED STATES OF AMERICA, ex rel | : |              |
| ALI WARIS,                       | : |              |
|                                  | : |              |
| plaintiff,                       | : | CIVIL ACTION |
|                                  | : | No. 96-1969  |
| v.                               | : |              |
|                                  | : |              |
| STAFF BUILDERS, INC., and        | : |              |
| TARGA GROUP, INC.,               | : |              |
|                                  | : |              |
| defendants.                      | : |              |

O’Neill, J.

October \_\_, 1999

MEMORANDUM

Presently before the Court is the Motion of defendants Staff Builders, Inc. (“Staff Builders”) and Targa Group, Inc. (“Targa Group”) to dismiss the amended complaint of qui tam plaintiff Ali Waris (“plaintiff” or “relator”) based on Fed. R. Civ. P. 12(b)(1), 12(b)(6), and 9(b). For the reasons stated below, the Court finds that it lacks subject matter jurisdiction. Therefore, defendants’ Motion under Rule 12(b)(1) is GRANTED, and the Court declines to consider the defendants’ arguments under Rule 12(b)(6) and 9(b).

BACKGROUND

For the purposes of deciding defendants’ Motion, the Court assumes that the well plead factual allegations in the amended complaint are true.

From 1987 to 1993 plaintiff Ali Waris owned and operated a home healthcare business,

American Health Systems, Inc. (“AHS”), in the Philadelphia area. Amend. Com. ¶ 17. In 1993 he sold the major assets of the business to a subsidiary of defendant Staff Builders. Id. ¶ 18. Staff Builders is a provider of home healthcare services with offices in 37 states and the District of Columbia, and derives a substantial part of its revenues from the federal Medicare program. Id. ¶ 10, 12. Defendant Targa Group is the Staff Builders’ franchisee in the Philadelphia area. Id. ¶ 8.

As part of the sale of AHS to Staff Builders, Waris entered into a two-year consulting agreement with Targa Group. Id. ¶ 19. Pursuant to the consulting agreement, Waris promised to provide at least 1,000 hours of consulting services annually for two years, for which he was to be paid \$105,000 annually (\$8,750 per month). Id. ¶ 21, 22. Although Waris entered into the consulting agreement with Targa Group, he was directed and paid by Staff Builders. Id. ¶ 23.

In the first month of his consulting work, January 1994, Waris was asked to conduct a market study of home healthcare in the Philadelphia area. Id. ¶ 27. At the end of the month, Waris submitted an invoice to Targa Group for 80 hours of work described as “market studies” and “studies on home health care [sic] industry trends.” Id. These services were not reimbursable under Medicare. Shortly thereafter, Staff Builders’ Vice President of Finance, Andy Anello, called Waris and told him that his invoice “could not be used” and that Anello “would provide a revised invoice to Waris which [he] could then submit.” Id. ¶ 28. Anello then sent Waris a false invoice detailing numerous types of services, most of which were reimbursable by Medicare, that Waris had not in fact performed. Id. ¶ 29. Waris told Anello that he would not submit the invoice because he had not done the work detailed on it, to which Anello responded that Waris need not submit any more monthly invoices in the future. Id. ¶ 30.

Waris did not submit anymore invoices and he was asked to perform only “minimal” consulting services over the remaining 23 months of the consulting agreement. Id. ¶ 31, 34. Nonetheless, Waris continued to receive his monthly payments and was paid a total of \$210,000 over the course of the consulting agreement until it expired in December 1995. Id. ¶ 33.

Based on these facts, on March 11, 1996, plaintiff filed under seal a qui tam complaint under the False Claims Act. See 31 U.S.C. §§ 3729 et seq. Simultaneous with the filing of the original complaint, plaintiff provided the Attorney General of the United States and the United States Attorney for the Eastern District of Pennsylvania with a copy of the complaint and a statement of all material evidence and other information related to the complaint.<sup>1</sup> Amend. Com. ¶ 4. The complaint alleged that throughout the two year period of the consulting agreement between Waris and Targa Group, Anello fabricated invoices that mischaracterized Waris’ services and/or detailed services that Waris never performed. The only basis for this allegation was the single false invoice that Anello had given to Waris (the “first invoice”).

After two years of investigation, on June 10, 1998 the government declined to intervene in the action. Id. ¶ 5. On July 17, 1998, the Court ordered that the complaint be unsealed and served on defendants. Id. Shortly thereafter, defendants moved to dismiss the complaint under Fed. R. Civ. P. 9(b) and 12(b)(6).

On March 4, 1999, the Court issued an Order that dismissed the complaint for failure to plead allegations of fraud with sufficient particularity as required by Fed. R. Civ. P. 9(b). See

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<sup>1</sup> Plaintiff also states in his memorandum, but not in the amended complaint, that he met with an Assistant United States Attorney for the Eastern District of Pennsylvania in February 1996. Plaintiff’s Mem. at 2. In that meeting, plaintiff provided the government with a draft complaint and supporting documents. Id.

Order dated March 4, 1999. The Court also granted plaintiff leave to cure the defect by filing an amended complaint.

On April 1, 1999, plaintiff filed an amended complaint. Like the original complaint, the amended complaint primarily bases the allegation of fraud on the first invoice that Anello gave to Waris. Amend. Com. ¶ 29. Plaintiff further alleges that “[t]he only reason to create false invoices listing false Medicare reimbursable services was to provide support for [defendants’] cost reports submitted to secure Medicare reimbursement to which it was not entitled.” Id. ¶ 54.

The amended complaint also varies from the original complaint in a number of relevant ways. First, the amended complaint includes boilerplate language which alleges that other relevant information is “in the exclusive custody, control and possession” of the defendants. Id. ¶ 42. Second, it describes the “investigative efforts” that the plaintiff engaged in prior to filing the amended complaint. Id. ¶ 63. These efforts included the investigation of “all possible sources of information including, but not limited to, all publicly available relevant information to confirm Defendants’ submission of false claims to the Federal Medicare program.” Id. Third, it references new information that apparently represents the fruit of plaintiff’s investigative effort.

This new information consists of:

1. The “second invoice.” The second invoice was “produced” to plaintiff “in an unrelated matter.” Id. ¶ 39. Like the first invoice, the second invoice “bears Waris’ name, address and telephone number” and “falsely states that Waris performed 75.6 hours of Medicare reimbursable services” in May 1994. Id. ¶ 40.

2. The “cost reports.” As part of his investigation, plaintiff obtained, through the Freedom of Information Act, the cost reports submitted to the Medicare program by defendant

Staff Builders for the fiscal years ending 1994, 1995 and 1996. Id. ¶ 64. Plaintiff alleges that “[t]hese cost reports reveal that Staff Builders sought considerably more reimbursement for Administrative and General expenses during the term of Waris’ Consulting Agreement than prior to the execution of the Agreement.” Id. ¶ 65 (emphasis in original).

3. The “audit report.” In September 1998 the Inspector General for the Department of Health and Human Services released an audit report of defendant Staff Builders for fiscal year 1994. Id. ¶ 71. The audit report concluded that “Staff Builders improperly claimed \$6,204,824.00 of costs as Medicare reimbursable.” Id. The audit report concludes that various consulting expenses were improperly claimed, but does not specifically identify the payments to Waris. Id.

In response to the amended complaint, on April 30, 1999, defendants filed this Motion to Dismiss based on Fed. R. Civ. P. 12(b)(1), 12(b)(6) and 9(b).

## DISCUSSION

Because federal courts have limited jurisdiction, every case begins with the presumption that the court lacks jurisdiction to hear it. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994). The plaintiff bears the burden of overcoming this presumption and proving that subject matter jurisdiction exists. Id. See also Kehr Packages, Inc. v. Fidelcot, Inc., 926 F.2d 1406, 1409 (3d Cir. 1991); Mortensen v. First Fed. Sav. and Loan Ass’n, 549 F.2d 884, 891 (3d Cir. 1977). Plaintiff therefore has the burden of proving that his claim survives the False Claims Act’s threshold jurisdictional requirement:

No Court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or

administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or 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.

31 U.S.C. § 3730(e)(4)(A).

Congress included this public disclosure provision in the 1986 amendments to the FCA in order to encourage whistle-blowers to bring forth claims of fraud against the government while simultaneously preventing “parasitic” suits based purely on information already known to the prosecuting authorities. See United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A., v. Prudential Ins. Co., 944 F.2d 1149, 1154 (3d Cir. 1991). If a claim is based upon public disclosure of allegations of fraud or fraudulent transactions, a court is precluded from hearing it unless the relator has “direct and independent knowledge of the information on which the allegations [of fraud] are based.” See 31 U.S.C. §3730(e)(4)(B). The Court must therefore consider four questions:

1. Are there any “public disclosures” at work in this claim?
2. If so, do they disclose “allegations” of fraud or fraudulent “transactions”?
3. If so, is the plaintiff’s claim “based upon” those “allegations or transactions”?
4. Is the plaintiff an “original source” of those “allegations or transactions”?

1.

The first step in this inquiry is to consider whether there are any public disclosures at work in this claim. There are five sources for the information contained in the amended complaint: 1) plaintiff’s firsthand knowledge of the consulting contract with defendants and the work that was actually performed pursuant to that contract; 2) the first invoice (which was given

directly to plaintiff by defendant Staff Builders); 3) the second invoice (which was produced in an unrelated matter); 4) the cost reports submitted to Medicare by defendant Staff Builders in fiscal years 1994, 1995 and 1996; and, 5) the Inspector General's audit report of defendant Staff Builders for fiscal year 1994.

The first two of these sources are obviously not public disclosures. The plaintiff's firsthand knowledge of the consulting contract, the work actually performed pursuant to that contract, and the first invoice have never appeared in the public domain until the plaintiff initiated this claim.

The last three, however, are public disclosures. The second invoice was "produced" to the plaintiff "in an unrelated matter." Amend. Com. ¶ 39. The Third Circuit has held that items produced in civil discovery are public disclosures within the meaning of Section 3730(e)(4)(A), even if the discovery is not filed with the court. See Stinson, 944 F.2d at 1158-59. Similarly, plaintiff obtained the cost reports through a Freedom of Information Act request. Amend. Com. ¶ 64. Since the parties briefed this Motion, the Third Circuit has held that FOIA requests are also public disclosures within the meaning of Section 3730(e)(4)(A). See United States ex rel. Mistick PBT v. Housing Authority of the City of Pittsburgh, No. 97-3248, 1999 WL 553843 at \*5-6 (3d Cir. July 30, 1999) (to be reported at 186 F.3d 376). Finally, the Inspector General's audit report is a paradigmatic example of an "administrative audit," which is rendered a public disclosure by the plain wording of Section 3730(e)(4)(A).<sup>2</sup>

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<sup>2</sup> The amended complaint does not clearly state whether the Inspector General's audit report was also received pursuant to a FOIA request. However, the contents of the audit report are discussed under the heading of "Investigative Efforts" in the amended complaint. The investigative efforts were said to include "all publicly available information." Amend. Com. ¶ 63. Moreover, the cover letter to audit report itself states that: "In accordance with the principles



combination of X and Y must be revealed, from which readers or listeners may infer Z . . . [W]hen X by itself is in the public domain, and its presence is essential but not sufficient to suggest fraud, the public fisc only suffers when the whistleblower's suit is banned. When X and Y surface publicly, or when Z is broadcast, however, there is little need for qui tam actions, which tend to be suits that the government presumably has chosen not to pursue or which might decrease the government's recovery in suits it has chosen to pursue.

Id. See also Dunleavy, 123 F.3d at 741.

Using this analysis, it is clear that the second invoice and the costs reports are neither allegations of fraud, nor fraudulent transactions. The second invoice “bears [plaintiff’s] name, address and telephone number” and “states that [plaintiff] performed 75.6 hours of Medicare reimbursable services . . . during May, 1994 [sic].” Amend. Com. ¶ 40. This is not allegation of fraud because its contains no “conclusory statement” whatsoever. See Springfield, 14 F.3d at 653-54. Nor is it – on its face – a fraudulent transaction. If plaintiff did in fact perform 75.6 hours of Medicare reimbursable services in May 1994, then the second invoice merely evidences a lawful transaction. It is relevant to an allegation of fraud (if at all)<sup>3</sup> only when one also possess the plaintiff’s firsthand knowledge that no such services were ever performed. To put it in the Springfield Court’s terms, it is – at best – either X or Y, but not X + Y and not Z.

The same is true of the costs reports. Plaintiff uses the costs reports to show that “Staff

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<sup>3</sup> Throughout this litigation, plaintiff has argued that the mere existence of a false invoice is sufficient to create an inference of fraud. See, e.g., Amend. Com. ¶ 54 (“The only reason to create false invoices listing false Medicare reimbursable services was to provide support for Staff Builders’ cost reports submitted to secure Medicare reimbursement to which it was not entitled.”). This reasoning, roughly analogous to the tort law doctrine of res ipsa loquitur, is inappropriate when allegations of fraud are being made. The cost reports, which merely show that defendant Staff Builders claimed more “Administrative” and “General” expenses during the period of plaintiff’s consulting agreement, do little to buttress the inference. Therefore, though the Court need not decide the issue definitively, it is unlikely that the amended complaint would survive the defendants’ challenge under Fed. R. Civ. P. 9(b).

Builders sought considerably more reimbursement for Administrative and General expenses during the term of Waris' Consulting Agreement than prior to the execution of the Agreement." Amend. Com. ¶ 65 (emphasis in original). Again, this fact is relevant to an allegation of fraud (if at all)<sup>4</sup> only if one also possesses the knowledge that plaintiff performed little or no Medicare reimbursable services under the consulting agreement, and if one accepts the plaintiff's contention that the two invoices were created as part of a conspiracy to defraud the Medicare program. Like the second invoice, the costs reports may be X or Y, but clearly are not X + Y or Z.

The same cannot be said, however, of the Inspector General's audit report. The audit report makes explicit allegations of fraud.<sup>5</sup> Most notably, it concludes that "Staff Builders improperly claimed \$6,204,840.00 of costs as Medicare reimbursable" in fiscal year 1994. Amend. Com. ¶ 71. This is a "conclusory statement implying the existence of provable supporting facts." See Springfield, 14 F.3d at 653.54. The Inspector General's report is, therefore, a public disclosure of allegations of fraud in an administrative audit, within the meaning of Section 3730(e)(4)(A).<sup>6</sup>

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<sup>4</sup> To rebut this inference, defendants state: "A far more plausible reason as to why Staff Builders' G&A costs increased during the term of Waris' consulting agreement is that Staff Builders' Medicare business grew as a result of its acquisition of Waris' company." Defendants' Mem. at 16 n.13. See also Defendants' Reply Mem. at 4.

<sup>5</sup> It should be noted that fraud has a particularized meaning in the context of Section 3730(e)(4)(A). "We think it sufficient, at least in considering the application of the disclosure bar, that the transaction merely be one in which a set of misrepresented facts has been submitted to the government." Dunleavy, 123 F.3d at 741. Therefore, the conclusions in the Inspector General's audit report constitute allegations of fraud even though they make no claim regarding defendant Staff Builders' knowledge of the improperly claimed costs.

<sup>6</sup> Plaintiff twice concedes this point. See Plaintiff's Mem. at 1 and 7.

3.

The next question is whether plaintiff's claim is "based upon" the publicly disclosed allegation of fraud in the Inspector General's audit report. See 31 U.S.C. § 3730(e)(4)(A).

Courts have struggled with the question of the extent to which a qui tam plaintiff may use publicly disclosed information before it can be said that the claim is "based upon" public disclosures within the meaning of Section 3730(e)(4)(A). On one extreme, the Tenth Circuit has taken the position that Section 3730(e)(4)(A) bars an action based "in any part" upon publicly disclosed allegations. See United States ex rel. Precision Co. v. Koch Indus., 971 F.2d 548, 553 (10th Cir. 1992). On the other extreme, the Fourth Circuit has read Section 3730(e)(4)(A) literally and has held that a claim is not "based upon" a public disclosure unless the relator "actually derived" his claim from the disclosure. See United States ex rel. Siller v. Becton Dickinson & Co., 21 F.3d 1339, 1348 (4th Cir. 1994).

In Mistick, the Third Circuit's most recent statement on Section 3730(e)(4)(A), the court took a middle position between these extremes. The court held that "a qui tam action is 'based upon' a qualifying disclosure if the disclosure sets out either the allegations advanced in the qui tam action or all of the essential elements of the qui tam action's claims." Mistick, 1999 WL 553843 at \*11. This test appears to be more lenient than the Tenth Circuit's test because the presence of "any" publicly disclosed allegation will not be enough to defeat the claim. Rather, the public disclosure must set out either "the allegation" or "all of the essential elements." Id. The Mistick test is also more strict than the Fourth Circuit's test because the putative relator need not have "actually derived" his claim from the public disclosure in order to be barred.

For this reason, the Mistick test necessarily rejects one of plaintiff's arguments. Plaintiff argues that the amended complaint cannot possibly be based upon the Inspector General's audit report because the original complaint was filed approximately two and a half years before the report was made public. See Plaintiff's Mem. at 14. If the Fourth Circuit's holding in Siller applied, and "based upon" meant "actually derived" from, then this argument would be persuasive. A claim cannot be actually derived from a report that is published after the claim is first made. Mistick, however, specifically rejected the "actually derived" test in favor of a stricter standard. See Mistick, 1999 WL 553843 at \*8. Therefore, plaintiff's argument based on the timing of its first complaint must also be rejected.

Plaintiff also argues that his claims are not "based upon" the Inspector General's audit report because although the two overlap, they are not perfectly congruent. Plaintiff's Mem. at 13. The Inspector General audited the fiscal year that ended February 28, 1994. See Amend. Com. (Exhibit G). Plaintiff's consulting agreement with defendant Staff Builders began on January 1, 1994 and continued until December 30, 1995. Amend. Com. ¶ 21. The audit report and the amended complaint therefore overlap by only two months, but otherwise contain essentially the same allegation of fraud; namely, that defendant Staff Builders improperly claimed consulting expenses that were not Medicare reimbursable. The fact that the allegations are not perfectly congruent does not save the plaintiff's claim from the public disclosure bar. The Inspector General's report shows that the government is aware that defendant Staff Builders improperly billed consulting expenses in fiscal year 1994. At best, plaintiff's complaint makes the unremarkable allegation that the improper conduct did not end on the last day covered by the audit. For the purposes of the Mistick test of "based upon," this is the same allegation.

Moreover, this reading is consistent with Section 3730's dual goals of encouraging whistleblowers while discouraging parasitic suit because “the putative relator is not sounding the alarm, but echoing it, and he does nothing to further the government’s efforts to ferret out fraud.”

United States ex rel. Detrick v. Daniel F. Young, Inc., 909 F. Supp. 1010, 1020-21 (E.D. Va. 1995).

Plaintiff’s claim is, therefore, based upon the publicly disclosed allegation of fraud in the Inspector General’s audit report.

4.

The final question is whether the plaintiff is an “original source” of the allegation of fraud.

The FCA defines “original source” as “an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.” 31 U.S.C. § 3730(e)(4)(B). In Mistick, the Third Circuit also addressed the application of this provision and held that the putative relator must have direct and independent knowledge “of the most critical elements of its claims.” Mistick, 1999 WL 553843 at \*11.

It is clear that in this case the plaintiff does have direct and independent knowledge of some of the elements of his claim. For example, the plaintiff has firsthand knowledge of the consulting contract, the work actually performed pursuant to that contract, and the existence of the first invoice. However, these are not all of the “most critical elements” of his claim. Despite plaintiff’s persistent claim to the contrary, the mere existence of a false invoice is insufficient to

make out a claim of fraud. This is dramatically illustrated by the history of this case. Plaintiff's original complaint, which was limited to items to which he has direct and independent knowledge, was dismissed because it failed to plead fraud with particularity under Rule 9(b). The amended complaint goes further in making out a claim of fraud, but it does so by explicitly relying on public disclosures.

Of particular importance here are the costs reports of defendant Staff Builders.<sup>7</sup> It is clear that because they were publicly disclosed, plaintiff does not have "direct and independent knowledge" of the costs reports. See Stinson, 944 F.2d at 1160 ("[A] relator who would not have learned of the information absent public disclosure [does] not have 'independent' information within the statutory definition of 'original source'."). It is equally clear that the cost reports are one of the "most critical elements" of plaintiff's claim. Based on those cost reports, plaintiff alleges that "Staff Builders sought considerably more reimbursement for Administrative and General expenses during the term of Waris' Consulting Agreement than prior to the execution of the Agreement." Amend. Com. ¶ 65 (emphasis in original). The Court is unconvinced that the costs reports, combined with the plaintiff's firsthand knowledge that defendant Staff Builders created false invoices, are sufficient to make out a claim of fraud under Rule 9(b) or otherwise. It is clear, however, that plaintiff cannot possibly make out a claim of fraud without them.

Therefore, plaintiff does not have independent knowledge of this critical element and is not an

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<sup>7</sup> As was discussed previously, Section 3730 (e)(4)(A) bars claims based upon publicly disclosed "allegations or transactions," and it was previously determined that the second invoice and the costs reports are neither. However, the original source provision in Section 3730(e)(4)(B) is not limited to "allegations or transactions." Instead, it refers more generally to "the information upon which the allegations are based." Therefore, the public disclosures contained in the costs reports (and the second invoice) are relevant to the original source inquiry under Section 3730(e)(4)(B).

original source of the claim.

#### CONCLUSION

The plaintiff's claim is based upon a publicly disclosed allegation of fraud, but he is not an original source of that allegation. Accordingly, plaintiff's claim is barred by 31 U.S.C. § 3730(e)(4)(A) and the Court lacks subject matter jurisdiction to hear the claim. Defendants' Motion under Fed. R. Civ. P. 12(b)(1) is, therefore, GRANTED. An appropriate ORDER follows.

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