IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 07-61329-CIV-MARRA/JOHNSON

UNITED STATES OF AMERICA,

Plaintiff,

v.

CHRISTI R. SULZBACH,

Defendant.
_______________________________________/

MEMORANDUM IN SUPPORT OF UNITED STATES' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

In 1994, Defendant Christi Sulzbach was Associate General Counsel of National Medical Enterprises, Inc. (NME), a large hospital chain, when the company entered into a historic settlement of fraud charges that the government had brought against it. Under the settlement, NME agreed to pay the then-record sum of $379 million to settle allegations that it had engaged in a variety of illegal practices, including the payment of illegal remuneration to referral sources. It also agreed to implement a Corporate Integrity Program to ensure that such misconduct did not recur. NME agreed to investigate all credible allegations of misconduct by its employees and to report misconduct to the government. When NME merged with another company, American Medical Holdings, Inc. (AMH), in 1995, the newly merged company, renamed Tenet Healthcare Corporation (Tenet), remained bound by the terms of the Corporate Integrity Agreement.

In many respects, the Defendant took personal responsibility for NME's Corporate Integrity Program. She signed the Settlement Agreement and the Corporate Integrity Agreement on behalf of NME. As Corporate Integrity Program Director, she was personally responsible for

overseeing the program, including investigations of misconduct and the preparation of the company's annual compliance reports to the Department of Health and Human Services (HHS). Each year for five years, she signed sworn declarations assuring HHS that NME/Tenet was in material compliance with all federal health care program legal requirements.

Unfortunately, the Defendant's conduct made a mockery of the commitments and representations that she made. Between January and July of 1997, five different Tenet employees presented her with information suggesting that a number of contracts that Tenet had with doctors in Florida might violate the Stark Statute, 42 U.S.C. § 1395nn. After she directed outside counsel to investigate, they prepared a lengthy report analyzing 46 physician contracts and explaining in detail why many of them did appear to violate the Stark Statute. The Defendant denies receiving the report itself, but it is undisputed that she received multiple briefings about it. The Defendant does not recall anyone at the time advising her that the contracts were legal.

Over the next two years, the Defendant supervised Tenet's efforts to renegotiate and/or terminate all of the physician contracts that had been discussed in outside counsel's report. Meanwhile, she allowed Tenet to continue submitting Medicare claims for referrals from these doctors, in direct violation of the Stark Statute. Instead of reporting Tenet's Stark violations to the government, as required by the Corporate Integrity Agreement, she submitted sworn declarations in June 1997 and June 1998 that falsely certified that Tenet was in compliance with applicable federal program requirements.

In this case, the government has alleged that the Defendant violated the False Claims Act by failing to disclose that Tenet was violating the Stark Statute by billing Medicare for referrals

from twelve physicians who practiced at a Tenet facility in Ft. Lauderdale known as North Ridge Medical Center (North Ridge), and by allowing those violations to continue. Although some facts are in dispute, the government respectfully submits that it is entitled to summary judgment on all of its claims in this case based on the facts that are not in dispute.[1]

LEGAL FRAMEWORK

I. THE STARK STATUTE

The Stark Statute, 42 U.S.C. § 1395nn, was designed to protect the integrity of physicians' medical judgments. Prior to its passage, studies had shown that when physicians had financial relationships with hospitals, they referred more patients to those hospitals for services like lab testing than they otherwise would have. 66 Fed. Reg. 856, 859 (Jan. 4, 2001). The Stark Statute was enacted to ensure that doctors' medical decisions are based solely on their patients' best interests, and are not influenced by the doctors' financial interests. To accomplish this, Congress prohibited hospitals and certain other health care providers from submitting Medicare claims for services rendered to patients referred by doctors with whom the providers have financial relationships, unless those relationships fall within certain statutory exceptions.

The Stark Statute allows hospitals to submit claims to Medicare based on referrals from employee physicians, but only if the doctor's compensation (1) would be "commercially reasonable even if no referrals were made to the employer," (2) is consistent with the fair market value of the services for which the physician has been employed, **and** (3) is not determined in a manner that takes into account the volume or value of the doctor's referrals. 42 U.S.C.

---

[1] The claims for payment at issue in this case were also at issue in United States ex rel. Barbera v. AMISUB, et al., Case No. 97-6590-Civ (S.D. Fla.), a *qui tam* case against Tenet that settled in 2004 for $22.5 million. As discussed below, the Defendant is entitled to an offset for the amount the government received from Tenet in Barbera.

§ 1395nn(e)(2). All three requirements are at issue in this case, but this motion will only address Tenet's failure to satisfy the "commercially reasonable" requirement.

The first version of the Stark Statute, which was in effect from January 1992 to December 1994, barred hospitals from billing Medicare for laboratory referrals from covered physicians. 42 U.S.C. § 1395nn(a)(1)(A). The present version, which has been in effect since January 1, 1995, expanded the statute to cover referrals for inpatient hospital services and a number of other products and services. 42 U.S.C. § 1395nn(h)(6). The statute also prohibits Medicare from paying claims for services rendered in violation of its provisions and requires providers to refund any payments received for such unlawfully rendered services. 42 U.S.C. § 1395nn(g)(1), (2).

II. THE FALSE CLAIMS ACT

The False Claims Act, 31 U.S.C. §§ 3729, *et seq.*, is one of the government's most important tools for combating health care fraud. Enacted in 1863 in response to fraud against the government during the Civil War, the statute has been amended several times, notably in 1986 and 2009. The statute was intended "to reach all types of fraud, without qualification, that might result in financial loss to the Government," Cook County, Illinois v. Chandler, 538 U.S. 119, 128-9 (2003) (quoting United States v. Niefert-White, 390 U.S. 228, 232 (1968)). Many courts have held that the statute should be construed "broadly" or "expansively" to accomplish the statute's remedial goal of protecting public funds from false and fraudulent claims.[2]

The statute proscribes seven categories of dishonest acts, three of which apply to this

[2] *E.g.,* United States ex rel. Augustine v. Century Health Services, Inc., 289 F.3d 409, 413 (6th Cir. 2002); Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 788 (4th Cir. 1999); United States v. Jackson, 845 F.2d 880, 882 (9th Cir. 1988).

case. 31 U.S.C. § 3729(a)(1) imposes sanctions of treble damages and penalties on anyone who "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval."

31 U.S.C. § 3729(a)(1)(B)(as amended) imposes sanctions on anyone who "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim."[3]

31 U.S.C. § 3729 (a)(7) imposes sanctions on anyone who "knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government."

Significantly, the False Claims Act does not limit liability to those who have actual knowledge that their claims or statements are false. Rather, it imposes liability on anyone who acts recklessly or with deliberate ignorance as to the truthfulness of their claims or statements. 31 U.S.C. § 3729(b). As this Court has stated, the scienter standard was designed "to preclude 'ostrich' type situations, where an individual has 'buried his head in the sand' and failed to make any inquiry which would have revealed the false claim." United States v. Entin, 750 F. Supp. 512, 518 (S.D. Fla. 1990) (*quoting,* False Claims Reform Act of 1985, S. Rep. No. 345, 99th Cong., 2nd Sess., *reprinted in* 1986 U.S. Code Cong. & Admin. News 5266).[4]

---

[3] The False Claims Act was amended several months ago. Since most of the 2009 amendments apply prospectively, this brief will generally cite the pre-2009 version of the statute. The one exception relevant to this case is the amendment of 31 U.S.C. § 3729(a)(1)(B), which Congress made applicable to all pending cases. Fraud Enforcement and Recovery Act of 2009, P.L. 111-10, Section 4(f)(1) (2009). Therefore, this brief will refer to § 3729(a)(1)(B), rather than its predecessor, § 3729(a)(2).

[4] *See also* Augustine, 289 F.3d 409 (applying reckless disregard standard and affirming judgment against defendant); United States v. Krizek, 111 F.3d 934, 941-42 (D.C. Cir. 1997)

STATEMENT OF FACTS

I. THE PHYSICIAN CONTRACTS AT ISSUE

The underlying Stark violations at issue in this case involve twelve physicians who entered into employment contracts with North Ridge in 1993 and 1994. Under these contracts, North Ridge was allowed to bill Medicare for services provided directly by the doctors themselves. The company also anticipated (correctly) that its relationships with these doctors would induce them to refer their patients to North Ridge for millions of dollars worth of lab tests, inpatient admissions, and other services. When AMH, North Ridge's parent, became part of Tenet in 1995, Tenet inherited these contracts and relationships.

The only written financial analysis that North Ridge prepared regarding these contracts while they were being negotiated is contained in the "Practice Contract Analyses" attached as Exhibit 1. These analyses show that when North Ridge negotiated these contracts, it projected that it would lose money on all twelve contracts if one did not take into account the value of the lab referrals that North Ridge anticipated the doctors would generate for North Ridge. For example, the Practice Contract Analysis for Drs. Dolchin, Gozansky, and Copen projected that their practice would lose $380,223 in its first year if one did not factor in the value of "NRMC [North Ridge Medical Center] Reference Lab Revenue" that the doctors generated. Ex. 1, p.

(holding that False Claims Act recklessness standard should be understood as "aggravated gross negligence," and upholding judgment against doctor who failed to review claims for payment submitted on his behalf); United States v. President and Fellows of Harvard College, 323 F. Supp.2d 151, 189-90 (D. Mass. 2004) (granting summary judgment against one of the defendants based on finding that "a reasonable jury could only conclude that Hay was at least acting in reckless disregard of the existence of the [regulations governing employees] and of their application to him."); United States v. Jointer, 910 F.Supp. 279, 282 (S.D. Miss. 1995) ("[T]o the extent that [defendant's] argument injects a requirement of actual knowledge or specific intent, it is legally frivolous.").

FLAPP 6289. The Practice Contract Analysis for Drs. Mellin and Schwartz projected that their practice would lose $353,514 in its first year if the value of lab referrals were not taken into account. In all, the Practice Contract Analyses projected that North Ridge would lose over $1.2 million on the twelve practices if lab referrals to North Ridge were not taken into account.[5]

It is undisputed that if the doctors' referrals of patients to North Ridge for lab work and other ancillary services are not taken into account, all twelve of the contracts at issue ended up being unprofitable. Ex. 2 (Sulzbach Dep.), pp. 246-249; Ex. 3, pp. 7-13, 17-22, 26-31; Ex. 4. Ultimately, the twelve contracts were terminated or restructured by Tenet between January 1998 and August 1999.

II. THE CORPORATE INTEGRITY AGREEMENT

In June 1994, NME entered into a five-year "Corporate Integrity Agreement" with the government as part of a settlement of allegations that NME had engaged in a number of illegal practices, including making illegal payments to referral sources. Exhibit 5 is a copy of that agreement, which the Defendant personally signed on behalf of NME. After NME and AMH merged to form Tenet, the company continued to operate under the terms of the Corporate Integrity Agreement until June 1999, when the agreement expired.

The Corporate Integrity Agreement required NME to establish a "Corporate Integrity Program" to ensure that the types of misconduct that had led to the settlement did not recur. When NME set up its Corporate Integrity Program, it designated the Defendant as the

[5] The Practice Contract Analyses projected that these losses would be offset almost entirely by the profits that North Ridge expected to make from lab referrals from the physicians. The Practice Contract Analysis for Drs. Erdman and Shook does not quantify their projected lab referrals, but lab referrals to North Ridge from the other ten physicians were expected to yield net operating income for North Ridge of over $1 million per year. Ex. 1.

program's Director. She remained in that position throughout the relevant time period.

The Corporate Integrity Agreement also required the company to submit annual compliance reports to HHS. As Corporate Integrity Program Director, the Defendant personally supervised and directed the preparation of these reports. Ex. 16, p. 12; ex 20, p. 14.

The Corporate Integrity Agreement also contained several requirements that the government contends the Defendant violated. First, under Paragraph 10(d) of the agreement, the company's annual reports were required to include certifications that the company was "either in compliance or noncompliance" with all federal program legal requirements. Id., p. 11. Under this paragraph, the Defendant submitted sworn declarations from herself and two colleagues that the government contends were false.

Second, under Paragraph 10(e), the annual reports were required to disclose "[t]he status of any ongoing investigation of, or legal proceedings involving NME's compliance with federal program legal requirements." Ibid. The government contends that the Defendant violated this requirement by failing to disclose a lawsuit and an internal investigation.

Third, under Paragraph 11, the company was required to investigate "any credible evidence of misconduct" brought to its attention, to "include a summary of the status of each such investigation" in its annual reports to HHS, and to promptly report to HHS any evidence that management had reasonable grounds, after appropriate inquiry, to believe might constitute a material violation of the civil law or rules and regulations governing federally funded health care programs. Id., pp. 12-13. The government contends that the Defendant violated this requirement by failing to disclose a substantial amount of information in her possession.

Finally, under Paragraph 11, once the company had identified legal violations, it was

required to "take appropriate corrective action, including prompt restitution of any damages to the Government to the extent NME is legally responsible for any such damages." Id., p. 13. The government contends that the Defendant failed to take appropriate corrective action after learning of Stark Statute violations at North Ridge, in that she allowed the violations to continue and failed to offer the government restitution for past violations.

III. THE DEFENDANT'S INVOLVEMENT WITH THE CONTRACTS AT ISSUE

In early 1997, the Defendant learned that Sal Barbera, a former Tenet employee, had filed a lawsuit alleging that he had been fired because he had raised concerns within Tenet that some of its contracts with physicians were illegal. Exhibit 6 is a March 5, 1997 fax from the Defendant to Donald Goldman, one of Tenet's outside counsel, forwarding Mr. Barbera's complaint and other pleadings.[6] The complaint alleged that Tenet had violated the Stark Statute, as well as 42 U.S.C. § 1320a-7(B) (the federal Anti-Kickback Statute), and the Florida Racketeering Influenced and Corrupt Organization Act. Ex. 6, p. MWE 459. Document requests that Mr. Barbera served on Tenet appear to identify the twenty-six Florida physicians and physician groups that he was complaining about, including the twelve North Ridge physicians at issue in this case. Id., pp. MWE 481-2.

The Defendant's March 5, 1997 fax to Mr. Goldman also included a February 1997 memo from a Tenet employee named Tony Bennett. The memo expressed concern that "Tenet may have some legal exposure" related to some of its arrangements with physicians who worked for Lauderdale Clinical Services (LCS), the medical group that included the twelve

---

[6] In May 1997, Mr. Barbera filed the *qui tam* discussed in footnote 1, above, which raised similar allegations. As the *qui tam* case was filed under seal, Tenet did not learn about it until much later.

physicians at issue in this case. Id. at MWE 454. The memo described Mr. Bennett's understanding of the requirements of the Stark Statute, and explained why the contracts might violate those requirements. For example, it stated that the contracts that he had looked at raised commercial reasonableness concerns because "in every case," financial analyses prepared by Tenet during contract negotiations with the physicians projected "a substantial loss" for each of the practices. Ibid. The memo also stated that the problems at LCS "are not entirely unique," and that "[t]here are similar issues related to the few physician employment arrangements associated with the former AMI hospitals in the Tampa area." Id. at MWE 455.

Some time in March 1997, the Defendant, who was living in California, flew to Florida and met with Mr. Bennett to discuss the concerns raised in his February memorandum. They were joined by Thomas Holliday, an attorney from Gibson, Dunn & Crutcher. At this meeting, Mr. Bennett showed the Defendant and Mr. Holliday copies of the Practice Contract Analyses discussed above and explained why he thought they raised legal concerns under the Stark Statute. Ex. 7 (Bennett Dep.), pp. 46-50.

On March 7, 1997, the Defendant and Mr. Goldman interviewed Donald Steigman, the CEO of North Ridge, about the allegations raised by Mr. Barbera and Mr. Bennett. According to a memo by Mr. Goldman memorializing this conversation, Mr. Steigman expressed the concern that approximately 100 contracts that Tenet had with physicians "appear[ed] to be inflated." Ex. 8, p. 6.[7]

---

[7] Mr. Goldman's notes stated: "In the period January to March, 1996, TPS added standardized benefits on top of salary. As a result, the salaries appear to be inflated. This problem results in approximately a $1 million issue because it is about $10,000 per contract times 100 practices."

Also on March 7, 1997, the Defendant and Mr. Goldman interviewed Barry Schochet, a Tenet Executive Vice President, about the allegations raised by Mr. Barbera and Mr. Bennett. Mr. Schochet stated that LCS was losing $6 million a year. Id., p. 4.

At the Defendant's direction, Mr. Goldman's firm, McDermott, Will & Emery, conducted an extensive investigation of the allegations raised by Mr. Barbera and Mr. Bennett. Between March and June 1997, a McDermott associate named Myla Reizen, in consultation with Mr. Goldman and other McDermott partners, spent roughly two hundred hours conducting site visits at Tenet facilities in Florida and preparing a lengthy report describing her findings. A copy of the May 27, 1997 version of this report (the McDermott Report) is attached as Exhibit 3. (There was also a June 23, 1997 version that was substantively identical.)

The McDermott Report analyzed possible Stark Statute violations involving 46 Tenet physicians, and concluded that many appeared to violate the statute. For example, the report stated, "almost all the arrangements reviewed for North Ridge Medical Center do not appear to be commercially reasonable without considering the referrals to the hospital." Ex. 3, p. 3. The report contained detailed data supporting this conclusion, including analyses of the twelve physician practices at issue in this case. Id., pp. 7-13, 17-22, 26-31

The Defendant contends that she never received a copy of the McDermott Report. Ex. 2 (Sulzbach Dep.), pp. 98-99. This contention is in dispute, but assuming for purposes of this motion that it is true, it is nevertheless undisputed that the Defendant received numerous briefings from Mr. Goldman about the status and substance of McDermott's investigation. According to McDermott's billing records, the accuracy of which the Defendant does not dispute, the Defendant discussed McDermott's investigation of possible Stark violations in

Florida with Mr. Goldman on March 4, 7, and 22; April 1, 9, and 21; May 28; and June 12. *See* exs. 9-12 (McDermott invoices for March, April, May, and June 1997). The billing records also indicate that on April 16, 1997, Mr. Goldman prepared a memo to the Defendant regarding Ms. Reizen's ongoing analysis of Tenet's relationships with doctors in Florida. Ex. 10, pp. 3-4. That memo has never been produced to the government.

Notably, McDermott's invoice for May 1997 states that on May 28, Mr. Goldman read the May 27 version of the McDermott Report and called the Defendant to discuss it. Ex. 11, p. 5. Mr. Goldman testified at his deposition that he believed that the report raised concerns about whether the contracts at issue violated the Stark Statute, and that he probably told the Defendant about those concerns during their May 28 phone call. Ex. 13 (Goldman Dep.), pp. 87-88.

Of equal note, on June 12, 1997, the Defendant and Mr. Goldman participated in a teleconference with Mr. Heinemann and Mr. Schochet regarding the "problems" addressed in the McDermott Report. Mr. Goldman's notes indicate that the parties discussed the problems that had been identified in the May 27 report, and that one of the alternatives that they discussed was "go[ing] to HHS" to report the problems. Id., pp. 92-96, 122-23; ex. 14.

On June 24, 1997, Mr. Goldman and Ms. Reizen met in Dallas with four Tenet employees, including Mr. Heinemann, Mr. Schochet, and Cori MacDonneil, an in-house attorney who reported directly to the Defendant, to discuss the concerns raised in the McDermott Report. Mr. Goldman gave a detailed presentation regarding Stark concerns relating to physician practices that his firm had analyzed, including the twelve at issue in this case. For example, with respect to Dr. Yesner, one of the doctors at issue here, the parties discussed the "commercial reasonability" of his salary, the fact that his practice was losing

$280,000 a year, and the fact that his wife was on Tenet's payroll. Ex. 15, p. 1. The Defendant testified that she could not recall whether or not she was briefed on the meeting. Ex. 2 (Sulzbach Dep.), pp. 137-8.

On June 27, 1997, three days after the meeting in Dallas, Tenet submitted its annual Compliance Report to HHS. Exhibit 16. The report included a sworn declaration from the Defendant, acting in her capacity as Tenet's Corporate Integrity Program Director, in which she stated that the Compliance Report was "prepared under [her] direction," and that:

> The Company has reviewed its records and practices during the preceding twelve (12) months and, to the best of my knowledge and belief, is in material compliance with the terms of the Corporate Integrity Agreement, as well as 42 U.S.C. Sections 1320(a) -7(a) and 1320(a)-7(b), and other federal program legal requirements, and has retained all documentation pertinent to this determination.

Ex. 16, p. 12.

The report also included sworn declarations from Tenet's CEO, Jeffrey Barbakow, and its General Counsel, Scott Brown, that included the same language, except that the Barbakow and Brown declarations did not include the word "material." Id., pp. 14-16. The report did not disclose the existence of the Barbera retaliatory discharge lawsuit, the McDermott investigation, or the possibility of Stark Statute violations at Tenet facilities in Florida.

On July 31, 1997, the Defendant sent a memo to Mr. Heinemann entitled "Compliance Reviews of Tenet Physician Services by McDermott, Will & Emery." Ex. 17. It stated in part:

> As you are aware, pursuant to our compliance program and Corporate Integrity Agreement, we requested McDermott, Will & Emery to conduct a privileged audit of several physician group practices in southern Florida. Under my direction, we ask that you implement the corrective action identified by McDermott, Will & Emery. Please provide me a written report on the status of the corrective action within 30 days. Failure to comply with the corrective action may result in our having to report certain issues to the Department of

Health and Human Services pursuant to the terms of the Corporate Integrity Agreement.

Also on July 31, 1997, Mr. Heinemann and Mr. Schochet sent the Defendant a memo setting forth "the operational plan to restructure those physician relationships identified by your staff and TPS [Tenet Physicians Services]." Ex. 4. The memo contained proposals for renegotiating the contracts of 48 Tenet physicians in Florida, including the twelve at issue in this case. Each of the 46 physicians analyzed in the May 27, 1997 McDermott Report was discussed in the July 31, 1997 memo. The July 31, 1997 memo showed that if the value of the doctors' referrals were not taken into account, each of the practices lost a substantial amount of money.

Over the next two years, Mr. Heinemann led Tenet's efforts to renegotiate a number of physician contracts, including the twelve at issue here. During that time, he sent the Defendant frequent written updates on his progress. For example, on October 14, 1997, he sent her this description of a recent meeting with Dr. Yesner:

> Dr. Yesner began talking about how he has honored his end of the deal, and how Tenet should honor their end of the deal. **He stated this Agreement was a "sweet deal for me." How he had to "force our patients to go to your hospital . . . . it's dirty . . . . the Out Patient Department is terrible." He stated he was taking home around $200K per year before Don Steigman "offered me $300,000 to convert patients to Northridge."**
>
> **I called Don Goldman and discussed this conversation with him.** He told me to document that Don and I had the conversation for my files, and he would speak with Christi to get direction. At this point, I have not heard what steps, if any, to take next. (I did ask Don on another occasion and he stated he had not yet heard from you.)

Exhibit 18, pp. FLAPP 516709-710. (Emphasis in original).

Dr. Yesner's contract remained in effect until November 8, 1998, more than one year

after the Defendant received this memo. Tenet continued to bill Medicare for referrals from Dr. Yesner, and did not mention Dr. Yesner in its June 1998 annual compliance report.

On June 19, 1998, Mr. Heinemann sent the Defendant a status report on his efforts to terminate or restructure over one hundred contracts between Tenet and physicians practicing in Florida. Ex. 19. It stated that four of the doctors at issue in this case (Drs. Angelillo, Shapiro, Coleman, and Perer) had been terminated, but that the contracts of eight others (Drs. Erdman, Shook, Copen, Dolchin, Gozansky, Mellin, Schwartz, and Yesner) remained in effect.

Seven days later, on June 26, 1998, Tenet submitted its 1998 annual Compliance Report to HHS. Ex. 20. The report included sworn declarations from the Defendant, Tenet CEO Barbakow, and Tenet General Counsel Brown, that were identical to those submitted in 1997.

The Defendant never notified the government of the existence of potential Stark Statute violations at North Ridge, the Barbera retaliatory discharge suit, the Bennett memo, or the McDermott investigation. Also, she never instructed Tenet employees to stop billing Medicare for referrals from the doctors at issue or to reimburse the government for past violations.

ARGUMENT

I. SUMMARY JUDGMENT IS APPROPRIATE WHERE THERE IS NO GENUINE ISSUE FOR TRIAL

The Court should grant summary judgment where "there is no genuine issue as to any material fact" and the record taken as a whole could not lead a rational trier of fact to find for the non-moving party. Fed. R. Civ. P. 56(c); Matsushita Elec. Industrial Co. v. Zenith Radio, 475 U.S. 574, 587 (1986). If summary judgment is not rendered on the whole action, partial summary judgment may be appropriate to eliminate from trial those matters that are not subject to genuine dispute. Fed. R. Civ. P. 56(d).

The mere existence of some alleged factual dispute will not defeat a properly supported motion for summary judgment; the non-moving party must come forward with evidence sufficient for a jury to return a verdict in its favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251 (1986). Thus, if the non-movant's allegations are merely colorable or are unsupported by evidence that is significantly probative, summary judgment may be granted. Id. The party opposing a motion under Rule 56 must present *evidence* in opposition and not merely show that there is some "metaphysical doubt" as to the material facts. Matsushita, 275 U.S. at 588.

II. BURDEN OF PROOF

Under the False Claims Act, the government bears the burden of proving all “essential elements” of its case by a preponderance of the evidence. 31 U.S.C. § 3731(c); United States v. Entin, 750 F. Supp. 512, 518 (S.D. Fla. 1990); United States v. Rogan, 459 F. Supp.2d 692, 716 (N.D. Ill. 2006), aff’d 517 F.3d 449 (7th Cir. 2008). One important caveat to this general rule is that the government does not bear the burden of proving that a financial relationship falls outside an exception to the Stark Statute. If the Defendant wishes to invoke one of the statutory exceptions as a defense, the burden is on the Defendant to establish that the exception applies to the financial relationship at issue. United States ex rel. Kosenke v. Carlisle HMA, Inc., 554 F.3d 88, 95 (3d Cir. 2009); Rogan, 459 F. Supp.2d at 716.

III. THE UNDISPUTED FACTS CLEARLY ESTABLISH THAT THE TWELVE PHYSICIAN CONTRACTS IDENTIFIED IN THE COMPLAINT VIOLATED THE STARK STATUTE

It is undisputed that Tenet had financial relationships with the twelve North Ridge physicians at issue in this case. It is also undisputed that Tenet submitted tens of thousands of claims for payment to Medicare for designated health services rendered by these physicians

during the period in which their employment agreements were in effect. The United States has provided data to the Defendant showing that Tenet received $16,296,057 in Medicare payments for such claims. The government is not including this data here because of its volume, but will provide a CD with the data to the Court upon request.

Under the Stark Statute, these undisputed facts constitute a prima facie showing that Tenet violated the Stark Statute, unless the Defendant can establish that Tenet's financial relationships with these doctors fit within a statutory exception. The only statutory exception that the Defendant has invoked in this case is the physician employment exception in 42 U.S.C. § 1395nn(e)(2). Among the elements that the Defendant is required to prove in order to establish that this exception applies is that the physicians's contracts would have been "commercially reasonable" even if the physicians had made no referrals to North Ridge.[8] Ibid.

The undisputed facts clearly establish that while the twelve contracts at issue may have been commercially reasonable if the value of the doctors' patient referrals to North Ridge is taken into account, they were never commercially reasonable absent the value of those referrals. Each of these practices was expected to lose substantial money from the beginning, and each practice fulfilled those expectations. Even the Defendant has admitted that "they were bad business deals." Ex. 2 (Sulzbach Dep.), p. 246. There is no evidence in the record from which one could reasonably conclude that any of these financial relationships were commercially reasonable if the value of referrals were not taken into account.

---

[8] In order to fit within the Stark exception, the Defendant must also prove that the doctors' compensation was (1) "consistent with fair market value" for the services they were hired to perform, and (2) was not determined in a manner that took into account the value of their referrals to North Ridge. Ibid. If this case goes to trial, the government will demonstrate that the physician contracts at issue failed both of these requirements as well.

The extent to which these contracts were commercially unreasonable in 1997, when the Defendant began looking into them, is explained in detail in the McDermott Report. This report, prepared by Tenet's own counsel, analyzed the available financial data for each practice, showed that they were all losing substantial money if the value of their referrals were not taken into account, and stated that the contracts did not appear to be commercially reasonable absent the value of referrals to North Ridge. Ex. 3, pp. 246-249; Ex. 3, pp. 7-13, 17-22, 26-31.

The July 31, 1997 memorandum from Barry Schochet and Jeffrey Heinemann to the Defendant also contained detailed financial analysis showing that each of these contracts was losing substantial money in 1997. Ex. 4.

This analysis is consistent with the deposition testimony of the Tenet executives who worked with these physicians. For example, when asked whether anyone other than Dr. Yesner had ever expressed the opinion that Dr. Yesner's salary was commercially reasonable, Mr. Heinemann testified, "Oh, my goodness, no. . . . Nobody with brain cells, no." Ex. 21 (Heinemann Dep.), pp. 41-42. Mr. Heinemann also testified that he had been concerned about the commercial reasonableness of a number of the other contracts at issue. Id., pp. 86-96.

Similarly, when Tony Bennett was asked by defense counsel if he believed that the contracts at issue were commercially unreasonable in 1997, he responded, "That is correct, and by commercially reasonable, just that they weren't making money. They were losing money." Ex. 7 (Bennett Dep.), pp. 75-76.

The Defendant does not contend that any of these contracts turned out to be profitable for Tenet. On the contrary, at her deposition, she called them "bad business deals," and stated that Tenet ultimately tried to renegotiate them in part because "they were incurring business

losses." Ex. 2 (Sulzbach Dep.), p. 246. Instead, the Defendant appears to contend that the fact that the contracts were commercially unreasonable in 1997 does not mean that they were commercially unreasonable in 1993 and 1994, when they were first entered into.

The problem with this argument is that the only financial analysis that was performed during the period in which the contracts were negotiated clearly showed that the contracts were **not** commercially reasonable at the time they were entered into unless the value of referrals were taken into account. This analysis, which was contained in the Practice Contract Analyses attached as Exhibit 1, shows that at the time these contracts were entered into, they were expected to lose more than $1.2 million in the first year alone. Drs. Dolchin, Copen and Gozansky were projected to lose $380,223; Drs. Mellin and Schwartz were projected to lose $353,514; Dr. Coleman was projected to lose $145,595; Dr. Perer was projected to lose $119,320; the practice that Drs. Shook and Erdman shared with two other doctors was projected to lose $94,833; Drs. Shapiro and Angelillo were projected to lose $74,073; and Dr. Yesner was projected to lose $60,078. (As noted above, the Practice Contract Analyses also projected that these losses would be roughly offset by the value of the doctors' lab referrals to North Ridge, a factor that the company was not legally permitted to consider under 42 U.S.C. § 1395nn(e)(2).)

The Defendant has not produced a shred of contemporaneous analysis that suggests that any of these contracts were commercially reasonable at the time they were entered into. Further, she testified that she could not recall anyone at McDermott or at Tenet expressing to her in 1997 the opinion that these contracts appeared to be commercially reasonable if referrals to North Ridge were not considered. Ex. 2 (Sulzbach Dep.), pp. 121-2.

It is true that the Defendant has hired two expert witnesses to testify that the contracts at

issue were commercially reasonable. For the reasons discussed in the government's accompanying motions to exclude these experts, the government respectfully submits that the analysis of both experts is fatally flawed, and should be disregarded. Alex Hunter has admitted that his analysis of the practices at issue took into account the value of the doctors' referrals of patients to North Ridge for laboratory tests. This analysis is fundamentally inconsistent with the applicable legal standard under 42 U.S.C.§ 1395nn(e)(2)(C), and therefore is legally irrelevant to the issues addressed in this motion.[9] Also, as explained in our motion to exclude, many of the numbers in Mr. Hunter's analysis appear to have no factual basis.

Nathan Kaufman, the Defendant's other expert, testified that because of fundamental changes in the economics of the health care industry that he says were anticipated in the early 1990's, but which never materialized, **any** amount of physician compensation would have been commercially reasonable at the time. This analysis was not based on any concrete numbers or any analysis of the specific physician practices at issue, and is fundamentally inconsistent with the language and purpose of the Stark Statute.

In short, all of the available evidence confirms the Defendant's admission that the physician contracts at issue were "bad business deals" if referrals were not taken into account. Not a shred of contemporaneous evidence exists to support the contention that any of these contracts were commercially reasonable absent the value of referrals, either when they were negotiated in 1993-94, or when the Defendant and her colleagues analyzed them in 1997-98.

---

[9] *See* Boca Raton Community Hospital, Inc. v. Tenet Healthcare Corp., Case No. 07-14352, __ F.3d __, 2009 WL 2833115 (11th Cir., Sept. 4, 2009)("The party offering the expert testimony has the burden of demonstrating that the testimony is 'relevant to the task at hand' and 'logically advances a material aspect' of its case.")(citations omitted).

Thus, as a matter of law, all of these contracts violated the Stark Statute.

IV. THE UNDISPUTED FACTS ESTABLISH THAT THE DEFENDANT KNEW OR SHOULD HAVE KNOWN THAT TENET WAS VIOLATING THE STARK STATUTE

The undisputed facts establish that when the Defendant signed her June 27, 1997 certification to HHS, she possessed substantial evidence that the contracts at issue were commercially unreasonable, and that they violated the Stark Statute. A year later, when she signed her June 28, 1998 certification, she had even more evidence confirming these concerns.

The Defendant's March 5, 1997 fax to Donald Goldman evidences that she was aware that both Tony Bennett and Sal Barbera had raised explicit concerns about Stark violations in Florida. Exhibit 6. While Mr. Bennett's memo did not identify which individual doctors he was concerned about, Mr. Barbera's document request included a list of affected doctors, and Mr. Bennett testified that he discussed specific doctors with the Defendant when they met in March. Ex. 6, pp. MWE 481-82; ex. 7 (Bennett Dep.), p. 49.

Mr. Bennett's memo also raised concerns about the commercial reasonableness of Tenet's contracts with Ft. Lauderdale physicians. Mr. Bennett testified that he discussed these concerns further at his March 1997 meeting with the Defendant. Ibid. The Defendant's concerns should have been heightened by Barry Schochet's March 7, 1997 statement to her that Lauderdale Clinical Services, the group in which all twelve doctors at issue here were employed, was losing $6 million per year. Ex. 8, p. 4. The same is true of Donald Steigman's March 7, 1997 statement that approximately 100 contracts that Tenet had with physicians "appear[ed] to be inflated." Id., p. 6.

As discussed above, the May 27, 1997 McDermott Report raised strong, precise, and

carefully documented concerns about the legality and commercial reasonableness of the twelve physician contracts at issue here. Assuming for purposes of this motion that the Defendant never received a copy of the report itself and was never briefed on McDermott's June 24, 1997 presentation to her subordinates, it is undisputed that Mr. Goldman informed her of the general concerns discussed in the report on May 28 and June 12, 1997, and that she discussed the status of McDermott's investigation with Mr. Goldman on March 22 and April 1, 9, and 21. Even general descriptions of McDermott's findings would have confirmed, rather than rebutted, the allegations raised by Mr. Barbera and Mr. Bennett.

The July 31, 1997 memo to the Defendant from Mr. Schochet and Jeffrey Heinemann, which detailed substantial operating losses for 48 physician practices, including those at issue here, provided the Defendant with concrete evidence that the contracts were commercially unreasonable as of 1997, and might therefore violate the Stark Statute. Ex. 4.

The memo that the Defendant sent on July 31, 1997, in which she discussed "the corrective action identified by McDermott, Will & Emery" and problems that "may result in our having to report certain issues to the Department of Health and Human Services pursuant to the terms of the Corporate Integrity Agreement" clearly demonstrates that the Defendant was aware of potential Stark violations that she knew should have been corrected and reported to HHS. Ex. 17. It flatly contradicts any contention that she was unaware of McDermott's findings.

In his October 14, 1997 memo, Mr. Heinemann informed the Defendant that Dr. Yesner claimed that he was "forcing" his patients to go to North Ridge, even though he thought it was "dirty" and "terrible," simply because he had received a salary increase of $100,000 per year to

do so. Ex. 18. This is an extreme and disturbing example of precisely the type of patient abuse that the Stark Statute was enacted to prevent. It should have been corrected and reported promptly, even if none of the other communications discussed above had occurred. The Defendant does not deny receiving this memo, but there is no evidence that she did anything about it. Ex. 2 (Sulzbach Dep.), pp. 262-6; ex. 21 (Heinemann Dep.), pp. 159-60.

As noted above, any comfort that the Defendant might have taken in the notion that the contracts were commercially reasonable when entered into, and only became unprofitable over time, would have been dispelled at her March 1997 meeting with Tony Bennett, in which he showed her Practice Contract Analyses that clearly showed that the contracts were always expected to lose money if the value of lab referrals were not taken into account. See Ex. 1; ex. 7 (Bennett Dep.), p. 49. The Practice Contract Analyses (also called "proformas") were also discussed in the McDermott Report and at the June 24, 1997 meeting. Ex. 3, pp. 2, 6-11, 17, 20-21, 23, 26, 28, 30; Ex. 15.

Significantly, there is no evidence that anyone at the time gave the Defendant any reason to believe that any of these contracts were legal. Nothing in the McDermott Report or any other contemporaneous document expressed or supported such a conclusion. Moreover, the Defendant testified at her deposition that she could not recall any discussions with anyone in 1997 or early 1998 of facts that would support the conclusion that any of the contracts at issue were legal. Ex. 2 (Sulzbach Dep.), at pp. 122-125, 274-76. Similarly, when asked at her deposition whether anyone who worked for Tenet or for McDermott expressed the opinion in 1997 that most of the contracts at North Ridge appeared to be commercially reasonable without considering referrals, the Defendant stated, "Not that I recall." Id. at 121-22.

The Defendant contends that she never received a physical copy of the McDermott Report, and that Mr. Goldman never told her that McDermott had reached a definite conclusion regarding the legality of any physician contracts. Id., pp. 98-101, 135. Assuming for purposes of this motion that these contentions are true, they do not constitute a legal defense in this case.

As discussed above, the False Claims Act does not require that defendants have "actual knowledge" of the falsity of their claims. Rather, 31 U.S.C. § 3729(b) expressly imposes liability on those who act recklessly or with deliberate ignorance as to the truthfulness of their statements. Here, all of the evidence in the Defendant's possession in 1997 and 1998 pointed to the fact that absent the value of referrals, the twelve contracts at issue were commercially unreasonable from their inception, and that they therefore violated the Stark Statute. At her deposition, the Defendant was unable to identify any facts or opinions to the contrary that were presented to her at that time. Under these circumstances, even assuming that the Defendant's description of what she knew and did not know is accurate, her conduct constitutes a textbook case of recklessness and deliberate ignorance. *See* cases cited on pp. 5-6, above.

V. THE DEFENDANT VIOLATED THE FALSE CLAIMS ACT IN SEVERAL DIFFERENT WAYS

A. The Defendant Violated 31 U.S.C. § 3729(a)(1) by Causing Tenet to Submit False Claims For Payment

31 U.S.C. § 3729(a)(1) imposes civil liability on those who knowingly submit false claims for payment to the government or cause such claims to be submitted. In order to establish a violation of this section, the government must prove five elements: (1) the existence of a "claim"; (2) that the claim was "false"; (3) that the false claim was "presented" to the government; (4) that the false claim was "material;" and (5) that defendant acted "knowingly."

United States ex rel. Schmidt v. Zimmer, 386 F.3d 235, 242 (3d Cir. 2004).

The facts discussed above establish that the Defendant violated § 3729(a)(1) with respect to all Medicare claims submitted by Tenet for services rendered to patients who were referred by the twelve doctors identified in the complaint between the time that the Defendant learned that Tenet's relationships with these doctors violated Stark (between March and June 1997) and the time the contracts expired or were restructured (between January1998 and August 1999).[10]

These claims were false – and materially false – because they were submitted in violation of the Stark Statute. As noted above, the Stark Statute expressly prohibits Medicare from paying such claims. 42 U.S.C. § 1395nn(g)(1). Therefore, the knowing submission of claims that violate the Stark Statute also violates the False Claims Act. United States v. Rogan, 517 F.3d 449 (7th Cir. 2008).

It is undisputed that Tenet presented to the government thousands of Medicare claims in this period for referrals from the doctors at issue. These claims are listed in a CD that the government has produced to the Defendant, and will provide to the Court upon request.

The Defendant caused these claims to be submitted because, as Corporate Integrity Program Director, she was in charge of Tenet's handling of the allegations and evidence discussed above. Her role is illustrated by the October 14, 1997 memo in which Jeffrey Heinemann informed her that Dr. Yesner had claimed that Tenet was paying him to "force" his patients to go to North Ridge. After reporting on his conversation, Mr. Heinemann stated:

---

[10] Drs. Shook and Erdman worked under their existing contracts until approximately August 4, 1999; Drs. Mellin and Schwartz did so until approximately February 2, 1999; Drs. Gozansky, Dolchin, and Copen did so until approximately January 28, 1999; Dr. Yesner did so until approximately November 8, 1998; Drs. Coleman and Perer did so until approximately March 1, 1998; and Drs. Shapiro and Angelillo did so until approximately January 1, 1998.

> I called Don Goldman and discussed this conversation with him. He told me to document that Don and I had the conversation for my files, and he would speak with Christi to get direction. At this point, I have not heard what steps, if any, to take next. (I did ask Don on another occasion and he stated he had not yet heard from you.)

Ex. 18, p. FLAPP 516710.

In other words, having been informed of a blatant Stark violation, Mr. Heinemann and Mr. Goldman both depended on the Defendant to provide "direction" and to decide "what steps, if any, to take next." As discussed above, the Defendant has not identified any steps that she took to stop Tenet from billing Medicare for unallowable claims associated with Dr. Yesner or any of the other doctors. As the Tenet official in charge of addressing these legal issues, by failing to direct Tenet employees to stop billing Medicare for these referrals, she effectively authorized and caused the illegal billing to continue.

Finally, the evidence that the Defendant acted "knowingly" within the meaning of the False Claims Act has been discussed in Section IV, above.

B. The Defendant Violated 31 U.S.C. § 3729(a)(1)(B) by Submitting False <u>Statements to the Government In Support of Tenet's False Claims For Payment</u>

31 U.S.C. § 3729(a)(1)(B) imposes liability on those who knowingly submit false statements to the government that are material to false claims for payment. In order to establish a violation of this section, the government must establish most of the elements of a § 3729(a)(1) claim (except that there is no presentment requirement under § 3729(a)(1)(B)), plus it must demonstrate that the Defendant (1) made or used a false statement (2) material to a false or fraudulent claim paid by the government.[11]

[11] Prior to the 2009 amendments, the predecessor version of § 3729(a)(1)(B) required the government to prove that false statements were made for the purpose of getting false claims paid.

Here, as discussed above, the undisputed evidence establishes that Tenet's 1997 and 1998 annual compliance reports were false because (1) they failed to disclose the existence of the Barbera retaliatory discharge lawsuit, in violation of paragraph 10(e) of the Corporate Integrity Agreement; (2) they failed to disclose the existence or status of Tenet's internal investigation of Stark violations at North Ridge, in violation of Paragraphs 10(d) and 11 of the agreement; and (3) they failed to disclose any evidence of Stark violations at North Ridge, in violation of paragraph 11 of the agreement. The Defendant has admitted that these reports were prepared and issued to HHS under her personal direction. Ex. 2 (Sulzbach Dep.), pp. 146-50.

Further, the sworn declarations of the Defendant, Jeffrey Barbakow, and Scott Brown falsely certified that the company was in compliance with federal program legal requirements. Ex. 16, pp. 12-16; Ex. 20, pp. 14-18. The Defendant admitted that these declarations were drafted either by the Defendant herself or by an attorney reporting to her, and that she personally reviewed them for accuracy before they were issued. Ex. 2 (Sulzbach Dep.), pp. 149-50.

It should be noted that under Paragraph 10(e) of the Corporate Integrity Agreement, Tenet was obligated to disclose the existence of Sal Barbera's retaliatory discharge lawsuit

---

Allison Engine Co., Inc. v. United States ex rel. Sanders, 128 S.Ct. 2123, 2128 (2008). The 2009 amendments eliminated this requirement. Even under the old version of the statute, however, the government was entitled to rely on the well-established presumption in the law that a defendant intends the natural consequences of her actions. *See, e.g.*, Reno v. Bossier Parish School Bd., 520 U.S. 471, 487 (1997) ("people usually intend the natural consequences of their actions."); Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 277 (1979) (recognizing "the presumption, common to the criminal and civil law, that a person intends the natural and foreseeable consequences of his voluntary actions."); United States v. Lawrence, 405 F.3d 888, 899 (10th Cir. 2005) (approving jury instructions in Medicare fraud case permitting jury to infer that "a person intends the natural and probable consequences of acts knowingly done or knowingly omitted."). Here, the Defendant's conduct satisfied that standard because, as discussed below, she was well aware that evidence of Stark violations would have been material to HHS' decision to continue paying Tenet for referrals from the twelve doctors at issue.

regardless of the suit's merits or the outcome of Tenet's internal investigation. Ex. 5, p. 11. Mr. Barbera's suit expressly accused Tenet of violating the Stark Statute and the Anti-Kickback Statute. Ex. 6, p. MWE 459. Thus, it was indisputably a "legal proceeding involving [Tenet's] compliance with federal program legal requirements," and had to be disclosed.

The Defendant has admitted that in March 1997, she was in possession of the Barbera complaint. Ex. 2 (Sulzbach Dep.), pp. 225-26. When asked why she did not mention the lawsuit in Tenet's 1997 report to HHS, the only explanation she could offer was that the government was not a party to the Barbera lawsuit. Id, pp. 225-27. This explanation is inconsistent with the plain language of the Corporate Integrity Agreement, which contains no such limitation. It is also facially absurd, since it suggests that Tenet was only required to inform the government of allegations if the government was already aware of them.

As discussed above, the Stark Statute expressly states that Medicare payments may not be made for claims that do not comply with the statute. 42 U.S.C. § 1395nn(g)(1). Therefore, there can be no question that evidence of Stark violations would have been "material," within the meaning of § 3729(a)(1)(B), to the government's decision to continue paying for referrals from the doctors at issue.

C. The Defendant Violated 31 U.S.C. § 3729(a)(7) by Submitting False Statements to the Government In Order to Avoid Tenet's Obligation to Make Restitution to the Government

31 U.S.C. § 3729(a)(7), sometimes referred to as the False Claims Act's "reverse false claim" provision, prohibits the use of false statements to conceal or avoid an obligation to pay money to the United States. To establish a claim under this section, the government must prove that the Defendant knowingly made a false statement, and that this statement was made in order

to conceal or avoid an existing legal obligation to pay money to the government. *See* United States ex rel. Bahrani v. Conagra, Inc., 465 F.3d 1189, 1194-5 (10th Cir. 2006).

Tenet's obligation to make restitution to the government once it learned of the Stark violations at issue arose under: (1) the Stark Statute itself, 42 U.S.C. § 1395nn(g)(2), which requires Medicare providers to "refund on a timely basis" any amounts billed in violation of the statute; (2) the regulations implementing the Stark Statute, 42 C.F.R. § 411.353, which require that any entity collecting payment for a health care service "performed under a prohibited referral must refund all collected amounts on a timely basis"; and (3) the Corporate Integrity Agreement, which required that once Tenet identified legal violations, it "take appropriate corrective action, including prompt restitution of any damages to the Government to the extent [Tenet] is legally responsible for any such damages." Ex. 5, p. 13.

For the reasons discussed above, the false reports and declarations that the Defendant submitted to HHS concealed and avoided this restitution obligation, and therefore violated 31 U.S.C. § 3729(a)(7). Also, undisputed evidence discussed above establishes that the Defendant acted "knowingly" within the meaning of the False Claims Act when she submitted these reports and declarations.

VI. THERE IS NO DISPUTE ABOUT THE GOVERNMENT'S DAMAGES

The Stark Statute expressly states that no Medicare payment may be made for designated health services provided in violation of the statute. 42 U.S.C. § 1395nn(g)(1). In this case, the government has identified $16,296,057 in Medicare payments that Tenet received in violation of the Stark Statute. These payments are documented in a CD that the government produced to the Defendant, and will provide to the Court upon request.

The Defendant has not produced any evidence contradicting the government's damage calculation. If the Court concludes that the Defendant violated the False Claims Act with respect to the twelve contracts at issue, there is no factual basis for concluding that the government's damages are less than $16,296,057. Under the False Claims Act, the government is entitled to treble damages, or $48,888,171. Similarly, if the Court concludes that the Defendant is only liable under the False Claims Act for some of these doctors, or for a narrower time period than the full life of each contract, then the government's damages are easily ascertainable from the data provided by the government to the Defendant.

In 2004, the United States received $22.5 million from Tenet to settle a *qui tam* case that involved allegations that overlapped with the allegations in this case. Although the claims in that case extended beyond the twelve physician contracts at issue here, the government will stipulate for purposes of this motion that the Defendant receive an offset for the full amount of the 2004 settlement. In accordance with United States v. Bornstein, 423 U.S. 303, 314-17 (1976), however, the government's damages must be trebled before any offset is taken. Thus, giving an offset for the full amount of the 2004 settlement, the government is entitled to recover $26,388,171 for its damages in this case ($16,296,057 times three, minus $22.5 million).

CONCLUSION

For the foregoing reasons, the government respectfully asks the Court to grant the government's motion for summary judgment and award it $26,388,171 in damages, plus penalties in an amount to be determined by the Court.

October 30, 2009

Respectfully submitted,

TONY WEST
Assistant Attorney General
Civil Division

JEFFREY H. SLOMAN
Acting United States Attorney for the Southern
District of Florida

s/ June C. Acton
JUNE C. ACTON
Assistant United States Attorney
99 N.E. 4th Street, Suite 337
Miami, Florida 33132
Fla Court I.D. No. A5501236
E-mail: june.acton@usdoj.gov
Tel: 305 961- 9374
Fax: 305 530- 7139

s/ David T. Cohen
JOYCE R. BRANDA
MICHAEL D. GRANSTON
DAVID T. COHEN
DAVID B. WISEMAN
JONATHAN I. KATZ
Attorneys, Department of Justice
Civil Division
Post Office Box 261
Ben Franklin Station
Washington, DC 20044
E-mail: david.t.cohen@usdoj.gov
Tel: (202) 307-0136
Fax: (202) 307-3852