

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 04-RB-2340 (BNB)

UNITED STATES OF AMERICA, and the STATE OF COLORADO,
Plaintiffs,

v.

HEALTH CARE MANAGEMENT PARTNERS, LTD, (HCMP), et al.,
Defendants.

**DEFENDANT V. ROBERT SALAZAR'S MOTION TO DISMISS
AND SUPPORTING BRIEF**

INTRODUCTION

The government brings this case alleging that a nursing home violated the False Claims Act, and defrauded the government, by providing inadequate care to Medicare and Medicaid patients. In addition to suing the nursing home itself, the government names as a defendant Robert Salazar, the president of a company that provided management services to the nursing home, even though the Complaint concedes that Salazar never had an ownership interest in the nursing home, never billed Medicare or Medicaid for nursing home services, and never lied or told anyone else to lie to the government about the nursing home's operations. Compl. ¶¶ 10, 87-98, 112.

The Complaint fails (a) to allege how Salazar personally committed a fraud on the government, and (b) to allege a false or fraudulent statement by Salazar. The face of the Complaint also demonstrates that some of the government's claims are time-barred. The Complaint fails to meet the pleading

requirements of Rule 9(b), and fails to state a claim for relief under Rule 12(b)(6). It must be dismissed.

ARGUMENT

I. The Complaint Fails To Allege That Salazar Personally Submitted Or Caused To Be Submitted, Claims for Payment or False Statements in Support of Claims for Payment (Claims 1, 2 and 3).

The government's first, second and third claims are brought under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729(a)(1) and (a)(2). To state a claim under FCA § 3729(a)(1), the government must allege two elements that are absent from the allegations of the Complaint: that (1) the defendant "presented, or caused to be presented," a claim for payment to the United States; and (2) the claim was "false or fraudulent". The elements of a claim under § 3729(a)(2) are similar, except that the government must prove the additional element (also absent from the Complaint) that the defendant "made or used a false statement which the defendant knew to be false" in order to get a claim paid or approved by the government.

A. False Claims Act Violations Must be Pled with Particularity.

Because FCA claims sound in fraud, they must be pled with particularity in accordance with Fed. R. Civ. P. 9(b). U.S. ex rel. Schwartz v. Coastal Health Care Group, 2000 U.S. App. Lexis 26914, *9 (10th Cir. 2000); U.S. ex rel. Bahrani v. ConAgra, Inc., 183 F. Supp.2d 1272, 1279 (D. Colo. 2002). (Rule 9(b) requires a plaintiff to "set forth the who, what, when, where and how of the alleged fraud"). In cases with multiple defendants, Rule 9(b) requires that the complaint make specific allegations against each defendant that identifies their

role in the alleged fraud. Koch v. Koch Industries, Inc., 203 F.3d 1202, 1236-37 (10th Cir. 2000); In re. Storage Tech Secs. Litig., 804 F. Supp. 1368, 1372 (D. Colo. 1992) (fraud claims against 11 of 14 defendants not pled with particularity because complaint only identified specific misrepresentations by three defendants).

B. The Complaint fails to allege that Salazar presented a claim for payment to the United States, or that he caused the submission of such a claim.

Claims 1 and 3 both are brought under 31 U.S.C. § 3729(a)(1). Claim 1 alleges that false Medicare and Medicaid claims were submitted for residents generally. Compl. ¶¶ 106-110. Claim 3 alleges that false claims were submitted under the Medicaid “hospital back-up program” for one particular patient. Compl. ¶¶ 115-118. Both fail to allege an FCA claim against Salazar.

One of the necessary elements of a FCA violation under section 3729(a)(1) is that the defendant “presents, or causes to be presented,” a claim for payment to the United States. 31 U.S.C. § 3729(a)(1). United States v. Murphy, 937 F.2d 1032, 1039 (6th Cir. 1991); U.S. ex rel. Piacentile v. Wolk, 1995 U.S. Dist. Lexis 580, *11 (E.D. Pa. 1995). The Complaint fails to state a claim against Salazar because Salazar did not present claims to the United States. To the contrary, the Complaint alleges that claims for payment were submitted to the government “by Solomon on behalf of O’Hara.” Complaint ¶ 88. As Salazar did not bill Medicare and Medicaid, Salazar did not “present” claims for payment to the United States.

The Complaint also fails to allege that Salazar “caused to be presented” a claim for payment from the United States. The Complaint contains no allegations that Salazar supervised, directed or otherwise was involved with the submission of claims by O’Hara to Medicare or Medicaid. Instead, the Complaint alleges that Salazar “knew” of the alleged understaffing and that Salazar “knew” that bills were being submitted to Medicare and Medicaid. Complaint ¶¶ 92, 95. This allegation is relevant to the FCA requirement that a violation be done “knowingly.” 31 U.S.C. ¶¶ 3729(a)(1)(2). But it does not satisfy the requirement that he “cause[d claims] to be presented.”

To violate the FCA, each defendant must actively participate in the submission of the false claims. The FCA only imposes liability on an individual defendant for his or her own conduct. United States v. Bornstein, 423 U.S. 303, 312 (1976) (holding that the FCA “penalizes a person for his own acts, not those of somebody else”). Mere knowledge of a possible fraud, without active participation, is inadequate to state a claim under FCA. Murphy, 937 F.2d at 1038; U.S. ex rel. Grynberg v. Ernst & Young LLP, 323 F. Supp. 2d 1152, 1155 (D. Wyo. 2004) (“allegations that a defendant had direct and concrete knowledge of a fraud on the government but did nothing to stop it are not enough to state a claim under the FCA.”); Wolk, 1995 U.S. Dist. Lexis 580 at *11. John T. Boese, Civil False Claims and Qui Tam Actions, 2d ed. § 2.01[A][2] (“Mere inaction does not constitute a violation of” the FCA).

Courts have held consistently that a corporate officer must personally participate in the submission of false claims to the government in order to be

liable personally under the FCA. For example, in Wolk, two corporate officers were alleged to have submitted false Medicare claims. The court granted one officer's motion to dismiss but denied the other's. 1995 U.S. Dist. Lexis 580 at **4-6.¹ The court dismissed claims against a corporate officer who knew claims were being falsified, "but did not take action to ensure that the practice was discontinued," because the government had failed to allege any actions by that defendant that constituted presenting, or causing to be presented, a false claim. Id. The court held that "[m]ere inaction is not enough to constitute a violation of the False Claims Act. [An allegation that the defendant] was aware of the fraud does not eliminate the need for some action by the defendant." 1995 U.S. Dist. Lexis 580 at **9-11.

Similarly, in United States v. Harvard College, 323 F. Supp. 2d 151 (D. Mass. 2004), two college officials were alleged to have submitted false claims under a federal grant.² The court granted summary judgment in favor of an officer who did not take any actions to have claims submitted to the government, concluding that even though the officer "knew that false claims were going to be submitted, his failure to take steps to ensure that Harvard discontinued the submission of the claims does not constitute 'causation'" for FCA purposes. 323 F. Supp. 2d at 188-189.³ See also, United States ex rel. Kinney v. Hennepin

¹ The court denied the motion by the officer who "supervised and instructed" employees in falsifying claims, personally falsified claims himself, and helped destroy incriminating corporate records. Id. at **4-6.

² The court ruled that the officer who signed invoices for payments that he knew ultimately would be submitted to the government caused a false claim to be submitted, because he "was engaged in the claims process." Id. at 188 n. 30.

³ Court decisions imposing FCA liability on individual defendants who took affirmative actions in overseeing the claims process are distinguishable because Salazar is not alleged to have actively participated in O'Hara's billing process. See United States v. Mackby, 261 F.3d 821, (9th Cir. 2001) (owner and managing director of physical therapy clinic caused submission of false claims by instructing billing service and office manager to place false information on claim forms);

County Med. Center, 2001 U.S. Dist. Lexis 25475, **29-32 (D. Minn. 2001) (physicians' allegedly false certifications of medical necessity did not cause submission of false claims where they had no involvement with or control over hospital's claims submission process); Murphy, 937 F.2d at 1039 (holding that FCA requires some action required by defendant).

The Complaint makes only two allegations of particular actions by Salazar, both of which fall far short of causing a claim to be submitted. First, with regard to claim 3, he is alleged to have approved a bid in October 1997 to provide services for the one HBU patient. Compl. ¶¶ 100-103. Making or approving a contract bid, however, does not cause the submission of a claim. Bornstein, 423 U.S. at 311; United States ex rel. Taylor v. Gabelli, 345 F. Supp. 2d 313, 335 (S.D. N.Y. 2004). Second, in August 1998, Salazar allegedly directed O'Hara not to use temporary nursing services. This allegation has nothing to do with the submission of a claim by O'Hara to the government. Moreover, both of these allegations involve actions that fall outside of the applicable statute of limitations period. See argument below.

The Complaint makes no allegation that Salazar played any role in O'Hara's billing process and does not allege that Salazar had control over the billing process.⁴ As such, he did not "cause to be submitted" allegedly false claims.

United States v. Krizek, 111 F.3d 934, 942 (D.C. Cir. 1997) (doctor caused submission of claims where his wife submitted claims for services he performed).

⁴ The Government does not allege that Salazar owned O'Hara or was a member of its governing body. Colorado and Federal law vest authority and responsibility for the operation of a nursing facility in the facility's governing body. A nursing facility "must have a governing body, or designated persons functioning as a governing body, that is legally

C. The Complaint Fails to Allege That Salazar Used A False Record Or Statement To Get A False Claim Paid.

Claim 2 of the Complaint asserts that Salazar “knowingly made, used, or caused to be made or used, false records or statements” in support of claims for payment in violation of 31 U.S.C. § 3729(a)(2). The Complaint, however, fails to allege any such records or statements by Salazar.

The government’s general allegation that unspecified defendants “engaged in a practice of deception” that included “providing false information concerning staffing levels at O’Hara, submission of false statements concerning staffing levels, and false statements in the plans of correction” (Compl. ¶¶112) fails to state a claim against Salazar. F. R. Civ. P. 9(b). The Complaint does not allege that Salazar made statements to the government concerning staffing levels or that Salazar directed others to falsify documents. The Complaint does not allege that Salazar wrote or signed any plans of corrections. Indeed, the Complaint does not allege that Salazar communicated in any way with the Medicare or Medicaid programs concerning the payment of O’Hara’s claims. Claim 2 against Salazar must be dismissed.

II. The Complaint Fails to Allege That the Claims Were “False or Fraudulent.” (Claims 1, 2, and 3)

The Complaint also fails to satisfy a second element of an FCA claim: that the claim forms were false or fraudulent. The government does not allege that

responsible for establishing and implementing policies regarding the management and operation of the facility.” 42 C.F.R. § 483.75(d). A nursing facility must have a “governing body” and “the governing body is the individual, group of individuals, or corporate entity that has ultimate authority and legal responsibility for the operation of the” facility. 6 C.C.R. 1011-1, Ch. 5, Sec. 1.1. Pursuant to these regulations, the “ultimate authority and legal responsibility” of a nursing facility rests with the facility’s governing body. The fact that Salazar did not have authority or legal responsibility for O’Hara is critical. Salazar cannot have committed a fraud by failing to use authority that he did not have.

any of the Defendants submitted claims for patients not receiving care at O'Hara, or that the facility's billing forms contained factual misrepresentations or were otherwise misleading. Rather, the government attempts to use the FCA as a malpractice statute by alleging that the care provided was not "appropriate," and that the care was "inadequate or worthless." Compl. ¶¶ 93, 98.⁵ These allegations fail to satisfy the "false or fraudulent" element of the FCA.⁶

The government's theory (known as an "implied certification claim") is that "the act of submitting a claim for reimbursement itself implies compliance with governing rules that are a precondition to payment" – even if the claim form makes no such certification of compliance. United States ex rel. Mikes v. Straus, 274 F.3d 687, 699 (9th Cir. 2001).⁷ Courts have observed that an implied certification theory "does not fit" into the Medicare context, "because the False Claims Act was not designed for use as a blunt instrument to enforce compliance with all medical regulations – but rather only those regulations that are a precondition to payment" Mikes, 274 F.3d at 699. As the Second Circuit recognized, the quality of care standard of [the Medicare regulations] is best

⁵ The Complaint at paragraph 93 makes a generic allegation alleging that claims were submitted for "care, goods or services that were not provided", but does not specify what those care, goods or services were.

⁶ The government may also be attempting to assert a "worthless services" theory. See Compl. ¶ 93 (services were "inadequate or worthless"). In a worthless services claim, the plaintiff alleges that the government was billed for performance of a service "that is so deficient that for all practical purposes it is the equivalent of no performance at all." Mikes, 274 F. 3d at 703. If the Complaint is attempting to assert such a claim it plainly fails. In the context of this action, the claim must assert that shortcomings in care were "so severe that, for all practical purposes, the patients were receiving no room and board services or routine care at all." Swan, 279 F. Supp. 2d at 1221. As with any FCA claim, the government must allege **with particularity** some factual basis for such a conclusion. See, U.s. ex rel. Lee v. Smith Kline Beecham, Inc., 245 F. 3d 1048, 1053-54 (9th Cir. 2001)(worthless services claim must meet Rule 9(b)'s heightened pleading requirement). There are no such allegations in the Complaint.

⁷ The Tenth Circuit has allowed a non-Medicare FCA claim to proceed on an implied certification theory where the defendant violated a discrete, readily-ascertainable contract term that was a condition of payment. See Shaw v. AAA Engineering & Drafting, Inc., 213 F.3d 519 (10th Cir. 2000) (invoices false where defendant photography studio ignored specific contractual requirement to recover silver used in photo developing process). Unlike in Shaw, in the present case Medicare and Medicaid payment was not preconditioned upon compliance with regulations allegedly violated.

enforced by those professionals most versed in the nuances of providing adequate health care.” 274 F.3d at 700. The FCA “is not a vehicle for ensuring regulatory compliance [It] only attaches liability to false claims for payment, not to underlying activity that allegedly violates federal law.” U.S. ex rel. Swan v. Covenant Care, Inc., 279 F. Supp. 2d 1212, 1220-21 (E.D. Calif. 2002) (rejecting implied certification claim based on allegations that nursing facility was severely understaffed and failed to comply with federal patient care regulations).

The statutes and regulations allegedly violated are broad quality of care standards -- not absolute preconditions for submitting payment requests.⁸ “Government payment of Medicare claims is not conditioned on perfect regulatory compliance – and [the government agencies] may . . . impose a less drastic sanction than full denial of payment” Swan, 279 F.Supp. 2d at 1222. In the nursing home setting, the Medicare Act specifically permits nursing facilities to bill and be paid even when they are not in substantial compliance with the governing regulations. 42 U.S.C. §§ 1395i-3(h)(2)(C) (government “may” continue payments despite noncompliance with quality of care standards for skilled nursing facilities); 42 U.S.C. § 1396r(h)(2) (States may deny Medicaid payments for noncompliance with quality of care standards only “after such notice to the public and the facility”); 42 C.F.R. § 488.450 (Medicare “may continue payments to a facility not in substantial compliance...”). See, Cathedral Rock of North College Hill, Inc. v. Shalala, 223 F.3d 354, 366 (6th Cir. 2000). As

⁸ The Complaint ignores the fact that O'Hara complied with the only applicable regulation specifically addressing the required hours of nursing care per patient day. Compare 6 C.C.R. 1011-1, Chapter XVII (3.5 hours per patient day).

Medicare and Medicaid payments are expressly permitted when a nursing facility is not in substantial compliance with the governing regulations, the submission of claims in such an instance cannot be a fraud.

Indeed, courts have rejected implied certification claims that were based on these very same statutes and regulations. Mikes, 274 F.3d at 701-02 (rejecting implied certification claim based on 42 U.S.C. § 1320c-5); Swan, 279 F. Supp. 2d at 1220-21 (rejecting claim based on 42 U.S.C. § 1395i-3 and 42 C.F.R. § 483.30, among other provisions); see also, United States ex rel. Mathews v. Healthsouth Corp., 140 F. Supp. 2d 706, 710-11 (W.D. La. 2001) (dismissing FCA claim that alleging that rehabilitation center failed to provide adequate number of hours per day of services under federal rules).⁹ The government's claim fails because it "would essentially turn[] a discretionary denial of payment remedy into a mandatory penalty for failure to meet Medicare requirements." 279 F. Supp. 2d at 1222. More generally, allowing such claims would "promote federalization of medical malpractice," with FCA claims added to tort cases as a means of recovering attorney fees and treble damages, and "the *qui tam* relator would replace the aggrieved patient as plaintiff." Mikes, 274 F.3d at 700.

⁹ The government may rely on two trial court decisions that recognized an implied certification theory in the Medicare or Medicaid context. See United States v. NHC Healthcare Corp., 115 F. Supp. 2d 1149 (W.D. Mo. 2000); United States ex rel. Aranda v. Community Psychiatric Centers of Oklahoma, 945 F. Supp. 1485 (W.D. Okla. 1996). These two rulings are "questionable" at best, and are not believed to have been adopted by any appellate court. "The prevailing law is that 'regulatory violations do not give rise to a viable FCA action' in the Medicare or Medicaid context, except where an express certification of compliance is required. Swan, 279 F. Supp. 2d at 1221, quoting United States ex rel. Hopper v. Anton, 91 F.3d 1261, 1266 (9th Cir. 1996). Notably, NHC and Aranda do not address the specific provisions of the underlying statutes, in contrast to those courts that have rejected an implied certification theory in this context. C.f., Mikes, 274 F.3d at 270-72; Swan, 279 F. Supp. 2d at 1220-21.

The history of the O'Hara facility further demonstrates that the alleged standard of care violations did not render the claims "false." As the Complaint alleges, government surveys and inspections repeatedly recognized serious problems with staffing care at O'Hara beginning in March 1998. Compl. ¶¶ 60-61, 63-66, 72-73, 85. Despite knowing of the problems, the government did not immediately treat O'Hara as ineligible for reimbursement under the Medicare program. Rather, the government decided to continue to make payments to O'Hara and to impose other administrative remedies. Compl. ¶ 74. Given the government's decision to continue payments to O'Hara during a time when it knew of serious problems, those alleged standard of care violations cannot make the claims "false or fraudulent." Mikes, 274 F.3d at 699; Swan, 279 F. Supp. 2d at 1220-21.¹⁰

III. The Common Law Fraud Claim Must Be Dismissed (Claim 6).

The government's common law fraud claim (Claim 6) must be dismissed because: (1) the Complaint fails to allege with particularity that Salazar made any false representations of existing fact to the government, and (2) the claim is barred by the statute of limitations.

¹⁰ This case contrasts sharply with U.S. ex rel. Wright v. Cleo Wallace Centers et al., 132 F. Supp. 2d 913 (D. Colo. 2000). In Cleo Wallace, the court allowed an implied certification claim to proceed where it did not involve a standard of care issue, but instead sought payment for patient services that defendant was not licensed to provide. Unlike O'Hara, the licensing requirement was a mandatory prerequisite to payment for the services at issue. *Id.* at 916-917. The government was unaware that services were being provided without a license. In fact, the government had previously informed the defendants that they were not allowed to carry out the unlicensed plan at issue. *Id.* at 916-17.¹⁰ In contrast, the government in this case continued payment of claims despite knowing of alleged problems with staffing and the standard of care at O'Hara.

A. Complaint Fails to Identify any False Statements by Salazar.

One of the elements of a common law fraud claim is that the “defendant made a false representation of material existing fact.” Bennett v. Coors Brewing Company, 189 F.3d 1221, 1229-30 (10th Cir. 1999). As discussed above, the Complaint fails to allege that Salazar made any factual representations to a government official (either true or false). It therefore fails to state a claim for common law fraud.

B. The Common Law Fraud Claim Is Time Barred.

The United States and Colorado’s common law fraud claim is also barred by the statute of limitations. The fraud claim is a tort claim governed by a three-year statute of limitations. 28 U.S.C. § 2415(b); C.R.S. § 13-80-101(1)(c). The limitations period begins to run when the material facts are known or reasonably could be known by the government. 28 U.S.C. § 2416(c); J.A. Balisteri Greenhouses v. Roper Corp., 767 P.2d 736 (Colo. App. 1988).

The face of the Complaint establishes, as a matter of law, that the government knew of the material facts alleged in the Complaint for more than three years before filing its Complaint. The Complaint alleges that the government’s November 1998 survey of O’Hara found alleged staffing deficiencies. “As a result of the survey findings, [the government] determined that O’Hara was putting the health and safety of its residents in ‘immediate jeopardy’ (the most severe level of harm) in four different areas, including ... failure to provide sufficient numbers of nursing staff ...” Complaint ¶ 72 (emphasis added).

Further, in a subpoena enforcement action involving these same issues in 2001, this Court ordered the production of documents to the United States from the defendants O'Hara and Solomon. In Re DOJ Admin. Investigative Subpoena 2000-113, Civ. No. 01-K-793 (D. Colo.) (case closed Sept. 24, 2001) (hearing and order of July 16, 2001 compelled production of documents requested by DOJ subpoenas relating to O'Hara).¹¹ As such, the government knew or reasonably could have known of the allegations in the Complaint since September 24, 2001 at the latest, which is more than 3 years before the Complaint was filed. Thus, the common law fraud claims are time barred and must be dismissed.

IV. In the Alternative, Claims 1-3 are Time Barred as to Salazar for Claims Submitted before November 10, 1998

The Complaint was filed on November 10, 2004. The United States may not bring an action for a violation of the FCA after the later of: (1) "6 years after the date of the violation," or (2) "three years after the date when facts material to the right of action are known or reasonably should have known" by the government. 31 U.S.C. § 3731(b). Therefore, claims 1-3 are time-barred to the extent they concern claims submitted before November 10, 1998 because the case was filed more than 6 years after the alleged violation. The government has known of the allegations in the Complaint for more than three years. Thus, any FCA action against Salazar is time-barred to the extent it is based on claims submitted more than six years before the filing of the Complaint.

¹¹ The Court also can take judicial notice of the existence of the subpoena proceedings without converting this motion to one for summary judgment. Gilchrist v. City, 71 Fed. Appx. 1, 3 (10th Cir. 2003).

V. The Complaint Fails to State a Claim Against Salazar for Claims Based Upon the Equitable Recovery of Payments (Claims 4, 5, & 7).

In addition to its fraud allegations, the Complaint includes three claims against Salazar seeking relief under equitable theories: payment by mistake (Claim 4), unjust enrichment (Claim 5), and restitution and disgorgement of illegal profits (Claim 7). These claims also should be dismissed. Claims 4 and 5 (payment by mistake and unjust enrichment) fail because they do not allege that Salazar receive any direct payments from the government or participated directly in the submission of claims for those payments.

The government may recover under a common law claim of “payment by mistake of fact” where it has mistakenly paid money to a recipient who receives the funds without a right to them. Mistaken payments that have flowed into the hands of a third party may be recovered if the third party (a) participated in and (b) benefited from the tainted transaction. United States v. Village of Island Park, 888 F. Supp. 419, 452 (E.D. N.Y. 1995); Wolk, 1995 U.S. Dist. Lexis 580 at **15-16; see also, United States v. Vector Corp., 1994 U.S. Dist. Lexis 21330, **14-16 (April 14, 1994). In the FCA context, courts have applied the same standard to unjust enrichment claims. See Wolk, 1995 U.S. Dist. Lexis 580 at **15-16 (dismissing unjust enrichment claim against third party based on analysis of payment by mistake claim); Vector, 1994 U.S. Dist. Lexis 21330 at **13-16 (same).

Here, the government does not allege that it paid any funds directly to Salazar. Rather, the Medicare and Medicaid payments were made to O'Hara.

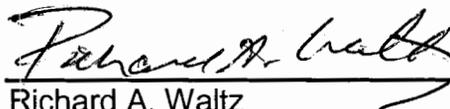
Compl. ¶ 109. The government fails to allege a claim for recovery from Salazar – a third party who received no direct payments – because as discussed above, he did not personally participate in obtaining the payments. Wolk, 1995 U.S. Dist. Lexis 580 at *16; Vector, 1994 U.S. Dist. Lexis at *16.

Finally, restitution, disgorgement of profits, imposition of a constructive trust and an accounting (Claim 7) are simply forms of relief that may be available for an equitable claim such as unjust enrichment. They are not a separate cause of action.¹² This “claim” is therefore subject to dismissal. See Carmody v. SCI Colo. Fun. Svcs., Inc., 76 F. Supp. 2d 1101, 1105 (D. Colo. 2000) (dismissing “claim” for punitive damages because it is merely a form of relief).

CONCLUSION

For the reasons stated above, Plaintiffs’ claims against Defendant V. Robert Salazar should be dismissed.¹³

Respectfully submitted this 1st day of March, 2005.



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¹² See e.g., University of Colorado Foundation, Inc. v. American Cynamid Co., 153 F. Supp. 2d 1231, 1233 (D. Colo. 2001) (disgorgement of profits); Smith v. Metropolitan Life Ins. Co., 344 F. Supp. 2d 696, 706 (D. Colo. 2004) (restitution). Restitution may also be viewed as a theory of liability that is “precisely coextensive” with unjust enrichment, in which case this claim must be dismissed for the same reasons as the fifth claim. Rest. 3d Restit. § 1 comm. b (draft 2000).

¹³ Counsel for the Plaintiffs declined a request by Salazar’s counsel to correct these defects through amendments to the Complaint. See REB Civ. Practice Standard V.H.2.a.

