

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

SHERI SWEENEY, *ex rel.*
UNITED STATES OF AMERICA,)
)
 Plaintiffs,)
)
 v.)
)
 MANORCARE HEALTH SERVICES, INC. a)
 Delaware corporation; and STACEY MESAROS,)
)
 Defendants.)

NO. C03-5320

ORAL ARGUMENT REQUESTED

UNITED STATES’ STATEMENT OF INTEREST PURSUANT TO 28 U.S.C. 517
AND AMICUS BRIEF IN RESPONSE TO
RELATOR’S MOTION TO SUBMIT AN AMENDED COMPLAINT

The United States of America ("United States") respectfully submits this statement of interest,¹ pursuant to 28 U.S.C. section 517, in response to Relator’s Motion to Amend Complaint (“Motion to Amend”) (Docket No. 69), in which the Relator requests the Court’s permission to

¹ The United States has a significant interest in False Claims Act case law, even when generated in a declined *qui tam* case such as this one. The United States brings most of the successful cases under the Act, and False Claim Act case law, whether generated in a declined case or not, has an impact on matters initiated by the United States and *qui tam* cases in which the United States intervenes. Moreover, even in cases it declines, the United States remains a real party in interest. See United States ex rel. Hyatt v. Northrop Corp., 91 F.3d 1211, 1214 (9th Cir. 1996). In the event the Relator prevails in this case, the United States is entitled to receive up to 75% of the judgment against the defendants. 31 U.S.C. § 3730(d)(2).

The United States has a particularly strong interest in assuring that the False Claims Act is correctly interpreted in the failure of care context. Over the past several years, the United States has pursued an increasing number of failure of care cases against health care providers such as nursing homes, where those providers knowingly bill a federal health care program for goods or services that have no medical value. Such cases involve not only false claims and losses to the government, but also usually have devastating consequences for the vulnerable elderly and disabled patients, who were the intended beneficiaries of the goods and services at issue.

1 reinstate her claims as a Relator under Section 3730 of the False Claims Act. 31 U.S.C. §§ 3729-
2 3833.

3 I. PROCEDURAL BACKGROUND

4 This *qui tam* action against Manor Care Health Services, Inc., and Stacy Mesaros
5 (collectively, "Manor Care"), was initiated by Sheri Sweeney ("Relator"), a former employee at
6 Manor Care's Gig Harbor facility, pursuant to Section 3730 of the False Claims Act. In her
7 second amended complaint, Relator alleged that Manor Care violated the False Claims Act by
8 violating the state and federal regulations concerning the quality of care it provided to its
9 residents, provided worthless snacks and dietary supplements, and that it conspired to falsely
10 inflate the cost of providing patient care at Gig Harbor. (Dkt. 19 at 3).

11 Although the United States takes no position on the question of whether this Court should
12 allow Relator a fourth attempt to plead her case, it respectfully requests this court to reconsider its
13 discussion of Relator's worthless services and "regulatory violation" claims. We submit that
14 billing for worthless services or services rendered in violation of regulations that are prerequisites
15 to payment may form the basis for a viable FCA violation, but that to date the Relator has failed to
16 plead the factual predicates necessary to sustain this type of claim in this case. We take no issue
17 with the Court's ruling that Relator did not properly allege facts sufficient to support a conspiracy
18 claim.

19 II. ARGUMENT AND AUTHORITIES

20 The United States pursues FCA failure of care cases under a variety of potential theories.
21 For example, the United States pursues such cases where defendants (i) knowingly violate laws,
22 regulations or rules that are a prerequisite to payment or (ii) bill for goods or services they did not
23 provide. But most frequently, FCA failure of care cases are brought under a worthless services
24 theory, where defendants bill the government for grossly substandard products or services. As
25 explained below, these cases present a prototypical False Claims Act claim — billing for items
26 that have no value to the United States.

27 Unfortunately, Relator has muddled and conflated several theories in her pleadings,
28 confusing the legal issues applicable in these types of cases, and leading to this Court's March 4,
2005 opinion, which dismissed the relator on Rule 12(b)(6) grounds. The United States submits

1 this pleading to provide the Court with a more complete picture of the relevant law regarding
2 Relator's claims under the FCA for worthless services and statutory and regulatory violations. To
3 the extent that the Court's earlier Order suggests that a worthless services claim does not state a
4 cause of action under the FCA, such a determination would be contrary to settled law in the Ninth
5 Circuit. United States ex rel. Lee v. SmithKline Beecham, Inc., 245 F.3d 1048, 1053-54 (9th Cir.
6 2001) ("If a party to a government contract knowingly or with deliberate ignorance charged the
7 government for worthless services, then there would be fraud on the government that may be
8 pursued under the FCA"). Likewise, to the extent that the Court's earlier order suggests that
9 conditions of participation and conditions of payment are mutually exclusive and that the former
10 can never form the basis for a False Claims Act suit, such a finding is also contrary to established
11 law. Notwithstanding the foregoing principles, the United States believes the Court's earlier
12 dismissals of the Relator's complaint were appropriate because the Relator failed to allege critical
13 facts needed to support her worthless services and statutory and regulatory claims.

14 A. The Relator Failed Properly To Allege A Worthless Services Claim

15 In our view, the Court correctly held that the Relator's allegations fail to make out a true
16 worthless services claim. We submit that this is the case, not because worthless services claims
17 never can be brought against nursing homes, but rather because the Relator failed to assert a
18 viable worthless services claim. Relator challenges the value of only a tiny portion of the services
19 provided and billed to the government - nutritional snacks - with no allegation that the
20 Defendants' failure to provide those snacks was so egregious that it rendered worthless the entire
21 service billed to the government as a bundle of services. Because of the manner in which skilled
22 nursing services are billed to the government, Relator's claim that the snacks provided were
23 worthless in and of themselves is insufficient to support a worthless services claim. She would
24 have had to, and appears unable to, allege facts sufficient to show that the failure to provide those

1 snacks rendered worthless the entire bundle of the services provided by the Defendant to the
2 residents at the Gig Harbor Facility.²

3 1. *Knowingly Billing for Worthless Services Constitutes a Prototypical Claim Under*
4 *the False Claims Act.*

5 In dismissing the Relator’s claim that Manor Care provided worthless snacks at the Gig
6 Harbor facility, this Court appears to follow the erroneous rationale of United States ex rel. Swan
7 v. Covenant Care, 279 F. Supp. 2d 1212 (E.D. Cal. 2002). Like the present case, Swan was a
8 declined qui tam, where the court did not receive a thorough briefing of the issues by the United
9 States, and thus relied on an erroneous understanding of the Medicare program. Although few
10 courts have considered the worthless services theory of liability in the skilled nursing facility
11 context, the other district courts to have done so have held that the theory states a viable cause of
12 action. See United States and State of Colorado v. Health Care Mgmt. Partners, et al., No. 04-cv-
13 2340-REB-BNB, Order Concerning Defendant Robert Salazar’s Motion to Dismiss (D. Colo. Oct.
14 31, 2005) (“Billing the government for worthless medical services, if done with the requisite
15 scienter, violates the FCA.” Id. p.9); United States ex rel. Garcia v. Integrated Health Systems,
16 Inc., No. 3:02-3796-24 (D. S.C. Sept. 25, 2005); c.f. United States v. NHC Healthcare Corp., 163
17 F. Supp. 2d 1051 (W.D. Mo. 2001).

18 Any decision that worthless services claims may not be brought against providers of
19 skilled nursing services runs contrary to the text of the False Claims Act, decades of case law, and
20 allows free rein to unscrupulous providers more interested in bilking the Medicare and Medicaid
21 programs than in providing the services (for which the government has paid) necessary to sustain
22 the lives of their vulnerable patients.

23 It is well-settled that billing the United States for a product or service that is of no value, if
24 done with the requisite *scienter*, violates the False Claims Act. See United States v. Bornstein,
25 423 U.S. 303 (1976). A worthless services claim stands for the unexceptional proposition that an

26 ² Nothing in the government’s investigation indicated that there were any significant deficiencies in
27 the care Manor Care provided to its patients at its Gig Harbor skilled nursing facility. Furthermore, the
28 State of Washington has conducted several surveys of the facility that similarly indicated no serious
deficiencies in the care provided. Finally, Relator stated to government investigators that she had no
knowledge whether any of the nutritional snacks at issue in this case were ordered by the patients’
physicians as set forth in the patients’ written plans of care.

1 entity may not bill the government for products or services that are so deficient that they have no
2 value to the United States. See United States ex rel. Lee v. Smithkline Beecham, Inc., 245 F.3d
3 1048, 1053 (9th Cir. 2001). Contractors who provided substandard and worthless products to the
4 United States prompted Congress to enact the False Claims Act: "For sugar, it often got sand; for
5 coffee, rye; for leather, something no better than brown paper; for sound horses and mules,
6 spavined beasts and dying donkeys; and for serviceable muskets and pistols, the experimental
7 failures of sanguine inventors or the refuse of shops and foreign armories." United States ex rel.
8 Newsham v. Lockheed Missiles and Space Co., Inc., 722 F. Supp. 607, 609 (N.D. Cal. 1989)
9 (quoting 1 F. Shannon, The Organization and Administration of the Union Army, 1861-1865, at
10 5456 (1965) (quoting Tomes, Fortunes of War, 29 Harper's Monthly Mag. 228 (1864))).

11 Courts consistently have upheld False Claims Act liability for billing for deficient products
12 and services. See United States v. McNinch, 356 U.S. 595, 599 (1958); United States ex rel.
13 Hopper v. Anton, 91 F.3d 1261, 1266 (9th Cir. 1996) (False Claims Act "actions have also been
14 sustained under theories of supplying substandard products or services"). Similarly, services that
15 are rendered but in an amount or manner that makes them the equivalent of no services, are
16 deemed to be worthless and actionable under the False Claims Act. See Lee, 245 F.3d at 1053
17 ("In an appropriate case, knowingly billing for worthless services or recklessly doing so with
18 deliberate ignorance may be actionable under § 3729. . . ."); United States ex rel. Mikes v. Strauss,
19 274 F.3d 687, 703 (2d Cir. 2001) ("[a] worthless services claim asserts that the knowing request
20 of federal reimbursement for a procedure with no medical value violates the Act irrespective of
21 any certification."). Contrary to the Swan court's erroneous dicta, and consistent with the
22 opinions of the Ninth and Second Circuits, both of which considered the issue in the context of
23 health care cases, there is no question that a health care provider that knowingly makes claims for
24 payment for worthless goods or services may be liable to the United States under the False Claims
25 Act.

26 In its Order, the Court appears to imply that the failure of the Relator to "allege that Manor
27 Care failed to provide any services at all," undermines a successful worthless services claim.
28 (Order, p. 8) The United States respectfully suggests that this statement is incorrect. A worthless

1 service, by definition, *is the provision of some service*. The determination of what constitutes
2 worthless services often is highly fact specific and must be made on a case-by-case basis. In
3 assessing whether the government, and the residents who are the beneficiaries of the government
4 programs, received any value for the service, among other factors, a court may need to examine
5 the purpose of the service, how the service was performed, and how it was billed (whether as a
6 stand alone service or part of a larger bundle of services). The latter factor is particularly
7 important in assessing the services billed by skilled nursing facilities.

8 2. *A Properly Stated Worthless Services Claim Alleges That The Bundle of Services*
9 *For Which the Government Pays Is Worthless.*

10 Skilled nursing care *is at the heart of the bargain* between Medicare and the providers of
11 nursing services, see 42 U.S.C. § 1395x(h), a fact ignored by the court in United States ex rel.
12 Swan v. Covenant Care, 279 F. Supp. 2d 1212 (E.D. Cal. 2002). The Medicare program pays
13 skilled nursing facilities (SNF's) a *per diem* amount for a bundle of services. This bundle of
14 services consists of "skilled nursing care" as well as services ancillary or incidental to the
15 provision of that skilled care. These ancillary services include room, board, and routine care such
16 as feeding, hydration, and turning and repositioning (which is necessary to prevent bed sores,
17 contractures, and other serious illness or injury). To ensure that both skilled care and all necessary
18 ancillary services are provided to residents, Medicare pays the providers of nursing facilities a
19 *bundled rate* designed to ensure that these services are provided in tandem.

20 Where, as here, Medicare pays for a bundle of services, a viable worthless services claim
21 may exist even where a provider has adequately performed some portion of the bundled services.
22 The failure to provide the government one of the bundle's services may not render the entire
23 bundle worthless. On the other hand, if a critical portion of the bundled services are not provided,
24 or are performed in a grossly deficient manner, that failure may render worthless the other
25 services that are performed. The key question is whether the government received value for the
26 bundle of services for which it paid. If the services that were provided are meaningless, or worse,
27 harmful to the patient, then neither the patient nor the government received value. Under these
28 circumstances, any services performed by the provider are properly considered worthless, and the
provider's claim for payment is no less fraudulent, and no less actionable under the False Claims

1 Act, than if it had simply failed to provide any services at all. See also United States v. NHC
2 Healthcare Corp., 163 F. Supp. 2d 1051, 1056 (W.D. Mo. 2001)(denying defendant’s motion for
3 summary judgment: “...a provider of care can cease to maintain this standard by failing to perform
4 the minimum necessary care activities required to promote the patient’s quality of life. When the
5 provider reaches that point, and still presents claims for reimbursement to Medicare, the provider
6 has simply committed fraud against the United States.”)

7 The Swan court’s conclusion that there cannot be a worthless services case as long as a
8 nursing home provides a bed and a roof to a patient, because the *per diem* rate includes the
9 provision of such routine services (bed and roof) for each patient, turns the very purpose of the
10 Medicare program on its head. The government pays providers only for skilled nursing services
11 or therapy, and, because these services must be provided on an in-patient basis, it also pays for the
12 other charges incidental to their provision, including room and board. See 42 U.S.C. § 1395x(h).
13 When measuring the value of the services provided in the Medicare program, the determining
14 factor must be whether there is value in the heart of the bundle: the skilled nursing services.³
15 Giving a pass to a skilled nursing facility that provided worthless services merely because the
16 patient had a bed and a roof over his head is the equivalent of finding that the United States is not
17 harmed when a contractor provides a box of bullets filled with sawdust, because there was some
18 value in the crate in which it was provided. This conclusion flies in the face of law, policy and
19 reason. See Cong. Globe, 37th Cong., 3rd Session., 952, 955 (1863) (Congress enacted the False
20 Claims Act “to assist in ferreting out unscrupulous defense contractors who committed fraud
21 against the Union Army by delivering bullets loaded with sawdust.”).

22 3. *Sweeney Has Failed To State A Viable Worthless Services Claim.*

23 Notwithstanding that viable worthless services claims do exist under the FCA, the Relator
24 has failed to properly articulate or allege the factual predicate of such a claim. Sweeney alleges
25 only that nutritional snacks and dietary supplements provided by Manor Care were worthless. In
26

27 ³ Of course, if certain services are not provided, the skilled nursing services may be worthless. For
28 example, to take an extreme but all too frequent occurrence, if a patient who needs help with eating is
not fed, skilled nursing care will be of little value to this patient, who may ultimately get sick or die due
to weight loss, malnutrition, or starvation.

1 none of her three complaints does she allege that any other services were not provided or
2 deficient, or that the failure to provide snacks alone rendered the entire bundle of services billed
3 by the Defendants worthless. As noted, the question in a worthless services case is whether the
4 service for which the United States was billed was worthless, and in the skilled nursing care
5 context the service consists of the entire bundle of services included in the per diem rate.

6 In this case, Manor Care and Sweeney “agree that nutritional services are not separately
7 billed services, but are part of the overall PPS rate.” To properly state a worthless services claim,
8 Sweeney would have had to allege that the bundle of nursing services for which the United States
9 paid, as a whole, was medically worthless because of the Defendant’s failure to provide
10 nutritional supplements and snacks. But she has not made such an allegation, and, given the facts
11 in this matter, she apparently would be unable to allege that the failure to provide snacks rendered
12 the bundle of services worthless. For this reason, we agree that the Relator has failed to state a
13 viable worthless services claim in this case.

14 B. Relator’s “Regulatory Violation” Claim Was Insufficient Because She Failed
15 To Allege That Those Violations Are Prerequisites to Payment

16 It is well established that violations of statutes and regulations that are prerequisites to
17 payment do state a viable claim under the FCA.⁴ An allegation of a regulatory violation, without
18 more, however, is insufficient to set forth a claim under the FCA. See United States ex rel.
19 Hopper v. Anton, 91 F.3d 1261, 1266 (9th Cir. 1996). The Court properly dismissed Relator's
20 claims because she failed to allege that the regulations in question were prerequisites to payment.

21
22 ⁴ See U.S. ex rel. Shaw v. AAA Eng'g & Drafting, Inc., 213 F.3d 519, 531-33 (10th Cir. 2000)
23 (expressly endorsing theory); United States ex rel. Quinn v. Omnicare Inc., 382 F.3d 432, 442 (3d Cir.
24 2004); U.S. ex rel. Augustine v. Century Health, 289 F.3d 409, 414-15 (6th Cir. 2002) (implicit false
25 certification of continuing compliance with Medicare requirements actionable under the FCA); Skolnick
26 v. U.S., 331 F.2d 598, 599 (1st Cir. 1964) (imposing FCA liability based upon mere cashing of check to
27 which payee was not entitled, without any representation to obtain check); U.S. ex rel. Mikes v. Strauss,
28 274 F. 3d 687, 697 (2d Cir. 2001) (liability may be premised on an implied false certification when the
underlying statute or regulation expressly states the provider must comply in order to be paid); U.S. ex
rel. Siewick v. Jamieson Science & Eng'g, 214 F.3d 1372, 1376 (D.C. Cir. 2000) (“Courts have been
ready to infer certification from silence, but only where certification was a prerequisite to the
government action sought”); Ab-Tech Construction, Inc. v. U.S., 57 F.3d 1084 (Fed. Cir. 1995)
(affirming without opinion claims court's decision expressly endorsing theory); cf. Harrison v.
Westinghouse Savannah River Co., 176 F.3d 776 (4th Cir. 1999) (questioning, but not addressing, the
viability of an implied certification claim in the Fourth Circuit).

1 We submit that conditions of participation for a nursing home can in appropriate
2 circumstances also be considered conditions of payment and can therefore properly support an
3 FCA claim. See United States ex rel. Quinn v. Omnicare, Inc., 382 F.3d 432, 442-43 (3d. Cir.
4 2004). The argument that conditions of participation and payment are always mutually exclusive,
5 and that violation of a condition of participation may never authorize the United States to deny
6 payment, is mistaken. To the contrary, the government frequently has the right to deny payment
7 when a provider violates a condition of participation. Implied in a statute or regulation that
8 authorizes the government to exclude a provider for prohibited or fraudulent acts can be the right
9 to recoup any past payments made for that prohibited conduct. When the government acts to deny
10 the defendant participation in the program, its goal is often to stop paying claims that the
11 defendant falsely certified it was entitled to receive. In many circumstances, therefore, it makes
12 no sense to hold that the government can remove the provider from the Medicare program for
13 providing defective services, but must continue paying the provider for those services. Thus, to
14 the extent that this Court intended to hold that conditions of participation can never support an
15 FCA action, we respectfully submit such a holding is overly broad.⁵ Rather, we submit that the
16 question of whether a particular condition of participation may support an FCA violation depends
17 on the specific condition of participation, and whether it can properly be viewed as being a
18 condition of payment.

19 Here the Relator has failed to allege any of the statutes or regulations allegedly violated by
20 the Defendant were conditions of payment. As a result, the Relator has failed to allege a critical
21 factual predicate for her statutory and regulatory violations claim.

22 III. CONCLUSION

23 In sum, the United States takes no position regarding whether the Court should allow
24 Relator a fourth attempt to re-plead her case. The government, however, does respectfully urge
25 this court to reconsider and clarify its prior analysis of Relator's worthless services and "regulatory
26

27 ⁵ The court cited to 42 U.S.C. § 1395i-3(h)(2)(c) for the proposition that “a skilled nursing facility
28 p.4. In fact, that section provides that the Secretary of the Department of Health and Human Services, at
his discretion, may continue to pay a provider for up to six months, but is not required to do so.

1 violation" claims, because, although Relator failed to plead the factual predicates necessary to
2 sustain such claims, billing for worthless services, and/or billing for services rendered in violation
3 of regulations that are prerequisites to payment, may form the basis for a viable FCA violation.
4

5 Respectfully submitted,

6 PETER D. KEISLER
Assistant Attorney General

7 JOHN MCKAY
8 United States Attorney

9
10 By: s/Peter Winn
11 PETER WINN
Assistant U.S. Attorney

12 MICHAEL F. HERTZ
13 MICHAEL GRANSTON
14 JILL CALLAHAN
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 30th, 2006, I electronically filed the foregoing Statement of Interest of the United States with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the CM/ECF participants.

I further certify that I have mailed by United States Postal Service the foregoing document to the following non CM/ECF participant, addressed as follows:

- 0 -

s/Kathleen Cline
KATHLEEN CLINE
Legal Assistant
United States Attorney's Office
700 Stewart Street, Suite
Seattle, Washington 98101
Phone: (206) 553-2637
Fax: (206) 553-4073
E-mail: Kathleen.M.Cline@usdoj.gov