UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA, et al. and ex rel. OSWALD BILOTTA,

Plaintiffs,

v. 11 CV 71(PGG)

NOVARTIS PHARMACEUTICALS CORP.,

Defendant.

----------x

New York, N.Y.
July 18, 2013
11:00 a.m.

Before:

HON. PAUL G. GARDEPHE,

District Judge

APPEARANCES

PREET BHARARA
United States Attorney for the
Southern District of New York
HEIDI WENDEL
JEANNETTE VARGAS
CHRISTOPHER HARWOOD
REBECCA MARTIN
Assistant United States Attorneys

CRAVATH SWAINE & MOORE, LLP
Attorneys for Defendant
BY: EVAN CHESLER
RACHEL SKAISTIS

(Appearances cont'd)

KAYE SCHOLER
Attorney for Defendant
BY: MICHAEL ROGOFF, ESQ.

ANDREW GROPPER, Relator
ERIC L. YOUNG, Relator
JAMES E. MILLS, Relator
LAURIE RUBINOW, Relator

(In open court; case called)

THE COURT: I should say I know Mr. Rogoff from years ago in the U.S. Attorney's Office. That will not influence me in any way in this case, but it is nice to see you.

This is our initial pretrial conference in the qui tam action alleging that defendant Novartis Pharmaceuticals Corp. paid kickbacks in the form of cash and lavish dinners to doctors to induce them to prescribe Novartis drugs, thereby causing the submission of false claims to various federal health care providers in violation of the Anti-Kickback Statute, 42, U.S.C., Section 1320a-7b, and the False Claims Act, 31, United States Code, Section 3729(a)(1)-(2). I will be referring to the False Claim Act as the "FCA."

On June 27th, 2013, defendant submitted a premotion letter regarding a proposed motion to dismiss the government's complaint in intervention. I will be referring to that complaint as "the complaint." The motion would be under Rule 12(b)(6) and would be based in part on allegations of fraud as not pleaded with particularity under Federal Rules of Civil Procedure 9(b).

I have some concerns about whether the Complaint is pleaded properly with respect to the requirement to plead fraud with particularity. I also have some concerns about the proposed motion to dismiss to the extent it is based on a statute of limitations argument, and to the extent that it is

addressed to the government's unjust enrichment claim.

I am going to share my concerns with you this morning.

Yesterday, I received a premotion letter from the government regarding a motion to sever the government's complaint from the relator third amended Complaint. I will not be addressing that application this morning because I have not had an opportunity to review it. I will note for the record that all parties consent to the proposed severance motion.

Let me begin with background.

The government's complaint alleges that "from January 2002 through at least November 2011, Novartis systematically paid doctors to speak about certain of its drugs, including its cardiovascular drugs Lotrel and Valturna and its diabetes drugs Starlix, at events that were often little or nothing more than social occasions for doctors." Citing the government complaint, Paragraph 1. In support of this theory, the complaint alleges that Novartis sales representatives hosted events to promote certain drugs and invited doctors to speak at and attend those events. Id. Paragraphs 50, 58. Speakers were allegedly paid an average of $750 to $1,500 for each event, and attendees received lavish dinners. Id. Paragraph 56-57, 64-65 105-109. Some speakers were paid for events that never occurred: Id. Paragraphs 115-121 (listing dozens of specific events, including dates and cities, for which doctors were paid when they did not speak).

The complaint further contains at least a dozen examples of doctors who gave the same presentation to the same group of attendees on several different occasions. Id. Paragraph 72-97, 103-106. Some events were allegedly fishing trips, meals at Hooters restaurants, and at other specific high-end restaurants. Id. Paragraphs 99-110. The implication from these allegations is that the events were shams, lacked any legitimate purpose, and were merely intended as kickbacks to induce the doctors to prescribe Novartis drugs Id. Paragraphs 72, 98, 112 to 114.

The complaint further alleges that doctors wrote more prescriptions for Novartis drugs after speaking at or attending the Novartis events. The complaint includes four examples of specific doctors, identified only by the city in which they practiced, whose rate of prescriptions for certain drugs increased, allegedly as a result of their participation at the events. Id. Paragraphs 128-131. The complaint also contains a series of charts that show the number of Medicare claims and the total amount of Medicare payments resulting from prescriptions written by 13 doctors, who are referred to as Dr. A through Dr. M. Id. Paragraph 152. Those doctors were all paid by Novartis to participate in these events as speakers. Id. Paragraph 153.

In its concluding paragraphs, the complaint alleges that "compliance with the Anti Kickback Statute is a

precondition of payment by virtue of federal and state statutes, regulations, and provider agreements" and that the kickbacks that were paid to physicians as alleged (in the complaint) render those certifications false." Id. Paragraphs 154-155. The complaint further alleges that "it was reasonably foreseeable that some of the prescriptions [written for Novartis drugs] would be for federal health care program beneficiaries and that claims for those prescriptions would be submitted for federal health care programs." Id. paragraph 157. Indeed, the complaint concludes that "thousand prescriptions were, in fact, submitted to and reimbursed by federal health care programs. "Id. paragraph 157.

Let me turn to the Defendant's proposed motion to dismiss based on the failure to plead fraud with particularity.

The defendant contends that the complaint does not allege, among other things, any false claims that were submitted, any prescriptions that were written, any doctors who were induced to write prescriptions, who at Novartis induced the doctors to write the prescriptions, what drugs were promoted at which of the events put on for the doctors, or how the events violated the Anti Kickback Statute. See June 27, 2013 Defense Letter 1-2.

In its July 1, 2013 response letter, the government contends that the complaint includes many details including numerous specific examples of the allegedly sham events put on

for the doctors, the drugs that were discussed, the amount of money paid to the speakers at these events, the cost of dinners provided to the attendees, the incentives created for Novartis sales representatives to host such events, data showing the connection between specific doctors' attendance at the events and the increase in the number of prescriptions written by those doctors, and data showing the amount of Medicare reimbursements associated with prescriptions written by doctors who attended the events. See July 1, 2013 Government Letter 2 --

Under Federal Rules of Civil Procedure 9(b), "in alleging a fraud or mistake, a party must state with particularity the circumstances constituting fraud." Citing Federal Rule of Civil Procedure 9(b). To satisfy this heightened pleading standard, a complaint must "(1) specify the statements that the plaintiff contend were fraudulent, (2) identify the speaker, (3)state where and when the statements were made, and (4) explain why the statements were fraudulent."

Citing Shields v. Citytrust Bankcorp. Inc., 25 F.3d 1124, 1128 (2d Cir. 1994). "The purpose of Rule 9(b) is threefold -- it is designed to provide a defendant with fair notice of a plaintiff's claims, to safeguard a defendant's reputation from improvident charges of wrongdoing, and to protect a defendant against the institution of a strike suit." O'Brien v. National Analyst Partners, 936 F.2d 674, 676 (2d

Cir. 1991).

The Second Circuit has stated that "claims brought under the FCA fall within the express scope of Rule 9(b)," Citing Gold v. Morrison-Knudsen Co., 68 F.3d 1475, 1476, (2d Cir. 1995) (per curiam).

Under the FCA liability attaches "not to the underlying fraudulent activity or to the government's wrongful payment, but to the claim for payment". United States ex rel. Polansky v. Pfizer Inc., 2009 WL 1456582, at *5 (E.D.N.Y., May 22, 2009). Accordingly, many courts have held that FCA pleadings are "inadequate unless they are linked to allegations, stated with particularity, of actual false claims submitted to the government that constitute the essential element of an FCA qui tam action." United States ex rel. Carvelas V. Melrose Wakefield Hospital, 360 F.3d 220, 232 ((1st Cir. 2004), abrogated on other grounds by Allison Engine Co. Inc. v. United States ex rel. Sanders, 553 U.S. 662 (2008); see also Polansky 2009 WL 1456582, at *5, (collecting cases). As the Eleventh Circuit explained in the much-created case of United States ex rel. Clausen v. Laboratory Corporation of America, Inc.,

"the submission of a claim [is] the sine qua non of a false claims act violation. As such, Rule 9(b)'s directive that "the circumstances constituting fraud or mistake shall be stated with particularity" does not permit a False Claim Act

plaintiff merely to describe a private scheme in detail but then to allege simply and without any stated reason for his plea that claims requesting illegal payments must have been submitted, were likely submitted, or should have been submitted to the government. "If Rule 9(b) is to be adhered to, some indicia of reliability must be given in the complaint to support the allegation of an actual false claim for payment being made to the government."

290 F.3d 1301, 1311, (11th Cir.2002).

The First Circuit has held that to meet this standard, a plaintiff must plead details including the follows: The dates of the claims, the content of the forms or bills submitted, their identification numbers, the amount of money charged to the government, the particular goods or services for which the government was billed, the individuals involved in the billing, and the length of time between the alleged fraudulent practices and the submission of claims based on those practices.

Karvelas 360 F.3d, 233. While "these details do not constitute a checklist of mandatory requirements that must be satisfied by each allegation included in the complaint, some of this information for at least some of the claims must be pleaded in order to satisfy Rule 9(b)." Id.

In light of these cases, several courts in this circuit have dismissed FCA cases -- in the health care fraud

context -- for failure to meet the requirements of Rule 9(b). For example, in United States ex rel. Mooney v. Americare, Inc., the relator alleged, among other things, that defendants paid kickbacks to third parties in exchange for referrals to defendant's home care services. No. 06 CV 1806 (FB)(VVP), 2013 WL 1346022, at *4 (E.D.N.Y. April 3, 2013). The relator alleged that the kickback scheme couldn't distribute to the dramatic increase in the number of patients who used the defendant's services over a two-year period. Id. The District Court dismissed this portion of the relator's complaint holding that it did not meet Rule 9(b)'s requirements because it did not provide any detail regarding "patient names, claim numbers, dates of services, claim amounts, reimbursement amounts, the specific payers or recipients of the kickbacks, what specific roles) [the scheme participants] played or what false claims they submitted, or dates of claims submissions." Id. at *4-3.

Similarly, in Polansky the relator alleged that Pfizer marked its drug Lipator for off-label uses and every prescription written as a result of those illegal marketing practices was the product of false or fraudulent statements, and that every claim for reimbursement for these off-label prescriptions was a false and fraudulent claim. 2009 WL, 1456582, at *2. The Court found that the complaint failed to meet Rule 9(b)'s requirements because it did not identify "any false claims or physicians who were induced to write a

prescription for an off-label use." Any pharmacist who filled a prescription by any such physician, or any person who sought reimbursement for the cost of that prescription. " Id. at *3 and *5. See also United States ex rel. Smith V New York Presbyterian Hospital, 2007 WL 2142312 (S.D.N.Y. July 18th, 2007) (dismissing FCA complaint regarding overbilling for radiology services where relator failed to specify any particular hospital employee who was responsible for submitting claims and provided no specific amounts, dates or other details regarding any specific fraudulent claim).

Here, the complaint provides some, but not all, of the details absent in the cases discussed above. The complaint describes but does not name four doctors who were allegedly induced to prescribe three specific Novartis drugs as a result of their participation in the events described in the complaint. See government Complaint paragraphs 128-131. The complaint further provides the total number of claims and aggravate value of the payments made as a result of prescriptions written by 13 different doctors (although these claims and payments are not broken down by drug). Id. Paragraph 152. The complaint does not contain any allegations about who submitted the claims, how they were submitted and paid, or when they were submitted and in particular when they were paid within the 11-year time frame cited in the complaint. Cf. In re Cardiac Devices Qui Tam Litigation, 221 F.R.D. 318,

336-38. (D. Conn 2004) (holding that complaint satisfied Rule 9(b) when it "listed the number of calls claims involving a particular device," and explicitly referred to spreadsheets provided under separate cover that "listed the patient, some identifying number regarding the patient's account or medical record, the make and model of the medical device, the date of service or the admission and discharge dates for the hospital stay [and in some cases] the specific amount of the Medicare or Medicaid reimbursement for the specific procedure").

Although the complaint here provides charts indicating the total number of claims and payments stemming from various doctors' prescriptions. See government complaint Paragraph 152. It does not make clear which of these claims were allegedly fraudulent. It is not clear whether the complaint is alleging that all of the claims on the chart are fraudulent simply because they were written by doctors who were paid to speak at defendant's events. If that is so the basis for that theory of liability is somewhat hazy to me, in part because it does not allow for the possibility that doctors may have prescribed the Novartis drugs even if they had not attended the events. See Polansky, 2009 WL 1456582, at *9-10 (taking judicial notice of published studies suggesting alternative reasons why doctors might have prescribed the drug in question with greater frequency). It may be that it is sufficient as to this issue, at the pleading stage, for the government to allege

that all of the claims were fraudulent because they violated an underlying condition to payment, that being the certification of compliance with the Anti-Kickback Statute. See In re Cardiac Devices Qui Tam Litigation, 221 F.R.D. 318, 335-36 (D. Conn 2004 (denying motion to dismiss complaint alleging that all claims for a particular service were false because the service was not medically necessary, which is a condition for payment).

But there is very little pled in the complaint about the actual claims submission. The complaint generally alleges that claims submitted as a result of kickbacks are fraudulent because compliance with the Anti-Kickback Statute is a prerequisite to payment of claims. See government complaint paragraphs 154-155. However the complaint does not specifically allege that defendant or any other participants in the scheme made any such certifications. See Polansky, 2009 WL 1456582, at *7 (dismissing complaint in part because it contained no allegations that defendant made any false certifications to obtain payment).

Finally, the data provided in the complaint pertains only to Medicare claims, yet the complaint generally alleges that claims were submitted to "federal health care programs." See government complaint Paragraphs 160-164, 167. The complaint provides brief descriptions of other programs including Medicaid, TRICARE, and Veterans Administration

programs. Id. Paragraphs 27-34. The complaint does not however, contain any specific allegations about claims submitted for payment under these program.

There are of course situations in which courts have relaxed Rule 9(b)'s heightened pleading standard. The Second Circuit has stated that "despite the generally rigid requirement that fraud be pleaded with particularity, allegations may be based on information and belief when facts are clearly within the opposing party's knowledge." Wexner v. First Manhattan Co., 902 F.2d 169, 172 (2d Cir. 1990). However, this exception does not open the door for "claims of fraud on speculation and conclusory allegations." Id. "Where pleading is permitted on information and belief, a complaint must adduce specific facts supporting a strong inference of fraud or it will not satisfy even a relaxed pleading standard." Id.

United States ex rel. Ellis v Skeikh, 583 F. Supp 2d 434, 438-39 (W.D.N.Y. Oct. 31 2009) provides an illustration. The Court there denied a motion to dismiss an FCA complaint, finding that the relator did not have access to more specific details of defendant's allegedly fraudulent conduct because she was abruptly terminated from her job at the defendant company. In that case, however, the relator provided one specific example to illustrate the fraudulent scheme, which she described in great detail. Id; see also United States ex rel.

Association Against Outlier Fraud v. Huron Consulting Group, Inc., 2009 WL, 253259 at *2-3 (S.D.N.Y. January 24th, 2011.) (holding that complaint satisfied relaxed 9(b) standard which it provided chart of information about specific patients, coupled with statistical evidence showing dramatic increase in claims for which defendant provided no convincing explanation.)

Here, there is no indications that the government lacks access to the information that would enable it to provide more details about the claims submitted for payment. See June 27, 2013 defense letter at two (stating that defendant made substantial products of documents during the 18 months that preceded the file of the complaint). However, the complaint sets forth aggregate data about the claims and payments resulting from prescriptions written by the 13 doctors. Government complaint paragraph 152. In short, the material before me does not suggest that the government lacks access to the necessary information to provide details that would satisfy the Rule 9(b) standard.

Courts in this circuit have also held that the pleading requirements should be relaxed "in cases involving complex fraudulent schemes or those occurring over a lengthy period of time and involving thousands of billing documents." United States ex rel. Tiesinga v. Dianon Systems, 231 F.R.D. 122, 123 (D. Conn 2005); see also In re Cardiac Devices, 221 F.R.D., 334 (collecting cases from other circuits). In such

cases Rule 9(b)'s requirements are balanced against the practical difficulties inherent in requiring the government to detail the fraudulent nature of thousands of claims submitted over many years. Id. In such cases, however, the government has been required to.

"illustrate general allegations of the complaint regarding the operation of the alleged scheme with a number of specific exemplars from various time periods and involving various alleged fraudulent practices that would give [the defendant] and the Court details of the specific manner in which the government alleges the scheme worked, what made it fraudulent in the specific examples provided, and why and specifically how the scheme fraudulently inflated billings in those examples."

Id. at 123-24 (denying motion to dismiss without prejudice and granting government opportunity to amend complaint to add examples of how a scheme operated). See also United States ex rel. Smith v. Yale University, 415 F. Supp 2d 58, 84 and 86-87 (D. of Conn. 2006) (dismissing FCA claim even after applying relaxed standard where relator "alleged a complex, specific scheme of fraud giving rise to an inference that fraudulent billing may have occurred but [did] not identify a specific amount of charges that were submitted provide the dates, the false claims were submitted or provide a copy of a single bill for payment").

Here the complaint provides examples of how four doctors wrote more prescriptions for Novartis drugs around the time they received payments for speak at Novartis events. Government complaint Paragraphs 128-131. These allegations provide the clearest suggestion that the doctors would not have prescribed the drugs but for their participation in the events. There are no allegations, however, about the resulting claims -- including precisely who submitted them, to which federal programs, and when and how they were submitted and paid -- nor is there an explanation of what exactly made the claims fraudulent.

I recognize that courts have found "a distinction between a qui tam action alleging that the defendant made false claims to the government, and a qui tam, action in which the defendant induced third parties to file false claims with the government." United States ex rel. Duxbury v. Ortho Biotech Products, L.P., 579 F.3d 13, 29 (2009). "In the latter context [the Fifth Circuit has] held that a relator could satisfy Rule 9(b) by providing factual or statistical evidence to strengthen the inference or fraud beyond possibility without necessarily providing details as to each false claim." Id. Applying this standard, the Fifth Circuit held that a motion to dismiss a qui tam complaint should be denied where it identified eight kickback recipients by name, specified the kickback each received, and specified the time period in which the claims

were allegedly submitted and paid. Id. at 30.

Here, as I stated, the complaint does not describe the claims submission process in any detail. It appears, however, that the defendant did not directly submit any claims for payment but rather was paid when, for example, a Medicare patient had a prescription filled for a Novartis drug. While statistical evidence may be appropriate in this case to bolster the government's allegations, I am not convinced that this excuses the lack of detail in the complaint about the claims submission process. See Polansky, 2009 WL 1456582, at *10 (finding that aggregate statistical evidence was insufficient to "strengthen the inference of fraud beyond possibility" when complaint failed to identify a single specific false claim) (quoting United States ex rel. Rost v. Pfizer, Inc., 507 F.3d 720, 733 (1st Cir. 2007)).

In sum, while the complaint contains substantial details about the alleged kickback scheme, I am concerned that it may not satisfy Rule 9(b) because it lacks sufficient detail about the claims submission process and does not provide examples of specific fraudulent claims that were submitted.

I will give the government 30 days to amend the complaint. It is the entirely up to the government whether it chooses to amend the complaint or not. However, if the complaint is not amended and I decide that a motion to dismiss is proper, dismissal may be without leave to amend. The

government should view the next 30 days as its opportunity to amend.

Now, let me turn to the other aspects of the proposed motion to dismiss and in particular the statute of limitations argument.

Novartis contends that "the allegations in the [government] complaint that occurred prior to 2007 are untimely and should be dismissed." According to Novartis, the government received notice of the allegations in the complaint in 2008 upon the filing of another qui tam action. Novartis contends that, under 31, United States Code, 3731(b), because the government waited more than three years from the discovery of the allegations to file the complaint, the claims are subject to a six-year statute of limitations (citing defendant's June 27th, 2013 letter at 2.

In response, the government points out that it seeks damages for claims implicated in the prior qui tam action only for the time period beginning in 2010. See government's July 1, 2013 letter at 3 (citing government complaint paragraphs 145-146). Without a copy of the prior qui tam action, it has been difficult for me to evaluate the parties' arguments and the degree to which the two cases overlap.

Regardless, it is not clear to me that the six-year statute of limitations applies to this case. FCA claims

"may not be brought (1) more than six years after the

date on which the violation is committed, or (2) more than three years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

31, United States Code, Section 3731(b). "For statute of limitations purposes; [a Complaint In Intervention] shall relate back to the filing date of the complaint of the person who originally brought the action, to the extent that the claim of the government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth in the prior complaint of that person." 31, United States Code, Section 3731(c). Accordingly, for statute of limitations purposes, the government's complaint here was filed in January 2011 when the relator first filed his complaint. The government contends that this was less than three years after the prior qui tam complaint was filed and alerted it to any claims against defendant. Citing government's July 1, 2013 letter at 3. Assuming this is true (again, I don't have a copy the prior qui tam complaint) but assuming the truth of that representation for statute of limitations purposes, the instant action was filed less than "three years after the date when facts material to the right of action [became] known" to the

government. 31, United States Code, Section 3731(b). Under such circumstances the complaint may allege violations as far back as January 1998, that is, 10 years prior to its filing. See Id.

Accordingly, it is not clear to me that there is merit to defendant's proposed motion to dismiss on statute of limitations ground.

In addition to the causes of action under the FCA, the complaint asserts a claim for unjust enrichment. Government complaint paragraph 166-167. The government seeks return of the payments made to the defendant for the allegedly fraudulent claims.

Defendant first contends that this equitable claim is unavailable because an adequate remedy at law exists. Citing defendant's June 27th, 2013 letter at 2. It appears to me that this argument lacks merit. Federal Rule of Civil Procedure (8)(e)(2) allows a plaintiff to plead alternative theories of liability, even if they are inconsistent or mutually exclusive of one another. Accordingly, although the government may not obtain duplicate relief if it ultimately prevails on both claims, it is entitled to plead and precede on both theories at this early stage of the case. See, e.g. United States v. Stevens 605 F.Supp 2d 863 870 (W.D. Ky 2008 ("Since the FCA claim has not been fully litigated, it would be premature to dismiss the alternative unjust enrichment claim."); United

States v. United Technologies Corp., 255 F. Supp 2d 779, 785 (SD Ohio 2003) (common law and FCA claims may proceed together because, while government "will not be allowed to recover twice, [it] may defer its election of remedy until trial on the merits"); United States ex rel. Purcell v. MWI Corp. 254 F. Supp 2d 69, 79 (D.D.C. 2003) ("Because the government may plead alternative theories of liability, the Court declines to grant the defendants' motion to dismiss the equity claims.")

See United States v. University Hospital at Stoney Brook, 2001 WL 1548797, at *1 & Note 1 (E.D.N.Y. October 26, 2001) (denying motion to dismiss FCA and unjust enrichment claims without discussion of duplicative relief).

Defendant further contends that the government's unjust enrichment claim, as a federal common law claim, has been displaced by the FCA." Citing defendant's June 27th, 2013 letter at 2. The cases I have just cited undermine this argument. In addition, our initial research suggests that the FCA does not preempt federal common law unjust enrichment claims. See United States v. Education Management Corp. 871 F. Supp 2d 433, 459 (W.D. Pa. 2012). ("In United States v Silliman, 167 F.2d 607, 611 (3d Cir. 1948), the Court of Appeals for the Third Circuit held that the False Claims Act does not preempt federal common law remedies"). United States v. Pierre Bouchet, Inc., 1987 WL 11565, at *5 note seven (S.D.N.Y. May 21, 1987). ("The Court notes that the United

States is not deprived of its common law remedies, by also seeking recovery under the False Claims Act") (citing Silliman).

At this stage, it is not clear to me that there is merit to defendants' proposed motion to dismiss the government's unjust enrichment claim.

As I stated, the government will have 30 days from today to file an amended complaint. If it does file an amended complaint, defendant will have two weeks from the filing of the amended complaint to inform this Court whether it wishes to file a motion to dismiss. If so, defendant will explain why a motion to dismiss is meritorious, taking into account any amendments that have been made as well as my comments concerning the statute of limitations and the unjust enrichment claim. Defendant should also propose a briefing schedule in the event that it wishes to proceed with a motion to dismiss.

In the event that the government does not file an amended complaint within the next 30 days, the defendant will also in that instance send me a letter proposing a briefing schedule with respect to its motion to dismiss addressing my comments, concerning the statute of limitations and the unjust enrichment claims.

What else should we discuss today?

MS. WENDEL: Your Honor, one other housekeeping matter is the scheduling order for discovery. The parties spoke about

that Tuesday and we reached an agreement that we will either submit a proposed schedule order to the Court within two weeks of this conference or a letter to the Court or perhaps multiple letters to the Court explaining our disagreement with respect to scheduling and either to you or the magistrate judge, your Honor, whichever you prefer.

THE COURT: You can send it to me in the first instance. I have not decided whether I will refer the case to the magistrate judge or not. I will expect the letter in two weeks on the discovery issue.

Mr. Chesler, anything you would like to say?

MR. CHESLER: Yes, your Honor. Thank you. One other issue is we learned yesterday that New York State intents to intervene, and I believe they have been 30 days to file their complaint in intervention from yesterday. There were a number of states that announced their intentions not to intervene. But we have not yet heard from Indiana, New Jersey, and City of Chicago, which also has intervention rights. Their deadline for announcing their intentions is today I believe. So there is at least one intervention complaint coming. There may be up to four.

I just ask your Honor whether that should impact the schedule since we haven't seen those complaints and if they look exactly like the U.S. Government's complaint, then we might want to move against them all at one time depending upon

what amendments are made, etc.

We wouldn't within want to do this piecemeal if that is not what the Court wishes.

MR. GROPPER: Your Honor, if I may speak to that. I am only here to speak for the State of New York, but I have been authorized to inform the Court that New Jersey does intend to intervene in this action. I believe they intend to do that today if possible. So they authorized me to say that. As for the state of Indian and City of Chicago, I don't have any information as to their intentions.

THE COURT: When will New York be filing its complaint?

MR. GROPPER: Your Honor, we have asked for 30 days, and Mr. Chesler is correct that 30 days from yesterday to file our complaint.

THE COURT: Well, that would put us on somewhat the same schedule if the United States decides to amend its complaint. I have given it 30 days to do that. I guess what I am saying is if you continue to have a problem with the government's complaint, and you have a problem with New York's complaint, then you should be in a position to address that as well within the two weeks that you have.

Does that present any problems?

MR. CHESLER: No, your Honor, unless the New York complaint is different in some material way, in which case we

may have to come back to see your Honor to get your views in the context of premotion process.

THE COURT: That is a fair point. We'll see what it looks like. If it is pretty much in haec verba, then you can proceed. If it is sufficiently different that it would necessitate another premotion letter on your side, then you will do that and I will set it down for conference and we'll talk about it.

MR. CHESLER: I assume, your Honor, same is true about the New Jersey complaint?

THE COURT: Yes.

MR. CHESLER: In that event, may we contact the Court to see if it makes sense to hold off on the motion directed to the U.S. complaint until we get them all lined up?

THE COURT: Absolutely. Do you know when the New Jersey complaint is going to be filed?

MR. CHESLER: I do not, your Honor.

THE COURT: Do you have any sense?

MR. CHESLER: I didn't know until just now that they intended to intervene, your Honor.

THE COURT: I certainly agree with you that there is no point in having duplicative motions that are making basically the same arguments. So if it turns out that these complaints come in and they are very much different or sufficiently different and that you have different arguments to

make, then by all means you can make an application to me about what makes sense in terms of a briefing schedule.

MR. CHESLER: Thank you, your Honor.

THE COURT: Other things we should discuss today?

MS. WENDEL: Nothing further from the government.

MR. CHESLER: Not from the defendants, your Honor.

THE COURT: I will enter an order consistent with dates we have discussed and we'll take it from there.

Thank you.

o0o