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

THE UNITED STATES OF AMERICA ex rel. MICHAEL D. WATSON,	:	
Plaintiff	:	CIVIL ACTION
v.	:	NO. 98-6698
CONNECTICUT GENERAL LIFE INSURANCE COMPANY	:	
Defendant .	:	

MEMORANDUM & ORDER

YOHN, J. FEBRUARY ___, 2003

Plaintiff, Michael D. Watson ("Watson") has filed this *qui tam* action, brought pursuant to the False Claims Act ("FCA" or the "Act"), 31 U.S.C. §§ 3729-30, against Connecticut General Life Insurance Company ("CGLIC"). Watson alleges that CGLIC deliberately and knowingly engaged in a multitude of deceptive and manipulative practices which artificially inflated the number of claims that it appeared to be processing, thereby causing CGLIC's claims-processing costs to rise and its reimbursement from the Health Care Financing Administration ("HCFA") to increase. Watson further alleges that CGLIC engaged in many fraudulent practices to create the appearance that it was performing in accordance with the government's Carrier Performance Evaluation Program ("CPE" or "CPEP") and the Medicare Carriers Manual ("MCM"). Additionally, Watson alleges that CGLIC wrongfully terminated his employment contracts when it became aware that Watson had reported these allegedly fraudulent practices to

HCFA.

Watson's second amended complaint alleges a total of six counts against CGLIC. Count I is a claim for a violation of the FCA. Count II is a claim for retaliatory discharge under 31 U.S.C. § 3730(h). Counts III through VI are California state law claims for wrongful termination (Count III), tortious interference with contract (Count IV), breach of common law right to fair procedure (Count V), and violation of the California Whistleblower Statute, Ca. Labor Code § 1102.5 (Count VI).

Presently before the court is CGLIC's motion for summary judgment on all counts contained in Watson's second amended complaint. For the reasons set forth below, I grant CGLIC's motion for summary judgment in its entirety. Judgment will be entered in favor of CGLIC and against Watson on all counts.

FACTUAL BACKGROUND

As necessary in considering CGLIC's motion for summary judgment, the facts that follow are viewed and all reasonable inferences are drawn in favor of Watson as the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Medicare, enacted as Title XVIII of the Social Security Act, is a federally funded subsidized program that reimburses for medical services provided to qualified elderly and disabled persons. 42 U.S.C. § 1395 *et seq*. The Department of Health and Human Services ("HHS"), acting through the Centers for Medicare and Medicaid Services ("CMS")[1] is responsible for administrating the Medicare program. 42 U.S.C. § 1395u(a)(1). To aid in its

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[1] As of July 1, 2001, HCFA has been renamed the Centers for Medicare and Medicaid Services ("CMS"). HCFA and CMS have been used interchangeably throughout this opinion to refer to the agency responsible for administering the Medicare program.

administration of the Medicare Part B claims[2], CMS contracts with Medicare carriers, typically private insurance companies, to process claims submitted by eligible service providers and authorize such claims for payment from the Federal Hospital Insurance and Supplementary Medical Insurance Trust Funds ("Medicare Trust Fund"). 42 U.S.C. § 1395u. Defendant became a Medicare carrier for three states in 1990 when it purchased Equicor and assumed its responsibilities in processing Part B Medicare claims. Doc. 73, ¶ 5.

In October 1993, CGLIC also contracted with HCFA to process durable medical equipment[3] claims for the western part of the United States.[4] *Id.* ¶¶ 7, 8. As a DMERC, CGLIC is responsible for processing Medicare claims associated with the sale of durable medical equipment to Medicare beneficiaries in that geographic area.[5]

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[2] The Medicare program consists of two parts. Medicare Part A covers inpatient hospital services. 42 U.S.C. §§ 1395c-1395i-2. Medicare Part B covers supplemental insurance benefits for other healthcare costs. 42 U.S.C. §§ 1395k(a)(1); 1395k(a)(2)(B); 1395x(s)(7).

[3] Durable medical equipment is that which is meant for repeated use and is appropriate for the home, such as wheelchairs, scooters, and oxygen tanks. 42 U.S.C. § 1395x(n).

[4] Durable medical equipment claims are Part B claims. Until 1993, these claims were handled by the same carriers who processed all other Part B claims. Def. Tab 67, Setzer Decl. ¶ 4 (Brian Setzer is a CGLIC employee; he has served as the Compliance Officer for the Medicare Division of CGLIC from April 2000 to the present, ¶ 1, 2). In 1993, HCFA entered into contracts with four carriers for the specific purpose of handling durable medical equipment claims. *Id.* ¶ 5. These carriers are known as "DMERCs." CGLIC was one of the four original DMERCs. *Id.*

[5] CGLIC repeatedly contends that its Part B contract is outside the scope of this lawsuit, and therefore any evidence cited by Watson that relates to this contract must be stricken. Doc. 74 at 19, 20, 23. CGLIC cannot, however, establish support for this contention. Contrary to CGLIC's belief, Watson has never agreed that his complaint excluded CGLIC's Part B carrier agreement. Watson's second amended complaint clearly contains allegations that cover CGLIC's Part B operations. Second Amend. Compl. ¶¶ 3, 5, 7, 8. Moreover, CGLIC was certainly on notice that Watson intended his complaint to cover the Part B contract as well as the DMERC contract, as his requests for admission make numerous references to the Part B contract.

In its role as a Medicare carrier, CGLIC engages in numerous claims-processing activities, including processing initial claims and conducting subsequent reviews and hearings, and it is paid for all these activities on a cost-reimbursement basis. Def. Tab 11, CGLIC DMERC Contract; Def. Tab 58, Underhill[6] Depo. at 17, 18. At the start of each year, HCFA and CGLIC negotiate a budget that is intended to cover CGLIC for all its workload costs in performing as a Medicare carrier. Def. Tab 138, Barton[7] Decl. ¶ 8. If CGLIC goes over budget, it can apply for more funds from the government by submitting a supplemental budget request. *Id.* ¶ 9. At the end of the year, CGLIC reports its actual costs to HCFA and if its costs are below budget, the excess funds are returned to the government. Def. Tab 58, Underhill Depo. at 16, 17.

Although CGLIC could not earn a profit under its Medicare carrier contracts, CGLIC's DMERC contract provided limited performance-based incentives for the second year of its initial two-year term. Def. Tab 11, CGLIC DMERC Contract. CGLIC did not apply for, receive, or qualify for these incentive payments. Def. Tab 58, Underhill Depo. at 14; Def. Tab 67, Setzer Decl. ¶ 13. CGLIC was also never penalized for a failure to comply with contract requirements

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See Pl. Exhs., Def. Responses to Pl. Requests for Admissions, Nos. 21, 92-96, 104-08, 114, 127. Thus, I will not preclude Watson from relying on documents from CGLIC's Part B operations to support his FCA claim. However, as will be shown below, Watson has not provided sufficient evidence of any kind, whether related to CGLIC's Part B or DMERC operations, to carry his burden of providing the court with sufficient evidence to establish that any of his allegations can sustain an FCA claim against CGLIC.

[6] James Underhill is a government employee; he has served as the CGLIC DMERC Contract Manager for CMS from mid-1999 to the present. Def. Tab 58, Underhill Depo. at 7-8.

[7] John Barton is a former government employee; he served as the Contracting Officer for certain CGLIC contracts with the government from 1994 through 2001. Def. Tab. 149, Barton Supp. Decl. ¶ 2.

even though its DMERC contract contained a provision that if CGLIC failed to perform under the contract, the government could require reperformance, and if the defects in service could not be corrected by reperformance it could reduce any fee payable to reflect the reduced value of the services performed. Def. Tab 11, CGLIC DMERC Contract; Def. Tab 149, Barton Supp. Decl. ¶¶ 3-4 (Barton's statements are given weight only to the extent that he is speaking from his experiences during the period of time that he served as the Contracting Officer for CGLIC's contracts with the government).

CGLIC's performance under its contracts is reviewed annually by HCFA pursuant to the government's CPE for things such as timeliness and accuracy in processing claims. Doc. 73, ¶¶ 30, 31. The results of the CPE are provided to CGLIC, and when applicable, corrective action plans are developed to improve performance. *Id.* CGLIC's CPE, however, is not a determinative factor in the government's decision to renew its contracts with CGLIC. Def. Tab 58, Underhill Depo. at 15, 16.

In December 1994, plaintiff/relator, Michael Watson, entered two contracts with CGLIC to be an independent hearing officer for the Medicare claims appeals process. Def. Tab 67, Setzer Decl. ¶¶ 3, 6. One contract was with CGLIC's DMERC operation, and the other was with CGLIC's Part B operation. Def. Tabs 14, 15. As a hearing officer, Watson was responsible for holding hearings to review the denial of Medicare claims when challenged by a Medicare provider. The contracts between CGLIC and Watson explicitly stated that Watson was an independent contractor of CGLIC. *Id.* Watson was compensated on a case-by-case basis, depending on the type of hearing he conducted. *Id.* However, when a uniquely complicated case was assigned, Watson's compensation was negotiated based on an estimate of the number of

hours of work that would be needed to complete the hearing. *Id.* Watson received no employee benefits from CGLIC and he filed tax returns as a self-employed individual. *Id.* CGLIC did not control the manner and place of Watson's work, other than requesting that Watson use CGLIC facilities whenever possible for in-person hearings. Doc. 77, Watson Decl. ¶ II. As long as Watson met the federally mandated timeliness requirements, Watson was free to set his own schedule. Def. Tab 41, Watson Depo. at 189. Watson supplied the bulk of his supplies. He paid for his own audio tapes, fax machine, printer, computer and telephone. Doc. 77, Watson Decl. ¶ IV; Def. Tab 41, Watson Depo. at 132. CGLIC simply provided Watson with reference materials, a recording device, and stationery on which to write his determination letters. *Id.* Watson's employment with CGLIC was not exclusive; he performed services for several other Medicare carriers while he worked for CGLIC. Def. Tab 41, Watson Depo. at 110-13. Pursuant to the terms of his contracts, Watson's DMERC and Part B contracts were terminated by CGLIC effective May 24, 1998 and June 10, 1998, respectively.

PROCEDURAL HISTORY

In December 1998, Watson filed under seal this qui tam action against CGLIC. Def. Tab 1. On February 24, 2000, the government notified the court of its decision not to intervene in the action. Doc. 7. Thus, on February 28, 2000, the court ordered the complaint unsealed and served upon CGLIC. Doc. 8. The complaint was thereafter amended on April 20, 2001 and again on November 8, 2001. Def. Tabs 2, 3.

On April 30, 2002, CGLIC filed a motion for summary judgment.[8] Doc. 72. It is this

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[8] Also on April 30, 2002, Watson moved for partial summary judgment on his second amended complaint. Doc. 70. The court has dealt with this motion in a separate order.

motion that is presently before the court. CGLIC maintains that it is entitled to summary judgment on the FCA claim (Count I) because Watson, as the non-moving party with the burden of proving a prima facie FCA case, has not identified sufficient evidence to establish every element essential to the claim. CGLIC also maintains that it is entitled to summary judgment on the FCA retaliatory termination claim (Count II) and the California wrongful termination claim (Count III) because Watson was an independent contractor of CGLIC who lacked standing to bring these claims. Finally, CGLIC seeks summary judgment on the fair procedure rights claim (Count V) on the basis that Watson cannot establish that he had the right to fair procedure prior to his termination as a Medicare hearing officer.[9]

STANDARD OF REVIEW

Either party to a lawsuit may file a motion for summary judgment, and it will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "'Facts that could alter the outcome are "material", and disputes are "genuine" if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct." *Ideal Dairy Farms, Inc. v. John Lebatt, LTD*., 90 F.3d 737, 743 (3d Cir. 1996) (citation omitted).

While the moving party bears the initial burden of showing that there is no genuine issue of material fact, *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), Rule 56(c) "mandates the

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[9] Watson has consented to the dismissal of his claim for tortious interference with contract (Count IV). He concedes that the record is insufficient to support such a claim. Doc. 76 at n. 31.

entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," *Id.* at 322.

When a court evaluates a motion for summary judgment, "[t]he evidence of the non-movant is to be believed." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Additionally, "all justifiable inferences are to be drawn in [the non-movant's] favor." *Id.* Moreover, "'[s]ummary judgment may not be granted . . . if there is a disagreement over what inferences can be reasonably drawn from the facts even if the facts are undisputed.'" *Ideal Dairy*, 90 F.3d at 744 (citation omitted). At the same time, "an inference based upon a speculation or conjecture does not create a material factual dispute sufficient to defeat entry of summary judgment." *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 382 n.12 (3d Cir. 1990). The nonmovant must show more than "[t]he mere existence of a scintilla of evidence" for elements on which he bears the burden of production. *Anderson*, 477 U.S. at 252. Thus, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citations omitted).

DISCUSSION

I. False Claims Act - Count I

There are three elements of a prima facie case under Section 3729(a)(1)[10] of the False

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[10] Watson's complaint does not specify which section of the False Claims Act he alleges to have been violated. However, based on the allegations contained in his complaint, it is clear to the court that his claim is for a violation of Section 3729(a)(1), which provides that any person who "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval . . . is liable."

Claims Act. First, Watson must prove that CGLIC presented or caused to be presented to HCFA a claim for payment. *Hutchins v. Wilentz, Goldman & Spitzer*, 253 F.3d 176, 183 (3d Cir. 2001), *cert. denied*, 122 S. Ct. 2360, 153 L. Ed. 2d. 182, 70 U.S.L.W. 3755, 70 U.S.L.W. 3756 (Jun. 10, 2002). The FCA defines "claim" as "any request or demand . . . for money . . . if the United States Government provides any portion of the money . . . which is requested or demanded." 31 U.S.C. § 3729(c). Thus, liability under the FCA does not attach unless the claim for payment results in economic loss to the government by having the "purpose and effect of causing the government to pay out money." *Id.* at 183.

Second, Watson must establish that the claim was false or fraudulent. *Hutchins*, 253 F.3d at 182. The term "false or fraudulent" is not defined in the FCA. However, considering the juxtaposition of the word "fraud"[11] with the word "false"[12] plus the word "claim" suggests that a false or fraudulent claim is one aimed at extracting money the government otherwise would not have paid had it known that the claim for payment was based on one's misconduct. *Mikes v. Straus*, 274 F.3d 687, 696 (2d Cir. 2001).

Finally, Watson must establish that CGLIC knew it was presenting a false or fraudulent claim for payment. To establish this element of knowledge, Watson must show that CGLIC (1) had actual knowledge that it submitted a false or fraudulent claim for payment, (2) acted in deliberate ignorance of the truth or falsity of its claim, or (3) acted in reckless disregard of its

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[11] "Fraud" is commonly defined as "an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right." BLACK'S LAW DICTIONARY 660 (6th ed. 1990).

[12] "False" often means "not true," "deceitful," or "designed to mislead." BLACK'S LAW DICTIONARY 600 (6th ed. 1990).

truth or falsity. 31 U.S.C. § 3729(b). Allegations of mere negligence or innocent mistake do not give rise to FCA liability. *Id.*

As the party with the burden of proof in establishing the elements of a prima facie FCA cause of action against CGLIC, in order to survive CGLIC's motion for summary judgment, Watson must identify evidence that establishes the existence of all three essential elements of an FCA claim. *See Pertucelli v. Bohringer & Ratzinger*, 46 F.3d 1298, 1308 (3d Cir. 1995). In other words, Watson must provide the court with evidence demonstrating that CGLIC acted knowingly, recklessly or with deliberate ignorance in submitting or causing to be submitted to the government a false or fraudulent claim for payment that caused the government economic loss. If Watson is unable to provide evidence sufficient to establish the existence of each of these elements, CGLIC will be entitled to summary judgment on Watson's FCA claim.

Watson's complaint alleges numerous instances of CGLIC's alleged manipulative and deceptive conduct, which he states have caused any claim for payment by CGLIC to be actionable under the FCA. First, Watson alleges that CGLIC engaged in an "illegal" practice of encouraging Medicare suppliers to resubmit rather than to seek review of their denied and/or incomplete claims. Second, he claims that CGLIC manipulated its computer software so that duplicate claims were impermissibly allowed through its system. Watson avers that by encouraging resubmissions and ignoring duplicate claims, CGLIC was able to increase the number of new claims it appeared to be processing, which resulted in an increase in funds allocated by the government to CGLIC's claims-processing activities. Third, Watson's complaint contains many averments that CGLIC violated the MCM but fraudulently certified its compliance in order to be reimbursed in full for its costs incurred in processing claims. Fourth,

Watson's complaint contains many averments that CGLIC engaged in practices to manipulate its CPE in order to be eligible for incentive payments, to avoid penalties, and to influence the government's decision to renew its contracts. Finally, Watson alleges that CGLIC failed to impose late fees on delinquent Medicare providers, causing the government to pay out more money from the Medicare Fund than it would have had to pay if the 10 percent late fee had been properly assessed by CGLIC.[13]

A. CGLIC's Practice of Encouraging Resubmission

When a claim is denied or returned to a Medicare provider because of incomplete information, the next course of action is for the provider to resubmit the claim and provide the missing information or to seek a review of the claim as denied. *See e.g.,* Pl. Exhs., MCM § 3005.2; Def. Tab 20, DMERC Action Codes for Resubmission; Def. Tab 59, Peterson Rep. at 10. Watson argues that CGLIC indiscriminately and wrongfully encouraged providers to resubmit claims rather than to seek reviews. According to Watson, this scheme artificially inflated the number of "new" claims CGLIC appeared to be processing, thereby increasing CGLIC's budgeted funds under its contracts with HCFA. Watson maintains that because CGLIC knowingly engaged in this deceptive and manipulative practice which had the effect of causing the government economic loss, there is an actionable FCA claim here. CGLIC does not dispute

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[13] Watson's complaint contains sixteen allegations of CGLIC's specific misconduct that Watson believes form the basis for his FCA claim against CGLIC. For purposes of this memorandum, the court has grouped these allegations into five categories: (1) CGLIC's practice of encouraging resubmission, (2) CGLIC's manipulation of its software to ignore duplicate claims, (3) CGLIC's false certification of regulatory noncompliance, (4) CGLIC's conduct to improve its CPE, and (5) CGLIC's failure to impose late fees on delinquent Medicare providers. The court's discussion below of these five categories encompasses all the grounds presented by Watson in his complaint for imposing FCA liability on CGLIC.

that it encouraged providers to resubmit their denied claims; however, CGLIC does dispute that this practice is actionable under the FCA.

CGLIC's contracts with HCFA are cost-reimbursement contracts. Def. Tab 11, CGLIC DMERC Contract; Def. Tab. 148, Davin[14] Supp. Decl. ¶ 8. Pursuant to these contracts, CGLIC is reimbursed for all its costs in processing Medicare claims,[15] but it cannot earn a profit for its performance as a Medicare carrier.[16] Because of its inability to profit, CGLIC contends it lacked an incentive to increase its claims volume by encouraging resubmissions, and therefore it cannot be liable under the FCA. Although it may be counterintuitive that CGLIC would submit fraudulent claims to the government without any prospect of benefitting itself financially, an incentive to defraud is not an essential element of an FCA claim. Even without an incentive, CGLIC must be held accountable for its actions, if indeed such conduct is actionable under the FCA. Def. Tab 58, Underhill Depo. at 17, 18.

In the alternative, CGLIC argues that Watson cannot establish all three elements of a

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[14] Kristi Davin is a CGLIC employee; she has served as the Assistant Compliance Director for the Medicare Division of CGLIC from April 1998 to the present. Def. Tab 148, Davin Supp. Decl. ¶¶ 1, 2

[15] Watson contends that CGLIC was only reimbursed for its costs in processing new claims, and not for conducting hearings or reviews of disputed claims. However, there is no evidence to support this contention. Instead, the evidence supports an opposite contention, namely that CGLIC was reimbursed for all claims-processing activities, including processing resubmissions and conducting reviews and telephone inquiries. *See e.g.,* Def. Tab 58, Underhill Depo. at 17, 18; Def. Tab 138, Barton Decl. ¶ 5; Pl. Exhs., Bates No. C041820.

[16] Although CGLIC is not entitled to earn a profit from its role as a Medicare carrier, CGLIC nevertheless has benefitted from its contracts with HCFA. CGLIC's Medicare contracts have brought it prestige, allowed it to enter the key senior health care market, and most importantly, have allowed CGLIC to recover its fixed costs that would otherwise have been borne by CGLIC's for-profit line of business. The value of CGLIC's overhead offset has been estimated at $12 million per year. Def. Tab 142, Setzer Supp. Decl. ¶ 5.

prima facie FCA claim based on its practice of encouraging resubmissions. First, CGLIC maintains that it did not present an actionable claim for payment because any "scheme" to encourage resubmissions only shifted its costs in processing Medicare claims from reviews to resubmissions and did not cause the government economic loss because this shift had the effect of reducing the amount of money the government owed to CGLIC.

Watson counters that even if it was generally less expensive for CGLIC to process resubmissions than to conduct reviews, there is evidence that on at least one occasion resubmissions caused an increase in the amount of funds budgeted to CGLIC. The evidence to which he cites is a modification of the DMERC contract where an additional $199,200 was budgeted to CGLIC to account for an increase in its workload from 7,100,000 to 7,276,301 claims. Pl. Exhs., Bates No. C004389. However, this increase in the amount initially budgeted to CGLIC for its processing of DMERC claims does not evidence that CGLIC's resubmission "scheme" caused the government to pay Watson more money than it would have otherwise been obligated to pay. CGLIC is not reimbursed on a per claim basis.[17] Def. Tab 58, Underhill Depo. at 17-18; Def. Tab 138, Barton Decl. ¶ 4; Def. Tab 148, Davin Supp. Decl. ¶ 8. Its payments under the Medicare contracts are not tied solely to its cost in processing "new" claims, but rather to all its costs in acting as a Medicare carrier for the HCFA, including those costs it incurs in processing resubmissions and in conducting reviews of denied claims. Def. Tab 138, Barton Decl. ¶¶ 4, 5. The budgeting of additional funds to account for an increase in claims volume has no bearing on the amount that the government ultimately would pay to CGLIC for its claims

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[17] Watson appears to concede this fact in his reply memorandum in support of his motion for summary judgment and points to no contrary evidence. Doc. 82 at 2.

processing activities. CGLIC receives its final reimbursement from HCFA at the end of the year after its actual claims processing costs have been calculated.[18] Thus, while more funds were initially budgeted to CGLIC for interim payments, CGLIC would only retain these additional funds if its actual claims processing costs rose, as calculated at the end of the year. As a result, contrary to Watson's argument, this contract modification does not establish that CGLIC's policy of encouraging resubmission caused it to present to the government a claim for payment actionable under the FCA.

Watson offers a second theory as to how the increase in CGLIC's claims volume created an actionable claim for payment under the FCA. Watson argues that CGLIC, by increasing its claims volume, artificially decreased its Budgeted Bottom Line Unit Costs ("BLUC"), the cost-per-claim figure. Watson contends that when deciding whether to approve CGLIC's supplemental budget requests, the government reviewed CGLIC's BLUC and was more willing to grant an increase in CGLIC's budget if it thought that CGLIC was performing its work efficiently. Although Watson has provided evidence that CGLIC's BLUC decreased, Pl. App., CMSX0273- CMSX0280, he has not provided evidence that CGLIC's budget was increased

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[18] Each year CGLIC submits a budget request to HCFA based on the workload requirements that it has been given. Def. Tab 138, Barton Decl. ¶ 8. HCFA, in turn, reviews the budget request and approves an amount of funding for the year by issuing a Notice of Budget Approval ("NOBA"). *Id.* During the year, minimal shifting of budget funding between tasks is allowed. *Id.* ¶ 9. However, if more than minimal shifting of the budget is required, CGLIC must submit a Supplemental Budget Request ("SBR") to the HCFA. *Id.* An SBR can be denied, or approved in part or in full, only with the issuance of a new NOBA by HCFA. Following the conclusion of the fiscal year, CGLIC is required to submit a Final Administrative Cost Proposal ("FACP"), which reports actual costs incurred during the year. *Id.* ¶ 10. Following the annual FACP, HCFA issues a final NOBA for the exact amount of the FACP, reimbursing CGLIC for the actual costs incurred. *Id.* If at the end of the year, CGLIC costs are below budget, defendant must return the excess funds to the government. Def. Tab 58, Underhill Depo. at 16-17; Def. Tab 148, Davin Supp. Decl. ¶¶ 12-18.

because of its decreased BLUC. In fact, the evidence is to the contrary. An HCFA official and CGLIC compliance officer have testified that the BLUC had no impact whatsoever on HCFA's budgeting decisions. Def. Tab 58, Underhill Depo. at 18, 42; Tab 67, Setzer Decl. ¶ 18; Def. Tab 148, Davin Supp. Decl. ¶ 22.

As shown above, the evidence before the court does not establish that CGLIC's policy of encouraging resubmission could be linked to a claim for payment actionable under the FCA. However, assuming *arguendo* that CGLIC's practice of encouraging resubmission did in fact cause an actionable claim for payment, Watson's FCA will still fail. Despite having conducted extensive discovery, Watson has failed to produce evidence that supports an inference of fraud on the part of CGLIC with regard to its resubmission policy, and thus, has failed to make a showing sufficient to establish the existence of an element essential to his claim. Most of the evidence presented by Watson simply establishes that CGLIC encouraged Medicare providers to resubmit claims whenever possible and not that this policy was manipulative or otherwise wrongful. *See e.g.,* Pl. Exhs., Bates No. JS82893; Pl. Exhs., Fisk[19] Decl. at 1-2. The only evidence Watson cites to support his allegation that CGLIC's resubmission practice was fraudulent, Section 3005.2 of the MCM, provides that a Medicare supplier has a choice of correcting claims returned as incomplete or of resubmitting such claims as entirely new claims, but that the chosen action must be "appropriate." Pl. Exhs., MCM 3005.2. This section does not explain when or why resubmission would be inappropriate, and therefore it does not demonstrate

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[19] Chela Fisk works for a provider company; she is the Communications Supervisor/Medicare contact for Keeler's Medical Supply company in Yakima, Washington. Pl. Exhs., Fisk Decl. at 1. In that position, she interacts with CGLIC as a provider. *Id.* She has served in this position from 1994 to the present. *Id.*

that CGLIC acted wrongfully when it encouraged providers to resubmit their claims instead of to seek review.[20]

While Watson has not provided any evidence of misconduct on the part of CGLIC in encouraging resubmissions, CGLIC has provided evidence that it acted entirely appropriately by encouraging providers to seek resubmissions instead of reviews. There is evidence that the government knew of CGLIC's practice of encouraging resubmissions, Def. Tab 58, Underhill Depo. at 20, which suggests that this practice was entirely legitimate and not at all fraudulent. *See, e.g.*, *United States ex rel. Durcholz v. FKW Inc.,* 189 F.3d 542, 544- 45 (7th Cir. 1999) ("The government's prior knowledge of an allegedly false claim can vitiate a FCA action."); *Wang v. FMC Corp.*, 975 F.2d 1412, 1421 (9th Cir. 1992) ("The fact that the government knew of FMC's mistakes and limitations, and that FMC was open with the government about them, suggests that while FMC might have been groping for solutions, it was not cheating the government in the effort."). Additionally, there is testimony from Medicare providers that resubmission is often the most efficient way to deal with denied claims, and that when claims are denied or incomplete, the preferred course of action is to resubmit these claims as new claims, rather than to seek reviews. Def. Tab 45, Fisk Depo. at 40; Def. Tab 57, Thacker[21] Depo. at 83.

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[20] Watson's expert, Stephen Brooks, concluded that based on CGLIC's own criteria at least 22 percent of the total resubmitted claims should have been handled as reviews. Pl. App., Brooks Decl. at 1. Watson contends that this number indicates that the occurrences of incorrect resubmissions were more than isolated incidents and it establishes a pattern of fraudulent activity. Doc. 82 at 5. However, whether CGLIC followed its own criteria for when claims should be resubmitted rather than reviewed has no bearing on a determination of whether CGLIC submitted a false claim for payment to the government based on its policy of encouraging resubmissions, which has not been shown to be at all fraudulent.

[21] Larry Thacker works for a provider company; he is the General Manager of A-Med Health Care Center. Def. Tab 57, Thacker Depo. at 6-8. In that position, he interacts with

Watson has made no effort to rebut this testimony which supports the legitimacy of CGLIC's resubmission policy.

Finally, even assuming that Watson could establish CGLIC's resubmission policy to be fraudulent, he has not provided the court with any evidence that CGLIC engaged in this practice with the requisite knowledge for imposing FCA liability. Considering that CGLIC provided evidence that it considered resubmission to be the more efficient and cost-effective method of dealing with denied or incomplete claims, it is extremely unlikely that CGLIC encouraged resubmissions knowing that this practice would increase costs and cause the government economic loss.

In sum, Watson has failed to meet his burden as the nonmoving party of identifying evidence sufficient to support all elements of an FCA claim against CGLIC based on his allegation that CGLIC wrongfully encouraged resubmission of denied claims. Watson cannot establish sufficient evidence that CGLIC's resubmission policy was fraudulent, that CGLIC engaged in this practice with the requisite knowledge, or that it resulted in an actionable claim for payment. Thus, because the record taken as a whole could not lead a rational trier of fact to find an actionable FCA claim here, there is no "genuine issue for trial."

B. CGLIC's Alleged Manipulation of its Software to Ignore Duplicate Claims

A duplicate claim is an exact copy of a claim that has already been submitted by a supplier and paid out of the Medicare Trust Fund. Def. Tab 68, Lehrer[22] Decl. ¶ 13. As

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CGLIC as a provider. *Id*. He has served in this position from 1987 to the present. *Id*.

[22] Arthur Lehrer is the Chief Operating Officer of ViPS, Inc., which is the company that creates and maintains Medicare claims processing programs. Def. Tab 68, Lehrer Decl. ¶ 2. Lehrer has worked for ViPS for 19 years and was promoted to his current position in 2001. *Id*.

mandated by HCFA, CGLIC utilizes the ViPS Medicare System ("VMS") computer software to catch duplicate claims so that multiple payments are not made on a single service. This software identifies exact duplicates and suspends potential duplicates for further manual review. *Id.* Watson alleges that CGLIC manipulated the VMS software and that CGLIC failed to correct known errors in the software program so that duplicate claims were allowed to pass undetected through the system, resulting in misspent Medicare Fund dollars. In its motion for summary judgment, CGLIC contends that this allegation cannot sustain an FCA claim as the evidence before the court does not sufficiently establish that CGLIC manipulated its VMS software, let alone that it engaged in this behavior with the requisite knowledge for imposing FCA liability.

In order to support his allegation that CGLIC knowingly engaged in the fraudulent practice of altering the VMS software to ignore duplicate claims, Watson has selectively excerpted quotes and paragraphs from a litany of internal CGLIC memoranda and e-mails. A review of the documents from which Watson excerpts, however, demonstrates that this evidence does not prove any wrongdoing on the part of CGLIC with regard to its operation of the VMS software. If anything, these documents demonstrate that CGLIC properly managed its computer system, educated its employees as to how to process claims correctly, and consulted with the government and took action when problems did arise.

Most of the documents that Watson cites in order to support his allegation that CGLIC manipulated the VMS software to ignore duplicate claims fall into three categories. First, there are those documents that deal with CGLIC's efforts to improve the efficacy and accuracy of its manual review of the claims suspended by the VMS software as potential duplicates. Pl. Exhs., Bates Nos. JS92552 (memo providing advice on how to manually spot duplicate claims);

JS92549 (memo explaining how manual claims reviewers should be extra vigilant when reviewing claims marked as potential duplicates). CGLIC's efforts to improve its clerical review of potential duplicate claims simply do not establish that CGLIC knowingly turned off or tricked the VMS software to ignore duplicate claims. Rather, these documents evidence CGLIC's attempt at diligent system management and its efforts to process both new and duplicate claims properly.

Second, there are documents that deal with the efforts of VMS to remedy program errors that had been discovered. Pl. Exhs., Bates Nos. JS082667 (explaining that the VMS software properly marked claims as denied but for the wrong reasons); JS082897 (explaining changes taken by VMS to refine its software); JS083746 (same). These program errors were discrete problems with the VMS software failing to catch small, insular categories of duplicate claims. The fact that some errors were discovered with the VMS software does not evidence CGLIC's manipulation of the software to allow duplicate claims to pass through its system undetected.

Third, some documents cited by Watson that do not relate at all to CGLIC's use of the VMS software. For instance, one document deals with a problem detected in the government's common working file system, which is used to check claims that have been cleared through CGLIC's processing system against the government's master file of Medicare beneficiaries. Pl. Exhs., Bates No. C045162; Def. Tab 150, Neely[23] Decl.¶ 7. Then, there are the two documents that relate to CGLIC's system for dealing with medical necessity claims. Pl. Exhs., Bates Nos. JS092546, JS092458; Def. Tab 150, Neely Decl. ¶ 17. Resubmitted medical necessity claims are

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[23] Melanie Neely is a CGLIC employee; she has worked as the Claims Services Consultant for the Medicare Division of CGLIC from 1994 to the present. Def. Tab 150, Neely Decl. ¶ 1.

automatically denied as duplicates whether or not payments on these claims have been previously made. Def. Tab 137, Medicare Program Integrity Manual, Section 1.3. This is a limited exception to the general rule that only resubmissions of paid claims should be denied as duplicates.[24] Finally, one document cited by Watson deals with CGLIC's failure to spot duplicate claim lines within a single claim. As such, this document does not have anything to do with the sort of duplicate claims which the VMS software is designed to identify – those claims which are duplicates of entirely separate claims that have been already processed and paid. Pl. Exhs., Bates Nos. C007183 (duplicate line items on the same claim were paid because an edit to catch such duplicate lines within a single claim had been turned off).

There is also evidence that directly refutes Watson's contention that CGLIC manipulated the VMS software. Arthur Lehrer, the Chief Operating Officer of VMS, stated in his declaration that it would have been impossible for CGLIC to alter the VMS computer logic, as it was hard-coded and could not be changed by Medicare carriers. Def. Tab 68, Lehrer Decl. ¶¶ 12, 15. Additionally, the fact that CGLIC denied more claims as duplicates than the national average for Medicare carriers, Pl. Exhs., Bates No. C009283, and that it had only a 0.2 percent error rate for allowing duplicate claims through the system, Def. Tab 60, Peterson Rep. at 3, tends to support CGLIC's contention that it was diligent in catching duplicate claims and that it did not

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[24] Further, I note that these documents do not demonstrate any wrongdoing on the part of CGLIC with regard to its processing of medical necessity claims; rather, they illustrate CGLIC's efforts to report its claims-processing numbers correctly to HCFA. Similarly, there are two other documents cited by Watson that demonstrate CGLIC's efforts to process duplicate claims properly. Pl. Exhs., Bates Nos. C44527 (indicating tendency of suppliers to flood CGLIC's office with duplicate claims before the original has a chance to be processed); JS083108 (providing advice on how to re-file claims properly so that unpaid claims, which are not technically duplicates, are not denied as such).

intentionally manipulate the VMS software to ignore such claims. Further, in his deposition, Watson admitted that he had no "specific evidence" to support his allegation that CGLIC turned off edits to allow duplicate claims to be processed as if they were new claims. Def. Tab 41, Watson Depo. at 353-54. Instead, Watson bases this allegation on an assumption that he drew when he witnessed multiple claims that were exactly alike yet were not identified as duplicates. Def. Tab 41, Watson Depo. at 351-54. Based on the existence of these identical claims, Watson presumed that CGLIC had manipulated the VMS software. This unsubstantiated presumption is at best a "scintilla of evidence" and is clearly not enough to support an allegation of wrongdoing on the part of CGLIC.

Watson has, however, cited one document that provides limited support for his contention that CGLIC manipulated the VMS software to ignore duplicate claims. At the 1999 congressional hearing on HCFA's problems with Medicare carriers, George Grob ("Grob"), Deputy Inspector General for Evaluations and Inspections, testified that Medicare carriers "adjusted their claims processing so that system edits designed to prevent inappropriate payments were turned off." Pl. Exhs., Bates No. JS054834. The strength of this evidence is extremely limited in that Grob's testimony does not specifically indicate that it was the VMS software that the Medicare carriers were altering nor does it indicate that this general problem with Medicare carriers was experienced with CGLIC specifically. Moreover, this congressional testimony also indicates that the government was aware of the alleged wrongful manipulation of system edits. The government's knowledge of CGLIC and others' possible manipulation of the VMS software if there were evidence of such, negates Watson's argument that CGLIC perpetrated fraud on the government in this effort. *See United States ex rel. Durcholz v. FKW Inc.*, 189 F.3d 542, 544-45

(7th Cir. 1999) ("The government's prior knowledge of an allegedly false claim can vitiate a FCA action."); *Wang v. FMC Corp.,* 975 F.2d 1412, 1421 (9th Cir. 1992) ("The fact that the government knew of FMC's mistakes and limitations, and that FMC was open with the government about them, suggests that while FMC might have been groping for solutions, it was not cheating the government in the effort."). Given these limitations on Grob's congressional testimony, this document does not establish more than a "scintilla of evidence" that CGLIC engaged in manipulation and alteration of its VMS software to ignore duplicate claims. Watson, therefore, has not presented sufficient evidence from which a rational jury could find CGLIC liable under the FCA based on this allegation of fraud.

Even assuming Watson could present sufficient evidence to support an inference that CGLIC did in fact manipulate its VMS software, his FCA claim against CGLIC will nevertheless fail because Watson has failed to demonstrate that CGLIC engaged in such behavior knowing that it would cause a false or fraudulent claim to be presented to the government. There is no evidence that CGLIC's occasional failure to catch duplicate claims was caused by anything more than negligence or mistake, which are not actionable under the FCA. *United States ex rel. Showell v. Philadelphia AFL, CIO Hosp. Assoc.*, 2000 WL 424274 at *6 (E.D. Pa. Apr. 18, 2000).[25] Because Watson, the party with the burden of proof in establishing a prima facie FCA

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[25] Watson contends that by allowing duplicates through the system, CGLIC increased the volume of claims it appeared to be processing, which caused the government to budget more funds to CGLIC. To support this argument, Watson relies on the DMERC contract modification of September 19, 1996, where more funds were allocated to CGLIC's claims-processing activities because of an increase in claims volume. Pl. Exhs., Bates No. C004389. As explained above, *see supra* I.A., this modification only establishes that an increase in claims volume caused more funds to be allocated to CGLIC initially. It does not prove that the government ultimately paid CGLIC more under its contracts than it would have otherwise been obligated to pay. It is not evidence, therefore, of an actionable claim for payment.

claim, has not provided the court with any evidence that CGLIC engaged in any wrongful behavior or that, if it did, it did so with the requisite knowledge for imposing FCA liability, there is no basis on which a rational jury could find that Watson's allegations of CGLIC's VMS software manipulation are actionable under the FCA.[26]

C. CGLIC's False Certification of Regulatory Compliance

Many allegations contained in Watson's second amended complaint assert claims that CGLIC violated the requirements of HCFA and/or the MCM[27] in processing its Medicare claims. Watson contends that each year CGLIC falsely and fraudulently certified its compliance with the MCM and HCFA directives in order to receive reimbursement under its contract with HCFA. CGLIC moves for summary judgment on these allegations, arguing that they cannot sustain Watson's FCA claim because there is no evidence that CGLIC's failure to follow MCM and HCFA guidelines caused it to present or attempt to present to the government a claim for payment.

Liability under the FCA for a false or fraudulent certification of compliance with the MCM and/or HCFA directives, whether the certification was express or implied, exists only if

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[26] Because I find that Watson has not presented sufficient evidence to support his claim that CGLIC knowingly or deliberately engaged in the fraudulent activity of paying duplicate claims, the duplicate claim allegations cannot form the basis for imposing FCA liability on CGLIC. Thus, the court need not reach CGLIC's alternative argument that CGLIC could not be held liable under the FCA for duplicate payments because it enjoyed statutory immunity as a Medicare carrier pursuant to the Eleventh Circuit decision in *United States v. Blue Cross and Blue Shield of Alabama*, 156 F.3d 1098 (11th Cir. 1998). Doc. 72 at 28.

[27] The MCM is published by HCFA/ CMS as a guide to Medicare carriers in their operating functions and responsibilities. Doc. 73 ¶ 11.

certification of such compliance influenced the government's payment decision.[28] *Mikes v. Straus*, 274 F.3d 687, 697 (2d Cir. 2001) ("Since the [False Claims] Act is restitutionary and aimed at retrieving ill-begotten funds, it would be anomalous to find liability when the alleged noncompliance would not have influenced the government's decision to pay."). Applying the above principle to the instant case, it becomes clear that Watson is unable to present sufficient evidence to raise a genuine issue of material fact that would enable a rational jury to find an FCA violation based on an allegedly false certification of compliance. Assuming that CGLIC knowingly and wrongfully[29] violated the MCM and/or HCFA directives as Watson alleges,

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[28] At the outset, I conclude, based on the decisions of sister circuits, that a false certification of compliance with a statute, regulation or guideline, whether express or implied, may constitute a violation of the FCA. *See*, *e.g.*, *United States ex rel. Augustine v. Century Health Services, Inc.*, 289 F.3d 409, 416 (6th Cir. 2002); *Mikes v. Strauss*, 274 F.3d 687, 697 (2d Cir. 2001); *Shaw v. AAA Eng'g & Drafting, Inc.*, 213 F.3d 519, 531 (10th Cir. 2000).

[29] I note that this assumption is highly speculative as the evidence that CGLIC engaged in behavior that violated the MCM and/or HCFA directives is not sufficient to raise a genuine issue of material fact that would enable a rational jury to find a FCA violation. For each allegation, Watson either cannot present evidence of any misconduct on the part of CGLIC or that CGLIC's conduct amounted to a violation of the MCM or HCFA directives. Two examples are set forth below.

Watson alleges that CGLIC violated the MCM by denying in person hearings when requested by Medicare providers. Second Amend. Compl. ¶¶ 23, 24. According to Watson, HCFA instructions required that hearings be completed within 120 days of the date of receipt of the hearing request. *Id*. Watson maintains that CGLIC deliberately adopted a policy of providing preliminary hearings before it granted in-person hearings, causing the 120-day time period for completing in-person hearings to expire. *Id.* The evidence, however, does not establish such conduct by CGLIC to be a violation of the MCM or HCFA directives. The MCM explicitly allows and encourages a carrier to conduct preliminary hearings prior to conducting in-person hearings, Def. Tab 134, MCM §§ 12015.A.1, 12017.2, and it only requires 90 percent of carrier hearing decisions to be completed within 120 days of the provider's hearing request. Def. Tab 39, MCM § 5261.1., Standard 10.

Another example of an allegation of noncompliance for which there is no evidence is Watson's contention that CGLIC violated the MCM by sending incomplete overpayment notices to Medicare providers. Second Amend. Compl. ¶ 32. The MCM requires that Medicare carriers notify Medicare providers when it is determined that an overpayment has been made on their

Watson's FCA claim based on such conduct will survive only if there is evidence that CGLIC's certification of regulatory compliance affected the amount of funds allocated and paid to CGLIC by the government for its work as a Medicare carrier. *Mikes*, 274 F.3d at 697. There is no such evidence. At the beginning of each year HCFA budgets funds to CGLIC based on an estimate of the costs that it would incur in processing claims. *See supra* note 18. This amount depends on CGLIC's workload, not on CGLIC's compliance with the MCM or HCFA directives. *Id*. Moreover, although there is a provision in CGLIC's DMERC contract that authorizes the government to "reduce any fee payable under the contract" when the services performed by the carrier do not conform with contract requirements,[30] there is no evidence that noncompliance

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claim and that this notification contain certain relevant information. *Id.* Watson has not provided *any* evidence, however, to establish that the letters sent by CGLIC to notify providers of overpayments were incomplete. In his memoranda in support of summary judgment, Watson modified this allegation, claiming that in some instances CGLIC did not send any notification to Medicare providers when an overpayment was declared. Doc. 70 at 35. The document upon which Watson relies to establish CGLIC's failure to send notification letters is an internal e-mail explaining that when a matter is referred to the fraud department, overpayment notification letters are not sent out by the accounting department but by the fraud department when necessary. Pl. Exhs., Bates No. C003441; Def. Tab 141, Moorman Decl. ¶¶ 15, 16 (Mary Moorman is a CGLIC employee; she has served as the Director of DMERC Operations for the Medicare Division of CGLIC from 1995 to the present). The MCM does not require that the same department of CGLIC send out all of the notices of overpayment.

[30] Section E.1(d) provides:

> If any of the services performed do not conform with contract requirements, the Government may require the contractor to perform the services again for no additional fee. When the defects in services cannot be corrected by reperformance, the Government may (1) require the contractor to take necessary action to ensure that future performance conforms to contract requirements and (2) *reduce any fee payable under the contract to reflect the reduced value of any services performed.*

Def. Tab 11, CGLIC DMERC Contract (emphasis added).

with any of the MCM and/or HCFA directives would have resulted in the government assessing this contractual penalty. While Watson has not provided evidence that the government would have withheld these budgeted funds from CGLIC had it known of CGLIC's noncompliace with the MCM and/or HCFA claims-processing requirements, CGLIC has provided evidence that such penalties were never imposed on carriers who operated under cost-reimbursement contracts, such as CGLIC's. Def. Tab 149, Barton Supp. Decl. ¶ 3 (Barton's statements are given weight only to the extent that he is speaking from his experiences during the period of time that he served as the Contracting Officer for CGLIC's contracts with the government).

Because Watson has not provided the court with any evidence that CGLIC's certification of MCM compliance influenced the government's decision to pay CGLIC under its contract, Watson has not met his burden, as the non-moving party with the burden of proof in submitting evidence supporting all elements of a prima facie FCA claim, of providing evidence that an actionable claim for payment exists here. Accordingly, a rational jury could not find in favor of Watson's contention that CGLIC's alleged violations of the MCM and HCFA directives sustain a FCA claim.

D. CGLIC's Actions to Improve its Contractor Performance Evaluation

CGLIC's performance as a Medicare carrier is reviewed annually by HCFA. Def. Tab 38, MCM § 5260. Each year CGLIC's operations are inspected by representatives of HCFA for compliance with Medicare standards and criteria. This review is known as the Contractor Performance Evaluation Program ("CPE" or "CPEP"). HCFA relies on CGLIC to provide complete and accurate information so that its performance may be measured and evaluated under CPE criteria. *Id.*

Many of Watson's false claims allegations are based on his belief that CGLIC engaged in deceptive practices to ensure a favorable CPE. Watson alleges that these practices enabled CGLIC (1) to avoid non-renewal of its contracts with HCFA, (2) to receive or be eligible to receive incentive payments under its contracts, and (3) to avoid penalties for non-compliance with its contracts. Second Amend. Compl. ¶¶ 13 -15.

1. Contract Renewal

Watson argues that CGLIC's actions to manipulate its CPE caused HCFA to renew its contracts, which thereby caused HCFA to pay money to CGLIC that it would not have paid had CGLIC's CPE been deficient and its contracts not renewed. There are three problems with this argument. First, there is simply no evidence that CGLIC's CPE would have been deficient had it not engaged in the alleged conduct to better its CPE. Any argument based on this assumption is entirely speculative. Second, there is no evidence that CGLIC's CPE played a determinative role in HCFA's decision to renew its contracts. Again, Watson bases this contention on his speculation rather than on any concrete evidence, assuming that HCFA must have considered CGLIC's CPE in determining whether to renew its contracts since the CPE is an indicator of how well CGLIC performed as a Medicare carrier. The only concrete evidence before the court on this matter supports the opposite conclusion, namely that the CPE has little or no effect on HCFA's renewal decisions. James Underhill of the HCFA testified at his deposition that a CPE review "would not singularly be a determinative factor" in contract renewal, and that there were many factors that contributed to these renewal decisions. Def. Tab 58, Underhill Depo. at 15-16.

Third, even if CGLIC's CPE played a significant role in HCFA's decision to renew its contracts with CGLIC, this renewal is too attenuated from any false or fraudulent claim for

payment presented by CGLIC to be actionable under the FCA. CGLIC does not receive funds from the government simply because it is in a contractual relationship with HCFA. Instead, CGLIC is reimbursed for its actual costs in processing Medicare claims as reported to HCFA on its Final Administrative Cost Proposal. Def. Tab 11, CGLIC DMERC Contract; Def. Tab 58, Underhill Depo. at 16-19; Def. Tab 138, Barton Decl. ¶ 10. Any actionable claim for payment here must relate to CGLIC's reported expenses, since it is based on these numbers that HCFA disburses funds to CGLIC. There is simply no evidence that under a renewed contract, CGLIC would submit anything other than honest expense reports. Accordingly, any activity by CGLIC to better its CPE and ensure renewal of its contracts was not linked to a claim for payment such that allegations of CGLIC's CPE-misconduct can sustain Watson's FCA claim.

2. Incentive Payments[31]

Watson next argues that, by improving its CPE, CGLIC claimed a right to incentive payments under its contracts to which it was not otherwise entitled. This argument suffers from the fundamental flaw that CGLIC's right to incentive payments was unrelated to its CPE.

CGLIC's DMERC contract provided incentives to CGLIC only in the second year of its contract[32] based upon its performance in three discrete areas. CGLIC could be considered for an incentive payment if (1) it exceeded the goal set for the percentage of claims filed electronically, (2) it exceeded the specified quality assurance rates, or (3) it developed innovative plans for

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[31] Although plaintiff's counsel admitted in oral argument, on September 6, 2002, that his client had little support for this allegation, I will nevertheless address this issue for the sake of thoroughness.

[32] These incentive provisions were eliminated after the second year of CGLIC's DMERC contract. Def. Tab 67, Setzer Decl. ¶ 9.

medical review of claims. Pl. Exhs., Bates Nos. C008860-C008862. Watson's various allegations of CGLIC's CPE-related misconduct do not relate to CGLIC's performance in any of these three areas, and therefore any manipulation of its CPE did not and could not have caused CGLIC to receive incentive payments from HCFA. Additionally, the undisputed evidence is that during the entire term of its DMERC contract, no incentive payments were applied for or made to CGLIC. Def. Tab 58, Underhill Depo. at 14; Def. Tab 67, Setzer Decl. ¶ 13. Thus, any activity by CGLIC to better its CPE was not linked to a claim for incentive payments such that allegations of CGLIC's CPE-misconduct can sustain Watson's FCA claim.

3. Penalties

Finally, Watson argues that, by improving its CPE, CGLIC avoided being assessed penalties for poor performance, which thereby caused the government to reimburse CGLIC fully for its costs when a deficient CPE would have provided the government with reason to withhold reimbursement money from CGLIC. In other words, Watson contends that because HCFA could have withheld payment from CGLIC for a deficient CPE, CGLIC's actions to ensure its favorable CPE caused the government to pay money to CGLIC that it would not have paid had CGLIC received an unfavorable CPE. Once again, there are two problems with this argument.

First, as stated above, there is simply no evidence that CGLIC's CPE would have been rated deficient had it not engaged in the alleged conduct to better its CPE, and any argument based on this assumption is entirely speculative. Second, Watson has not provided one shred of evidence that CGLIC's manipulation of its CPE caused the government to pay CGLIC amounts that it could have otherwise withheld as a penalty for failing to meet CPE criteria. Watson contends that there is a liquidated damage provision in CGLIC's contract, but he has not

provided any evidence to verify its existence.[33] Additionally, although CGLIC's DMERC contract contained a general penalty provision by which the government could reduce any fee payable to CGLIC to reflect the reduced value of any inadequate services, there is no evidence that HCFA would have assessed this penalty on CGLIC had its CPE been less than favorable. Watson could have provided testimony from HCFA officials or other Medicare providers that it was the government's practice to assess penalties for substandard CPEs, but he did not. Instead, the only evidence before the court is the statement of a former government contracting officer, that based on his experience during the time period in question, HCFA did not impose penalties on carriers, such as CGLIC, who operate under cost-reimbursement contracts. Def. Tab 149, Barton Supp. Decl. ¶¶ 1, 3, 4 (Barton's statements are given weight only to the extent that he is speaking from his experiences during the period of time that he served as the Contracting Officer for CGLIC's contracts with the government). Accordingly, the mere existence of this penalty provision in Watson's DMERC contract does not establish a genuine issue of material fact that CGLIC's alleged CPE-related misconduct caused or attempted to cause the government economic loss such that these allegations can sustain Watson's FCA claim.

In sum, Watson has not carried his burden as the non-moving party of providing evidence to support all essential elements of a prima facie FCA claim based on his allegations that CGLIC engaged in behaviors to alter its CPE. There is no evidence that by allegedly artificially improving its CPE, CGLIC caused or attempted to cause a claim for payment to be presented to

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[33] A liquidated damage provision is one in which "a specific sum of money has been expressly stipulated by the parties . . . as the amount of damages to be recovered by either party for a breach of the agreement by the other." BLACK'S LAW DICTIONARY 391 (6th ed. 1990). The penalty provision in the DMERC contract does not provide for such liquidated damages.

HCFA. Because FCA liability does not extend to misconduct that does not result in a claim for payment, Watson's CPE-related allegations cannot serve as the basis for imposing FCA liability on CGLIC.[34]

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[34] Even if Watson's manipulation of its CPE score could amount to an actionable claim for payment under the FCA, his CPE-related allegations would still fail because for each allegation Watson has failed to provide evidence of the other essential FCA elements. Some examples are set forth below.

Watson alleges that to ensure CPE compliance CGLIC fraudulently sanitized the files requested by HCFA during the CPE audit. Second Amend. Compl. ¶ 19. To support this allegation, Watson testified that he was told by Piper Sweatman, a CGLIC hearing officer, that the files requested by HCFA in the CPE audit were being reviewed to determine whether there was "anything in them that might cause them not to pass" and that he was asked whether he would be willing to rewrite hearing decisions if anything in his files was found to be problematic. Def. Tab 41, Watson Depo. at 342-43. There is nothing in Sweatman's deposition that corroborates Watson's statement that she knew about CGLIC's attempt to sanitize his files. Additionally, Watson's testimony that he refused to sanitize his files does not provide evidence that CGLIC sanitized its files to ensure CPE compliance. *Id.* at 343. James Bumgardner, a HCFA health insurance specialist, testified that he was unaware of any instance when CGLIC had deliberately altered case files to improve its CPE, and that because such files were on microfilm, such alteration would have been difficult. Def. Tab 43, Bumgardner Depo. at 12-13.

Watson also alleges that CGLIC arbitrarily created overpayment determinations in order to meet CPE criteria, which required that a certain percentage of audits result in overpayment determinations. Second Amend. Compl. ¶ 27. Watson testified that he assumed CGLIC had fabricated overpayments when he received cases for overpayment reviews that were not accompanied with any documentation. Def. Tab 41, Watson Depo. at 377 -78. However, other than this speculative testimony, Watson has not provided any evidence to support this allegation. Bumgardner testified that it would not have been to CGLIC's benefit to create false overpayments just for the sake of appearing that it had discovered a certain number of overpayments during the year, and therefore he concluded that this allegation was meritless. Def. Tab 43, Bumgardner Depo. at 61-62.

Many of Watson's CPE-related allegations claim that CGLIC engaged in activities to create the appearance that it was handling its claims in a timely fashion. Watson alleges that CGLIC improperly concealed hearing requests for more than 90 days before forwarding them to the Hearings Department so that it would appear to comply with CPE timeliness requirements. Second Amend. Comp. ¶ 28. For purposes of FCA liability, the alleged fraud of this practice is undermined by Watson's acknowledgment in his second amended complaint that HCFA's Seattle Regional Office was informed of this practice. *Id.*; *Durcholz v. FKW Inc.*, 189 F.3d 542, 544-45 (7th Cir. 1999) ("The government's prior knowledge of an allegedly false claim can vitiate a FCA action."); *Wang v. FMC Corp.*, 975 F.2d 1412, 1421 (9th Cir. 1992). Watson also alleges that CGLIC concealed its processing delays by shelving hearing requests without entering them

E. *CGLIC's Failure to Impose Late Fees*

Medicare carriers are obligated to assess a penalty of 10 percent on claims filed by suppliers more than twelve months from the date of service. 42 U.S.C. § 1395w-g(4)(b)(i). Watson alleges that between January 1995 and April 1998, CGLIC engaged in a pattern of failing to assess this penalty on delinquent claims, thereby increasing the benefits paid out by the government. Second Amend. Compl. ¶ 25. To support this allegation, Watson relies solely on the expert report of Stephen Brooks who opined that CGLIC failed to collect $30,661 in late fees during the period in question. Def. Tab 63, Brooks Rep. at 10.

The accuracy of Brooks' report, however, has been completely undermined by his deposition testimony. Brooks testified that he failed to account for the fact that the 10 percent late fee could have been waived by CGLIC for good cause or administrative error. Def. Tab 64,

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into its system and by improperly treating carrier hearing requests as requests for ALJ hearings. Second Amend. Compl. ¶ 29. Watson testified that his only basis for the allegation that CGLIC concealed hearing requests was that a CGLIC employee told him that she found some old files stuffed in the desk of another employee who was out on maternity leave. Def. Tab 41, Watson Depo. at 381 -82. This is hardly proof that CGLIC engaged in a deliberate and knowing pattern of fraud. Additionally, there is only one example of a hearing improperly classified as an ALJ hearing request. Def. Tab 153 (email message regarding mis-characterization of a request for a hearing). However, this mistake was corrected immediately after it was discovered, thereby evidencing that CGLIC was merely negligent in failing to classify the review request properly in the first instance. *Id.*

Finally, there are many CPE-related allegations which Watson has not even attempted to support with evidence. As to Watson's allegations that CGLIC improperly labeled letters as "education letters" to meet the CPE informational requirements (Second Amend. Compl. ¶ 26), withheld information of its use of outside consultants from hearing officers (Second Amend. Compl. ¶ 33), and submitted "canned" responses to review requests (Second Amend. Compl. ¶ 34), Watson has not raised these allegations in his motion for summary judgment nor has he responded to CGLIC's challenge that these allegations lacked evidentiary support. Because Watson has failed to offer sufficient evidence from which a rational jury could conclude that CGLIC engaged in these alleged practices, these allegations cannot form a basis for imposing FCA liability on CGLIC.

Brooks Depo. at 96- 98. According to Brooks, a manual case-by-case review of all processed claims, which he had not conducted, was the only accurate way to determine when these exceptions applied to excuse CGLIC's failure to impose a late fee. *Id.* at 98.

Watson contests the implication that Brooks' failure to consider the application of the good cause and administrative error exceptions corrupted his analysis. Watson claims that these exceptions operate as "waivers" on penalties that have already been assessed. In other words, Watson argues that whenever a claim is more than a year late, CGLIC must automatically assess a 10 percent penalty and it is the provider's responsibility to request a waiver of this late fee. Therefore, Watson maintains that Brooks' failure to account for these exceptions did not pervert his analysis since he focused on claims for which penalties had not been assessed in the first place.

The MCM section cited by Watson in making this argument does not support his understanding of how the waiver operates. Def. Tab 33, MCM § 3004.1. Moreover, regardless of whether Brooks should have considered the application of the good cause and administrative exceptions, it is undisputed that Brooks failed to omit all resubmitted, superceded, and unassigned claims from his analysis and that this failure altered the accuracy of his report. Brooks' admitted this in his deposition. Def. Tab 64, Brooks Depo. at 88-91, 94-95.

Even giving the benefit of every possible inference to the testimony of Watson's expert, he has not provided evidence to establish that CGLIC acted knowingly, recklessly or with deliberate ignorance in failing to assess the 10 percent late fees. There is no evidence that when CGLIC failed to assess the appropriate penalties this failure was caused by anything more than negligence or mistake, which is not actionable under the FCA. When CGLIC's experts reran the

numbers after properly removing all resubmitted, superceded and unassigned claims, they found that CGLIC properly assessed late fees on 98.6 percent of the claims processed. Def. Tab 59, Peterson Rep. at 7. This high rate of accuracy undermines any contention that CGLIC knowingly engaged in a pattern of failing to assess late fees. Because Watson has not identified evidence sufficient to establish that CGLIC knowingly failed to assess late fees, an element essential to his claim and on which he bears the burden of proof, there is no genuine issue of material fact that this allegation of CGLIC's misconduct does not provide a basis for imposing FCA liability.[35]

F. Conclusion

None of Watson's allegations can sustain his claim that CGLIC violated the False Claims Act. For all of his allegations, Watson has failed to identify sufficient evidence to meet all three essential elements of an FCA claim. On the most basic level, Watson has failed to provide evidence establishing that CGLIC in fact manipulated its VMS software to ignore duplicate claims as alleged or that CGLIC's practice of encouraging providers to seek resubmission instead of reviews was improper. For Watson's allegations that CGLIC violated the MCM and/or HCFA directives and for his allegations that CGLIC engaged in wrongful activities to strengthen its CPE, no evidence exists that this behavior caused the government economic loss, such that liability for this conduct, if proven, may be imposed under the FCA. Moreover, Watson has not even attempted to demonstrate that CGLIC perpetrated fraud on the government with knowledge, recklessness or deliberate ignorance as is required to establish a violation of the FCA. After

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[35] CGLIC also argues that summary judgment is appropriate on the 10 percent penalty allegation because CGLIC enjoys statutory immunity for its actions as a Medicare intermediary in authorizing payments from the Medicare Trust Fund. Once again, the court need not reach this issue, as Watson has failed as a threshold matter to establish evidence sufficient to support an FCA claim based on his 10 percent allegation.

extensive discovery, Watson cannot make a sufficient showing to establish every element of an FCA claim based on any of his allegations of CGLIC's deceptive or manipulative conduct, a matter on which he bears the burden of proof. Thus, because the record could not lead a rational trier of fact to find in favor of Watson on his FCA claim, there is no "genuine issue for trial" and CGLIC's motion for summary judgment on Count I of Watson's second amended complaint will be granted.

II. Count II - Retaliatory Discharge in Violation of the FCA

CGLIC moves for summary judgment on Watson's FCA retaliation claim, Count II of his second amended complaint, arguing that the evidence clearly establishes that Watson was an independent contractor of CGLIC and only employees have standing to bring retaliation claims under the FCA. CGLIC argues that because Watson lacked standing to bring an FCA retaliation claim, this claim must be summarily dismissed.

The plain language of the retaliation provision of the FCA, 31 U.S.C. § 3730(h),[36] limits its relief to employees. Thus, as a threshold matter, in order for Watson to have standing to bring a claim of retaliatory termination under this FCA provision, Watson must have been an employee of CGLIC.[37] *Shapiro v. Sutherland*, 835 F. Supp. 836, 837 (E.D. Pa. 1993). Because the term "employee" is not defined by the FCA, the term is prescribed its meaning by the common law

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[36] Section 3730(h) provides that "any employee who is discharged . . . by his or her employer because of lawful acts done by the employee . . . in furtherance of an action under [the FCA], including investigation for, initiation of, testimony for, or assistance in an action under [the FCA], shall be entitled to all relief necessary to make the employee whole."

[37] In arguing for summary judgment, Watson totally ignores this issue of standing and instead jumps straight to the merits of his retaliation claim. In resolving parties' opposing motions for summary judgment, however, the court must consider whether Watson has standing to bring a retaliation claim before it can consider the merits of this claim.

agency doctrine. *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323. In *Darden*, the Supreme Court articulated the common law agency test for determining whether an individual is an employee or an independent contractor, listing the following factors for a court to consider: (1) the skill required, (2) the source of instrumentalities and tools, (3) the location of the work, (4) the duration of the relationship between the parties, (5) whether the hiring party has the right to assign additional projects to the hired party, (6) the extent of the hired party's discretion over when and how long to work, (7) the method of payment, (8) the hired party's role in hiring and paying assistants, (9) whether the work is part of the regular business of the hiring party, (10) whether the hiring party is in business, (11) the provision of employee benefits, and (12) the tax treatment of the hired party. *Id.* None of these factors is determinative; all must be assessed and weighed when considering whether an individual may be characterized as an employee.[38] *Id.* at 324.

Most of the above factors favor a finding that Watson was an independent contractor of CGLIC and not its employee. At the time Watson contracted with CGLIC he was an experienced hearing officer who required no training from CGLIC to perform his job. Def. Tab 41, Watson Depo. at 430. In fact, as one of CGLIC's most experienced hearing officers, CGLIC often relied upon Watson to train its other less experienced hearing officers. Doc. 77, Watson Decl. ¶ V. Watson provided his own cassette tapes, fax machine, scanner, data processing system, and

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[38] In arguing that he was an employee and not an independent contractor of CGLIC, Watson relies on the IRS test for determining employee status, completely ignoring the Supreme Court test as set forth in *Darden.* The Supreme Court has clearly stated, however, that when "employee" is not defined in a statute, as it is not defined in the FCA, Congress intended the term to have the meaning prescribed to it by the common law agency doctrine. *Darden*, 503 U.S. at 322-23. The twelve *Darden* factors constitute the Court's elucidation of the common law agency test for employee status, and therefore it is only these factors that the court must consider here.

answering machine. Def. Tab 9, Watson Decl. ¶ 5; Doc. 77, Watson Decl. ¶ IV. CGLIC only provided Watson with a tape-recorder and letterhead for writing determination letters. Def. Tab 41, Watson Depo. at 132; Doc. 77, Watson Decl. ¶ IV.

Watson was not paid a set salary. He was paid on a case-by-case basis, depending on the type of hearing. Def. Tabs 14, 15. Although Watson was occasionally compensated on an hourly rate for complicated cases, hourly compensation was not the norm. Doc.77, Watson Decl. ¶ X. Watson was compensated in this manner only after a case specific fee re-negotiation. Further, any travel reimbursements that Watson may have received were just that, reimbursements and not payments. Watson did not receive employee benefits of any kind under his agreements with CGLIC. Def. Tab 41, Watson Depo. at 102; Def. Tabs 14, 15. Watson filed his taxes as a self-employed individual on IRS-1099 forms. Def. Tab 41,Watson Depo. at 94.

For the most part, Watson exercised complete control over the location and time that he completed his work. Watson's DMERC contract with CGLIC explicitly states that the writing and submission of hearing decisions may be performed "at any location and at any time." Def. Tab 14. Although Watson did not have the same control about the location of his in-person hearings, these locations were mostly dictated by the locales of those with whom he was meeting and not by CGLIC. However, CGLIC did request that Watson hold these in-person hearings in CGLIC facilities "whenever available." Doc. 77, Watson Decl. ¶ II. Within the timeliness requirements set by HCFA for Medicare coverage determinations, Watson had complete discretion over his own work schedule. He held hearings when it was most convenient to him and not when CGLIC directed. Def. Tab 41, Watson Depo. at 189. Watson worked the hours he preferred and he took vacations when he wanted. *Id.* at 191. Throughout the course of his tenure

with CGLIC, Watson worked as a hearing officer for other Medicare carriers. *Id.* at 110-13. CGLIC did not have the right to assign Watson additional projects unrelated to his role as a hearing officer. *Id.* at 195. Thus, other than requesting that in-person hearings be held in CGLIC facilities, CGLIC did not exercise any control over the manner in which Watson performed his work. Doc. 77, Watson Decl. ¶ II.

Additionally, the parties' unmistakable intent was that Watson would be an independent contractor of CGLIC, not its employee. The employment agreements between CGLIC and Watson specifically state that "at all times during the term of the agreement" Watson was "an independent contractor and not an employee" of CGLIC. Def. Tab 14; *see also* Def. Tab 15 ("The relationship between [Watson and CGLIC] is one of agency/independent contractor and not that of employer/employee."). Although not dispositive, the agreement is a strong indicator of Watson's independent contractor status. *Holtzman v. The World Book Co., Inc.*, 174 F. Supp. 2d 251, 256 (E.D. Pa. 2001).

Watson argues that CGLIC's control over his performance as a hearing officer is illustrated by the constraints that CGLIC's Regional Medical Review Policies ("RMRPs") imposed on him in conducting Medicare hearings. This argument is without merit. CGLIC's RMRPs are not renegade policies as Watson suggests, but rather they are merely supplements to the MCM and HCFA policy statements. Def. Tab 141, Moorman Decl. ¶ 19. CGLIC requires that all hearing officers abide by its RMRPs simply to ensure its compliance with established Medicare regulations. Given the heavily regulated nature of the Medicare program, this effort by CGLIC to comply with the law is simply not inconsistent with the overwhelming evidence that Watson, a Medicare hearing officer, was an independent contractor of CGLIC, a Medicare

carrier. *Strange v. Nationwide Mutual Ins. Co.*, 1997 WL 550016 at * 5, 7 (E.D. Pa. Aug. 21, 1997) (noting that the continuous oversight of insurance agents is compatible with independent contractor status given the heavily regulated nature of the insurance industry).

Watson also argues that CGLIC's control over his work is indicated by the requirement that he attend telephone conferences. However, although Watson was "expected" to take part in these telephone conferences, there is no evidence that Watson's attendance was mandatory. Def. Doc. 77, Watson Decl. ¶ V. Moreover, even if CGLIC made Watson's attendance at telephone conferences mandatory, considering the vast discretion that he otherwise had in performing his work, this requirement does not demonstrate sufficient evidence to support a finding of employee status by a rational jury.

Admittedly, the four year duration of Watson's relationship with CGLIC and the fact that CGLIC and Watson were both in the business of processing Medicare claims favor a finding that Watson was an employee of CGLIC. These two factors, however, would hardly allow a rational jury to conclude that they outweigh the other factors that favor a finding that Watson was an independent contractor. It is clear that based on the freedom Watson had to conduct his Medicare hearings, as indicated by the express provisions of his agreements and the actual practices of Watson and CGLIC during their four year relationship, that a reasonable jury could only find Watson to be an independent contractor of CGLIC. Thus, Watson is not entitled to assert the protections of 31 U.S.C. § 3730(h), and the court will accordingly grant CGLIC's motion for summary judgment on Count II of Watson's second amended complaint.[39]

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[39] Because I find that Watson was an independent contractor of CGLIC, as a matter of law, without standing to bring a retaliation claim under the FCA, there is no need for the court to consider whether Watson can establish the elements of a prima facie cause of action under §

III. Count III - California State Law Claim - Wrongful Termination

In Count III of his second amended complaint, Watson states a claim against CGLIC for wrongful termination in violation of public policy and in breach of the covenant of good faith and fair dealing. Second Amend. Compl. ¶¶ 66, 67. Watson claims that CGLIC terminated his employment solely for identifying and reporting its deceptive and unethical practices to HFCA and that this retaliatory discharge violated the public policy against termination of employees in retaliation for reporting fraud and breached the covenant of good faith and fair dealing implicit in Watson's agreements with CGLIC.

A. Violation of Public Policy

Under California Law, discharge of an employee during the term of an employment contract may be wrongful and actionable in tort if the employee proves that the discharge was for reasons contravening public policy. *Abrahamson v. NME Hospitals, Inc.*, 241 Cal. Rptr. 396, 398 (Cal. Ct. App. 1987). This wrongful discharge tort "'reflects a duty imposed by law upon all *employers* in order to implement the fundamental public policies of the state.'" *Foley v. Interactive Data Corp.*, 765 P.2d 373, 377 (Ca. 1988) (quoting *Tameny v. Atlantic Richfield Co.*, 610 P.2d 1330 (Ca. 1980)) (emphasis added). Thus, courts applying California law have held that non-employees, such as independent contractors, cannot state claims for wrongful discharge in violation of public policy against the party that contracted with them because that party is not their employer. *Frederickson v. United Parcel Service*, 1999 WL 129534 at *5 (N.D. Cal. Mar.

3720(h). In other words, the court need not reach the issue of whether it was Watson's "protected conduct" that caused CGLIC to terminate his employment. *See Dookerman v. Mercy Hosp. of Pittsburgh*, 281 F.3d 105, 107 (3d Cir. 2002) (explaining the elements of a prima facie claim for retaliation under the FCA).

8, 1999) (agent may not sue for wrongful termination); *Abrahamson*, 241 Cal. Rptr. at 398 (independent contractor may not sue for wrongful termination); *Sistare-Meyer v. Young Men's Christian Assoc.*, 67 Cal. Rptr. 2d 840, 844 (Cal. Ct. App. 1997) (same). Given the court's conclusion that a rational jury could only find that Watson was an independent contractor with CGLIC,[40] Watson cannot maintain a claim of wrongful discharge based on an alleged violation of public policy.

Watson argues that *Caplan v. St. Joseph's Hospital*, 233 Cal. Rptr. 901 (Cal. Ct. App. 1987), a decision that the California Supreme Court ordered not to be officially published, establishes that independent contractors may bring actions for wrongful discharge.[41] Although it is true that the *Caplan* court rejected an argument that the plaintiff could not bring an action for breach of the implied covenant of good faith and fair dealing because he was an independent contractor, the exact reason for the court's rejection of defendants' argument is unclear. It appears, though, that the court rejected the argument not because it found that independent contractors are entitled to bring wrongful discharge actions, but rather, because it found that even if plaintiff was labeled an independent contractor, he was functionally an employee. *Caplan*, 233 Cal. Rptr. at 905 ("For all practical purposes, [plaintiff] was an employee: he was paid a monthly salary, required to follow hospital guidelines, and subject to discharge."). After all, the label

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[40] California's independent contractor standard is similar to the *Darden* analysis set forth in Part II. *See Lumia v. Roper Pump Co.,* 724 F. Supp. 694, 696-97 (N.D. Cal. 1989). Thus, under both the FCA and California law, Watson must be considered an independent contractor.

[41] Contrary to Watson's argument, *Caplan* did not involve a case where the plaintiff complained of retaliatory discharge. Rather, the retaliatory action complained of by the plaintiff in *Caplan* was that his former employer breached the covenant of good faith and fair dealing by improperly withholding wages due to him. *Id.* at 902.

given to an individual in his employment agreement is not dispositive of his legal status as an employee or an independent contractor; instead, the actual working relationship between parties must be considered. *Holtzman v. The World Book Co., Inc.*, 174 F. Supp. 2d 251, 256 (E.D. Pa. 2001). This explanation of the *Caplan* court's reasoning squares with the holdings of other California courts that wrongful termination actions may only be brought by discharged employees and not by independent contractors. Accordingly, Watson, as an independent contractor, is not entitled to the protections of the state statute and thus, is unable to bring such a claim.

B. Breach of Covenant of Good Faith and Fair Dealing

In California, the covenant of good faith and fair dealing is implied by law in all contracts to ensure that neither party unfairly frustrates the other party's right to receive the benefits of their agreement. *Guz v. Bechtel Nat'l. Inc.*, 8 P.3d 1089, 1110 (Ca. 2000). Because the implied covenant of good faith and fair dealing only protects the parties' rights to receive the benefit of their agreement, when parties have agreed to without cause termination, a wrongful discharge action sounding in a breach of the covenant of good faith and fair dealing is untenable. *Id.*

Watson's agreements with CGLIC provided that he could be terminated with or without cause upon 30 days notice. Def. Tabs 14, 15. CGLIC abided by this contractual provision and provided Watson with 30 days notice prior to his termination, thereby complying with the only prerequisite for terminating Watson's employment. Thus, Watson cannot now maintain a suit for a breach of the covenant of good faith and fair dealing based on an allegation that his termination was wrongful when it was clearly not part of the parties' agreement that his termination could only occur for good cause. If such an action were allowed to go forward, it would be akin to

requiring CGLIC to have a legitimate and fair reason for terminating Watson's contract, effectively transforming the "without cause" termination provision of the agreement into a "for cause" termination provision. *Id*. at 1110-11. Because California law does not allow courts to imply the covenant of good faith and fair dealing in a manner that changes the explicit meaning of a contractual provision, *Abrahamson*, 241 Cal. Rptr. at 399, the court refuses to rewrite Watson's agreements in such a manner. Accordingly, Watson cannot bring a wrongful discharge action sounding in breach of the covenant of good faith and fair dealing claim against CGLIC.

In sum, because Watson was an independent contractor hired pursuant to an agreement that allowed termination with 30 days notice, neither theory he proposes as a basis for his wrongful termination action can sustain this cause of action. Thus, CGLIC's motion for summary judgment on Watson's state law claim of wrongful discharge (Count III) will be granted.

IV. Count V - California State Law Claim - Violation of Common Law Right to Fair Procedure

In Count V of his seconded amended complaint, Watson claims a violation of his fair procedure rights. Watson alleges that his discharge from CGLIC prevented him from obtaining work as a hearing officer with other Medicare carriers, and therefore he was entitled to a fair procedure prior to his termination. Under California law, fair procedure is required when an employer has the ability to frustrate an individual's practice of a profession and prevent his enjoyment of the economic and professional benefits therefrom. *Crosier v. United Parcel Service, Inc.,* 198 Cal. Rptr. 361, 366 (1983), *overruled on other grounds*, *Foley v. Interactive*

Data Corp., 765 P.2d 363 (Ca. 1988). "California requires 'fair procedure' prior to dismissal only for those individuals working in the private sector threatened with *permanent exclusion form a particular profession*." *Nijjar v. Peterbilt Motors Co.*, 1994 WL 650078 at *1 (9th Cir. Nov. 17, 1994) (emphasis added). For example, courts applying California law have found the right to fair procedure to exist when the plaintiff's termination threatened exclusion from membership in a professional society, a participating physicians network, or a preferred provider insurance program. *See, e.g., Potvin v. Metropolitan Life Ins. Co.,* 997 P.2d 1153, 1159-61 (Cal. 2000); *Ambrosian v. Metro Life Ins. Co.*, 899 F. Supp. 438, 445 (N.D. Cal. 1995).

Watson has not provided evidence that his termination from CGLIC had the effect of permanently excluding him from the Medicare hearing officer profession. There is no evidence that his termination caused him to be excluded from a network of hearing officers nor is there evidence that Watson's termination deprived him of a professional license so that he absolutely could not work as a hearing officer in the future. Although Watson has not been employed as a hearing officer since his termination by CGLIC, he has not shown that his unemployment is permanent, that he attempted and failed to find gainful employment elsewhere as a hearing officer, or that his termination from CGLIC was what prevented him from finding employment with other Medicare carriers.

In making his fair procedure argument, Watson relies solely on the fact that his termination from CGLIC had a large impact on his economic well-being, as his work for CGLIC comprised 75-85 percent of his income. This reliance misunderstands the California fair procedure doctrine. As stated above, fair procedure rights are only available when one's termination threatens permanent exclusion from a profession. Watson misstates *Ambrosian v.*

Metro Life Ins. Co., 899 F. Supp. 438 (N.D. Cal. 1995), to support the proposition that fair procedures are required any time an individual is terminated from private employment in which he earns a substantial part of his income. Rather, the *Ambrosian* court found that the plaintiff, a physician, should have been afforded fair procedure rights before he was excluded from a health insurer's participating physician agreement. 899 F. Supp. 445. The court mentioned the economic impact of the plaintiff's exclusion from the participating physician agreement only to demonstrate that this exclusion amounted to his exclusion from the medical profession as a whole because a substantial portion of the physician's patients were insured by the health insurer. *Id.*

Because there is no evidence that Watson's termination from CGLIC resulted in his permanent exclusion from the hearing officer profession, a reasonable jury could not find that Watson was entitled to fair procedure under California law. Accordingly, I will grant CGLIC's motion for summary judgement on Watson's fair procedure claim (Count V).

V. Count VI - Violation of California Whistleblower Statute, Ca. Labor Code § 1102. 5

In Count VI of his second amended complaint, Watson alleges that his termination constituted a violation of California's Whistleblower Statute, Ca. Lab. Code § 1102.5. Section 1102.5 provides that "[no employer shall retaliate against an *employee* for disclosing information to [the] government . . . where the *employee* has reasonable cause to believe that the information discloses a violation of state or federal statute, or violation or noncompliance with a state or federal regulation." CA. LAB. CODE § 1102.5 (emphasis added). As can be seen, the plain language of this California statute, like the FCA Whistleblower provision, limits its protections to employees.

"Employee" is not defined in the California Whistleblower Statute. Thus, in defining "employee" for purposes of this statute, the court turns to the ordinary meaning of the term. Black's Law Dictionary defines "employee" as a "person in the service of another . . . where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed." BLACK'S LAW DICTIONARY 525 (6th ed. 1990). Black's Law Dictionary goes on to state that an "'employee' must be distinguished from 'independent contractor,'" which is defined as one that contracts to do work for another but is not subject to that person's control. *Id.* at 525, 770. California courts have long recognized this distinction between employees and independent contractors and the greater freedom and flexibility that an independent contractor status provides over an employer-employee relationship. *Sistare-Meyer*, 67 Cal. Rptr. 2d at 844.

Watson has not identified, and the court has been unable to find, any case in which an independent contractor sustained a claim under Section 1102.5 of the California Whistleblower Statute. Nor has Watson provided the court with any authority under California law as to why it should abandon the well-established employee/independent contractor distinction and conclude that the term "employee" as used in the California Whistleblower Statute encompasses independent contractors. *Caplan v. St. Joseph's Hosp.*, 233 Cal. Rptr. 901 (Cal. Ct. App. 1987), the case cited by Watson to support his contention that the California Whistleblower Statute applies to employees and independent contractors alike does not even involve a claim brought under the California Whistleblower Statute, Ca. Lab. Code § 1102.5. Additionally, although Watson may have a point that the policy considerations underlying the California Whistleblower Statute, *i.e.*, to encourage those in the workplace to report concerns regarding an employer's

illegal conduct without fear of retaliation, *Collier v. Superior Court*, 279 Cal. Rptr. 453, 456 (Cal. Ct. App. 1991), are equally applicable to independent contractor whistle blowers, policy considerations alone do not provide the court with a basis for expanding the ordinary, everyday meaning of the term employee in the California Whistleblower Statute to include independent contractors.

As shown above in Part II, the overwhelming evidence establishes Watson to be an independent contractor and not an employee of CGLIC, as a matter of law. Because the protections of the California Whistleblower Statute, Cal. Labor Code § 1102.5, are reserved for employees, Watson cannot bring a claim against CGLIC under § 1102.5. Accordingly, I will grant CGLIC's motion for summary judgment on count VI of Watson's second amended complaint.

CONCLUSION

For the reasons set forth above, CGLIC's motion for summary judgment will be granted in its entirety. Judgement will be entered in favor of CGLIC and against Watson on all counts contained in the second amended complaint. An appropriate order follows.

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

THE UNITED STATES OF AMERICA ex rel. MICHAEL D. WATSON, Plaintiff v. CONNECTICUT GENERAL LIFE INSURANCE COMPANY Defendant .	: : : : : : : : : : :	 CIVIL ACTION NO. 98-6698

ORDER

And now this _____ day of February, 2003, upon consideration of the second amended complaint (Doc. 51); the defendant's motion for summary judgment and memorandum in support therein (Doc. 72); plaintiff's response (Doc. 76); the United States response as *amicus curiae* (Doc. 79); defendant's reply (Doc. 84); plaintiff's supplemental brief (Doc. 95); and defendant's reply thereto (Doc. 97); it is hereby ORDERED that defendant's motion for summary judgment is GRANTED and judgment is entered in favor of Connecticut General Life Insurance Company and against Michael Watson on all counts.

____
William H. Yohn, Jr., Judge