

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, STATE  
OF CALIFORNIA, STATE OF  
COLORADO, STATE OF  
CONNECTICUT, STATE OF GEORGIA,  
STATE OF INDIANA, STATE OF  
MONTANA, STATE OF NEVADA,  
STATE OF NORTH CAROLINA, STATE  
OF TENNESSEE, STATE OF  
WASHINGTON, STATE OF  
WISCONSIN, COMMONWEALTH OF  
MASSACHUSETTS, and  
COMMONWEALTH OF VIRGINIA, ex  
rel. TIMOTHY SIRLS,  
Plaintiffs,

CIVIL ACTION

NO. 16-683

v.

KINDRED HEALTHCARE, INC.,  
KINDRED HEALTHCARE OPERATING,  
INC., KINDRED HEALTHCARE  
SERVICES, INC., KINDRED NURSING  
CENTERS EAST, LLC, KINDRED  
NURSING CENTER WEST, LLC,  
KINDRED NURSING CENTERS SOUTH,  
LLC, and KINDRED NURSING  
CENTERS NORTH, LLC, ,  
Defendants.

DuBois, J.

February 4, 2021

**MEMORANDUM**

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## I. INTRODUCTION

This is a *qui tam* action brought on behalf of the United States under the False Claims Act (“FCA”) and on behalf of California, Colorado, Connecticut, Georgia, Indiana, Montana, Nevada, North Carolina, Tennessee, Washington, Wisconsin, Massachusetts, and Virginia under their analogous false claims laws<sup>1</sup> by relator, Timothy Sirls, against defendants Kindred Healthcare, Inc.; Kindred Healthcare Operating, Inc.; Kindred Healthcare Services, Inc.; Kindred Nursing Centers East, LLC; Kindred Nursing Centers West, LLC; Kindred Nursing Centers South, LLC; and Kindred Nursing Centers North, LLC. Presently before the Court is defendants’ Motion to Dismiss relator’s Second Amended Complaint (“SAC”). For the reasons set forth below, defendants’ Motion is granted in part and denied in part.

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<sup>1</sup> These claims are brought pursuant to the California False Claims Act, Cal. Gov’t Code § 12651(a)(1) (Count 3); Colorado Medicaid False Claims Act, Colo. Rev. Stat. § 25.5-4-303.5 (1)(a)-(b) (Counts 4 & 5); Connecticut False Claims Act, Conn. Gen. Stat. § 17B-301b(a)(1)-(2) (Counts 6 & 7); Georgia False Medicaid Claims Act, Ga. Code Ann. § 49-4-168.1(a)(1)-(2) (Counts 8 & 9); Georgia Taxpayer Protection False Claims Act, Ga. Code Ann. § 23-3-121(a)(1)-(2) (Counts 10 & 11); Indiana False Claims and Whistleblower Protection Act, Indiana Code § 5-11-5.5-2(b)(1)-(2) (Counts 12 & 13); Massachusetts False Claims Act, Mass. Ann. Laws Ch. 12, § 5(B)(a)(1)-(2) (Counts 14 & 15); Montana False Claims Act, Mont. Code Ann. § 17-8-403(1)(a)-(b) (Counts 16 & 17); Nevada False Claims Act, Nev. Rev. Stat. § 357.040(1)(a)-(b) (Counts 18 & 19); North Carolina False Claims Act, N.C. Gen. Stat. § 1-605(a)(1)-(2) (Counts 20 & 21); Tennessee Medicaid False Claims Act, Tenn. Code Ann. § 71-5-182(a)(1)(A)-(B) and Tennessee False Claims Act, Tenn. Code Ann. § 4-18-103(a)(1)-(2) (Counts 22 & 23); Virginia Fraud Against Taxpayers Act, Va. Code Ann. § 8.01-216.3(A)(1)-(2) (Counts 24 & 25); Washington Medicaid Fraud False Claims Act, Rev. Code Wash. § 74.66.020(1)(a)-(b) (Counts 26 & 27); and Wisconsin False Claims Act, Wis. Stat. § 20.931(2)(a)-(b) (Counts 28 & 29).

## II. BACKGROUND

The facts of this case are summarized in detail in the Court's Memorandum dated June 29, 2020 (Document No. 60) ("Memorandum Addressing Defendants' First Motion to Dismiss"). They are recited in this Memorandum only as necessary to address the pending Motion.<sup>2</sup>

Relator Timothy Sirils worked as the Director of Nursing Services at Heritage Manor Healthcare Center in Mayfield, Kentucky, between April 2014 and June 2014. Second Amended Complaint ("SAC") ¶ 7. Heritage Manor is a nursing facility that was operated by Kindred Nursing Centers, LP from November of 2005 to December of 2015. SAC Ex. 1. Kindred Nursing Centers, LP is one of several wholly-owned subsidiaries through which defendant Kindred Healthcare, Inc. operated a network of nursing facilities around the country. SAC ¶ 1 n.1, ¶¶ 20-21. Kindred Healthcare, Inc. is a healthcare services conglomerate that operates through its subsidiary companies in 46 states and Puerto Rico. *Id.* ¶ 20. Among those subsidiaries are defendants Kindred Nursing Centers East, LLC; Kindred Nursing Centers West, LLC; Kindred Nursing Centers North, LLC; and Kindred Nursing Centers South, LLC. *Id.* ¶ 25. These entities owned and operated nursing facilities identified by relator in exhibits attached to the SAC. SAC Exs. 1, 2. Each of these entities were owned by defendant Kindred Healthcare Operating, Inc., which itself is a subsidiary of Kindred Healthcare, Inc. *Id.* ¶¶ 20-21, 25-28.

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<sup>2</sup> Defendants filed a Request for Judicial Notice with their Motion to Dismiss (Document No. 67, filed August 25, 2020). In evaluating a Motion to Dismiss, the Court may look beyond the pleadings to "items subject to judicial notice." *Buck v. Hampton Twp. Sch. Dist.*, 452 F.3d 256, 260 (3d Cir. 2006) (internal citation omitted). Defendants specifically cite public records published by CMS, HHS, and the California Department of Health Care Services, a complaint filed in a prior lawsuit, and a news report. Judicial notice of these documents is proper as the Court may take judicial notice of public records such as those issued by CMS, HHS, and the California Department of Health Care Services, and documents that are publicly filed on a court docket. *See Carroll v. Prothonotary*, No. 08-1683, 2008 WL 5429622, at \*2 (W.D. Pa. Dec. 31, 2008). Courts may also take judicial notice of news reports to evaluate "what was in the public realm" at a given time. *See Benak ex rel. Alliance Premier Growth Fund v. Alliance Capital Mgmt. L.P.*, 435 F.3d 396, 401 n.15 (3d Cir. 2006).

### A. Overview of the Medicare and Medicaid Systems

Medicare is a federal health insurance program administered by the Centers for Medicare & Medicaid Services (“CMS”), a division of the U.S. Department of Health and Human Services (“HHS”) that, *inter alia*, provides federally-funded insurance benefits for skilled nursing facilities (“SNFs”). *See* 42 U.S.C. § 1395, *et seq.* Medicare reimburses SNFs using a prospective payment system. SAC ¶ 41. The prospective payment system pays a *per diem*, per patient amount at a rate that is based on the Resource Utilization Group (“RUG”) to which a resident is assigned. *See United States v. Long Grove Manor, Inc.*, 315 F. Supp. 3d 1107, 1110 (N.D. Ill. 2018). The RUG “uses measures of staff time and service frequency, variety, and duration to classify patients.” Prospective Payment System and Consolidated Billing for Skilled Nursing Facilities, 63 Fed. Reg. 26,252, 26,258 (proposed May 12, 1998). “RUG levels also consider a person’s capacity to perform activities of daily living (‘ADL’) such as ‘bed mobility, toilet use, transfer from bed to chair, and eating.’” *United States v. Life Care Centers of America, Inc.*, 114 F. Supp. 3d 549, 553 (E.D. Tenn. 2014) (quoting 63 Fed. Reg. 26,252).

Skilled nursing facilities use a clinical assessment tool referred to as the Minimum Data Set (“MDS”) to periodically determine each beneficiary’s RUG classification. *See* 42 C.F.R. §§ 413.337, 413.343. An MDS assessment is completed for each resident upon admission to a facility and periodically throughout the resident’s stay. *See* 42 C.F.R. §§ 413.337, 413.343, 483.20. To conduct these assessments, facility staff evaluate the preceding seven days—the “look-back period”—and report the resident’s self-performance of ADLs, as well as the level of staff assistance that was required by and provided to the resident. Defs.’ Req. Judicial Notice Ex. A, Centers for Medicare & Medicaid Services, *Long-Term Care Facility Resident Assessment Instrument User’s Manual Version 3.0* (Oct. 25, 2013), at G-3. Skilled nursing

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