UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PEOPLE OF THE STATE OF ILLINOIS, ex rel. BYRON STRAKUSEK, Relator,	)	
Plaintiff,	)	
v.	)	**No. 19 C 7247**
OMNICARE, INC. and CVS HEALTH CORPORATION,	)	**Judge Rebecca R. Pallmeyer**
Defendants.	)	

MEMORANDUM OPINION AND ORDER

In this action brought under the Illinois False Claims Act, Plaintiff-Relator Byron Strakusek ("Relator") contends that Defendants Omnicare, Inc. ("Omnicare") and its parent, CVS Health Corp. ("CVS"), caused the submission of materially false claims to Medicaid—specifically, claims for prescription drugs dispensed without a valid prescription. Defendants removed the case to this court on the basis of diversity jurisdiction, and now move to dismiss it. They argue that Plaintiff has not adequately pleaded facts supporting their direct involvement in the alleged wrongdoing, and that Plaintiff's complaint, a copy of one he filed in this federal court almost seven years ago, is barred by *res judicata*. As explained here, the court agrees. The motion is granted.

Relator commenced this *qui tam* action under the Illinois False Claims Act ("IFCA"), 740 ILCS 175/1–8. Like the federal False Claims Act ("FCA"), 31 U.S.C. § 3729 *et seq*., the IFCA allows private citizens acting as whistleblowers to sue on behalf of the State of Illinois to recover damages for the submission of materially false claims to government programs. 740 ILCS 175/3, 4(b)(1). Without describing the nature of his job, Relator alleges that he worked at Omnicare between July 2011 and December 2013, when the alleged misconduct occurred. (Compl. ¶ 6, Ex. 1 to Defs.' Notice of Removal [1-1].) Specifically, Strakusek alleges that Defendants Omnicare and its parent, CVS, caused the submission of false claims to the Illinois Medical Assistance Program ("Illinois Medicaid") for controlled substances that were dispensed without a

valid prescription. (Compl. ¶¶ 1–2.) The Illinois Controlled Substances Act ("ICSA"), 720 ILCS 570/100–603, prohibits pharmacists and pharmacies from dispensing a prescription unless the prescriber has affixed his or her manual signature to the prescription. 720 ILCS 570/312(i), (i-5); *see also* ILL. ADMIN. CODE tit. 77, § 3100.390(b). Relator claims that Defendants received and filled more than 2,000 prescriptions using pre-signed or photocopied forms in violation of the ICSA. (Compl. ¶¶ 18, 20.) This practice, Strakusek alleges, caused various long-term care facilities to submit false claims and false certifications to Illinois Medicaid in violation of the IFCA. (Compl. ¶¶ 28–30.)

Relator filed this lawsuit in state court on March 31, 2017. The Complaint was held under seal while the State of Illinois investigated Relator's claims. *See* 740 ILCS 175/4(a), (b). On April 15, 2019, the State declined to intervene in the action. (State of Illinois' Notice of Declination of Intervention, Ex. 2 to Defs.' Notice of Removal.)[1] The Illinois court then ordered that the Complaint be unsealed. (Order, Apr. 15, 2019, Ex. 3 to Defs.' Notice of Removal.) On October 7, 2019, Relator served process on Defendants. (Service of Process Transmittal, Ex. 1 to Defs.' Notice of Removal.) Defendants timely removed the action to federal court on the basis of diversity and federal question jurisdiction. (Defs.' Notice of Removal ¶¶ 1–2).[2] Defendants now

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[1] The text of 740 ILCS 175/4(b)(1) provides that, when the State declines to intervene, a *qui tam* action "may be dismissed only if the court and the [State] Attorney General give written consent to the dismissal and their reasons for consenting." Citing this provision in its notice declining to intervene, the State requested that, "should either the Relator or the Defendants propose that this action be dismissed, settled, or otherwise discontinued, [the Circuit Court of Kane County] solicit the written consent of the State of Illinois before ruling or granting its approval." Relator has not argued that this court must obtain the State Attorney General's consent before dismissing this case, but even if he had, that argument would fail. As this court made clear in another *qui tam* case, "Section 175/4(b)(1) only applies to voluntary dismissals or settlements initiated by the parties, not to court-ordered involuntary dismissals." *United States ex rel. Stop Illinois Mktg. Fraud, LLC v. Addus Homecare Corp.*, No. 13 C 9059, 2018 WL 1411124, at *8 (N.D. Ill. Mar. 21, 2018) (citing *Salmeron v. Enter. Recovery Sys., Inc.*, 579 F.3d 787, 797 n.5 (7th Cir. 2009) (reaching the same conclusion in a federal FCA action)).

[2] Defendants assert that federal question jurisdiction supports removal because the Complaint implicates a prior federal court judgment that may have preclusive effect. (Defs.' Notice

move to dismiss Relator's complaint, arguing that *res judicata* bars this case, that the IFCA's public disclosure bar applies, and that the Complaint fails to state a claim. (Mot. to Dismiss [19]; Defs.' Mem. in Support of Mot. to Dismiss [20] (hereinafter "Defs.' Mem.").) For the following reasons, Defendants' motion is granted.

BACKGROUND

Relator's allegations, deemed true at this stage, are summarized below. *See United States ex rel. Berkowitz v. Automation Aids, Inc.*, 896 F.3d 834, 839 (7th Cir. 2018). A court may also take judicial notice of matters in the public record, including judicial proceedings, because their accuracy cannot reasonably be questioned. *See* FED. R. EVID. 201(b); *Fletcher v. Menard Corr. Ctr.*, 623 F.3d 1171, 1173 (7th Cir. 2010) (collecting cases and observing that courts may "take judicial notice of prior proceedings in a case involving the same litigant"). Because one basis for Defendants' motion to dismiss is *res judicata*, the court takes judicial notice of pleadings and orders from a previous lawsuit that Relator filed against Omnicare in this court: *United States ex rel. Strakusek v. Omnicare, Inc.*, No. 14-cv-2808 (N.D. Ill.) (Castillo, J.) (hereinafter "*Strakusek I*").

A. *Strakusek I*

In 2014, Relator filed a complaint under the federal FCA and the Controlled Substances Act ("CSA"), 21 U.S.C. § 801 *et seq*., making allegations similar to those at issue here. (Compl., *United States ex rel. Strakusek v. Omnicare, Inc.*, No. 14-cv-2808 (N.D. Ill. Apr. 18, 2014); Am. Compl. (Apr. 25, 2014), Ex. 1 to Defs.' Mem. [20-1] (hereinafter "*Strakusek I* Compl.").) After investigating the allegations, the United States concluded that further prosecution of the case was

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of Removal ¶ 2 (citing *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 911–12 (7th Cir. 1993); *Franchise Tax Bd. v. Const. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 13 (1983); *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394 (1981)); *see also* Defs.' Notice of Removal ¶ 27 (same).) Without endorsing that theory, the court acknowledges that diversity jurisdiction provides an independent basis for this court's exercise of jurisdiction.

not in the Government's interest. (Mem. in Support of U.S. Mot. to Dismiss, Ex. 2 to Defs.' Mem. (hereinafter "U.S. Mot.") [20-2] at 1.) The United States estimated that the cost of assisting Relator with discovery would outweigh any potential loss to the Government—a loss it calculated at approximately $167,200. (*Id*. at 9–10.) Accordingly, the United States declined to intervene and moved to dismiss as an exercise of its prosecutorial discretion under 31 U.S.C. § 3730(c)(2)(A), which provides that "the Government may dismiss [a *qui tam*] action notwithstanding the objections of the person initiating the action" so long as the relator receives notice and an opportunity for a hearing. Relator received notice of the Government's motion but failed to submit a response by the agreed-upon deadline. (*See* Am. Order, Ex. 3 to Defs.' Mem. [20-3].) On March 24, 2016, the District Court for the Northern District of Illinois granted the United States' motion and dismissed the complaint "with prejudice as to Relator." (*Id*.) Pursuant to the dismissal order, the case was later unsealed. (Order of May 13, 2016, Ex. 4 to Defs.' Mem. [20-4].)

B. *Strakusek II*

More than a year after his federal case was dismissed, Relator filed the instant lawsuit ("*Strakusek II*") under seal in the Circuit Court of Kane County, Illinois on March 31, 2017. Relator alleges that Defendants' "management imposed performance standards . . . requir[ing] . . . pharmacists to review fifty-five (55) prescriptions for controlled substances per hour." (Compl. ¶ 17.) Relator further alleges that this policy "had the effect of causing . . . pharmacists to dispense thousands of invalid prescriptions for controlled substances." (*Id.*) These prescriptions were invalid, according to Strakusek, because the prescriber's signature was either "not manually affixed" to the prescription or "photocopied and reused numerous times." (*Id*. ¶ 18.)

A brief explanation of the Illinois Medicaid reimbursement scheme is helpful to understand the basis for Strakusek's theory of liability. First, Defendants provide pharmaceutical services to long-term care facilities pursuant to a contract with the State of Illinois's Medicaid licensure program. (*Id*. ¶ 22.) In exchange for providing pharmaceuticals to Illinois Medicaid patients, the

Illinois Department of Public Aid reimburses Defendants for their costs plus a fixed dispensing fee. (*Id*.) Physicians working at long-term care facilities write prescription orders for patients; nurses then present the orders to data-entry personnel employed by Defendants; pharmacists at Defendants' pharmacies receive and fill the orders; and orders are finally shipped to long-term care facilities where patients reside. (*Id*. ¶ 23–24.) Each day, Defendants' pharmacies electronically submit their Medicaid claims to the Illinois Department of Public Aid along with their Medicaid provider identification number, which certifies that Defendants are complying with federal and state regulations. (*Id*. ¶ 25.)

Relator alleges that, between July 2011 and December 2013, Defendants "knowingly caused to be made false or fraudulent prescription[ ] reports that falsely represented that said drugs were dispensed pursuant to a valid prescription." (*Id*. ¶ 27.) Thus, Relator alleges, Defendants "knowingly caused various long[-]term care facilities to submit false claims to Illinois Medicaid for controlled substances including Schedule II drugs that were dispensed without valid prescriptions." (*Id*. ¶ 28.) Defendants' conduct allegedly caused "long-term care facilities and pharmacies to submit false certifications . . . on over 2000 occasions where controlled substances were dispensed" based on the invalid prescriptions. (*Id*. ¶ 30.)

Relator points to four examples of patients who received medication without a manually signed prescription. (Compl. ¶¶ 32–44, 45–56, 57–70, 71–82.) In each example, he asserts that it is "plainly obvious" that the prescription forms were "pre-signed and photocopied" (*id*. ¶¶ 34, 47, 61, 73), sometimes "numerous times." (*Id*. ¶¶ 34, 47.) He also attaches a "summary of controlled substances," detailing over 2,000 prescriptions that were illegally dispensed. (*Id*. ¶ 20 & Ex. A.) According to Relator, "[n]early each and every nursing home and/or long[-]term care facilit[y]" in the summary chart accepts Illinois Medicaid [reimbursement]." (*Id*. ¶ 26.)

Defendants read Strakusek's factual allegations as "a copy-and-paste of his allegations" from *Strakusek I*. (Defs.' Mem. at 3.) Both complaints alleged violations of the ICSA at an

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