IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA, EX.REL.; AND INTEGRA MED ANALYTICS, LLC, RELATOR; *Plaintiffs*	§	SA-17-CV-01249-XR
-vs-	§	
CREATIVE SOLUTIONS IN HEALTHCARE, INC., *Defendant*	§	

ORDER

On December 11, 2017, Plaintiff/Relator Integra Med Analytics LLC ("Relator") on behalf of the United States of America initially filed this Federal False Claims Act case. The Amended Complaint is the live complaint. Dkt. No. 14.

Relator brings this action to recover more than $94.97 million paid by Medicare and Medicaid to a network of skilled nursing facilities ("SNFs") run by Creative Solutions in Healthcare, Inc. Creative Solutions operates 48 facilities throughout Texas.

Relator alleges that it "uncovered that Defendant fraudulently billed Medicare and Medicaid for unnecessary and unreasonable 'Ultra High Rehab'—the most intensive therapy provided by SNFs—and kept patients in Ultra High Rehab longer than necessary." Dkt. No. 14 ¶ 2. Relator also alleges that "[b]y increasing the quantity of rehab provided, without otherwise changing any other care to a patient, an SNF [a skilled nursing facility] can move the patient's claim to a higher RUG [resource utilization group] category and therefore get a higher per-diem payment amount [from Medicare]." Dkt. No. 14 ¶ 23.

Relator further alleges that Creative "collaborated with two rehab contractors, Century Rehab ("Century") and Reliant Rehabilitation ("Reliant")" to provide instruction to staff to keep RUG rates as high as possible. *Id*. ¶ 26.

Prior to bringing suit, Relator interviewed several employees at facilities located in Longview, Hearne, Beaumont, Brownwood II, Devine, Fairfield, Lubbock II, Memphis, Wellington, Lufkin, and Vidor. The complaint alleges numerous fraudulent acts were committed in an alleged attempt to secure more payments from Medicare and Medicaid than authorized. *Id*. ¶¶ 27–47.

In addition, prior to suing, Relator secured data from the Centers for Medicare and Medicaid Services. "Relator compared the rate of Ultra High therapy provided at Creative to the rate of Ultra High therapy provided at other SNFs for patients with comparable principal diagnosis codes." *Id*. ¶ 49. Based upon its statistical analysis, Relator concluded that Creative engaged in a "systematic effort to excessively bill Medicare for Ultra High Rehab." *Id*. ¶ 56.

This case was abated for a period of time to allow the United States Government to decide whether it would intervene. On December 12, 2018, the United States declined to intervene. Thereafter, Defendant requested that the case be abated because it needed to devote its attention to the COVID-19 pandemic and the court again abated this matter from March 13, 2020 to June 7, 2021. Now both parties agree the case can be resumed, but they disagree about how discovery should be conducted. At the request of the parties the Court held a hearing on June 21, 2021, to discuss the discovery stalemate.

As a general matter, this judge normally will not engage in discovery matters until such time as a party files some motion to compel or protective order. Discovery is supposed to be conducted by the parties in good-faith and without court intervention. In this case the Court will

make an exception because of the volume of discovery anticipated and the chasm that exists between the parties on how to proceed.

First, the parties are ordered to make or supplement their initial discovery disclosures pursuant to Fed. R. Civ. P 26(a)(1).

Second, discovery will be conducted in phases. Phase 1 in this case will consist of requiring the Defendants to: (a) produce documents, email or ESI between its corporate officers and employees that refer to billing Medicare or Medicaid for Ultra High Rehab or moving a patient to a higher RUG to secure higher per-diem payments; (b) produce documents, email or ESI between Defendants and Century Rehab that refer to billing Medicare or Medicaid for Ultra High Rehab or moving a patient to a higher RUG to secure higher per-diem payments; (c) produce documents, email or ESI between Defendants and Reliant Rehabilitation that refer to billing Medicare or Medicaid for Ultra High Rehab or moving a patient to a higher RUG to secure higher per-diem payments; and (d) produce documents, email or ESI between Creative Solutions corporate office and a select number of the 48 facilities (the number and facility to be selected jointly by the parties) that refer to billing Medicare or Medicaid for Ultra High Rehab or moving a patient to a higher RUG to secure higher per-diem payments. The parties should not understand the above direction to be the sole interrogatories or requests for production that will be allowed. The above is merely meant to serve as a guide in this discovery dispute. In the event the parties cannot agree to the number and location of facilities for this first round of discovery, the Court will choose the number and location.

The parties indicate that they could also not agree on what keywords to use during discovery. Defendants argue that the keywords proposed by the Plaintiffs have resulted in many hits (apparently indicating non-relevant data). Defendants, however, have not disclosed to

Plaintiffs any particulars to justify their objections. The Court has not been provided the proposed keywords. The parties are ordered to again meet and confer regarding this issue. Generally, little good and much damage can be done by defaulting to a judicial officer to inflict keywords upon the parties.

Defendants have requested that Plaintiff produce the user agreement it reached with the U.S. Centers for Medicare & Medicaid Services (CMS) and that Plaintiff also produce its statistical analysis referenced in the amended complaint. Relator's counsel is ordered to confer with CMS to determine if CMS has any objection to the release of this information to the Defendants. If CMS does not object to the release of this information, Relator is ordered to produce the material to Defendants, subject to a confidentiality order. If CMS objects to this production, the Defendants should notify the Court that this discovery dispute remains outstanding.

The parties are ordered to meet and confer as to a deadline when Phase 1 discovery will be completed. In the event the parties cannot agree to such a deadline, the Court will unilaterally issue a deadline.

Once Phase 1 discovery is completed another status conference will be held to discuss what additional discovery is required. The parties are urged to reach agreement on this issue without the necessity of court intervention. In the event court intervention is required, Relator should be prepared to discuss what information was uncovered during Phase 1, whether documents or ESI are needed from any additional custodians or facilities, and why such data is needed. Defendants should be prepared to discuss why additional discovery is not required, and if Defendants raise any proportionality concerns, what evidence exists to justify their proportionality concerns. Left unresolved at this time is how patient files are to be produced. Relator argues that a random sample of patient files could be produced to assess what percentage of these files evidence improper

billing. Defendants argue that it is the Relator's burden to establish liability, intent, and actual improper billing on every patient file. This issue will be taken up after Phase 1 discovery is completed. Accordingly, production of patient files is not required at this stage.

It is so ORDERED.

SIGNED this 22nd day of June, 2021.

Xavier Rodriguez
United States District Judge