UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA, ex rel. DEBORA PARADIES, et al., Plaintiff, v. GGNSC ADMINISTRATIVE SERVICES, LLC, et al., Defendants.	Civil Action No. 2:12-cv-00245-KOB

UNITED STATES' MOTION FOR RECONSIDERATION

Pursuant to Federal Rule of Civil Procedure 60(b), the United States respectfully moves the Court for reconsideration of its Order bifurcating the trial into two phases. *See* ECF No. 298 (hereinafter "Bifurcation Order"). The Bifurcation Order requires the United States to prove a single element of False Claims Act liability before being permitted to proceed to the second phase of trial, if at all. *Id.* In so holding, the Court did not merely bifurcate the elements of liability, it went further and limited the scope of the "falsity phase" to evidence that relates in time and location to 124 patients – a

determination that is to be made document-by-document and witness-by-witness. *See* ECF No. 304 (Status Conference Tr. 12:11-19, May 26, 2015).

On May 25, 2015, the United States filed a Request for Clarification, asking the Court to supplement its prior ruling with a new memorandum and order clarifying numerous areas of uncertainty. *See* ECF No. 300. Thereafter, the Court denied as moot the United States' request for clarification but did not supplement its prior ruling with a new memorandum and order. *See* ECF No. 302.

The United States continues to strongly object to the Bifurcation Order and asks this Court to reconsider. First, the Bifurcation Order is extraordinary, requiring the United States to jump over an arbitrary hurdle that is without precedent. The elements of False Claims Act liability in a single cause of action have never before been bifurcated by a federal district court, nor should they be. The elements of "falsity" and "knowledge of falsity" are not so distinct and separable that they may be tried separately without injustice.

Second, bifurcation will cause jury confusion, compel significant duplication at trial, and unnecessarily disrupt the lives of witnesses. A sizable portion of the United States' documentary and testimonial evidence is probative in the "falsity" phase because it undermines the reliability of the

COTIs and rebuts AseraCare's defense that every patient was eligible for Medicare hospice benefits because a physician signed a Certificate of Terminal Illness ("COTI"). *See* ECF No. 276 at 14. This same evidence is also probative in the "knowledge of falsity" phase because it shows AseraCare knew or should have known that it was submitting false claims for non-terminally patients despite COTIs signed by physicians. For example:

- AseraCare's outside auditors surveyed the Milwaukee, Wisconsin, AseraCare agency in January 2008. The auditors found that AseraCare employees did not always give doctors who signed COTIs basic patient information such as diagnosis: "**presentation of new admissions did not always include basic patient information such as diagnosis** . . . " Exhibit A (AseraCare Review of Milwaukee Hospice, Jan 23, 2008) (emphasis added). The report, which found that 40% of the Milwaukee patients reviewed were ineligible despite having signed COTIs in their medical record, was circulated to the highest levels of AseraCare's management team. *Id.*

- AseraCare's Director of Reimbursement and Outcomes reviewed claims for Medicare hospice payments submitted by the Austin, Texas, agency in 2008. Despite the fact that there were signed COTIs from a physician for all claims, the Director concluded: "**In this case, these patients should have been discharged from service long ago. It truly would be wrong of us to expect the federal government to pay for these services**." *See* Exhibit B (Email from Susan Gerhart, April 3, 2008) (emphasis added). The Director's conclusions were widely circulated, including to AseraCare's Director of Operations for the region that included the Austin agency. *Id.*

- In December 2008, a regional AseraCare nurse (a Clinical Services Regional Manager or "CSRM") identified concerns about the nursing staff at AseraCare's McKenzie, Tennessee, agency which could lead to the submission of claims for non-terminally ill patients. The nurse wrote in a weekly report that: "[e]ligibility in McKenzie is still a challenge, they confuse 'old chronic' /w terminal, LCDs poorly used as effective tool." *See* ECF No. 251 at 90, ¶ 125. Months later, AseraCare found continued problems at the McKenzie agency which led to ineligible patients. In a November 2009 report about the status of the McKenzie agency, AseraCare's Regional Director of Operations found that "[**t]his location is significantly challenged in clinical oversight and hospice eligibility as evidenced by internal and external audits**." Exhibit C (McKenzie, TN, Plan at ACCW00261006) (emphasis added). She also reported that the CSRM - who is not a physician - had the final say in all admissions and patient eligibility determinations: "**CSRM has the final say in all admission and current patient eligibility determination**." *Id.* This report was sent directly to the President of AseraCare. *Id.*

For each of these examples, plus a trove of other evidence, bifurcation will confuse the jury in Phase 1 because witnesses will not be able to freely testify about these documents to the extent their testimony relates to "knowledge of falsity." Practically speaking, it is unclear how the Court would enforce its bifurcation Order without parsing each piece of evidence on a document-by-document (potentially line-by-line) basis – an unfathomable approach in a case of this size. In addition, bifurcation will disrupt the personal lives of witnesses who live all over the United States, and needlessly prolong the length of time jurors must sit for this case, because the United States will have to recall the same witnesses and show

different portions of the same documents to prove that AseraCare knew or should have known it was submitting false claims. Bifurcation will also cause unnecessary delay because the Court will need to entertain arguments by counsel, resolve "falsity" or "knowledge of falsity" disputes, and make rulings on a document-by-document and witness-by-witness basis.

Third, evidence about AseraCare's patterns and practices that contributed to the submission of false claims undermines AseraCare's defense, but is not prejudicial or confusing. To the contrary, such evidence will help the jury understand why AseraCare regularly submitted claims for ineligible patients to Medicare and how AseraCare implemented its practice of submitting false claims to Medicare.

Consequently, the United States respectfully requests that the Court reconsider the Bifurcation Order and allow the United States to proffer evidence that proves the entirety of its False Claims Act allegations without hindrance or suppression of highly relevant evidence in a single, efficient, and uninterrupted trial. Otherwise, the United States' case will be subject to delay, significant duplication, and unnecessary burden to the parties, the jury, witnesses and the Court.

I. LEGAL STANDARD

Federal Rule of Evidence 60(b) provides, in relevant part: "On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; … or (6) any other reason that justifies relief." Fed. R. Civ. P. 60(b). According to the Eleventh Circuit, "Rule 60(b) is to be given a liberal and remedial construction." *Nisson v. Lundy*, 975 F.2d 802, 807 (11th Cir. 1992). The decision to grant or deny a motion to reconsider is left to the discretion of the trial court. *See Chapman v. AI Transp.*, 229 F.3d 1012, 1023-24 (11th Cir. 2000).

II. THE COURT'S RULING IS WITHOUT PRECEDENT

Since the False Claims Act ("FCA") was enacted in 1863, no federal district court has ever ordered separate trials on the elements of liability under the FCA. The elements of FCA liability have not been separated in the context of health care fraud, government contracts fraud, crop insurance fraud, mortgage fraud, or any other type of fraud on the United States that is subject to liability under the FCA. Thus, the Bifurcation Order is truly an extraordinary and unpreceded action.

Furthermore, its result contravenes governing precedent. The United States Supreme Court has explained that, in allowing bifurcation, a court

must ensure that issues are "so distinct and separable" that they may be tried separately without injustice. *Gasoline Prods. Co. v. Champlin Refining Co.*, 283 U.S. 494, 500 (1931); *see also Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 318 (5th Cir. 1979) ("This Court has cautioned that separation of issues is not in the usual course that should be followed, and that the issue to be tried must be so distinct and separable from the others that a trial of it alone may be had without injustice."); MANUAL FOR COMPLEX LITIGATION § 11.632 (4th ed. 2012) ("issues for trial should not be severed if they are so intertwined that they cannot fairly be adjudicated in isolation. . . .").

No federal district court has ever bifurcated the elements of liability because the elements of liability of a single FCA cause of action are not "so distinct and separable" that they may be tried separately without injustice. *See United States ex rel. Walker v. R&F Properties of Lake Cnty, Inc.*, 433 F.3d 1349, 1360 (11th Cir. 2005) (finding that knowledge of how a defendant carried out a fraudulent scheme can substantiate allegations that the scheme resulted in false claims). Indeed, even courts outside of the FCA context have found that "knowledge" issues should not be tried separately from other questions of liability. *See Kimberly-Clark Corp. v. James River Corp.*, 131 F.R.D. 607 (N.D. Ga. 1989) (declining to bifurcate "infringement" and "willfulness" in a patent case because "the willfulness

determination, i.e., the defendant's state of mind when it infringed the patent, is a finding of fact inextricably bound to the facts underlying the alleged infringement."). Evidence of AseraCare's practice of admitting and keeping ineligible patients on hospice is highly probative of AseraCare's liability under the FCA, even if this evidence does not fit neatly into the "falsity" or "knowledge" categories.

III. BIFURCATION WILL CAUSE JURY CONFUSION, UNNECESSARY DELAY, SIGNIFICANT DUPLICATION, AND DISRUPTION TO WITNESSES

Bifurcation is also not appropriate where, as here, proving the elements of the cause of action involves overlapping evidence that cannot be separately presented without causing delay and inconvenience to all parties and witnesses. *See, e.g., In re "Agent Orange" Prods. Liability Litig.*, 565 F. Supp. 1263, 1275 (E.D.N.Y. 1983) (separate trial on government contractor defense deemed inappropriate because trial would involve the same evidence that would be needed to determine the issue of liability); *Payne v. A.O. Smith Corp.*, 99 F.R.D. 534, 539 (S.D. Ohio 1983) (overlap of evidence precluded bifurcation of issue of proximate cause).

In response to the United States' request for clarification, ECF No. 300, the Court explained that it intends to allow evidence that is connected

in time and place to the claims in the United States' statistically valid random sample:

> I was trying to address the government's concern that basically all our good evidence is going to be excluded by saying, in essence, if you can show me some connection to the claims that are at issue, you know, that's going to be relevant and I'm going to let it in. And I do understand that general practices can be used to show certain conduct. But even there, it's got to have some time and place connection, I think.

See ECF No. 304 (Tr. of Proceedings 6:19 -7:2, May 28, 2015).

In Phase 1 of a bifurcated trial, the United States will present evidence – connected in time and location to the patients in the sample – that undermines the reliability of the COTIs and rebuts AseraCare's defense that every patient was eligible for Medicare hospice benefits because a physician signed a COTI. Much of this same evidence would need to be duplicated in Phase 2 to demonstrate AseraCare's knowledge, reckless disregard, or deliberate ignorance of the false claims. The United States' sample contains ineligible patients from AseraCare's agencies in Milwaukee (Wisconsin), Austin (Texas), and McKenzie (Tennessee) within the timeframe 2007 through 2012. The following three examples show the type of evidence that would need to be duplicated in both phases of a bifurcated trial.

First, the United States intends to present – in both phases – reports from AseraCare's outside auditors who surveyed AseraCare agencies at the

time they were billing for patients in the statistically valid random sample. These reports demonstrate that AseraCare employees had a practice of not providing physicians with clinical information about AseraCare patients necessary to evaluate whether the patients were terminally ill. These same reports also demonstrate that AseraCare had a regular practice of submitting claims for which the clinical information and other documentation in patient medical records do not support terminal illness, i.e., a practice of submitting claims that were false. More specifically, AseraCare's outside auditors, who surveyed the Milwaukee, Wisconsin, agency in January 2008, found that discussions between AseraCare's clinical team and the certifying physician – "lacked sufficient reference to criteria for eligibility." Exhibit A (AseraCare Review of Milwaukee Hospice, Jan 23, 2008). Furthermore, the report concluded that "**presentation of new admissions did not always include basic patient information such as diagnosis** . . . ." *Id.* (emphasis added). The report also found that 40% of the Milwaukee patients with signed COTIs reviewed during the audit were nonetheless ineligible to receive the hospice benefit because the documentation in the medical record did not support a terminal diagnosis. This report was circulated to the highest levels of AseraCare's corporate structure.

Second, the United States intends to present – in both phases – testimony and documents related to a review conducted in 2008 for claims submitted by AseraCare's agency in Austin, Texas. For each claim reviewed, the patient's file contained a COTI from a physician stating that the patient was terminally ill. Despite signed COTIs for each patient, AseraCare's National Director of Reimbursement and Outcomes found: "**The documentation simply was not there to support eligibility. Some of these patients were on service in excess of 3 years – and still walking, talking, independent, no change since admission – need I go on**?" Exhibit B (Email from Susan Gerhart, April 3, 2008) (emphasis added). She continued: "In this case, these patients should have been discharged from service long ago. **It would truly be wrong of us to expect the federal government to pay for these services**." *Id.* (emphasis added). This email from AseraCare's National Director of Reimbursement and Outcomes was widely circulated, including to AseraCare's Director of Operations Peggy Durkin and to AseraCare's Director of Clinical Services and future President Angie Hollis. *Id.*

Third, the United States intends to introduce evidence of practices in AseraCare's McKenzie, Tennessee, agency in 2008 and 2009. In December 2008, a regional AseraCare nurse (a Clinical Services Regional Manager or

"CSRM") identified concerns about the nursing staff at AseraCare's McKenzie, Tennessee, agency which could lead to the submission of claims for non-terminally ill patients. The nurse wrote in a weekly report that: "[e]ligibility in McKenzie is still a challenge, they confuse 'old chronic' /w terminal, LCDs poorly used as effective tool." *See* ECF No. 251 at 90, ¶ 125. Months later, AseraCare found continued problems at the McKenzie agency which led to ineligible patients. In a November 2009 report about the status of the McKenzie agency, AseraCare's Regional Director of Operations found that "**This location is significantly challenged in clinical oversight and hospice eligibility as evidenced by internal and external audits**." Exhibit C (McKenzie, TN, Plan at ACCW00261006) (emphasis added). The report also stated that the CSRM – who is not a physician – had the final say in all admissions and patient eligibility determinations: "**CSRM has the final say in all admission and current patient eligibility determination**." *Id*. (emphasis added). This report was sent directly to the President of AseraCare Bob Donovan, with an electronic copy sent to the Vice President of Clinical Affairs, and future AseraCare President Angie Hollis.

All of this evidence, as well as a trove of other evidence collected by the United States, is highly probative of the issue of whether the physician

certifications (i.e., the COTIs) are reliable statements. This same evidence is also relevant to whether AseraCare knew or should have known it was submitting false claims for patients who were not terminally ill. Bifurcating the trial will confuse the jury in Phase 1 because witnesses may not be able to freely testify about those documents relating to "knowledge of falsity" and the jury may be distracted by line-by-line redactions.

Practically speaking, it is unclear how the Court could limit witness testimony and documentary evidence that include both "falsity" and "knowledge of falsity" in Phase 1. Bifurcation would seem to require this Court to parse each piece of evidence on a document-by-document basis (potentially on a line-by-line basis), entertain arguments by counsel, resolve disputes, and make rulings – an approach that is unfathomable in a case this size.

In addition, bifurcating the trial will cause unnecessary delay and duplication in Phase 2 and disrupt the personal lives of witnesses who live all over the United States. Bifurcation would compel the United States to recall the same witnesses and show the same documents (or different portions of the same documents) to prove that AseraCare knew or should have known it was submitting false claims.

IV. BIFURCATION IS UNWARRANTED BECAUSE EVIDENCE OF ASERACARE'S PRACTICE OF ADMITTING AND KEEPING INELIGIBLE PATIENTS IS NOT PREJUDICIAL OR CONFUSING

As this Court correctly held in its Order on summary judgment, a central question of fact in this case is "whether clinical information and other documentation in the medical record support the certifications of terminal illness, a pre-requisite for payment of a Medicare Hospice Benefit claim." ECF No. 268 (Order at 15). Under well-established Eleventh Circuit precedent, AseraCare's claims are false if they do not meet this pre-requisite for payment and are therefore not reimbursable. *See United States ex rel. Walker v. R&F Props. of Lake Cnty., Inc.*, 433 F.3d 1349, 1356 (11th Cir. 2005) ("Medicare claims may be false if they claim reimbursement for services or costs that either are not reimbursable or were not rendered as claimed.").

To prove that AseraCare's claims for hospice services were false, the United States will rely on medical records and expert opinions showing that the "clinical information and other documentation" in the medical records do not support a medical prognosis that the patient has a life expectancy of six months or less if his or her illness runs its normal course.

To prove that AseraCare knowingly submitted false claims, the United States will rely on evidence that AseraCare coerced its employees to admit

and keep ineligible patients, recklessly disregarded warnings, red flags and persistent expressions of concern raised over and over again by its own employees, as well as evidence that AseraCare deliberately disregarded its own auditors who repeatedly informed AseraCare that it was billing Medicare for patients who were not terminally ill. Clearly possessing knowledge that it was submitting false claims to Medicare, AseraCare continued to do so.

To rebut AseraCare's falsity defense that every AseraCare patient was eligible because a physician certified each patient as terminally ill, *see* ECF No. 276 (Pretrial Order at 14), the United States intends to show, through fact witnesses and documentary evidence, that: (1) AseraCare placed great pressure on its sales force to refer patients who were not terminally ill and therefore not eligible for the Medicare hospice benefit; (2) once these invalid referrals were in the system, AseraCare marginalized and misled doctors and pressured its clinical staff to admit and re-certify non-terminally ill patients; and (3) AseraCare disregarded its own auditors' warnings that the company was admitting ineligible patients because physicians were not adequately involved in making eligibility determinations.

This evidence undermines AseraCare's defense but is not "unfair" or confusing. *See Dollar v. Long Mfg., N.C. Inc.*, 561 F.2d 613, 618 (5th Cir.

1977) ("Virtually all evidence is prejudicial or it isn't material. The prejudice must be unfair."). Evidence of AseraCare's practices is highly probative because this evidence rebuts AseraCare's falsity defense that every AseraCare patient was eligible because a physician certified each patient as terminally ill. *See* ECF No. 276 (Pretrial Order at 14). Rather than forcing the jury to deliberate on falsity in a vacuum, this evidence will help the jury understand why AseraCare regularly submitted claims for ineligible patients to Medicare and how AseraCare was able to submit these claims with the required physician signatures.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court reconsider its Order bifurcating the trial into two phases. The United States requests the Court allow the United States to proffer evidence that proves the entirety of its False Claims Act allegations in a single streamlined and efficient trial, without hindrance or suppression of the evidence in any phase.

Dated June 10, 2015

Respectfully submitted,

BENJAMIN C. MIZER
PRINCIPAL DEPUTY ASSISTANT
ATTORNEY GENERAL

JOYCE WHITE VANCE

UNITED STATES ATTORNEY

LANE HINES WOODKE
Assistant United States Attorney
1801 4th Avenue North
Birmingham, AL 35203
Telephone: (205) 244-2107
Lane.Woodke@usdoj.gov

/s/ Jeffrey A. Wertkin
MICHAEL D. GRANSTON
RENÉE BROOKER
HOLLY H. SNOW
JEFFREY A. WERTKIN
CAROLYN B. TAPIE
WILLIAM E. OLSON
EVA U. GUNASEKERA
Attorneys, Civil Division
Commercial Litigation Branch
P.O. Box 261, Ben Franklin Station
Washington, DC 20044
Telephone: (202) 305-3911
Jeffrey.A.Wertkin@usdoj.gov

Counsel for the United States

CERTIFICATE OF SERVICE

I, Jeffrey A. Wertkin, Trial Attorney for the United States Department of Justice, hereby certify that on June 10, 2015, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to counsel for the relators and defendants.

/s Jeffrey A. Wertkin
Jeffrey A. Wertkin
Trial Attorney
U.S. Department of Justice