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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, *ex rel., et al.,*

Plaintiffs/Relators,

v.

CENTER FOR DIAGNOSTIC
IMAGING, INC.,

Defendant.

Case No. C05-0058RSL

ORDER GRANTING IN PART
PLAINTIFFS’ MOTION TO STRIKE

This matter comes before the Court on “Plaintiff-Relators’ Motion to Strike ‘Affirmative Defenses’” (Dkt. # 167). Plaintiffs ask the Court to strike seven of Defendant’s ten affirmative defenses as “baseless and improper.” For the reasons set forth below, the Court GRANTS Plaintiffs’ motion IN PART.

I. BACKGROUND

The Court described the background facts underlying this matter in the Court’s “Order Granting in Part and Denying in Part CDI Defendants’ Motion to Dismiss” (Dkt. # 129) and in its subsequent “Order Denying Defendant’s Motion to Dismiss or Strike and for Rule 11 Sanctions” (Dkt. # 161). It will not repeat those facts here.

Following entry of those orders, Defendant filed its “Second Amended Answer to

1 Plaintiffs/Relators' Fourth Amended Complaint" ("SAA") (Dkt. # 165).¹ In its SAA, the
2 Defendant asserted the following ten defenses:

3 1. Some or all of Plaintiffs' claims are subject to the public disclosure
4 bar of the False Claims Act [{"FCA"}], and Plaintiffs are not original sources
5 of the claims as that term is understood under the Act; accordingly, they are
6 jurisdictionally barred from asserting their claims.

7 2. Some or all of Plaintiffs' claims are barred by the doctrine of unclean
8 hands, and/or *in pari delicto* inasmuch as Relator West engaged in improper
9 and inequitable activities during the time of her employment with CDI relating
10 to the subject matter of claims that she has raised.

11 3. Some or all of Plaintiffs' claims are barred by the doctrines of
12 waiver, including but not limited to claims related to payments made by the
13 government for epidurographies, fluoroscopic guidance, injection procedures,
14 MRAs, discounted services, CT Orbits, and claims related to referrals from
15 Sound Urological.

16 4. Some or all of Plaintiffs' claims are barred by the doctrine of accord
17 and satisfaction to the extent the government has accepted prior payments from
18 CDI and/or its affiliates.

19 5. Some or all of Plaintiffs' claims are barred by the statute of
20 limitations.

21 6. Some or all of Plaintiffs' claims are barred by the doctrine of release,
22 including such releases as were provided under the Settlement Agreement
23 entered into with the United States. (See Dkt. # 107.)

24 7. Some or all of Plaintiffs' claims are barred by claim preclusion,
25 including but not limited to those related to epidurographies, fluoroscopic
26 guidance, injection procedures, MRAs, Sound Urological, discounted services,
the Stark Law, CT Orbits, and any other previously adjudicated or settled
claims.

8. If Plaintiffs suffered damages, such damages were caused by the acts
or omissions of persons for whose acts or omissions CDI is not liable.

¹ The Court notes that Defendant filed its answer long after the agreed-upon deadline of September 2, 2011, and only after repeated prompting by Plaintiffs. See Mot. (Dkt. # 167) at 6-7. The Court appreciates Plaintiffs' obvious desire to avoid further delay.

1 Wash. Nov. 19, 2010) (Zilly, J.) (applying Twombly). As a result, courts typically
2 decline to strike an allegedly “insufficient” affirmative defense unless plaintiff shows that
3 “there are no questions of fact, that any questions of law are clear and not in dispute, and
4 that under no set of circumstances could the defense succeed.” Kerzman, 2007 WL
5 765202, at *7.

6 Notably, even if a defense has been sufficiently plead, courts have discretion under
7 Federal Rule of Civil Procedure 12(f) to strike those that entail “redundant, immaterial,
8 impertinent, or scandalous matter.” “[T]he function of a 12(f) motion to strike is to avoid
9 the expenditure of time and money that must arise from litigating spurious issues by
10 dispensing with those issues prior to trial” Sidney–Vinstein v. A.H. Robins Co., 697
11 F.2d 880, 885 (9th Cir. 1983).

12 **A. First Defense: Public Disclosure/Original Source**

13 In its original motion, Plaintiffs argued that Defendant’s asserted defense was
14 merely a denial of liability and therefore not a matter “extraneous to the plaintiff’s prima
15 facie case.” See Mot. (Dkt. # 167) at 11. It also argued that Defendant had failed to
16 plead sufficient facts to put Plaintiffs on notice as to who Defendant alleges to be the
17 original source of the claims in question. In response, Defendant noted that it relies upon
18 31 U.S.C. § 3730(e)(4) (“Certain Actions Barred”), which operates as a jurisdictional bar,
19 as the foundation of its defense. Opp. (Dkt. # 169) at 4 (citing United States ex rel.
20 Hagood v. Sonoma Cnty. Water Agency, 929 F.2d 1416, 1419 (9th Cir. 1991) (describing
21 § 3730(e)(4) as a jurisdictional bar)).

22 Now that Defendant has disclosed the basis of its defense, the Court sees no reason
23 to strike. See Wyshak, 607 F.2d at 827 (denying motion to strike in light of reference to
24 specific statutory basis for an asserted defense in a memorandum). Though Defendant
25 admittedly provides few details to support its contention, the Court cannot conclude that

1 Plaintiffs have demonstrated that they lack fair notice of Defendant's defense. Plaintiffs
2 can readily obtain the factual detail they seek through common discovery practices.

3 **B. Second Defense: Unclean Hands**

4 Plaintiffs next argue that Defendant's unclean hands defense should be stricken
5 because they stand in the shoes of the United States, the real party in interest, and bring
6 an action in law, not equity. Mot. (Dkt. # 167) at 11. Defendant responds by arguing that
7 Plaintiffs themselves requested equitable relief in connection with their FCA claim. Opp.
8 (Dkt. # 169) at 4–5. Conceding that they did, Plaintiffs argue in reply that the request was
9 inadvertent and stipulate to its withdrawal. Reply (Dkt. # 171) at 3.

10 The Court notes that the Ninth Circuit has already concluded that a qui tam
11 defendant may not defend an FCA action by asserting that a qui tam plaintiff has unclean
12 hands. Mortgages, Inc. v. U.S. Dist. Ct. for Dist. of Nev. (Las Vegas), 934 F.2d 209, 213
13 (9th Cir. 1991) (per curiam); see also Cell Therapeutics Inc. v. Lash Grp. Inc., --- F.3d
14 ----, 2010 WL 22686, at *9 (9th Cir. Jan. 6, 2010). Rather, “the framers of the Act
15 recognized that wrongdoers might be rewarded under the Act, acknowledging the qui tam
16 provisions are based upon the idea of ‘setting a rogue to catch a rogue.’” Mortgages, Inc.,
17 934 F.2d at 213 (citation omitted).

18 Because Defendant makes no other argument as to why its defense should not be
19 stricken, the Court accepts Plaintiffs' stipulation and STRIKES both its request for
20 equitable relief and Defendant's second affirmative defense.

21 **C. Third and Fourth Defense: Waiver & Accord and Satisfaction**

22 The crux of Plaintiffs' complaint about defenses three and four is that they are
23 redundant. Reply (Dkt. # 171) at 12–13. The Court is not convinced. As explained by
24 Defendant in its Opposition, it asserts waiver in light of the litigation history of this case
25 and accord and satisfaction on account of a settlement agreement previously reached with

1 the United States. Opp. (Dkt. # 169) at 5–7. Though Plaintiffs may have good reason to
2 be skeptical about the viability of these defenses, see Mot. (Dkt. # 167) at 12–13, their
3 concerns are better dealt with after the parties have had the benefit of discovery.

4 **D. Eighth Defense: Damages Caused by Third Persons**

5 Plaintiffs next assert that Defendant’s third-person defense lacks sufficient factual
6 support and must be dismissed. However, the better rationale for striking lies in the fact
7 that the purported defense amounts to nothing more than a denial of liability and is thus
8 not an affirmative defense at all. Zivkovic v. S. Cal. Edison Co., 302 F.3d 1080, 1088
9 (9th Cir. 2002) (“A defense which demonstrates that plaintiff has not met its burden of
10 proof is not an affirmative defense.”). On that ground, the Court STRIKES the defense.

11 **E. Ninth Defense: Good Faith**

12 Defendant’s ninth defense is also not an affirmative defense, but rather a simple
13 denial of liability. Zivkovic, 302 F.3d at 1088. The Court thus STRIKES it as well.

14 **F. Tenth Defense: *Ex Post Facto* Application of the Law**

15 Defendant’s final defense is that the *Ex Post Facto* Clause of the United States
16 Constitution precludes application of those portions of the FCA amended by the Fraud
17 Enforcement Recovery Act of 2009 (“FERA”) against them. Opp. (Dkt. # 169) at 8–9.

18 The Court notes that the law is currently unsettled as to whether any portion of
19 FERA gives rise to *ex post facto* concerns. Compare, e.g., United States ex rel. Miller v.
20 Bill Harbert Int’l Constr., Inc., 608 F.3d 871, 878 (D.C. Cir. 2010) (holding that the *Ex*
21 *Post Facto* Clause does not apply to the FCA because it is not penal), and United States
22 ex rel. Drake v. NSI, Inc., 736 F. Supp. 2d 489, 498–502 (D. Conn. 2010) (same), with
23 United States ex rel. Sanders v. Allison Engine Co., 667 F. Supp. 2d 747, 756 (S.D. Ohio
24 2009) (holding that FERA’s retroactivity provision violates the *Ex Post Facto* Clause).

25 Accordingly, the Court would need far more detailed and persuasive briefing before it

1 could conclude that Plaintiffs have carried their burden of demonstrating “that any
2 questions of law are clear and not in dispute, and that under no set of circumstances could
3 the defense succeed.” See Kerzman, 2007 WL 765202, at *7.

4 Notably, however, the Court does agree that, as alleged, the defense stops short of
5 providing Plaintiffs with “fair notice” of Defendant’s theory. Wyshak, 607 F.2d at 827.
6 At no point in its SAA or its memoranda does Defendant reference any specific FCA
7 provisions it believes problematic. Defendant have thus failed to provide Plaintiffs with
8 “a chance to argue, if [they] can, why the imposition of [the defense] would be
9 inappropriate.” Blonder-Tongue Lab., 402 U.S. at 350. The Court thus STRIKES
10 Defendant’s tenth affirmative defense, but GRANTS Defendant leave to amend. Within
11 21 days of the date of this Order, Defendant may file an amended answer that adequately
12 asserts its *ex post facto* defense. Wyshak, 607 F.2d at 826.

13 III. CONCLUSION

14 For all of the foregoing reasons, the Court GRANTS Plaintiffs’ motion IN PART.
15 The Court STRIKES Defendant’s second (unclean hands), eighth (third party), ninth
16 (good faith), and tenth (*ex post facto*) defenses. The Court also STRIKES Plaintiffs’ FCA
17 request for equitable relief. Defendant may re-assert its tenth defense in a more sufficient
18 manner within 21 days of the date of this Order.

19 DATED this 16th day of December, 2011.

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22 Robert S. Lasnik
23 United States District Judge
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