IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

THE UNITED STATES OF AMERICA, *ex rel.* W. BLAKE VANDERLAN, M.D., Plaintiffs, v. JACKSON HMA, LLC d/b/a Central Mississippi Medical Center a/k/a MERIT HEALTH CENTRAL – JACKSON, Defendants.	Civil Action No. 3:15-cv-00767-DPJ-FKB

JACKSON HMA, LLC'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS RELATOR'S FIRST AMENDED COMPLAINT

Defendant Jackson HMA, LLC ("Jackson HMA") respectfully submits this Memorandum in Support of its Motion to Dismiss Plaintiff-Relator W. Blake Vanderlan, M.D.'s ("Vanderlan") First Amended Complaint ("Complaint").

INTRODUCTION

In hopes of creating leverage in a pending state-court contract dispute, Vanderlan brought this False Claims Act ("FCA") suit, which is premised on alleged regulatory violations that have no relation to claims for payment from the federal government. That is not a proper use of the FCA: "The False Claims Act is not an all-purpose antifraud statute or a vehicle for punishing garden-variety . . . regulatory violations." *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 2003 (2016) (quotation marks and citation omitted).

Vanderlan was a doctor at Jackson HMA's hospital for less than nine months. He resigned in December 2013, in breach of his employment agreement, and Jackson HMA sued him for breach of contract. *See Jackson HMA, LLC v. Vanderlan*, Case No. CI1:14-cv-00124 (filed May 6, 2014

in the Circuit Court of Madison County, Mississippi). Nearly a year and a half into that case, Vanderlan filed this FCA suit against Jackson HMA. The parties continue to litigate Jackson HMA's breach-of-contract suit in state court.

In his Complaint here, Vanderlan asserts a variety of claims under the FCA premised on alleged violations of Emergency Medical Treatment and Labor Act ("EMTALA"), 42 U.S.C. § 1395dd, as well as of state regulations related to the Mississippi Trauma Systems Fund ("State Trauma Fund"). Vanderlan theorizes that the alleged EMTALA violations for certain patients tainted Jackson HMA's claims for government-payor reimbursement for all of its other patients, making them all false under the FCA. Vanderlan also asserts a claim under the FCA for retaliation.

Vanderlan fundamentally misunderstands the FCA. First, EMTALA violations are not a valid, recognized basis for FCA claims. They do not result in false or misleading representations in the hospital's submitted claims and they are not material to the government's payment decision. Also, the Complaint identifies no specific certification of EMTALA compliance falsely submitted to the government. Second, Vanderlan cannot state a reverse FCA claim because Jackson HMA had no established obligation to pay the government. Third, the FCA does not apply where no federal funds are at issue, as with the State Trauma Fund. Fourth, his claim for FCA retaliation fails because he did not engage in any activity protected by the FCA. Fifth, his cursory claim for "worthless services" lacks any supporting factual allegations. Sixth, even if Vanderlan could state a valid FCA claim, that claim would be precluded by the FCA's "public disclosure bar" because substantially the same allegations appeared in the news media long before Vanderlan filed this suit. Finally, even if Vanderlan had any likelihood of success on the merits, his request for injunctive relief must fail because the relief he requests is already provided by statute. For all of these reasons, the Court should dismiss Vanderlan's Complaint in its entirety.

BACKGROUND[1]

I. The FCA

The FCA imposes liability on anyone who submits "a false or fraudulent claim for payment or approval" to the federal government or "makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim." 31 U.S.C. §§ 3729(a)(1)(A), (B). A "claim" includes direct requests to the government for payment, as well as reimbursement requests made to the recipients of federal funds under federal benefits programs. *See id.* § 3729(b)(2)(A). Claims may be "factually" false, if the information provided to the government is inaccurate, or "legally" false, if the "claimant . . . falsely certifies compliance with [a] statute or regulation." *United States ex rel. Ruscher v. Omnicare, Inc.*, 663 F. App'x 368, 373 (5th Cir. 2016) (internal quotation marks omitted and alteration in original).

In turn, "legally" false claims can be based on both express and implied certifications of compliance with applicable law. *See United States ex rel. Jamison v. McKesson Corp.*, 900 F. Supp. 2d 683, 696 (N.D. Miss. 2012). Under an "express false certification" theory, liability is based upon a claim or request for payment submitted to the federal government in which the claimant *expressly* makes a false statement of compliance with a particular statute, regulation or contractual term. *United States ex rel. Mikes v. Straus*, 274 F.3d 687, 697–98 (2d Cir. 2001). By contrast, under the "implied false certification" theory, if a defendant "makes representations in submitting a claim but omits its violations of statutory, regulatory, or contractual requirements, those omissions can be a basis for liability if they render the defendant's representations misleading with respect to the goods or services provided." *Escobar*, 136 S. Ct. at 1999.

[1] This section is substantively similar to the Background section in Doc. 39, Jackson HMA's memorandum in opposition to Vanderlan's motion for preliminary injunction.

The FCA applies not only when an individual wrongfully *takes* money or property from the government, but also when that individual wrongfully *withholds* money or property that it owes to the government. Specifically, the Act imposes "reverse" FCA liability on anyone who "knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government." 31 U.S.C. § 3729(a)(1)(G); *see Ruscher*, 663 F. App'x at 376 (under this provision, "the defendant's action does not result in improper payment by the government to the defendant, but instead results in no payment to the government when a payment is obligated" (citation omitted)).

The FCA's *qui tam* provisions authorize private individuals, called relators, to sue on behalf of the United States to recover monies that were obtained or withheld from the government as a result of FCA violations. 31 U.S.C. § 3730(b)(1). The government may elect to intervene and prosecute the action itself or allow the relator to conduct the action. *Id*. §§ 3730(b)(2), (c)(3).

The FCA also provides certain specified relief from retaliation for an employee who is "discriminated against in the terms and conditions of employment" because of his or her acts in furtherance of a *qui tam* FCA suit or "other efforts to stop" FCA violations. 31 U.S.C. § 3729(h).

II. The Emergency Medical Treatment and Labor Act

Often referred to as the "anti-dumping" statute, Congress enacted EMTALA in 1986 to prevent hospitals from "turning [patients] away from their emergency rooms or transferring them before their emergency conditions were stabilized." *Miller v. Medical Ctr. of Sw. La.*, 22 F.3d 626, 628 (5th Cir. 1994). To that end, EMTALA mandates that a hospital "must conduct appropriate screening examinations for any individual who presents to its emergency department" and, "if an emergency condition is found to exist, the hospital must either provide sufficient treatment to

stabilize the patient or transfer the patient in accordance with the strictures of the statute." *Id.*; *see also* 42 U.S.C. §§ 1395dd(a), (b)(1)(A)–(B).

Congress delegated to the Secretary of the Department of Health and Human Services ("DHHS") the authority to monitor compliance with EMTALA; determine whether violations occurred; to decide whether to impose penalties if it finds a violation; and to establish the amount of any penalties owed. The Secretary has discretion on whether to impose "civil money penalties" for violations. *See* 42 U.S.C. § 1395dd(d)(1)(A) ("civil money penalties" may be assessed for EMTALA violations pursuant to "[t]he provisions of section 1320a-7a"); *id*. § 1320a-7a(c)(1) ("The Secretary *may* initiate a proceeding to determine whether to impose a civil money penalty, assessment, or exclusion . . . ." (emphasis added)).[2] The Secretary may assess penalties only after providing opportunity for a hearing before an Administrative Law Judge in which the alleged violator has the opportunity to present evidence. *Id*. §§ 1320a-7a(c)(2), (c)(3). Plus, the alleged violator can challenge the assessment of any penalties through judicial review in a federal court of appeals. *Id.* §§ 1320a-7a(e). When determining whether to impose a civil penalty, as well as the amount of a penalty, the Secretary must take into account "(1) the nature of claims and the circumstances under which they were presented, (2) the degree of culpability, history of prior offenses, and financial condition of the person presenting the claims, and (3) such other matters as justice may require." *Id*. § 1320a-7a(d)(1).

[2] In turn, DHHS has delegated the Secretary's EMTALA enforcement authority to both CMS and the Office of Inspector General ("OIG") of DHHS, both of which must follow the strictures of 42 U.S.C. § 1320a-7a, *et seq.*, and its related regulations. *See St. Anthony Hosp. v. U.S. Dep't of Health and Human Services*, 309 F.3d 680, 693 (10th Cir. 2002) (EMTALA "[e]nforcement duties are vested in the Department of Health and Human Services'[] Health Care Financing Administration," now known as CMS, "and the OIG").

III. Relevant Allegations and Claims

Jackson HMA operates the Merit Health Central hospital in Jackson, Mississippi, which was formerly called the Central Mississippi Medical Center (hereinafter, the hospital shall be referred to as "Merit Health Central" regardless of the time period at issue). Compl. ¶¶ 1, 19. From April until December 2013, Vanderlan worked for Jackson HMA at Merit Health Central as an intensivist and burn/trauma/general surgeon. *Id*. ¶¶ 54-55, 69. Vanderlan contends that during his tenure at Merit Health Central, he identified several alleged EMTALA violations. *Id*. ¶ 72. Specifically, the Complaint identifies fifteen emergency room patients who were allegedly either insufficiently examined or improperly transferred to a different hospital. *Id*. ¶¶ 73–116. Only two of these fifteen alleged patients were Medicare or Medicaid beneficiaries. *See id.* ¶¶ 104–05 (Case 11), 114-15 (Case 15).

Vanderlan purportedly informed CMS about the hospital's alleged EMTALA violations. *Id*. ¶ 6. In response, CMS sent a letter to Merit Health Central on May 13, 2015, asserting that the hospital had committed certain EMTALA violations. *See id.*, Exh. 1. CMS informed the hospital that its Medicare provider agreement would be terminated in 21 days unless the hospital rebutted the alleged EMTALA violations or undertook corrective action to prevent further violation. *Id*. However, CMS did not threaten to impose EMTALA penalties at that time or seek to recoup any moneys Medicare already paid Jackson HMA in satisfaction of claims for patients with purported EMTALA violations or any other patients.

On October 23, 2015, Vanderlan filed the Complaint in this action on behalf of himself and the United States of America. *Id*. ¶ 1. As required by the FCA, Vanderlan filed the Complaint under seal to give the government an opportunity to review the allegations and decide whether it

wanted to take over the action. *See* 31 U.S.C. § 3730(b)(4). The United States declined to intervene, and the Complaint was unsealed on August 31, 2017. Doc. 24.

LEGAL STANDARD

"To overcome a Rule 12(b)(6) motion, a plaintiff must plead 'enough facts to state a claim to relief that is plausible on its face.'" *Goley v. Elwood Staffing, Inc.*, No. 3:15-cv-277, 2016 WL 3648287, at *2 (S.D. Miss. July 1, 2016) (Jordan, J.) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The court must accept well-pleaded factual allegations as true. "But 'the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.'" *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). To be "plausible," an allegation must do more than present "a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678. When "the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Id.* (quoting Fed. R. Civ. P. 8(a)(2)).

"Claims brought under the FCA must also comply with Rule 9(b), which requires a plaintiff to set forth the who, what, when, where, and how of the alleged fraud." *United States ex rel. Spicer v. Westbrook*, 751 F.3d 354, 365 (5th Cir. 2014) (quotation marks omitted). "[T]he plaintiff 'cannot rely on speculation or conclusional allegations' to fulfill Rule 9(b)'s particularity requirement." *United States ex rel. Guth v. Roedel Parsons Koch Blache Balhoff & McCollister*, 626 F. App'x 528, 531 (5th Cir. 2015) (quoting *United States ex rel. Rafizadeh v. Cont'l Common, Inc.*, 553 F.3d 869, 873 (5th Cir. 2008)).

ARGUMENT

I. Vanderlan fails to state an FCA claim for EMTALA violations. (Counts I and II)

Vanderlan does not contend that Jackson HMA's claims submitted to the federal government for patient care were inaccurate on their face. Rather, he contends that claims for Medicare and/or Medicaid reimbursement submitted by Jackson HMA falsely included either an "express" or an "implied" certification that Merit Health Central was in "compliance with EMTALA." Compl. ¶¶ 32-35, 53, 117-33. He has not sufficiently stated a claim under either theory, and regardless, EMTALA violations are not material to the government's payment decision, as required to state a claim under the FCA. In fact, we are aware of no prior FCA case premised on alleged EMTALA violations.

A. Vanderlan has not sufficiently pled any specific express certification of compliance with EMTALA. (Count I)

Vanderlan's attempt to plead an express-false-certification theory fails, as he does not allege that Jackson HMA ever certified compliance with EMTALA when submitting a claim for payment. Vanderlan alleges two supposed certifications in the complaint, but neither support False Claims Act liability. The first supposed certification quoted is that "'payment and satisfaction of this claim will be made from Federal and State funds, any false claims, statements, documents, or concealment of any material fact, may be prosecuted under applicable Federal or State laws.'" Compl. ¶ 33 (quoting Form UB-04). But that is not a certification by Jackson HMA at all, and it does not speak to EMTALA compliance.

The second certification is located on the Patient Transfer Form that Vanderlan attaches in part to his Complaint, Compl. ¶ 53, Exh. 3, but as Vanderlan pleads—and as stated on the face of the document—this form is part of the patient's medical file, not part of a claim submitted to the government for reimbursement. *Id*. Vanderlan pleads no basis to believe this form was ever

provided to the government at all for any patient. A purported false certification not submitted to the government cannot plausibly be a prerequisite to payment and cannot form the basis for an express false certification FCA claim. *See U.S. ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 269 (5th Cir. 2010) ("even if a contractor falsely certifies compliance (implicitly or explicitly) with some statute, regulation, or contract provision, the underlying claim for payment is not 'false' within the meaning of the FCA if the contractor is not required to certify compliance in order to receive payment"); *see also United States ex rel. Riley v. St. Luke's Episcopal Hosp.*, 355 F.3d 370, 376 n.6 (5th Cir. 2004) ("an express false certification *on a claim form submitted to the Government for payment* is actionable under the FCA") (emphasis added). Additionally, Vanderlan cannot plausibly plead that a certification not provided to the government was material to the government's decision to pay. *See infra* pp. 13-15.

Vanderlan also alleges vaguely that Jackson HMA certified it "had and was providing healthcare services under circumstances satisfying all of Medicare and Medicaid's conditions of payment, including EMTALA." Compl. ¶ 35. Vanderlan does not allege who made such a supposed certification, nor say when or where it was made. He thus fails to plead with the particularity that Rule 9(b) requires. But even if he had met Rule 9(b)'s requirements, the FCA does not create liability for a certification that "represents compliance with underlying laws and regulations" but "contains only general sweeping language and does not contain language stating that payment is conditioned on perfect compliance with any particular law or regulation." *United States ex rel. Conner v. Salina Reg'l Health Ctr., Inc.*, 543 F.3d 1211, 1219 (10th Cir. 2008); *accord United States ex rel. Stephenson v. Archer W. Contractors, L.L.C.*, 548 F. App'x 135, 138 (5th Cir. 2013) (finding "boilerplate language stating that the company would follow the law" insufficient to create FCA liability because "[a]bsent a more specific certification of compliance,"

the FCA would "become a general enforcement device"). Without any specific express certification provided to the government, Vanderlan's express false certification claim fails.

B. Vanderlan fails to state an FCA claim under an implied false certification theory because Jackson HMA did not submit any claim for payment that made specific, misleading representations about the services provided. (Count II)

Vanderlan also theorizes that the act of submitting claims impliedly certifies compliance with EMTALA, such that *every* claim that Jackson HMA submitted to the federal government for Medicare or Medicaid reimbursement following the alleged EMTALA violations was a false claim, actionable under the FCA. But Vanderlan's attempt to assert an "implied false certification" claim fails because he cannot show that Jackson HMA submitted any claim for reimbursement that included *specific representations* about the services that were provided that were misleading because of the alleged failure to disclose the purported EMTALA violations.

Even assuming that there were EMTALA violations, Vanderlan has not—and cannot—demonstrate that Jackson HMA's alleged failure to disclose the alleged violations made any of Jackson HMA's Medicare or Medicaid reimbursement claims misleading. In *Escobar*, the Supreme Court held that a relator may rely on an "implied certification theory" as "a basis for liability, at least where two conditions are satisfied: first, *the claim does not merely require payment, but also makes specific representations about the goods or services provided*; and second, the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements *makes those representations misleading half-truths*." 136 S. Ct. at 2001 (emphasis added). The Supreme Court expressly refused to find that all failures to disclose a statutory or regulatory violation would be actionable under the implied certification theory of the FCA. *Id*. at 2000.

Since *Escobar*, many courts have refused to find that mere requests for payment that did not include specific, misleading representations about the goods or services provided are

actionable under an "implied false certification" theory. *See, e.g., United States ex rel. Kelly v. Serco, Inc.*, 846 F.3d 325, 332 (9th Cir. 2017) ("Even assuming that [the defendant's] compliance with [a contractual requirement] was a condition of payment for its work," the relator's claim failed because "there [was] no evidence that [the defendant's claims for payment] made any specific representations about [its] performance"); *United States ex rel. Curtin v. Barton Malow Co.*, No. CV 14-2584, 2017 WL 2453032, at *7 (W.D. La. June 6, 2017) (dismissing FCA action where alleged noncompliance was not sufficient to make defendant's representations "misleading half-truths"); *United States ex rel. Schimelpfenig v. Dr. Reddy's Labs. Ltd.*, No. 11-cv-4607, 2017 WL 1133956, at *6 (E.D. Pa. Mar. 27, 2017) (rejecting argument that "all claims for reimbursement are implicit representations of legal entitlement to Government payment;" dismissing implied certification FCA claims because relator did not allege specific representations made misleading half-truths by noncompliance); *United States ex rel. Creighton v. Beauty Basics Inc*, No. 2:13-CV-1989-VEH, 2016 WL 3519365, at *3 (N.D. Ala. June 28, 2016) (to plead a false certification, a plaintiff "must allege" that the claim makes specific representations that are made misleading half-truths by noncompliance with material requirements).

The facts in *Escobar* are crucial to understanding this requirement. Yarushka Rivera, a teenager who received Medicaid benefits, died after an adverse reaction to medication prescribed at Arbour Counseling Services, a mental health facility. 136 S. Ct. at 1997. As a Medicaid provider, Arbour submitted claims for reimbursement to the government. Arbour's claims included several specific representations, including both "payment codes corresponding to different services its staff provided to Yarushka, such as 'Individual Therapy' and 'family therapy,'" and "National Provider Identification numbers [('NPIs')]," which "correspond to specific job titles." *Id.* These payment codes and NPIs were misleading. "For instance, one Arbour staff member who treated

Yarushka registered for a number associated with 'Social Worker, Clinical,' despite lacking the credentials and licensing required for social workers engaged in mental health counseling." *Id*. "Likewise, the practitioner who prescribed medicine to Yarushka, and who was held out as a psychiatrist, was in fact a nurse who lacked authority to prescribe medications absent supervision." *Id*. Arbour's use of payment codes and NPIs in its Medicaid reimbursement claims were thus "clearly misleading in context," as they specifically represented to the government that staff members with specific job titles had provided specific medical services when, in fact, the staff members lacked the requisite licenses to hold those job titles or perform those services. *Id*. at 2000.

The facts alleged in this case are of a completely different nature than those in *Escobar*. Vanderlan has not alleged that a single Medicare or Medicaid reimbursement claim submitted by Jackson HMA included "specific representations about the goods or services provided," much less that any "specific representation" in a reimbursement claim was made misleading by Jackson HMA's failure to disclose any alleged EMTALA violations. How could he? For patients who *were not* the subject of an alleged EMTALA violation, any representations about the services provided to them could not be misleading for failing to disclose that *other patients* were subject to alleged EMTALA violations.

But even for the *two* Medicare/Medicaid patients listed in the Complaint who were subject to alleged EMTALA violations (*see* Compl. ¶¶ 104–05 (Case 11), 114-15 (Case 15)), Vanderlan has not pled that any Medicare or Medicaid claim was even submitted, much less that the claims included specific representations regarding the services that were provided to those patients. And even if a claim were submitted, Vanderlan could not show that the claim was misleading for failing to disclose the alleged EMTALA violation. Any representations made in a reimbursement claim about the services that *were* provided cannot be misleading for failing to disclose services that

were not provided until after transfer. Thus, Vanderlan has failed to allege that even a single Medicare or Medicaid claim submitted by Jackson HMA was misleading for failing to disclose the alleged EMTALA violations.

C. Regardless of his theory, the alleged EMTALA violations do not satisfy the FCA's demanding and rigorous materiality standard because they did not impact the government's decision to pay the claims at issue. (Counts I and II)

Vanderlan's EMTALA-based FCA claims also fail because he has not and cannot demonstrate that Jackson HMA's alleged EMTALA violations satisfy the FCA's demanding and rigorous materiality standard. A misrepresentation is material if it is likely to or actually affects the government's decision to pay an invoice. *Escobar*, 136 S. Ct. at 2002-03; 31 U.S.C. § 3729(b)(4) (defining "material" to mean "having a natural tendency to influence, or be capable of influencing the payment or receipt of money or property"). This standard is "demanding" and "rigorous": "A misrepresentation cannot be deemed material merely because the Government designates compliance with a particular statutory, regulatory, or contractual requirement as a condition of payment. Nor is it sufficient for a finding of materiality that the Government would have the *option* to decline to pay if it knew of the defendant's noncompliance." *Escobar*, 136 S. Ct. at 2002-03 (emphasis added). What matters, in other words, is not whether the government *could* decline to pay if it knew of the misrepresentation, but rather whether it *would* decline to pay. *Abbott v. BP Exploration & Prod., Inc.*, 851 F.3d 384, 388 (5th Cir. 2017) ("[W]hen the DOI decided to allow the Atlantis to continue drilling after a substantial investigation into Plaintiffs' allegations, that decision represents 'strong evidence' that the requirements in those regulations are not material."). Materiality can be established by showing that "the Government consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular . . . requirement." *Escobar*, 136 S. Ct. at 2003. Whether the government "expressly identif[ied] a provision as a condition of payment" is "relevant" but "not automatically dispositive." *Id.*

Compliance with EMTALA is not a condition of payment for individual Medicare or Medicaid claims. Instead, agreeing to adopt and enforce an EMTALA policy is part of the larger Medicare provider agreement. 42 U.S.C. § 1395cc(a)(1)(I)(i). When a facility is out of compliance with the provider agreement, including the provision related to EMTALA, CMS follows set administrative procedures, which do not include denying reimbursement of pending or future claims or seeking repayment of claims already paid. 42 C.F.R. § 489.53(d)(2) (setting out process for notice and opportunity to correct deficiencies). The procedure *may* result in termination of the facility's provider agreement, but only after the facility is given notice and an opportunity to return to compliance. *Id*.; 42 U.S.C. § 1395cc(b)(2)(A) (stating CMS *may* terminate provider agreement after finding lack of substantial compliance).[3] We are aware of no law or regulation that suspends payment of claims unless or until the hospital returns to compliance. We are also aware of no law or regulation that conditions Medicaid payments in any way on EMTALA compliance.

Moreover, Vanderlan has not pled and cannot show that the federal government *in fact* conditions Medicare or Medicaid payments on EMTALA compliance, or even considers alleged EMTALA violations when making payment determinations. If anything, the May 13, 2015 letter from CMS to Merit Health Central attached as Exhibit 1 to Vanderlan's Complaint shows just the

[3] Some courts have declined to find False Claims Act liability for regulatory compliance where, as here, the government already has a detailed administrative mechanism for managing the defendant's compliance:

> Based on the fact that the government has established a detailed administrative mechanism for managing Medicare participation, we are compelled to conclude that although the government considers substantial compliance a condition of ongoing Medicare *participation*, it does not require perfect compliance as an absolute condition to receiving Medicare *payments* for services rendered.
>
> By contrast, consider if [the Relator's] view of the certification were correct. An individual private litigant, ostensibly acting on behalf of the United States, could prevent the government from proceeding deliberately through the carefully crafted remedial process and could demand damages far in excess of the entire value of Medicare services performed by a hospital.

Conner, 543 F.3d at 1221.

opposite. In that letter, CMS identified EMTALA violations allegedly committed by the hospital. Nevertheless, CMS did not immediately revoke the hospital's Medicare provider agreement, did not cut off Medicare funds to the hospital, and did not demand repayment of any funds paid following the alleged EMTALA violations. To the contrary, the letter gave the hospital 21 additional days within which to demonstrate EMTALA compliance, effectively allowing the hospital to submit Medicare claims for 21 additional days without being in "compliance with EMTALA." Compl., Exh. 1 at 2 ("If you have not demonstrated compliance within *twenty one days from the date of this letter*, you will receive a final notice of termination."). That CMS was willing to pay the hospital's claims for Medicare reimbursement during that 21-day period—and showed no inclination to attempt to recoup payments made during the earlier periods of time within which the hospital was allegedly not in compliance with EMTALA—shows that EMTALA compliance is not material to the government's payment decision for individual Medicare claims. *See Abbott*, 851 F.3d at 388 (evidence that government made payments despite being aware of alleged contractual violations demonstrated that alleged violations were not material to payment decision).

For these reasons, Vanderlan's claims under § 3729(a)(1)(A) and (B) of the FCA must be dismissed, as he has not pled and cannot show that EMTALA violations or certifications of EMTALA compliance are material to the government's payment decisions.

II. Vanderlan has failed to state a "reverse" FCA claim because liability cannot be based on contingent, unassessed statutory penalties. (Count III)

Vanderlan's attempt to state a "reverse" FCA claim also fails. Vanderlan's "reverse" FCA theory is that by allegedly certifying compliance with all conditions of payment despite its alleged EMTALA violations, Jackson HMA fraudulently avoided hypothetical, unassessed penalties that CMS may have imposed for the alleged EMTALA violations. That theory has no support.

The "reverse" FCA imposes liability on one who "[1] knowingly makes, uses, or causes to be made or used, a false record or statement material to an *obligation* to pay or transmit money or property to the Government, or [2] knowingly conceals or knowingly and improperly avoids or decreases an *obligation* to pay or transmit money or property to the Government." 31 U.S.C. § 3729(a)(1)(G) (emphasis added). In other words, without an "obligation" to pay or transmit money or property to the government, there can be no "reverse" FCA liability. The statute defines "obligation" as "an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment." *Id.* § 3729(b)(3). Therefore, "reverse" FCA liability exists only where there is an "*established duty*" to pay or transmit money or property to the government. As a matter of law, the failure to pay an *unassessed* penalty is not the breach of an "*established* duty" to pay or transmit money or property to the government. That simple point dooms Vanderlan's theory of "reverse" FCA liability.

Consistent with the FCA's plain text, the Fifth Circuit recently confirmed that unassessed penalties cannot form the basis of a "reverse" FCA claim. *United States ex rel. Simoneaux v. E.I. DuPont de Nemours & Company*, 843 F.3d 1033, 1034 (5th Cir. 2016) ("A statute enforceable through an unassessed monetary penalty . . . creates an obligation to obey the law, not an obligation to pay money."). And every other court that has dealt with this issue is in agreement, dismissing "reverse" FCA claims based on unassessed civil penalties. *See, e.g., United States ex rel. Petras v. Simparel, Inc.*, 857 F.3d 497, 505-07 (3d Cir. 2017); *United States ex rel. Kasowitz Benson Torres LLP v. BASF Corp.*, No. CV 16-2269, 2017 WL 4803906, at *7 (D.D.C. Oct. 23, 2017) ("An unassessed, contingent penalty is not an FCA 'obligation' subject to suit under the reverse false claims provision."); *United States ex rel. Nissman v. Southland Gaming of the Virgin Islands, Inc.*,

182 F. Supp. 3d 297, 315 (D.V.I. 2016) ("[T]he reverse false claims provision was not meant to cover . . . unadjudicated and unassessed statutory fines."); *United States ex rel. Guth v. Roedel Parsons Koch Blache Balhoff & McCollister*, No. CIV.A. 13-6000, 2014 WL 7274913, at *7 (E.D. La. Dec. 18, 2014), *aff'd*, 626 F. App'x 528 (5th Cir. 2015); *United States ex rel. Schaengold v. Mem'l Health, Inc.*, No. 4:11-cv-58, 2014 WL 6908856, at *17 (S.D. Ga. Dec. 8, 2014); *United States ex rel. Comeaux v. W&T Offshore, Inc.*, No. 10-494, 2013 WL 4012644, at *3 & n.6 (E.D. La. Aug. 6, 2013).

Vanderlan's EMTALA allegations are based on the type of unassessed civil penalties that, for the reasons given above, cannot support a "reverse" FCA claim. Vanderlan alleges only that Jackson HMA violated certain EMTALA requirements and failed to disclose those alleged violations to CMS. Compl. ¶ 135. He does not—and cannot—allege that CMS has actually assessed civil penalties for the alleged EMTALA violations. Indeed, Vanderlan cannot dispute that no hearing has yet taken place, no evidence has yet been presented, and no penalties have yet been imposed after such a hearing. Further, the government has acknowledged in this case that EMTALA penalties are "not mandatory but rather provide[] discretion to the Secretary of the United States Department of Health and Human Services." United States' Response to Relator's Mot. for Prelim. Inj. (Doc. 38) at 2. Vanderlan thus alleges the classic kind of "contingent" duty to pay a fine or penalty that cannot support FCA liability. *See Simoneaux*, 843 F.3d at 1039. He cannot state a "reverse" FCA claim on this basis, and his claim must be dismissed.

III. Vanderlan fails to state an FCA claim based on the State Trauma Fund because it does not include federal dollars. (Counts II and III)

The FCA does not apply to allegedly false claims where only state funds are involved. The FCA requires a "claim" be "presented to an officer, employee, or agent of the United States" or to a party, such as a contractor, where the federal government "provides any portion" of the funds.

31 U.S.C. § 3729(b)(2). Where federal funds are not at issue, there can be no FCA liability. *See, e.g., United States ex rel. Shupe v. Cisco Sys., Inc.*, 759 F.3d 379, 383 (5th Cir. 2014) (discussing programs that "do not trigger FCA protection because they do not receive federal funds").

Vanderlan's Complaint repeatedly discusses the State Trauma Fund and related state law obligations. *E.g.*, Compl. ¶¶ 10-12, 41-52, 71, 128. The State Trauma Fund receives no funding from the federal government. *See* Miss. Code § 41-59-75. Rather, according to the legislative report Vanderlan relies on in the Complaint, the State Trauma Fund "receives revenues from assessments and fees related to vehicles, penalties assessed against hospitals that choose not to participate in the state's trauma care system, and interest on the investment of the fund." Joint Legislative Committee on Evaluation and Expenditure Review, *Report to the Mississippi Legislature* (January 3, 2013) (cited in Compl. ¶¶ 41-42).[4] Vanderlan does not allege that State Trauma Fund involves any federal money, and he cannot premise FCA liability on purported fraud involving only state funds.

IV. Vanderlan's retaliation claim fails because his internal reporting of EMTALA violations is not a protected activity under the FCA. (Count IV)

The FCA provides a cause of action to those who are "discriminated against in the terms and conditions of employment because of [their] lawful acts done . . . in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter." 31 U.S.C. § 3730(h)(1). "To survive a motion to dismiss, a plaintiff alleging injury under Section 3730(h)(1) must show (1) he engaged in protected activity, (2) his employer . . . knew about the protected activity, and (3) he was retaliated against because of his protected activity." *United States ex rel. Bias v. Tangipahoa Par. Sch. Bd.*, 816 F.3d 315, 323 (5th Cir. 2016). Vanderlan cannot meet even the first requirement.

[4] This report is available at: http://www.peer.ms.gov/reports/rpt568.pdf.

Vanderlan's complaint does not plead any protected activity because it makes no allegation that he complained about false claims or fraud against the government. To constitute a protected activity under the FCA's retaliation provision, "the complaints must concern false or fraudulent claims for payment submitted to the government." *United States ex rel. Patton v. Shaw Servs., L.L.C.*, 418 F. App'x 366, 372 (5th Cir. 2011); *see also Thomas v. ITT Educ. Servs., Inc.*, 517 F. App'x 259, 262 (5th Cir. 2013) (affirming dismissal of plaintiff's FCA retaliation claim for failure to show that the purpose of her purportedly protected activity was to prevent false claims to the government). "The Fifth Circuit recognizes internal complaints that concern false or fraudulent claims for payment submitted to the government as protected activity under the Act, but requires that the complaints raise concerns about fraud." *McCollum v. Jacobs Eng'g Grp., Inc.*, 992 F. Supp. 2d 680, 688 (S.D. Miss. 2014) (quotation marks omitted).

Vanderlan's internal complaints are not a protected activity under the FCA. Vanderlan does not allege that he complained about false claims or fraud: his only supposed complaints were about "EMTALA compliance violations," Compl. ¶ 59, and "problems with the group assigned trauma/general surgery call adhering to trauma requirements of CMMC as a Level III trauma center," *id.* ¶ 61. Even if EMTALA violations could form the basis for an FCA claim, Vanderlan's alleged internal complaints about violations of EMTALA and improper transferring of patients were not about false claims or fraud.

In *Patton*, the relator asserted that he complained to supervisors about "fraudulent construction mistakes," which were the same mistakes that formed the basis for his FCA claims. *Patton*, 418 F. App'x at 372. The court held that despite the relator's characterization that he internally reported "fraud," the substance of his complaints was unsafe or improper construction methods—not that he was concerned that his employer was defrauding the government. *Id.* The

same is true here. The substance of Vanderlan's alleged complaints was EMTALA violations, not false or fraudulent claims. The FCA is not "a vehicle for punishing garden-variety breaches of contract or regulatory violations." *Escobar*, 136 S. Ct. at 2003. Likewise, complaining about such violations—as Vanderlan alleges he did—without connecting those violations to false claims is not a protected activity under the FCA.

V. Vanderlan fails to allege a claim for "worthless services." (Count V)

Vanderlan alleges "upon information and belief" that Jackson HMA is liable for tests and procedures that had to be repeated after patients were inappropriately transferred. Compl. ¶ 144. Plaintiff alleges no facts to support this claim for relief, and his "generalized allegations do not come close to satisfying Rule 9(b)." *United States ex rel. Hebert v. Dizney*, 295 F. App'x 717, 723 (5th Cir. 2008). He has not provided the "who, what, when, where, and how" of any purportedly worthless services. *Westbrook*, 751 F.3d at 365 (quotation marks omitted). "Pleading on information and belief does not otherwise relieve a qui tam plaintiff from the requirements of Rule 9(b)." *Hebert*, 295 F. App'x at 723.

In any event, the "worthless services" theory on which Vanderlan relies does not apply here. "In a worthless services claim, the performance of the service is so deficient that for all practical purposes it is the equivalent of no performance at all." *Mikes*, 274 F.3d at 703. Such a claim is "effectively derivative of an allegation that a claim is factually false because it seeks reimbursement for a service not provided." *Id.* The Complaint contains no allegations, even conclusory, of tests and procedures that were of such poor quality that they were tantamount to no service at all. Plaintiff has alleged nothing that meets even Rule 8(a)'s requirements, much less Rule 9(b)'s. The worthless services theory thus does not apply here, and Vanderlan has failed to state a claim under this theory.

VI. The FCA bars Vanderlan's claims because substantially the same allegations were publicly disclosed in the news media long before he filed this suit.

Under the FCA's public disclosure bar, the "court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed . . . from the news media" unless the action is brought by an "original source of the information." 31 U.S.C. § 3730(e)(4). Vanderlan's claims are barred because the same allegations he makes here appeared in the news nearly two years before Vanderlan filed his Complaint, and Vanderlan is not an "original source."

A. Substantially the same allegations were disclosed in the news media before Vanderlan filed this lawsuit.

Vanderlan filed this lawsuit on October 23, 2015. A year and eight months before that, on February 22, 2014, the Clarion-Ledger published a lengthy article about alleged EMTALA violations at Merit Health Central, which is attached to our motion as Exhibit A.[5] The article alleges a pattern of improper transfers of trauma patients, possibly in violation of EMTALA.

The article's allegations are substantially the same allegations in this case. Like Vanderlan's Complaint, the Clarion-Ledger alleged that trauma patients were inappropriately transferred to other hospitals. The Clarion-Ledger "obtained hospital transfer logs, patient charts

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[5] Brian Eason, *Trauma Transfers Could Put Lives at Risk*, The Clarion-Ledger (Feb. 22, 2014), http://www.clarionledger.com/story/news/local/2014/02/23/trauma-transfers-could-put-lives-at-risk/5743477/. This article is not discussed in the Complaint, but the Court may consider it in deciding Jackson HMA's motion to dismiss. On a motion to dismiss, the Court may consider matters of which judicial notice may be taken. *United States ex rel. Willard v. Humana Health Plan of Texas Inc.*, 336 F.3d 375, 379 (5th Cir. 2003). "Courts have the power to take judicial notice of the coverage and existence of newspaper and magazine articles." *United States ex rel. Lam v. Tenet Healthcare Corp.*, 481 F. Supp. 2d 673, 680 (W.D. Tex. 2006); *Morrow v. Mississippi Publishers Corp.*, No. 72J-17(R), 1972 WL 236, at *3 (S.D. Miss. Nov. 27, 1972) (taking judicial notice of statement in the Clarion-Ledger).

The Court may also treat Jackson HMA's motion on public disclosure as one for summary judgment. *See United States ex rel. Colquitt v. Abbott Labs.*, 858 F.3d 365, 373 (5th Cir. 2017) ("Although Abbott invoked the public disclosure bar through a motion to dismiss, the district court correctly decided it as a motion for summary judgment and considered evidence outside of the pleadings.").

and other documents." Exh. A. The newspaper alleged that "[t]rauma victims were sent away at least 89 times in 2013" and discussed Merit Health Central's "potential EMTALA problems." *Id.*

Several of the patients discussed in the article appear to be the same patients Vanderlan discusses in the Complaint. *Compare, e.g.*, Exh. A ("In February 2013, a man was taken to the emergency room in a wheelchair after being shot in the abdomen—a clear Alpha situation, but a Bravo alert was called. Rooks eventually decided to transfer the patient 'after a discussion of the case,' but did not examine the patient himself, according to the charts.") *with* Compl. ¶ 95 ("On February 1, 2013, [a male patient] presented to the CMMC ED with a gunshot wound to the left inguinal region. Code Bravo was called although Alpha criteria was met. The on-call trauma surgeon was contacted. The on-call trauma surgeon refused to accept the patient stating that a higher level of care was required, and that all penetrating trauma must be sent directly to UMMC."); Exh. A ("One of those cases, in May, involved a shooting victim sent to another hospital while his foot was still hemorrhaging badly enough to bleed through the pressure dressing applied to the wound. He recovered after a 10-day stint at the University of Mississippi Medical Center.") *with* Compl. ¶¶ 89-91 ("On May 21, 2013, [a patient] presented to the CMMC ED with a gunshot wound to the foot, with artery and nerve damage . . . . The unstable patient was inappropriately transferred to UMMC."). Even if Vanderlan provided more examples in his Complaint than appear in the article, the substantive allegation had already been publicly disclosed for the purposes of the FCA. *Colquitt*, 858 F.3d at 374 (finding that relator "cannot avoid the jurisdictional bar[6] simply by adding other claims that are substantively identical to those previously disclosed").

[6] Since the FCA's amendment in 2010, the public disclosure bar is no longer jurisdictional. *Abbott v. BP Expl. & Prod., Inc.*, 851 F.3d 384, 387 n.2 (5th Cir. 2017).

Vanderlan's Complaint here is essentially a rehash of the allegations in the Clarion-Ledger article. And that is exactly what the FCA's public disclosure bar requires the Court to dismiss.

B. Vanderlan is not an "original source" under the FCA's definition.

Because the same allegations were publicly disclosed before Vanderlan filed his Complaint, the Court must dismiss this case unless Vanderlan qualifies as an original source. To be an original source, Vanderlan must (1) have—prior to the February 22, 2014 article—"voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based" or (2) have "knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions," which he disclosed to the government prior to filing his lawsuit. 31 U.S.C. § 3730(e)(4)(B).[7]

Although the Complaint contains a conclusory statement that Vanderlan is an original source, Compl. ¶ 20, it alleges no facts to support that Vanderlan meets the statutory definition. Vanderlan has not pled that he made any disclosure to the government before February 22, 2014, much less one that covers the sweeping allegations contained in the Clarion-Ledger article.

He also has not alleged any knowledge that materially adds to the publicly disclosed allegations or transactions. "The Court's task is to ascertain whether the relator's allegedly new information is sufficiently significant or essential so as to fall into the narrow category of information that materially adds to what has already been revealed through public disclosures." *Green v. AmerisourceBergen Corp.*, No. 4:15-CV-379, 2017 WL 1209909, at *9 (S.D. Tex. Mar. 31, 2017) (quoting *United States ex rel. Winkelman v. CVS Caremark Corp.*, 827 F.3d 201, 211

[7] In 2010, Congress revised the FCA, changing the requirements for being an "original source." Pub. L. No. 111-148, § 1303, 124 Stat. 119, 168 (2010); *see also Green v. AmerisourceBergen Corp.*, No. 4:15-CV-379, 2017 WL 1209909, at *9 (S.D. Tex. Mar. 31, 2017) (discussing differences in prior and current versions of this provision). All relevant conduct in this case occurred after the amendment, so only the current version of the statute is at issue. *See id.*

(1st Cir. 2016)) (alteration marks omitted). One who has read the Clarion-Ledger article would learn nothing material from reading Vanderlan's Complaint. He thus does not meet the FCA's definition of an "original source," and his claims are statutorily barred.

VII. As Vanderlan's right to recovery if the government pursues an "alternate remedy" is protected by statute, he has no legal basis for injunctive relief to prevent settlement negotiations. (Count VI)

To obtain an injunction, a plaintiff must show: "(1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable harm if the injunction is not granted; (3) that the threatened injury outweighs any harm that the injunction might cause to the defendant; and (4) that the injunction will not disserve the public interest." *Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 288 (5th Cir. 2012). Here, Vanderlan would face *no* threat of injury, much less a threat of *irreparable* injury, from a settlement of the government's EMTALA claims against Jackson HMA. The FCA expressly authorizes the government to pursue the claims, by either intervening in this action o*r* by pursuing an "alternate remedy," including a settlement. 31 U.S.C. §§ 3730(c)(1), (2), (5); *United States ex rel. Bledsoe v. Community Health Sys., Inc.*, 342 F.3d 634, 647 (6th Cir. 2003) ("[A] settlement pursued by the government in lieu of intervening in a *qui tam* action asserting the same FCA claims constitutes an 'alternate remedy' for purposes of 31 U.S.C. § 3730(c)(5)."). The FCA makes clear that if the government elects to pursue an "alternate remedy," then the relator "shall have the same rights in such proceeding as such person would have had if the action had continued under this section." *Id* § 3730(c)(5). Thus, to the extent there is any settlement between Defendant and the government related to the claims in this action, Vanderlan is statutorily entitled to a portion of the proceeds of the settlement to the same extent he is entitled to a portion of the proceeds of this litigation.

For this reason, and others stated in this brief and in Jackson HMA's Memorandum in Opposition to Plaintiff-Relator's Motion for Preliminary Injunction, or Alternatively, for

Temporary Restraining Order [Doc. #39], the Court should dismiss Vanderlan's claim for injunctive relief against settlement negotiations.

CONCLUSION

For any and all of the foregoing reasons, the Court should dismiss Vanderlan's Complaint in its entirety.

Dated: November 9, 2017 */s/ J. William Manuel*

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CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2017, I caused a true and correct copy of Jackson HMA, LLC's Memorandum in Support of its Motion to Dismiss Relator's First Amended Complaint to be filed electronically with the Clerk of Court using the CM/ECF system, which will send electronic notification of such filing to all counsel of record.

/s/ *J. William Manuel*
One of the Attorneys for Defendant Jackson HMA, LLC