

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

UNITED STATES OF AMERICA)	
AND STATE OF TENNESSEE <i>ex rel.</i>)	
JEFFREY H. LIEBMAN AND)	
DAVID M. STERN, M.D.,)	Case No. 3:17-CV-902
)	
Plaintiffs/Relators,)	
)	
v.)	
)	Judge William L. Campbell, Jr.
METHODIST LE BONHEUR)	
HEALTHCARE, <i>et al.</i>,)	Magistrate Judge Barbara D.
)	Holmes
Defendants.)	
)	

DECLARATION OF ANDREW F. SOLINGER

I, Andrew F. Solinger, make the following declaration:

1. I am an attorney at Waller Lansden Dortch & Davis, LLP. Since September 2018, I have represented The West Clinic, PLLC (“West”) in the Government’s False Claims Act (“FCA”) investigation resulting from the allegations made in relator Jeffery Liebman’s *qui tam* complaint against West.

2. In September 2018, Assistant United States Attorney Christopher Sabis, who was then assigned to this action, reached out to counsel for West. On September 21, 2018, AUSA Sabis had a phone call with West counsel, JD Thomas, during which he explained that the United States was seeking documents and interrogatory responses from West in an ongoing investigation. AUSA Sabis stated that West was an “entity that has information that may be relevant to the investigation.” He offered to send a letter request to West’s counsel requesting that information.

That same day, AUSA Sabis sent a letter request to West's counsel, including 20 document requests and 6 interrogatories.

3. In response to the letter request, West began producing documents, and provided interrogatory responses on October 19, 2018. West made 13 document productions in response to the letter request, beginning on October 8, 2018, and ending on December 4, 2019. West's productions included 48,553 pages of documents.

4. On February 25, 2019, West's counsel attended at a meeting with United States' counsel, AUSA Sabis, at the U.S. Attorney's Office for the Middle District of Tennessee. During this meeting, AUSA Sabis discussed the focus of the United States' investigation, including how compensation was paid by Methodist to West, details of the services provided under the MSA, as well as the compensation paid under the PSA. AUSA Sabis explained that the United States' main concern at that time was whether the arrangement complied with Stark and AKS, and whether West was overcompensated as a result of the arrangement. AUSA Sabis also informed West's counsel at that meeting, for the first time, that West was a named defendant in a *qui tam* complaint, that the case was pending before Chief Judge Crenshaw, that the United States had already retained an expert, and that the United States anticipated filing a motion to extend the seal for another six months. AUSA Sabis further explained that the Court was becoming increasingly reticent to grant extensions of the FCA seal, and if the United States could not obtain another extension of the seal, it would likely result in a "no decision." AUSA Sabis stated that the United States would like to continue investigating and wanted to be able to represent to the Court that Defendants consented. West's counsel stated that it would want to view a copy of the *qui tam* complaint before deciding whether it would consent. Following that meeting, the United States provided a redacted copy of

the First Amended Complaint. Shortly thereafter, West's counsel informed the United States that West took "no position" on the United States' request for a further extension of the seal.

5. On January 6, 2020, less than a month after Relators' complaint was unsealed, West counsel, Mr. Thomas, had a phone call with Relators' counsel, Jerry Martin, during which Mr. Martin brought up the prospect of a "quick settlement." Mr. Martin also stated that Relators viewed Methodist as the deeper pocket and believed that a settlement with West would assist them in prosecuting the action and reaching a quicker resolution with Methodist. Over the proceeding several months, Relators' counsel and West's counsel continued to discuss the broad terms for a settlement and West's dismissal from the action through phone calls and written communication.

6. On January 14, 2020, West counsel, Mr. Thomas, and AUSA Sweet had a phone call to discuss the status of the litigation, now that the seal had been lifted and the United States had issued its "no decision" decision. On that call, AUSA Sweet stated that the "case is what it is" and that "whatever Relators decide to do with it, that's on them." AUSA Sweet stated that she would "see how the motion to dismiss goes, and then take it from there." She stated that the United States was "not going to be asking anyone for anything at this point," and that the action was going to be "monitored."

7. After taking control over the litigation, Relators served discovery requests on Defendants, including West. Relators' first set of requests for production served on West included 91 requests for production of documents. West provided written responses and objections to these requests on June 24, 2021, and produced 48,553 pages of documents on September 4, 2021.

8. Based on discussions with Relators' counsel, West understood that the United States was actively involved in discussions with Relators over the proposed settlement with West and the dismissal of West from the action. After an exchange of settlement terms, in late September

2020, Relators' counsel, Mr. Martin, told West's counsel, Mr. Thomas, that the United States understands that West's cooperation "would be good," and provided the United States' position on West's settlement and dismissal.

9. Following that conversation with Relators' counsel, West's counsel had a phone call with counsel for the United States, AUSA Kara Sweet and DOJ Trial Attorney David Cohen, on October 6, 2020. On that call, counsel for the United States stated that "for a number of months, there's been a no decision," and the United States has "been passive." United States' counsel then went on, clarifying that "no decisions can vary," but "this is not a case where there is an active investigation." In discussing the United States' "no decision," counsel for the United States explained that "other times it functions more as a declination - and that's kinda what's happened here." Based on these comments in the midst of West's settlement negotiations with Relators and the United States, West understood that the United States was treating its "no decision" as a declination and that it was not actively investigating West.

10. During the middle of October 2020, this case received a flurry of press coverage in Memphis. As part of that coverage, the press officer for the U.S. Attorney's Office for the Middle District of Tennessee was quoted as stating, "We haven't made a decision yet as to whether we will intervene or not; we are still evaluating the case." He continued, "We can neither confirm nor deny the existence of a criminal investigation. The case is moving forward, at least from the relators' point of view, based on the filings. They are continuing with their side." Counsel for West was concerned about this statement because it was at odds with that they had been told on October 6, 200. As a result, counsel for West followed up with United States' counsel in another phone call on October 16, 2020. On that call, West's counsel expressed their concern about these public statements in light of the fact they did not match counsel for the United States' prior statements

and because West was, at that point, contemplating settling and wanted to know the status of the United States' investigation. West counsel also expressed concerns that the public statements by the United States could leave open the question of a criminal investigation and asked if one existed. On that call the United States was represented by AUSA Sweet, DOJ Trial Attorney Cohen, and DOJ Trial Attorney Linda McMahon. During the call, AUSA Sweet addressed the recent public statements and explained that the U.S. Attorney's press officer was "just quoting what has been publicly filed" and that nothing that she had told us previously had changed and "nothing has changed since [Chief] Judge Crenshaw unsealed the case."

11. Immediately after that call ended, West's counsel received a call from AUSA Sweet only. She explained she was calling to clarify some comments from the previous call, stating that she was unaware of any criminal investigation. AUSA Sweet went on to state that the United States "see[s] some value in settlement here" and is "not going to stand in the way of that." At the end of that call, AUSA Sweet noted that her office's press officer "said we are monitoring" the case, but clarified that "we are not actively investigating."

12. Following this phone call with United States' counsel, West continued its settlement discussions with Relators' counsel. On January 28, 2021, West and Relators executed the Settlement Agreement.

13. Pursuant to the Settlement Agreement, West agreed to fully cooperate with Relators, including producing any additional documentation requested, responding to follow-up written inquiries, and sitting for interviews with Relators' counsel. Over the ensuing nine months, West produced claims data and documents requested by Relators' counsel, and responded to Relators' written requests for information. Three West physicians, and West's former CEO and CFO, all sat for interviews with Relators' counsel. West's former CEO, Erich Mounce, was

interviewed on February 23-24, 2021. Dr. Brad Somer and Dr. Kurt Tauer were interviewed on March 5, 2021. West's former CFO, Ron Davis, was interviewed on March 15, 2021. And Dr. Lee Schwartzberg was interviewed on March 17, 2021.

14. On March 19, 2021, Relators filed their motion for leave to file a third amended complaint, adding additional allegations that they claim emanated from their counsel's interviews with West. After reviewing the Third Amended Complaint, West's counsel spoke with Relators' counsel to specifically note that the Third Amended Complaint's allegations about facts that West "senior leadership had confirmed" were not accurate and not supported by what was said during Relators' counsel's interviews with West senior management. In particular, West counsel informed Relators' counsel that the allegations that "West's senior physician leadership has confirmed that West did not perform inpatient management services at Methodist hospitals over the 7-year term of the partnership" (TAC, ¶¶ 7, 295) and "West's senior leadership has confirmed that West did not provide inpatient management services at Methodist hospitals during the years of the 'partnership' with Methodist" (*Id.*, ¶¶ 20, 294) were plainly incorrect and that no such statement was ever made by any West witnesses that Relators counsel interviewed. West's counsel also noted to Relators' counsel that two of the three West attorneys present at these interviews took copious notes, and that their notes did not support these allegations about what West senior management supposedly "confirmed."

15. In addition to the five initial interviews of current and former West senior management, Relators' counsel sought to interview additional West physicians in May 2021. During discussions about scheduling those interviews, West's counsel was informed by Relators' counsel that counsel for the United States also wished to participate in these interviews. On May 3, 2021, counsel for West had a phone call with United States' counsel, AUSA Sweet, regarding

the United States' interest in participating in Relators' counsel's interviews of West physicians. On that call, AUSA Sweet stated that she did not want to attend the interviews in person, but rather to listen by phone and not ask any questions. AUSA Sweet stated that she "want[ed] to get a sense from them as to their veracity." On this same call, West's counsel told AUSA Sweet that some of the representations in the Third Amended Complaint were false, and that none of the interviewees ever "confirmed that West did not provide inpatient management services," and that the Third Amended Complaint is "nothing more than advocacy by Relators." On that call, West's counsel informed counsel for the United States that it viewed those allegations as potential Rule 11 material. AUSA Sweet again requested to participate in the upcoming interviews, to which West counsel responded that the United States' involvement would necessarily delay the interviews by at least a month, to June 2021.

16. On May 12, 2021, West's counsel held another phone call with United States' counsel, then represented by AUSA Sweet and DOJ Trial Attorney Cohen, during which AUSA Sweet stated that the United States wished to proceed with its own interviews of West senior management. She further stated that she had "reached out to an agent who worked on this [case] initially," but was unsure he could attend since he was no longer assigned. DOJ Trial Attorney Cohen stated that these interviews would focus on whether West provided "substantive real inpatient management services" to Methodist under the arrangement. Counsel for West again reiterated that the representations in the Third Amended Complaint were inaccurate and did not match what was said at the interviews conducted by Relators' counsel.

17. On June 22-23, 2021, the United States interviewed three West witnesses at the U.S. Attorney's Office for the Middle District of Tennessee—Erich Mounce, Dr. Kurt Tauer, and Dr. Lee Schwartzberg. At these interviews, the United States focused on West's provision of in-

patient management at Methodist hospitals as well as whether West provided management services as required under the MSA. Counsel for the United States also interviewed two former Methodist senior executives in early July 2021. All five of these interviews were recorded by the United States, and the audio recordings of the West interviews were provided to West's counsel. Notably, none of these interviewees substantiated the allegation in the Third Amended Complaint that "West's senior leadership has confirmed that West did not provide inpatient management services at Methodist hospitals during the years of the 'partnership' with Methodist."

18. One week after the United States' interviews, on July 1, 2021, counsel for West had a phone call with United States' counsel, AUSA Sweet, about the United States' plan moving forward. On that call, AUSA Sweet stated that the three West interviews gave her "pause," but that the United States wanted "to continue on with [West's] cooperation." She then acknowledged that the United States was no longer focused on in-patient management under the MSA, and had now "moved to whether West was paid for base versus incentive" management services. AUSA Sweet stated that the United States' theory was now a "kickback based on sham transaction" theory. She also noted that some specific documents gave the United States "more concern," but did not identify which documents she was referring to. At the end of the call, AUSA Sweet stated, for the first time, that the United States was contemplating intervening, noting that "if we were to litigate the case, we would definitely bring [West] in." She stated that she "hope[d] not to get to that point" and that the United States was "currently at status quo."

19. On August 18, 2021, counsel for West held another phone call with United States' counsel, AUSA Sweet and DOJ Trial Attorney Cohen. On that call, AUSA Sweet stated that she was in the process of getting approval to intervene, but that the United States was "happy to have discussions in the meantime on that." In response, West's counsel, requested to schedule a

presentation so that West could respond to the United States' specific concerns. To prepare for West's presentation, Mr. Thomas asked United States' counsel what the United States' specific concerns were that it wanted addressed by West. DOJ Trial Attorney Cohen responded that the United States' "theory is that the MSA and FMV that went with it were shams" and that "numerous requirements in contracts were never paid attention to in practice." He then explained the United States' concerns with the PSA, stating that because West's wRVU-based compensation exceeded West's professional collections under the PSA and that "it's improper."

20. On September 13, 2021, West's counsel was prepared to present to the United States' counsel on the two theories of liability espoused on the August 18, 2021 phone call. At the beginning of the presentation, before West's counsel began with its slide presentation, AUSA Sweet noted that the United States had "a different theory" than what was discussed on the prior call. She then explained the United States' current theory of liability.

21. Following the United States' counsel's discussion of its new theory, West's counsel requested additional time to prepare a response and presentation. Counsel for West and the United States then had a phone call the following day, on September 14, 2021, in order to get a better sense of the United States' new theory.

22. West's counsel then followed up with counsel for the United States, by email, to ensure that West's understanding of the United States' new theory was correct. In response, United States' counsel, AUSA Sweet, responded that the United States' theory was as follows:

- (1) "[T]he arrangement violates the AKS, as Methodist paid West remuneration -- one purpose of which was to induce referrals -- and that there is evidence of scienter that includes, but is not limited to,

the statements [West counsel Michael] Blau made multiple times about the transaction having irreducible AKS risk and others.”

(2) “[W]e do not believe that the personal services safe harbor fits this arrangement for multiple reasons, one of which is that the aggregate compensation is not set in advance.”

(3) Therefore, because the arrangement violates the AKS and does not file within a safe harbor, it is, *ipso facto*, a criminal violation of the AKS and also violates the FCA.

23. On September 23, 2021, West’s counsel presented to the United States’ counsel on each of the United States’ theories, including its new theory about the arrangement being a *per se* violation of the AKS. In that presentation, West’s counsel also explained, in detail, the Court’s prior decision in *SEES* and its application to the United States’ intervention in this action.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 22nd day of October 2021.

/s/ Andrew F. Solinger
Andrew F. Solinger
WALLER LANSDEN DORTCH & DAVIS, LLP