UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE LORAZEPAM & CLORAZEPATE ANTITRUST LITIGATION	MDL Docket No. 1290 (TFH) Misc. No. 99ms276 (TFH)
This Opinion applies to: THE UNITED STATES OF AMERICA, ex rel WHIDDON, Plaintiff, v. MYLAN LABORATORIES, INC. et al., Defendants.	Civ. No. 99-2457 (TFH)

FILED
JAN 16 2001
NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

MEMORANDUM OPINION

This case has been transferred to this Court pursuant to 28 U.S.C. § 1407 for multidistrict purposes. Pending before the Court is the defendants' Motion to Dismiss Qui Tam Complaint for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure, for failure to state a claim upon which relief can be granted under Rule 12(b)(6), for a lack of standing, and for lack of personal jurisdiction under Rule 12(b)(2). Upon careful consideration of the defendants' motion, the opposition and reply thereto, and the entire record herein, the Court will grant the defendants' motion and dismiss this case.

(N)

I. BACKGROUND

Relator Patrick Whiddon is a licensed pharmacist employed by K-Mart in South Carolina. He filed this qui tam action under the federal False Claims Act ("FCA"), 31 U.S.C. §3729-3733, on behalf of the United States government to recover damages he claims the federal government suffered as a result of unlawful trade practices of defendants with respect to the manufacture and sale of the generic prescription drugs Lorazepam and Clorazepate. Although the complaint was originally filed in South Carolina, the Judicial Panel on Multidistrict Litigation transferred it to this Court for proceedings pursuant to 28 U.S.C. § 1407 ("[C]ivil actions involving one or more common questions of fact . . . pending in different districts . . . may be transferred to any district for coordinated or consolidated pretrial proceedings.").

In his lawsuit, the relator alleges that Mylan Laboratories, Inc. ("Mylan") entered into exclusive agreements involving the generic drugs at issue with Profarmaco S.r.l. ("Profarmaco"), a subsidiary of Cambrex Corporation ("Cambrex"), through Profarmaco's United States distributer, Gyma Laboratories of America, Inc. ("Gyma"). Mylan thus cornered the market on raw materials necessary for the manufacture of these generic drugs, raised the prices of the drugs to an exorbitant level, and thereby violated various federal and South Carolina laws. See Relator's Amended Complaint ¶¶ 6-7, 10. On the basis of these facts, the relator states seven causes of action against the defendants in his complaint. Count One alleges a violation of the federal False Claims Act ("FCA"), 31 U.S.C. §§ 3729, 3730. See id. ¶¶ 18-19. Count Two alleges a violation of the federal Racketeer Influence and Corrupt Organizational Act ("RICO"), 18 U.S.C. §§ 1961-1968. See id. ¶¶ 20-31. Count Three alleges unfair trade practices in violation of the South Carolina Unfair Trade Practices Act, S.C. Code § 39-5-10, *et seq*. See id.

¶¶ 32-47. Count Four alleges anticompetitive practices in violation of S.C. Code § 39-3-10. See id. ¶¶ 48-52. Count Five alleges unjust enrichment under South Carolina common law. See id. ¶¶ 53-56. Count Six alleges disgorgement under South Carolina common law. See id. ¶¶ 57-58. Count Seven alleges civil conspiracy under South Carolina common law. See id. ¶¶ 59-64.

In response, the defendants filed this motion to dismiss, which asserts four bases for dismissing this qui tam action: (1) the Court has no subject matter jurisdiction over the FCA claim pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure; (2) the relator's complaint fails to state a claim under the FCA upon which relief can be granted pursuant to Rule 12(b)(6); (3) the relator has no standing to bring any of the non-FCA claims; and (4) in any event, the Court has no personal jurisdiction over Cambrex and Profarmaco. The Court will address each argument below.

II. DISCUSSION

A. Subject Matter Jurisdiction

The FCA grants private individuals a cause of action against those who submit false claims to the government. See 31 U.S.C. § 3730(b); United States ex rel. Findley v. FPC-Boron Employees' Club, 105 F.3d 675, 678 (D.C. Cir. 1997). Private individuals who bring such actions are identified as relators and are authorized to receive a portion of any government recovery for bringing suit. See 31 U.S.C. § 3730(d); Findley, 105 F.3d at 678.[1] However, the FCA also has jurisdictional limitations. Pertinent here are two limitations upon which the defendants base their motion to dismiss for lack of subject matter jurisdiction under Rule

[1] The FCA requires the relators to file their complaint under seal in order to permit the government sixty days to decide whether to intervene as plaintiff. See 31 U.S.C. § 3730(b)(2). Here, the federal government has decided not to intervene, and the relator has proceeded with the action.

12(b)(1). The first is a public disclosure bar, which prohibits qui tam actions that are "based upon" public information. 31 U.S.C. § 3730(e)(4). The second is a piggy-back bar, which prohibits qui tam actions that are based upon the same "allegations or transactions" that are part of a lawsuit to which the federal government is already a party. 31 U.S.C. § 3730(e)(3). If either provision is triggered, a relator will be unable to maintain his lawsuit. For the reasons stated below, the Court finds that both bars are triggered, requiring the dismissal of this qui tam action under the FCA.

1. Public Disclosure Jurisdictional Bar

The FCA bars lawsuits "based upon" public information, unless the relator is an "original source" of the information:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A). The FCA defines an "original source" as:

> an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. § 3730(e)(4)(B). Section 3730(e)(4) therefore provides a two-part test for determining jurisdiction: (1) whether the "allegations or transactions" upon which the qui tam action is based were "publicly disclosed"; and (2) if they were, whether the relator is an "original source." Findley, 105 F.3d at 681; United States ex rel. Schwedt v. Planning Research Corp., Inc., 39 F. Supp.2d 28, 31 (D.D.C. 1999).

The first prong of section 3730(e)(4) has two distinct requirements. First, there must be a " 'public disclosure of allegations or transactions.' " Schwedt, 39 F. Supp.2d at 31 (quoting 31 U.S.C. § 3730(e)(4)(A)). Second, the qui tam suit must be "based upon" the public disclosure. Id. (quoting 31 U.S.C. § 3730(e)(4)(A)). With respect to the first, the FCA specifically covers disclosures made in the news media. See 31 U.S.C. § 3730(e)(4)(A). As early as February 7, 1998, the news media contained reports that subsequently formed the central allegations of the FTC's case:

> Mylan Laboratories . . . raised the prices [of six generic drugs] late last month, including a 20-fold jump in the price of . . . [Lorazepam]. . . . The Medicaid program is particularly vulnerable to increases in generic drug prices . . . Mylan may have cornered the market on the drugs by securing exclusive agreements with suppliers of raw materials.

Jim DeBrosse, Generics Get Pricey, Dayton Daily News, Feb. 7, 1998, at 1A. See also, e.g., Sandra Brown Kelly, Generic Drug Prices Soaring, Roanoke Times & World News, Feb. 21, 1998, at A5 ("Mylan Laboratories' generic version of the anti-anxiety drug Tranxene [i.e., Clorazepate, that] used to cost $3 wholesale now costs $300 . . . . [Mylan] has cornered the market on raw materials for the drugs."). The relator's allegations of exclusive agreements allowing the defendants to corner the market on raw materials for the generic drugs, price hikes, and the impact on federal programs such as Medicaid were thus publicly disclosed through the news media as early as February 7, 1998 and were further explored in news accounts throughout the balance of 1998.[2]

[2] In July, the media carried additional stories about the FTC's investigation of Mylan's price increases and referenced its exclusive agreements with Profarmaco for Lorazepam and Clorazepate, for example, and the Federal Trade Commission and state Attorneys General filed their lawsuits in December.

The relator apparently does not dispute the existence or timing of such news accounts. Rather, he argues that news accounts did not have the requisite form and content to disqualify his claim under the FCA. The relator is correct in his assertion that public disclosures must have the correct form—"a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media"—and content—"allegations or transactions"—to disqualify a qui tam action. 31 U.S.C. § 3730(e)(4)(A). But as newspaper articles, the disclosures clearly satisfy the requisite form. And the content of the articles, as described above, describe the exclusive contracts, price increases, and potential effects on programs such as Medicaid. The relator attempts to distinguish his disclosure on the ground that the news articles merely relayed the obvious and failed to disclose the real rationale behind Mylan's behavior. That is, Mylan put a false "public spin," on its price increases, which the relator uniquely reported. Even so, this distinction is inadequate to defeat a finding of public disclosure. The pertinent transactions underlying all the allegations in this case were reported by the news media, and the Court finds that the "allegations or transactions" at issue in this case were therefore publicly disclosed.

Having found that the "allegations or transactions" underlying this action were publicly disclosed, the Court must next examine whether this qui tam action is "based upon" the public disclosures. Schwedt, 39 F. Supp.2d at 31 (quoting 31 U.S.C. § 3730(e)(4)(A)). The parties here dispute the proper interpretation of "based upon" for the purposes of the FCA. In United States ex rel. Siller v. Becton Dickinson & Company, the Fourth Circuit held that the term "based upon" bars only suits in which the information relied on by the relator was derived solely from the public disclosures. 21 F.3d 1339, 1349 (4th Cir. 1994). Finding the Siller interpretation to be an anomaly among the circuits, however, the D.C. Circuit rejected the Fourth Circuit's interpretation in Findley: "We reject Siller, however, because our review of the language, structure, history and purpose of the FCA demonstrates that Congress sought to limit qui tam actions 'to those in which the relator has contributed significant independent information [that is not already in the public domain].' " 105 F.3d at 682 (quoting United States ex rel. Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 653 (D.C. Cir. 1994)). It found that the Fourth Circuit's interpretation would render the original source exception to the public disclosure bar "largely superfluous." Id. at 683. Under the Siller test, reasoned the D.C. Circuit, a relator who has actually derived his complaint from public information such as the *Washington Post* could conduct an "independent" investigation and beat the government to the courthouse. See id. Thus, the D.C. Circuit adopted a "broader construction of the jurisdictional bar to encompass situations in which the relator's complaint repeats what the public already knows, even though she had learned about the fraud independent of the public disclosures." Id. It interpreted "based upon" to mean "supported by" or "substantially similar to" rather than "derived from." Id. at 682. The public disclosure bar is therefore triggered when the allegations or transactions are to those in the public domain, regardless of the actual source for the information in the particular complaint. See id.

The relator argues, however, that the Siller interpretation should nonetheless apply to this action because he filed this claim in South Carolina. In In re Korean Air Lines Disaster, 829 F.2d 1171, 1174 (D.C. Cir. 1987), the D.C. Circuit addressed the question of whether in multidistrict litigation cases, the law applicable in the transferor forum necessarily attends the transfer. It answered the question in the negative, holding that on substantive federal questions,

" 'the transferee court [should] be free to decide a federal claim in the manner it views as correct without deferring to the interpretation of the transferor circuit.' " Korean Air Lines, 829 F.2d at 1174 (quoting Richard L. Marcus, Conflict Among Circuits and Transfers Within the Federal Judicial System, 93 Yale L.J. 677, 721 (1984)). This holding rested upon the uniformity principle of federal law. The court reasoned that unlike conflict of laws cases in which state law interpretations are involved, " '[t]he federal courts comprise a single system [in which each tribunal endeavors to apply] a single body of law . . . .' " Id. at 1175 (quoting H.L. Green Co. v. MacMahon, 312 F.2d 650, 652 (2d Cir. 1962)). "[I]t is logically inconsistent to require one judge to apply simultaneously different and conflicting interpretations of what is supposed to be a unitary federal law." Id. The court importantly proceeded to adopt language to the effect that " '[t]here is no room in the federal system of review for rote acceptance of the decision of a court outside the chain of direct review. If a federal court simply accepts the interpretation of another circuit without [independently] addressing the merits, it is not doing its job.' " Id. at 1175 (quoting Marcus, *supra*, at 679, 702).

The relator argues that Korean Air Lines is inapposite to the analysis here. He contends that in ordinary multidistrict litigation, there are multiple cases confronting similar legal and factual situations, and the D.C. Circuit's rationale in Korean Air Lines applies to allow district courts to resolve conflicts and unify federal law. But because there can only be one FCA claim in a case, Korean Air Lines should not apply here: there can be no conflicts to resolve because there are no other cases. See Relator's Opposition at 3.

These arguments are misplaced. The parties dispute what interpretation of the FCA's "based upon" language is applicable to this case, and Korean Air Lines—the law of this circuit—provides the binding resolution. Under the holding of Korean Air Lines, this Court is not bound by the Fourth Circuit's interpretation of "based upon." And because the D.C. Circuit has ruled definitively on how to interpret "based upon" in Findley, this Court must follow that interpretation.[3] Findley explicitly rejected Siller, and this Court will not, therefore, reconsider the issue here. Having found Findley's "supported by" interpretation of the FCA's "based upon" language to be controlling, the Court must next apply that interpretation to the facts at hand.

The defendants argue that the relator's allegations are "substantially similar" to, and therefore "based upon" the publicly disclosed information in the media. While conceding that news accounts may have described the transactions in this case before he reported his allegations, the relator counters that he never consulted them. Rather, the allegations he reported to the U.S. Attorney's office in Philadelphia stemmed solely from a memorandum he received in mid-February 1998 while working at K-Mart, which described expected price increases in the generic drugs. But the relator relies too heavily on the Siller interpretation of "based upon," which is inapplicable here. Under the Findley standard, it is clear that the relator's allegations are "supported by" the news reports that publicly disclosed the price increases, Mylan's cornering of the raw materials market, and the negative effects on Medicare and Medicaid. 105 F.3d at 682. That the defendant also purports to have seen through Mylan's spin does not change this conclusion. Assuming that the relator has made an additional charge not contained in the news accounts, the public was already aware of the transactions underlying the allegations involved,

[3] While it may be true that if the D.C. Circuit had not definitively ruled on an issue, this Court would closely consider the law of the transferor circuit. But this case does not present such an occasion.

and the relator's reported information was nonetheless "substantially similar" to those publicly disclosed in the news media. Id.

Because the relator's complaint is based upon publicly disclosed information, this qui tam action can withstand the jurisdictional bar of section 3730(e)(4) only if he was an "original source" of the information. As with the first prong of section 3730(e)(4), this second prong also has two distinct requirements. First, the relator can be considered an original source only if he had "direct and independent knowledge of the information on which the allegations are based." 31 U.S.C. § 3730(e)(4)(B). In order to be "direct," the information on which the relator's complaint relies must be "firsthand" knowledge. Findley, 105 F.3d at 690; see also Quinn, 14 F.3d at 656 (quoting United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co., 944 F.2d 1149, 1160 (3d Cir.1991)) (" 'Direct' signifies 'marked by absence of an intervening agency.' "). "Independent knowledge" is "knowledge that is not itself dependent on public disclosure." Quinn, 14 F.3d at 656. Second, the relator must have "voluntarily provided the information to the Government before filing" his action. 31 U.S.C. § 3730(e)(4)(B). And in the D.C. Circuit, it is "clear . . . that an 'original source' must provide the government with the information prior to any public disclosure." Findley, 105 F.3d at 675.

The relator has, at best, indirect knowledge of the allegations or transactions at issue in this case. The relator received his price increase information from a memorandum he received in mid-February 1998, when he was working for K-Mart. And while he may have had a conversation with wholesaler about the fact that Mylan had cornered the market on raw materials for the generic drugs, he had no "firsthand" knowledge of the exclusive contracts that led to it. Findley, 105 F.3d at 690. Moreover, even construing all inferences in the relator's favor, he did not report any information to the government prior any public disclosure of it. The news began reporting the pertinent information, as shown above, as early as February 7, 1998. The earliest conversation the relator claims to have had with the U.S. Attorney's office in Philadelphia occurred shortly after he saw the price increase memorandum at K-Mart. But he did not begin working at K-Mart until mid-February 1998, which needless to say is after February 7, 1998. Ultimately, therefore, this qui tam claim under the FCA is barred by section 3730(e)(4) of the FCA, and on this basis alone, must be dismissed.

2. Piggy-Back Jurisdictional Bar

The FCA also bars all cases that are based upon the same allegations or transactions that are part of a lawsuit to which the federal government is already a party:

> In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

31 U.S.C. § 3730(e)(3). The court in United States ex rel. S. Prawer & Co. v. Fleet Bank of Maine interpreted the language "based upon transactions or allegations which are the subject of" another lawsuit to require a determination as to whether the two lawsuits in question can be viewed as having a "host/parasite relationship." 24 F.3d 320, 327 (1st Cir.1994). A "host/parasite" relationship is one in which the qui tam action is receiving "support, advantage or the like" from the host case in which the government is a party, without giving "any proper or useful return to the government." Id. In other words, the FCA bars "piggy-back" qui tam lawsuits. Findley, 105 F.3d at 675.

Pointing to this section as another grounds for dismissal, the defendants argue that this qui tam action is substantially similar to the Federal Trade Commission's ("FTC") case in this multidistrict litigation and should therefore be dismissed. The relator claims in this action that Mylan "raised the wholesale price of the generic version of these drugs . . . after it cornered the market for raw materials before raising the prices." Relator's Amended Complaint ¶ 6. Similarly, the FTC's complaint alleges that "Mylan embarked on a strategy to raise the price . . . of some of its generic drugs by seeking from its [raw material] suppliers, long term exclusive licenses. . . ." FTC Complaint ¶ 19. Both complaints are based on the same alleged exclusive licensing transactions, and both cases seek monetary relief for this anticompetitive behavior.

The relator nonetheless maintains that his case is distinguishable from FTC action on two grounds. First, he claims as he did with respect to the public disclosure bar that his case is not "based upon" the FTC action within the meaning of Siller, 21 F.3d at 1349. Second, he contends that the relief sought by the FTC is different, because FTC seeks disgorgement for direct payments and not relief for reimbursements paid by agencies such as the Health Care Financing Agency ("HCFA").

For the same reasons stated in the public disclosure bar discussion above, the relator's first argument is without merit. His second argument, while a closer call, is not persuasive. Even if there is a difference in the remedy sought, that distinction is likely not as large as the relator believes. The FTC's original complaint addresses harm to government agencies: "As a result of these substantial and unprecedented price increases for Lorazepam and Clorazepate tablets, many purchasers, including pharmacies, hospitals, insurers, managed care organizations, wholesalers, government agencies, and others, have paid substantially higher prices. . . ." FTC

Complaint ¶ 30. And it goes on to ask for "such other equitable relief, including disgorgement and restitution in an amount . . . as the Court finds necessary to redress and prevent recurrence of defendants' violations . . . ." FTC Complaint, Prayer for Relief ¶ 4. The distinction drawn by the relator between the relief sought for payments vis-à-vis reimbursements is therefore not clear, and reimbursements are not necessarily precluded from the FTC suit. Even if this was not the case, the potential of additional monetary return to the government is insufficient to overcome this jurisdictional hurdle. See, e.g., United States ex rel. Stone v. AmWest Sav. Ass'n, 999 F. Supp. 852, 855 (N.D. Tex. 1997) ("If the qui tam action receives support from the earlier case without giving the government any useful return (other than the potential for monetary recovery), the basis and the subject of the lawsuits are the same."). Because the quit tam and FTC complaints allege the same underlying transactions and allegations, and because the only potential distinction relates to additional monetary relief, the Court finds that this qui tam action is substantially similar to the FTC complaint, and is therefore parasitic within the meaning of Prawer, 24 F.3d at 327, and barred by the FCA.

B. Failure to State a Claim

Even if jurisdiction existed over the relator's FCA cause of action, the Court finds that the relator's complaint fails to state a claim. A motion to dismiss under Rule 12(b)(6) will be granted only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); see Hishon v. King & Spalding, 467 U.S. 69, 73 (1984) ("A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations."). In reviewing such a motion, the Court must construe the complaint in the light most favorable to plaintiff and must accept as true all allegations and all reasonable factual inferences drawn from well-pleaded factual allegations. See In re United Mine Workers Employee Benefit Plans Litig., 854 F. Supp. 914, 915 (D.D.C. 1994).

Assuming that Mylan did unlawfully corner the market and raise prices, as the Court must do at this stage, the question before the Court is whether such anticompetitive behavior constitutes a valid basis for an FCA claim. Liability under the FCA is premised upon the United States government receiving and paying a "false or fraudulent claim." 31 U.S.C. § 3729(a). Such a claim is defined as:

> [A]ny request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

31 U.S.C. § 3729(c). The relator does not allege that the defendants made any affirmative misrepresentations to the government in order to receive a payment. He does not allege, for example, that the defendants misrepresented Mylan's prices to the government. Rather, the relator's theory is that when Mylan raised its prices with a false explanation to the public through its spin, "the company . . . used a false record to obtain a series of payments from the United States or reduce an obligation to the United States. . . . Where entities collude to engage in obtaining money through a false record, the act is violated." Relator's Opposition at 12. While

he generally points to three sections of the FCA,[4] the relator cites no case authority to support such a broad theory of liability under the FCA. Perhaps the closest analog available to him is the false certification theory, under which liability attaches when one falsely submits a required certification that certain conditions precedent to payment, such as compliance with the law, have been met. See, e.g., United States ex rel. Siewick v. Jamieson Science and Eng'g, Inc., 214 F.3d 1372 (D.C. Cir. 2000). The D.C. Circuit, however, has made clear that " '[v]iolations of laws, rules, or regulations alone do not create a cause of action under the FCA. It is the false certification of compliance which creates liability when certification is a prerequisite to obtaining a government benefit.' " Id. (quoting United States ex rel. Hopper v. Anton, 91 F.3d 1261, 1266 (9th Cir. 1996)). See also, e.g., X Corp. v. Doe, 816 F. Supp. 1086, 1093 (E.D. Va. 1993) ("The heart of fraud is an intentional misrepresentation. A violation of a regulatory provision, in the absence of a knowingly false or misleading representation, does not amount to fraud.").

Under cases such as Siewick, therefore, a necessary predicate for liability is a certification requirement. The relator here has made no allegations that any certification, let alone certification from Mylan that its prices were raised in compliance with federal law, was required by the government in this case. Thus, even if Mylan violated the federal antitrust laws, the relator has failed to provide the required nexus between that violation and a certification required

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[4] He cites section 3729(a)(2) (creating liability against one who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government"); section 3729(a)(3) (creating liability against one who "conspires to defraud the Government by getting a false or fraudulent claim allowed or paid"); and section 3729(a)(7) (creating liability against one who "knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government").

by the government and falsified by Mylan in this case. As the courts have held, the FCA "attaches liability, not to underlying fraudulent activity, but to the 'claim for payment.' . . . What constitutes the FCA offense is the knowing presentation of a claim that is either fraudulent or simply false." Hopper, 91 F.3d at 1266 (quoting United States v. Rivera, 55 F.3d 703, 709 (1st Cir. 1995)). Thus, the relator has failed to state a claim under the FCA.

C. Standing to Assert Non-FCA Claims

In addition to his FCA claim, the relator has brought a federal RICO claim and several state law claims in this qui tam lawsuit. The defendants assert that the relator has no standing to assert these non-FCA claims. The relator counters merely that if he "is not properly a relator then he may assert pendent claims in his individual capacity." Relator's Opposition at 12. To maintain this action, however, the relator must point to specific legislation conferring the right to bring his actions in this qui tam capacity: "No common law right to maintain qui tam actions exists and authority to file such actions must be found in legislation." United States ex rel. Burnette v. Driving Hawk, 587 F.2d 23, 24 (8th Cir. 1978) (citing Connecticut Action Now, Inc. v. Roberts Plating Co., Inc., 457 F.2d 81, 84 (2d Cir. 1972)). See, e.g., Marra v. Burgdorf Realtors, Inc., 726 F. Supp. 1000, 1012 (E.D. Pa. 1989) ("[F]ederal courts have consistently held that qui tam actions do not exist at common law and thus can only be maintained under express or strongly implied statutory authority."). The relator cites no section of the federal RICO statute that confers such a right, for which there is good reason: "The RICO statute contains no qui tam provisions for the plaintiff to proceed as a relator . . . ." United States ex rel. Kalish v. Desnick, No. 91-C-2288, 1992 WL 32185, at *2 (N.D. Ill. Feb. 18, 1992).[5] Nor does the relator cite any South Carolina statute that grants the right. The relator, therefore, is without standing to assert his non-FCA claims.[6]

III. CONCLUSION

For the reasons stated above, the Court will grant defendants' motion and dismiss this case. An appropriate Order will accompany this Opinion.

January 15th, 2001

Thomas F. Hogan
Thomas F. Hogan
United States District Judge

[5] While the relator has not brought this action in his individual capacity, it is unlikely that he could do so. The RICO requires personal injury, which the relator has not alleged in this action. See 18 U.S.C. § 1964(c).

[6] The defendants have also argued that this Court has no personal jurisdiction over Cambrex and Profarmaco, because the exercise of pendent personal jurisdiction is precluded by the fact that the relator's FCA and RICO claims fail. Having found no subject matter jurisdiction over the FCA claims, that the relator has failed to state a claim under the FCA, and that the relator has no standing to assert his other claims, the Court need not reach this issue.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE LORAZEPAM & CLORAZEPATE ANTITRUST LITIGATION	**MDL Docket No. 1290 (TFH)** **Misc. No. 99ms276 (TFH)**
This Opinion applies to: **THE UNITED STATES OF AMERICA, ex rel WHIDDON,** **Plaintiff,** **v.** **MYLAN LABORATORIES, INC. et al.,** **Defendants.**	**FILED** **JAN 16 2001** **NANCY MAYER WHITTINGTON, CLERK** **U.S. DISTRICT COURT** **Civ. No. 99-2457 (TFH)**

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that the defendants' Motion to Dismiss Qui Tam Complaint is **GRANTED**. Accordingly, this qui tam lawsuit is **DISMISSED WITH PREJUDICE**.

January 15th, 2001

Thomas F. Hogan
Thomas F. Hogan
United States District Judge

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