UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA and the STATE OF ILLINOIS, *ex rel.* VANESSA ABSHER and LYNDA MITCHELL,	)	
Plaintiffs,	)	04-2289
v.	)	
MOMENCE MEADOWS NURSING CENTER, INC., and JACOB GRAFF, individually,	)	
Defendants.	)	

ORDER

The relators filed this *qui tam* action pursuant to the federal False Claims Act, 31 U.S.C. § 3729 *et seq.* (the "FCA") and the Illinois Whistleblower Reward and Protection Act, 740 Ill. Comp. Stat. 175/1 *et seq.* (the "WBA"). After a lengthy delay, the United States of America (the "USA") and the State of Illinois declined to intervene.[1] The relators then filed a second amended complaint [#22].

The defendants sought and obtained an extension of time to respond to the complaint, and have filed a motion to dismiss [#35] and supporting memorandum [#36]. The relators filed their opposition to the motion [#37], as has the USA [#42]. The court then denied a flurry of motions for leave to file replies, surreplies, responses to replies, and a motion for a status conference to determine a briefing schedule for the filing of replies, surreplies and responses to replies.

The defendants' motion to dismiss [#35] and motion for protective order/motion to quash the plaintiff's discovery requests [#48], and the relators' motion for entry of their proposed discovery plan [#49], are now pending.

BACKGROUND

Vanessa Absher ("Absher") is a licensed practical nurse. Lynda Mitchell ("Mitchell") is a registered nurse. Absher and Mitchell (collectively, "the relators") are former employees of defendant Momence Meadows Nursing Center ("MMNC"). MMNC is a 140-bed skilled nursing facility that houses disabled and elderly patients. At all relevant times, defendant Jacob Graff was

[1] The USA still has an interest in the case, however. As the USA stated in its brief opposing the motion to dismiss, "A decision to decline intervention should not be construed as a statement about the merits of the case. Indeed, the Government retains the right to intervene at a later date upon a showing of good cause. 31 U.S.C. § 3730(c)(3).

the owner and operator of MMNC.

The vast majority of the residents of MMNC are Medicare and Medicaid patients. The Medicare and Medicaid programs impose minimum staffing, quality of life and other requirements upon facilities that receive payment from those programs. Absher and Mitchell allege that a number of residents at MMNC received grossly substandard care for which Medicare and Medicaid were billed. They also allege that they were directed to falsify (1) patient and medication records to reflect that care and medication were given; and (2) staffing records, to show minimum staffing levels were reached. They were also told to "rechart" patient records to conceal events leading to the injury, illness, or death of some residents. In MMNC's effort to conceal the true conditions existing at its facility, an employee was directed to place an "out of order" sign on the photocopier so inspectors from the Illinois Department of Public Health could not duplicate the records. The thirty-five page complaint makes shocking allegations of neglect of MMNC residents.

Absher and Mitchell complained to management about the inadequate care being provided to residents, the failure to provide medications and meals to patients, the appalling condition in which residents were found, and other incidents involving MMNC employees. The relators also complained to their supervisors that the defendants failed to comply with federal and state laws governing quality of care. Mitchell alleges she was subjected to continuous verbal abuse and hostility and was told to "shut her mouth" and told she could be terminated if she continued to complain. Mitchell was terminated three days after one of MMNC's residents died. When Absher learned that Mitchell was terminated, she felt she had no other reasonable choice but to resign. In response, MMNC tried to prevent other employers from hiring her. The relators allege that MMNC fabricated charges against both women with the Illinois Department of Professional Regulation.

The relators assert four claims against the defendants. The first two claims allege that the defendants knowingly presented or caused to be presented thousands of false or fraudulent claims for Medicare and Medicaid reimbursement. The remaining two claims allege unlawful retaliation against the relators for their reports of wrongdoing to MMNC management, the Illinois Department of Public Health, the Center for Medicare and Medicaid Services, and others.

ANALYSIS

The defendants argue that the complaint must be dismissed pursuant to Federal Rules of Civil Procedure 9(b) (failure to allege fraud with particularity) and 12(b)(6) (failure to state a claim). The defendants contend that (1) no false claim for payment is identified anywhere in the second amended complaint, as required by the FCA and WBA; (2) the FCA and WBA do not apply because there is no allegation that services were not provided at all (as opposed to provided badly); (3) there are no claims or assertions against Graff individually; and (4) the

relators have failed to state a claim for retaliation pursuant to either statute.[2]

In ruling on a Rule 12(b)(6) motion to dismiss, a court must accept the plaintiff's well-pled allegations as true and draw reasonable inferences in the plaintiff's favor. *Perkins v. Silverstein*, 939 F.2d 463, 466 (7th Cir. 1991). Dismissal should be granted only if it appears that the plaintiff cannot prove a set of facts supporting his claim that would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

Federal pleadings must meet the standards set out in Rule 8(a): "A pleading . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief[.]" However, "[i]n all averment of fraud . . . the circumstances of fraud . . . shall be stated with particularity." Fed. R. Civ. P. 9(b).

I. The FCA and WBA

FCA claims are subject to the requirements of Rule 9(b). *United States ex rel. Gross v. AIDS Research Alliance – Chicago*, 415 F.3d 601, 604 (7th Cir. 2005). The relators must plead facts to show: (1) the defendant made a statement in order to receive money from the government;[3] (2) the statement was false; and (3) the defendant knew it was false. *Gross*, 415 F.3d at 604. The defendants argue that the relators do not state with particularity any statements made. They contend that the relators have attempted to equate inadequate care to a false statement.[4]

> Three primary policies support Rule 9(b)'s requirement that fraud be pled with particularity: (1) protecting a defendant's reputation from harm; (2) minimizing "strike suits" and "fishing expeditions"; and (3) providing notice of the claim to the adverse party. To satisfy these policies, Rule 9(b) requires that the

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[2] In the memorandum, they also argue that some of the claims are barred by the applicable statute of limitations. In response, the relators assert that conduct outside the limitation period is relevant as background and evidence of continuing violations. There is no reason for the court to reach this issue, undeveloped as it is at this time, because some of the allegations fall squarely within the limitations period.

[3] The false statement might consist of a request for payment for medication or physical therapy not administered, or a false statement that MMNC adhered to the general standards of skilled nursing care and was entitled to payment for the care given to its Medicare/Medicaid patients.

[4] The United States points out that the relators and the defendants have muddled and conflated two distinct theories of liability under the FCA and the WBA – worthless service claims and false certification claims. Whether this is true is not relevant to the court's analysis, however. Both sorts of claims are actionable under the FCA.

> circumstances must be pleaded in detail. This means the who, what, when, where, and how: the first paragraph of any newspaper story. Rule 9(b) does not require that plaintiff explain his entire case, only that he state the actions that allegedly constitute fraud.

United States ex rel. Yannacopolous v. General Dynamics, 315 F. Supp. 2d 939, 944-45 (N.D. Ill. 2004) (internal citations omitted).

However, it is well settled that the pleading requirement is relaxed where "the plaintiff lacks access to all facts necessary to detail his claim[.]" *Corley v. Rosewood Care Center, Inc.*, 142 F.3d 1041, 1051 (7th Cir. 1998). It is especially important to apply the provisions of Rule 9(b) leniently when "the specific information is in the hands of the defendants who . . . [have] resisted attempts in discovery[.]" *Corley*, 142 F.3d at 1051. And that is similar to what has happened in this case: after the defendants moved to dismiss the complaint based on its lack of particularity, the plaintiffs subpoenaed information from the current owners of MMNC. That subpoena is the subject of the pending motion to quash.

In *United States ex rel. Crews v. NCS Healthcare, Inc.*, 460 F.3d 853 (7th Cir. 2006), the Court of Appeals ruled that the relator could not proceed with her case because she had failed to tie her claim to vouchers that were actually submitted for payment. The Seventh Circuit noted that there might not be a false claim connected to the alleged wrongdoing because it may have affected only non-Medicaid patients: "Statistically unlikely, to be sure, but possible." *Crews*, 460 F.3d at 857. However, the Seventh Circuit affirmed *summary judgment* in favor of the defendants because Crews had not presented the required *evidence* to support her case. *Crews*, 460 F.3d 853. At this early stage of the litigation, the court need not concern itself with the relators' ability to prove their case. Under a more relaxed application of Rule 9(b), the court need only decide whether they have alleged enough of the "who, what, when, where and how" of the fraud.

In this case, the plaintiffs name the "who," "what," "where" and "how." The relators identify supervisors who directed others to falsify patients' records, and some of the patients whose records were falsified.[5] It is alleged they did so to cover up MMNC's grossly substandard care of its patients and/or request Medicare and/or Medicaid payments for medication and services not provided. It is the "when" that is pled with less particularity. The relators possess first-hand knowledge of the incidents by virtue of their employment with MMNC. Absher was employed at MMNC from December 1997 through February 2003, and Mitchell from August

[5] Those patients are identified by first and last initial to protect their anonymity. This lack of particularity can hardly hamper the defendants' investigation. Given that MMNC is a 140-bed facility, and that some of the more shocking allegations identify the patients as well a general description of the patient's condition (dementia, developmental disability) or the outcome (death), the defendants are not left completely in the dark.

2001 through February 2003. But as part of the nursing staff, they were isolated from the billing function and cannot know the information within the defendants' exclusive control – the precise dates that false claims were submitted.

"The particularity required by Rule 9(b) is intended to enable the defendant to respond specifically and quickly to the potentially damaging allegations." *United States ex rel. Costner v. United States*, 317 F.3d 883, 888 (8th Cir. 2003). One of the purposes of Rule 9(b) is to prevent "fishing expeditions" based on vague and unsubstantiated claims. *See United States ex rel. Harris v. George Washington Primary Care Assoc.*, 1999 WL 1021936, at *1 (D.C. Cir. 1999) (*citing Vicom, Inc. v. Harbridge Merchant Serv., Inc.*, 20 F.3d 771, 777 (7th Cir. 1994)). This complaint is far from a fishing expedition. The relators' allegations are highly specific and detailed. Although they have not pointed to specific dates on which false claims were submitted, they have pled enough information to allow the defendants to respond to the allegations.

II.

The defendants also contend that there are no allegations supporting a claim against Graff individually. They argue that the relators have not alleged that Graff managed, supervised or provided any of the allegedly inadequate care or submitted any of the claims for reimbursement or knew of their alleged falsity. They also contend that the relators allege Graff was in California the whole time. The court disagrees. If Graff had actual knowledge of the falsity, or acted in deliberate ignorance or reckless disregard of the truth, he can be held liable under the FCA. *United States ex rel. Garst v. Lockheed Integrated Solutions Co.*, 158 F. Supp. 2d 816, 820 (N.D. Ill. 2001) (*citing* 31 U.S.C. § 3729(b)). The relators allege that Graff, a resident of California, was at all relevant times responsible for management of the day-to-day and long-term operations of the facility. The allegation that Graff managed the day-to-day operations of MMNC are sufficient to tie him to the allegations of fraud.

III.

The defendants argue that the relators have failed to state a retaliation claim pursuant to the FCA because they do not allege the defendants knew the relators were investigating FCA violations before they were terminated or constructively discharged.

The two cases cited by the defendants deal with proving, rather than pleading, retaliation and/or constructive discharge claims. *See Witte v. Wis. Dep't of Corr.*, 434 F.3d 1031 (7th Cir. 2006) (summary judgment on constructive discharge); *Brandon v. Anesthesia & Pain Mgmt. Assoc.*, 277 F.3d 936 (7th Cir. 2002) (judgment as a matter of law after trial on retaliatory discharge claim). The complaint alleges that the relators repeatedly reported the wrongdoing to the defendants and reported several incidents to government officials. The relators also allege that the defendants knew or should have known that they were engaging in statutorily protected activities when they reported the substandard care to MMNC management and government agencies. They have alleged enough to sustain their retaliation claim at this early stage of the litigation.

IV.

The court does agree with one of the defendants' contentions. They argue that a chart

incorporated into the complaint lacks particularity because thirty-four identified patients are alleged to have suffered from neglect or injury, scabies, pressure sores, failure to administer meals and/or medications, or died as the result of the defendants' wrongful conduct, but the specific injury or incident for nine of those patients is not indicated in the chart. This hinders the defendants' ability to respond to the complaint. The relators concede this information is lacking and seek leave to amend their complaint accordingly. The court grants leave for them to do so, and also orders them to cite within the complaint a statutory or regulatory reference -- a shortcoming noted in the United States' amicus brief, page 14, lines 3-5.[6] No other changes shall be made at this time. The plaintiffs may file the amended complaint within 15 days of the date of this order. The defendant shall have 30 days thereafter to file their answer. Because there will be no change to any of the allegations except as discussed above, the defendants will have forty-five days to investigate the substance of the relators' claims. No further extension of time will be granted.

Also pending is a motion for protective order and motion to quash the relators' subpoena served on the new owners of the nursing home, and the relators' motion for the entry of their unsigned proposed discovery plan. Fed. R. Civ. P. 26(f) requires the parties to confer and develop a proposed discovery plan. "A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f)." Fed. R. Civ. P. 26(d). Consequently, the court grants the defendants' motion for protective order and motion to quash [#48] and denies the relators' motion for entry of the discovery plan [#49]. A Rule 16 scheduling conference will be held on April 23, 2007 at 1:30 p.m. by personal appearance.

CONCLUSION

For the foregoing reasons, the motion to dismiss [35] is denied. The plaintiffs shall file, within fifteen days of the date of this order, an amended complaint with the changes noted above. No other changes shall be incorporated at this time. The defendants shall file an answer within thirty days thereafter. The motion for protective order and motion to quash [48] is granted. The motion for entry of the discovery plan [49] is denied. A separate written order will be entered as to the April 23, 2007 scheduling conference.

Entered this 2nd day of March, 2007.

s/Harold A. Baker

HAROLD A. BAKER
UNITED STATES DISTRICT JUDGE

[6] "It is the responsibility of Relators to allege which section or subsection of . . . particular statutes or regulations were violated and which were conditions of payment, thereby triggering liability under the FCA." United States' Brief, p. 14.