

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA)
ex rel. ANTHONY KITE,)
)
Plaintiff,)
) Civil No. 05-cv-3066 (FSH)
v.)
)
BESLER CONSULTING, et al.,)
)
Defendant.)

UNITED STATES' MOTION TO INTERVENE FOR GOOD CAUSE

The United States of America, through its undersigned counsel, pursuant to 31 U.S.C. § 3730(c)(3) and Rule 24(b) of the Federal Rules of Civil Procedure, respectfully moves to intervene for good cause against defendant Brookhaven Memorial Hospital Medical Center, Inc. ("Brookhaven") in the above-captioned action. The United States is filing its complaint against Brookhaven contemporaneously with this motion.

In support of its motion, the United States states as follows:

On June 15, 2005, relator Anthony Kite filed the above-captioned qui tam action against 16 different hospitals or hospital chains, two consulting companies, and two individuals affiliating with those consulting companies. The complaint alleges that the hospitals, aided by the consulting companies, submitted false claims for payment to the United States. Specifically, the complaint alleges that the defendant hospitals obtained "outlier" payments to which the hospitals were not entitled. Outlier payments are payments that the Medicare program makes to compensate hospitals for extraordinarily costly episodes of care. The hospital defendants are alleged to have intentionally and grossly increased their charges well above their increase in costs (a practice commonly known as "turbocharging") so as to mislead the Medicare program about

these defendants' actual costs for the purposes of calculating their eligibility for outlier payments.

In January 2008, the United States filed its Notice of Election to Decline the qui tam allegations against defendant Brookhaven. Since the filing of the original complaint, the United States has either stipulated to the dismissal of, or entered into a settlement with, every defendant in this case, except for Brookhaven.¹

Pursuant to the False Claims Act, 31 U.S.C. § 3730(c)(3), if the United States elects not to proceed with a qui tam action, "the court . . . may nevertheless permit the Government to intervene at a later date upon a showing of good cause." According to the Senate Report discussing the False Claims Act's 1986 amendments, one reason for the good cause provision is to provide the government with the option of intervening in "situations where new and significant evidence is found" which "escalate[s] the magnitude or complexity of the fraud," after it initially declines to intervene. S.Rep. No. 345, 99th Cong., 2d Sess. 26-27, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5291-92. This is the exact situation here.

Since the filing of the United States' initial election regarding Brookhaven, the United States continued to monitor discovery and the course of litigation between Relator and Brookhaven. The discovery process has brought to light additional facts that make the case against Brookhaven stronger and that were unavailable to the United States at the time it made its initial election. In particular, the United States received from the relator information that Brookhaven provided during discovery regarding the precise magnitude of its charge increases

¹ In a document filed contemporaneously with this motion, the Court is being apprised of settlements with Trinitas Hospital and Helene Fuld Medical Center. As for Defendant Lourdes Medical Center of Burlington County, the United States will address issues relating to that defendant in an in camera submission that will be served on that Defendant.

and the timing of these charge increases in relation to the dates when Brookhaven received recommendations from consultants to engage in turbocharging for the sole purpose of maximizing outlier payments. The “subsequent discovery of new and significant evidence which has altered [the United States’] view of the magnitude of the alleged fraud” constitutes good cause to intervene. United States ex rel. Hall v. Schwartzman, 887 F.Supp. 60, 62 (E.D.N.Y. 1995).

The government’s intervention would not unduly prejudice the proceeding or the parties. Since the government’s declination, the relator has continued to prosecute its case. The thrust of the relator’s allegations involve precisely the same allegations that the United States would be pursuing: namely, that Brookhaven geometrically increased its charges for the primary, if not exclusive, purpose of misleading the Medicare program about the hospital’s actual costs so as to receive “cost outlier” payments to which the hospital was not entitled. Throughout the pendency of this case, Defendant Brookhaven has also been vigorously defending itself. Consequently, intervention by the United States would not cause any undue prejudice.

In addition, allowing the government to intervene also is consistent with Rule 24(b) of the Federal Rules of Civil Procedure, which “requires the intervention be granted liberally to the governmental agencies because they purport to speak for the public interest.” Metro Transp. Co. v. Balboa Ins. Co., 118 F.R.D. 423, 424 (E.D. Pa. 1987) (citing 7C Wright & Miller, Fed. Prac. & Proc., § 1912, at 373-74 (1986)).

Intervention is particularly appropriate under Rule 24(b) where, as here, fraud is at issue. Congress has made it clear that in order to protect the public interest, the Department of Justice “has standing to appear or intervene at any time in any appropriate court to restrain the

enforcement of contracts with the United States based on fraud.” S&E Contractors, Inc. v. United States, 406 U.S. 1, 17 (1972). The public interest is similarly well-served where the Government intervenes to recover damages under the FCA from Medicare suppliers that have defrauded the Government. Again, for the reasons stated above, neither party would be unduly prejudiced by the intervention of the United States under Federal Rules of Civil Procedure 24(b).

Finally, counsel for the relator has authorized the United States to represent that the relator does not object to the United States intervening in this matter against defendant Brookhaven.

CONCLUSION

For the above reasons, the United States respectfully requests that this Court issue an order allowing the United States to intervene against defendant Brookhaven for good cause.

Respectfully submitted,

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UNITED STATES OF AMERICA)	
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Plaintiff,)	
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v.)	
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BESLER CONSULTING, et al.,)	
)	
Defendant.)	

ORDER

The United States having moved to intervene in this action against defendant Brookhaven Memorial Hospital Medical Center, Inc. (Brookhaven), pursuant to the False Claims Act, 31 U.S.C. § 3730(c)(3), the Court rules as follows:

IT IS ORDERED that,

1. the Government's Motion to Intervene for Good Cause is granted; and
2. the United States serve its Complaint upon defendant Brookhaven, together with

this Order, no later than five business days from the date of entry of this Order;

IT IS SO ORDERED,

This ____ day of _____, 2009.

Hon. Faith S. Hochberg, U.S.D.J.