IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

UNITED STATES OF AMERICA and the STATE OF TENNESSEE *ex rel.* JEFFREY H. LIEBMAN et al.,	)	
Plaintiffs,	)	Civil Case No.: 3:17-cv-00902 JUDGE CAMBPELL MAGISTRATE JUDGE HOLMES
v.	)	
METHODIST LE BONHEUR HEALTHCARE, et al.	)	JURY TRIAL
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE

Pursuant to 31 U.S.C. § 3730(c), the United States of America seeks to intervene for good cause in the above-captioned action against Defendants Methodist Le Bonheur Healthcare and Methodist Healthcare-Memphis Hospitals (collectively, "Methodist") to recover damages for the false claims submitted to Federal health care programs, including Medicare and Medicaid. Specifically, the United States intends to allege that Methodist knowingly paid remuneration to West Clinic, P.C. ("West") as part of a multi-agreement transaction that allowed West's outpatient cancer treatment centers to become part of Methodist, West's physicians and other employees to provide services at Methodist, and West to manage inpatient and outpatient adult cancer care at Methodist. [1] One purpose of the arrangement was to induce West to refer its patients to Methodist. This arrangement violated the Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b) ("AKS"), which

[1] Should intervention be granted, the United States intends to add the West, which previously was dismissed from this action without prejudice as to the United States, as a defendant. Methodist and West, therefore, are referred to herein as "Defendants" for ease of reference.

constitutes violations of the False Claims Act, 31 U.S.C. §§ 3729-3733 ("FCA"), for which the United States is entitled to treble damages and penalties.

Should the Court grant this motion, the United States respectfully requests thirty days from the date of the Court's order to file a complaint in intervention.

PRELIMINARY STATEMENT

The United States has a legally sufficient basis for intervention and should be allowed to intervene in this litigation for multiple reasons. First, Relators consent to the proposed intervention, which is a principal consideration in finding good cause. Second, following Relators' settlement with West earlier this year, the United States obtained new and additional evidence that Defendants' conduct violated the AKS, which is detailed in part below. Third, Methodist has been aware of -- and complied with -- the ongoing investigation and acted to minimize any possible prejudice in the litigation. Further, the United States has advised the Court that it intends to streamline the case by seeking partial summary judgment to resolve a contested legal issue at the outset, which would result in more narrowed discovery at a minimum. Finally, it is in the best interest of the public to allow the United States to intervene and prosecute this action directly, which outweighs any arguable prejudice to Methodist.

BACKGROUND

This *qui tam* action alleging violations of the FCA based on the AKS and the Stark Law, 42 U.S.C. § 1395nn ("Stark Law"), was originally filed under seal on May 30, 2017. (ECF 1.) Although the United States indicated that it needed additional time to understand the complicated nature of the multi-agreement transaction that spanned over seven years and to determine whether there was an actionable violation of the FCA, the AKS or Stark Law, Chief Judge Crenshaw advised that he would not grant any further extensions of the deadline to make an intervention

decision. For this reason, on September 3, 2019, the United States filed a notice indicating that it had not yet completed its investigation, was unable to make an intervention decision at that time and was continuing to investigate. (ECF 45.) The action was unsealed on December 19, 2019. (ECF 61.)

After Relators served Defendants with the Second Amended Complaint, Defendants filed their respective motions to dismiss the action, and Methodist filed a motion to stay discovery, in which West joined. Magistrate Judge Holmes denied the motion to stay on April 27, 2020 (ECF 99), and discovery commenced, while briefing on the motions to dismiss continued.

Thereafter, Relators and West entered into a settlement agreement that resulted in West being dismissed from the action without prejudice on February 9, 2021. (ECF 133.)[2] Pursuant to the terms of the settlement, to which the United States was not a party, West provided documents to Relators that had not been provided to the United States or produced in the action and agreed to make witnesses available for Relators to interview. Following Relators' interviews of certain current and former West executives, Relators advised the United States that they had obtained new evidence concerning West's performance, or lack thereof, of its obligations under the Management Services/Performance Improvement Agreement ("MSA"), which Relators incorporated in the Third Amended Complaint. (ECF 169.)

In early May 2021, the United States notified Methodist that it was investigating specifically whether the MSA was a sham in light of statements allegedly made in Relators' interviews of West personnel that, in sum and substance, West did not perform any inpatient management services at Methodist. The United States conducted its own interviews of West and Methodist personnel in June and July of 2021, during which new and additional evidence was

[2] West was dismissed with prejudice as to Relators only on October 6, 2021. (ECF 192.)

obtained of conduct that supported the allegations of FCA violations under the AKS. Among other information that will be detailed in the contemplated complaint in intervention, the United States (i) obtained admissions that Methodist paid West for certain services West had not rendered under the MSA; (ii) confirmed that West lacked any time records to document or justify the amounts Methodist paid West for base management services; and (iii) learned that West sought higher fees from Methodist under the MSA based on increases in the revenues generated by West after the deal was signed. In addition, the United States obtained new evidence that payments Methodist made to West under a Professional Services Agreement ("PSA") were excessive as compared to the amount of reimbursement for professional services Methodist received from West physicians, such that West was paid at least tens of millions of dollars more than Methodist collected. Following these interviews, the United States immediately notified Methodist that it intended to seek the requisite approvals to intervene.

Noting the litigation deadlines, the United States proceeded with the process of obtaining approval to intervene, while simultaneously allowing Methodist the opportunity to present arguments against intervention. Methodist has stated publicly that there cannot be any wrongdoing because the transaction was structured by counsel. The United States has learned however, that the very same counsel made repeated public statements that spanned over five years – both before and during the arrangement – that the types of contracts at issue here present risks for violating the AKS and do not comport with the relevant safe harbor. The United States now seeks approval from this Court to intervene for good cause to assert claims under the FCA based on Defendants' illegal multi-agreement arrangement whereby Methodist paid remuneration to West one purpose of which was to induce West to refer its patients to Methodist in violation of the AKS.

ARGUMENT

I. Legal Standard

Under the FCA, a private person, known as a relator, may file a civil action on behalf of the United States, which will remain under seal for at least 60 days, and thereafter for as long as the Court approves an extension. 31 U.S.C. §§ 3730(b)(1)-(3). If the United States does not elect to intervene, the relator may proceed to litigate the action on behalf of the United States. 31 U.S.C. § 3730(b)(4)(b).

Even if the United States does not elect to intervene initially, the FCA expressly provides that "the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause." 31 U.S.C. § 3730(c)(3).

The Supreme Court has acknowledged that the United States has the right under the FCA to "intervene at any time with good cause." *Conchise Consultancy, Inc. v. U.S. ex rel. Hunt*, 139 S. Ct. 1507, 1510 (2019) (citing 31 U.S.C. § 3730(c)(3)). *See also U.S. ex rel. Poteet v. Medtronic, Inc*., 552 F.3d 503, 507 (6th Cir. 2009) ("the government may later intervene upon a showing of good cause"); *U.S. v. Health Possibilities, P.S.C*., 207 F.3d 335, 340 (6th Cir. 2000) (noting that the United States "can intervene for 'good cause' at any time in the litigation").

As this Court has recognized, there is no definition of "good cause" in the FCA. *U.S. ex rel. Hinds v. SavaSeniorCare, LLC*, No. 3:18-cv-01202, 2021 WL 1663579, at *11 (M.D. Tenn. Apr. 28, 2021) (Campbell, J.) (noting that good cause is a "'uniquely flexible and capricious concept'" defined as a "'legally sufficient reason'") (citing *U.S. ex rel. Cimznhca, LLC v. UCB, Inc.,* 970 F.3d 835, 853 (7th Cir. 2020)). In fact, the "good cause" language was added to expand the opportunity for the United States to intervene during the litigation rather than to limit its ability

to do so. *U.S. ex rel. Hall v. Schwartzman*, 887 F. Supp. 60, 62 (E.D.N.Y. 1995); *see also Griffith v. Conn*, No. 11-157, 2016 WL 3156497, at *2-3 (E.D. Ky. Apr. 22, 2016) (Thapur, J.). Indeed, the purpose of the FCA is "to protect the government from fraud, and it is best protected if it fully participates in the litigation, bringing its considerable expertise and resources to bear against those alleged to have defrauded it." *U.S. ex rel. Ross v. Independent Health Corp.*, No. 12-CV-299S, 2021 WL 3492917, at *3 (W.D.N.Y. Aug. 9, 2021). However, the good cause requirement also was intended to protect the interests of relators who have been litigating the action. *See, e.g.*, *U.S. ex rel. Stone v. Rockwell Intern. Corp.*, 950 F. Supp. 1046, 1049 (D. Colo. 1996).

Within this framework, district courts have almost uniformly found good cause when intervention is sought for the United States to proceed with an ongoing litigation, particularly where the relator consents. *See, e.g.*, *Ross*, 2021 WL 3492917, at *2-4 (allowing post-declination intervention while motion to dismiss was *sub judice* where government had been investigating over seven years and relator consented); *Sharp ex rel. U.S. v. Americare Ambulance*, No. 08:13-cv-1171, 2017 WL 2986258, at *1-2 (M.D. Fla. July 13, 2017) (granting intervention motion during discovery and noting courts have found good cause when relator consents); *Griffith*, 2016 WL 3156497, at *2 n.1 (finding "the FCA requires the government to show only good cause for untimely intervention, not new and significant evidence" and granting intervention where relator consented); *Guthrie v. A+ Home Health Care, Inc.*, No. 12-60629, 2013 WL 12384137, at *1 (S.D. Fla. July 18, 2013) (finding good cause where relator consented and rejecting defense argument that government failed to diligently investigate); *U.S. v. Aseracare, Inc.*, Nos. 2:12-cv-0245, 2:12-cv-2264, 2:09-cv-0627, 2012 WL 4479123, at *2 (N.D. Ala. Sep. 24, 2012) (summarizing cases where courts found good cause where relator's interests would be protected, magnitude of fraud was greater than anticipated, or additional or new information was obtained); *U.S. ex rel. Baklid-*

Kunz v. Halifax Hosp. Med. Ctr., No. 06:09-cv-1002, 2011 WL 4480846, at *1 (M.D. Fla. Sep. 27, 2011) (granting intervention on basis of relator's consent); *U.S. ex rel. Roberts v. Sunrise Sr. Living, Inc.*, No. CV-05-3758, 2009 WL 499764, at *1 (D. Ariz. Feb. 26, 2009) (granting intervention motion made while motion to dismiss pending where relator did not oppose); *U.S. ex rel. Tyson v. Amerigroup Ill., Inc.*, No. 02 C 6074, 2005 WL 2667207, at *3 (N.D. Ill. Oct. 17, 2005) (granting motion to intervene more than two years after filing notice of declination where relator consented); *Stone*, 950 F. Supp. at 1049 (allowing intervention where relator consented and in public interest); *Hall*, 887 F. Supp. at 62 (granting intervention where relator consented, rejecting defense argument of undue prejudice even though the United States would be able to obtain broader discovery, and noting that defendants were aware that the government was contemplating intervention). As these cases demonstrate, where, as here, the United States can satisfy the good cause requirement, intervention should be granted.

II. The United States Has Good Cause To Intervene At This Time

The Court should grant this motion to intervene for multiple reasons. First, Relators, who have been handling the discovery issues, consent to the proposed intervention and welcome the full participation of the United States, which has both additional resources and False Claims Act expertise. As noted above, many courts find relator's consent to be almost dispositive given the purpose of the FCA and the basis for the addition of the "good cause" language.

Second, based on new and additional evidence obtained following Relators' settlement with West, the United States proposes to file a complaint in intervention that will streamline the issues in dispute and narrow matters for trial. Through the investigation that has occurred following the West settlement, the United States obtained, among other evidence, admissions from West that it received payment from Methodist for certain services which West was required to

provide to Methodist under the terms of their agreement, even though the services were not actually provided. In addition, despite contractual requirements in the MSA that supporting documentation be kept, Defendants could not identify any time records to justify the base management services West purportedly provided under the MSA, for which Methodist paid millions of dollars. Methodist also confirmed in interrogatory responses that Methodist paid West tens of millions of dollars more for West physicians' professional services under the PSA than the amount Methodist ultimately received for those physicians' professional collections. This information sheds light on the nature and amount of kickbacks the United States contends Methodist paid West, as will be detailed further in the proposed complaint.

In addition, the United States learned that the counsel who structured the transaction and provided legal advice to both West and Methodist throughout the over seven years of the arrangement, repeatedly made public statements that identified how the overall transaction structure presented irreducible AKS risk, including that one purpose was to induce referrals. Further, the same counsel acknowledged that the type of payment terms that are present in both the PSA and MSA would not comport with the relevant AKS safe harbor. This new and additional evidence should allow the United States to narrow the issues in dispute.

Third, there is limited, if any, prejudice to Methodist. Methodist has been aware that the United States was continuing to investigate the AKS allegations after the Court unsealed the case. The United States informed Methodist that it was reviewing the documents Defendants provided to Relators in the litigation and in connection with the settlement. The United States also sought additional documents and information, including any exculpatory materials directly from Methodist. Indeed, in responding to the United States' recent requests for documents, information, and witness interviews, Methodist expressly recognized that the United States still had the

authority to investigate the allegations in this matter under the FCA. Thus, it is undisputed that Methodist was on notice that the United States might seek to intervene, and Methodist cannot argue that it was unfairly surprised by this motion. *Cf. Ross*, 2021 WL 3492917, at *3 ("Further, there is no unfair surprise since Defendants have been on notice of the government's continuing investigation and the likelihood that it would seek to intervene."); *Griffith*, 2016 WL 3156497, at *4 (finding that defendants would not suffer prejudice from intervention when "the government continued its involvement in this case and notified the defendants that its investigation was ongoing, so intervention will not cause the defendants any unfair surprise").

Moreover, Methodist limited any potential prejudice by seeking a partial stay of discovery, which the Court granted. Methodist, Relators, and the United States all agreed to the stay of depositions until after this motion is decided. The Court also allowed for limited written discovery to be coordinated between Relators and the United States, which further obviates the risk of prejudice. That Methodist may have incurred some unnecessary costs prior to this motion does not outweigh the reasons supporting intervention. *Cf. Ross*, 2021 WL 3492917, at *3 ("Finally, this Court finds that any strategic or financial prejudice arising from the filing of Defendants' motion to dismiss is outweighed by the reasons supporting intervention.").

Finally, the United States' intervention in this case serves public interests and may reduce judicial resources in streamlining the litigation of this action. The alleged fraud at issue here is on the Federal health care programs in which the public has a vested interest in protecting. The United States will be able to utilize its resources and expertise in understanding the nature of the unlawful conduct and in determining the extent of the damages. The United States already advised the Court that predicate legal questions as to liability should be resolved that would narrow any remaining discovery in this matter. To establish a violation of the AKS, the United States must show that

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Methodist paid remuneration to West with the intent to induce referrals. *See U.S. ex rel. Goodman v. Arriva Medical, LLC*, 471 F. Supp. 3d 830, 833 (M.D. Tenn. 2020) ("Some AKS violations are obvious; for example, if a hospital CEO 'paid kickbacks to physicians who referred Medicare and Medicaid patients to' his hospital, then he probably violated the AKS."). Even if the remuneration had legitimate purposes, an AKS violation can be established where "one purpose" of the arrangement was to induce referrals. *See, e.g.*, *U.S. ex rel. Lutz v. Mallory*, 988 F.3d 730, 741 (4th Cir. 2021); *U.S. v. Borrasi*, 639 F.3d 774, 782 (7th Cir. 2011); *U.S. v. McClatchey*, 217 F.3d 823, 835 (10th Cir. 2000); *U.S. v. Davis*, 132 F.3d 1092, 1094 (5th Cir. 1998); *U.S. v. Kats*, 871 F.2d 105, 108 (9th Cir. 1989); *U.S. v. Greber*, 760 F.2d 68 (3d Cir. 1985). Here, Methodist paid millions of dollars to West under the arrangement, which constitutes remuneration. Additional documentary evidence shows that Methodist and West established the amount of payments based on the revenue that West would generate for Methodist from its referrals. Given these facts, the United States contends that it will be able to establish some, if not all, of the elements to prove an AKS violation, and intends to make a partial summary judgment motion as soon as practicable. If this matter is not fully resolved through early motion practice, at a minimum, the remaining discovery issues will be clarified.

In sum, here, as in *Ross* – the most recent case to address good cause – "[i]ntervention serves the public interest, is supported by new evidence, is welcomed by the Relator[s], and does not result in unfair prejudice" to Methodist. *See Ross*, 2021 WL 3492917, at *3.

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CONCLUSION

Because the United States has shown good cause, pursuant to 31 U.S.C. § 3730(c) of the FCA, this Court should grant the United States' motion to intervene and allow it thirty days to file a complaint in intervention.

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CERTIFICATE OF SERVICE

I hereby certify that on October 8, 2021, a true and correct copy of the foregoing was served via the Court's CM/ECF system, if registered. A service copy was also served via First Class U.S. Mail, postage prepaid, and/or via email, if not registered, to the following:

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