Cause No. D-1-GV-12 -000435

STATE OF TEXAS ex rel UNDER SEAL,	§	IN THE DISTRICT COURT
Plaintiffs,	§	OF TRAVIS COUNTY, TEXAS
UNDER SEAL,	§	
Defendants.	§	98TH JUDICIAL DISTRICT

DEFENDANT HARLINGEN FAMILY DENTISTRY'S AND DEFENDANT ANTOINE DENTAL CENTER'S MOTION TO UNSEAL

TO THE HONORABLE JUDGE OF SAID COURT:

Now come Harlingen Family Dentistry and Antoine Dental Center, presumptive Defendants, and as grounds for this motion present to the Court the following:

SUMMARY OF THE ARGUMENT

Upon information and belief, the above named parties believe that they are actually undisclosed defendants in this unsealed Texas Medicaid Fraud Prevention Act ("TMFPA") lawsuit. Both Harlingen Family Dentistry ('HFD") and Antoine Dental Center ("ADC") are the subject of completed administrative payment hold hearings at SOAH. The State and the Relator are not permitted to maintain a TMFPA complaint under seal once "the purposes sought to be achieved by the sealing have evaporated." Having already brought administrative charges against HFD and ADC, there is no legitimate reason for the case to remain under seal.

BACKGROUND

A. Events prior to this case being partially unsealed.

This is a *qui tam* lawsuit, filed pursuant to TEX. HUM. RES. CODE § 36.102 et seq. (The Texas Medicaid Fraud Prevention Act, or "TMFPA"). It was filed *under seal* on April 24, 2012

by Dr. Christine Ellis (also referred to as the "Relator"). One month later, on June 25, 2012, the State of Texas intervened and joined the lawsuit. Because it was filed under seal, no Defendants were served with the lawsuit and no Defendant was informed that it had been sued. Apparently, the relator and the State of Texas have persuaded this Court that the case should remain under seal for over a year. The case generally involves allegations of fraud and misrepresentations by Medicaid dental providers.

Meanwhile, the State, through the Texas Health and Human Services, Office of the Inspector General (HHSC-OIG), has been pursuing separate administrative sanctions/remedies against HFD and ADC.

On or about September 2011, the OIG instituted an administrative "payment hold" against HFD. A payment hold temporarily freezes future Medicaid payments to a provider, despite the provider's ongoing participation in the Medicaid program. The payment hold against HFD was issued pursuant to what the OIG called a "credible allegation of fraud" regarding HFD's past Medicaid billings. HFD requested an expedited administrative hearing limited to determining whether the State had a credible allegation of fraud, and if so, what level of payment hold, if any, was justified on the facts. The payment hold hearing was held at the State Office of Administrative Hearings on April 24-25, 2012—the same day that this TMFPA case was filed by the relator. On August 15, 2012, an administrative law judge found that the HHSC-OIG had no evidence that was "credible, reliable, or verifying, or that has indicia of reliability, that HFD committed fraud or misrepresentation."[1] That proposal for decision was adopted in full by the HHSC and became final on February 6, 2013.[2]

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[1] *See* Exhibit 1, Proposal for Decision in *Harlingen Family Dentistry v. Texas Health and Human Services Commission, Office of Inspector General*, SOAH Docket No. 529-12-3180.
[2] See, Exhibit 2, January 7, 2013 Order of Judge Fekety on behalf of HHSC Executive Director Dr. Kyle Janek.

On or about April 4, 2012, the OIG instituted a "payment hold" against ADC; the paymcnt hold against ADC was issued pursuant to what the OIG called a "credible allegation of fraud" regarding ADC's past Medicaid billings. ADC requested an expedited hearing limited to determining whether the State had a credible allegation of fraud, and if so, what level of payment hold, if any, was justified on the facts. The administrative hearing was set for May 28, 2013. Three weeks before that hearing, in a move that appeared highly unusual at the time, the HHSC-OIG sought and received approval from the Attorney Gcneral to retain outside eounsel to prosecute the administrative case.[3] The outside counsel in the ADC ease was Dan Hargrove (and his law firm) and Jim Moriarty (and his law firm).[4] The ADC payment hold hearing was held at the State Offiee of Administrative Hearings on May 28-31, 2013. Final written closing arguments will probably be submitted within the next 45 days.

B. This lawsuit is now partially unsealed as to two defendants, but not HFD or ADC.

On June 6, 2013, this Court considered and granted what was misleadingly titled as an "Agreed Motion to Partially Unseal" the petition as to one of the Defendants. That Defendant is "M&M Orthodontics, Diana T. Malone, DDS, et al." (the "Malone Defendants"). As a result of that order, a heavily redacted copy of the petition was provided to the Malone Defendants' counsel. No other defendants in this case were unsealcd or notified of the case, but it is elear from the 125 page petition (which includes 46 pagcs of redacted defendant names), that the Relator and State have chosen to bring their claims against many, many dental providers. The timing of the partial unsealing of this lawsuit as to the Malone Defendants is now obvious—the Malone Defendants are set to proceed to an administrative adjudication of the HHSC-OIG's

[3] *See* Exhibit 3, Respondent's Response to SOAH Order No. 6 in *Antoine Dental Center y v. Texas Health and Human Services Commission, Office af Inspector General,* SOAH Docket No. 529-13-0997.
[4] The outside eounsel eontract was also quite unusual because it was filed quite late in the case, and permitted the outside lawyers up to $250,000 in fees and costs. Exhibit 3 at Page 9.

elaims in the next 60 days.[5] The order partially unsealing the lawsuit as to the Malone Defendants expressly permitted the State and the Relator to pursue their elaims in this lawsuit through the pending administrative hearing. The attorneys that filed this eivil TMFPA ease on behalf of the Relator are Dan Hargrove and Jim Moriarty—the same attorneys that substituted late into the ADC administrative ease as outside counsel.

On June 18, 2013, this Court considered and granted a second misleadingly titled "Agreed Motion to Partially Unseal," but this time as to another set of Defendants (eolleetively referred to as the "National Defendants."). The National Defendants are set for an administrative hearing on August 19, 2013. Again, this court's order partially unsealing the lawsuit as to the National Defendants expressly permitted the State and the Relator to pursue their TMFPA claims in this lawsuit through the pending administrative hearing. However, unlike the Malone Defendants, the National Defendants have never received a redacted eopy of the petition that actually reveals that they are actually Defendants in this lawsuit.

In response to the June 6, 2013 Order Unsealing the Petition on the Malone Defendants, on July 19, 2013 the Malone Defendants filed in this court a document titled "Malone Defendants" Motion to Vacate. In an attempt to prevent this court from reviewing its earlier orders or determining whether the Relator was barred from bringing this suit in any forum, the State filed a June 24, 2013 Notiee of Nonsuit as to the TMFPA claims against the Malone Defendants and the National Defendants in this case. Subsequently, the State filed at SOAH a notice of its intent to pursue its TMPFA elaims in that administrative forum as to both the Malone Defendants and National Defendants.

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[5] See Exhibit 4, Notice of Hearing in *M&M Orthodontics Clinic v. Texas Health and Human Services Commission, Office of Inspector General,* HHSC Doeket No. 12-0096-K; HHSC OIG Case No. P200803163.

ARGUMENT

The TMFPA, Texas Human Resources Code Ch. 36, requires that a *qui tam* action by a Relator be filed under seal. TEX. HUM. RES. CODE § 36.102. Like its federal counterpart, the Federal False Claims Act (FCA),[6] it is well settled that the purpose of requiring that the Relator's complaint be sealed initially is to proteet the government and allow it a chance to investigate the claims bcfore it deeides whether to intervene in the relator's case. *U.S. ex rel. Becker v. Tools & Metals, Inc.*, 3:05-CV-0627-L, 2008 WL 3850522 (N.D. Tex. Aug. 19, 2008).

Upon information and belief, both HFD and ADC believe that they are named as defendants in this TMFPA lawsuit. Surely, the Relator's attorneys that filed this TMFPA ease for the Relator also petitioned the HHSC-OIG to appear in the ADC administrative hearing earlier this year because the Realtor feared that ADC would triumph in its administrative hearing (like HFD did in its April 2012 hearing)—severely damaging the pending TMFPA claims that were pending, under seal, in this ease against ADC. Simply put, it appears that the State and the Relator are engaged in gamesmanship caleulated to unseal TMFPA claims just ahead of any HHSC-OIG administrative hearing that might imperil its civil claims due to res judicata or collateral estoppel, then immediately nonsuit these TMFPA claims to prevent the Defendants from challenging the Relator's standing. While that partieular argument is better addressed by the Malone Defendants and the National Defendants (whose administrative case is about to proceed), equally troubling is the idea that the State would be permitted to keep a complaint

[6] There are a limited number of Texas state court opinions discussing the basis for keeping a complaint under seal pursuant to TMFPA. The relative dearth of case law on state fraud prevention statutes such as the TMFPA has led courts to construe state acts consistently with the federal False Claims Act when the relevant provisions are identical. *See, e.g., Id.* at *103; *see also United States ex rel. Bogart v. King Pharmaceuticals*, 414 F. Supp. 2d 540, 543 (E.D. Pa. 2006). Accordingly, federal cases discussing the high bar to keeping a complaint under seal are cited herein.

against HFD and ADC under seal for the purposes of "investigation" even **after** it has tried those same claims in an administrative hearing! That is not permitted under the TMFPA.

The TMFPA permits the State to extend the sealing protection beyond 180 days for good cause shown. However, almost fourteen months have passed since the State elected to intervene and join Relator's lawsuit. Here, the record should be unsealed for three reasons. First, HFD and ADC have a substantial need to access the full petition in order to evaluate the allegations against it and to assert all potential defenses to the TMFPA claims, regardless of the forum in which those claims are brought. Second, HFD and ADC, as well as the public, have a right to the unredacted petition, particularly because of the nature of the allegations. Third, the State cannot articulate any interest sufficient to keep the petition under seal, especially since both HFD and ADC have already been charged with wrongdoing by the HHSC-OIG, and both parties have actually completed preliminary "credible allegation of fraud" hearings.

A. The full, unredacted petition is necessary to evaluate the Relator's allegations.

A defendant's need to evaluate allegations is a well-established basis for unsealing records. *See, e.g., U.S. ex rel. Becker v. Tools & Metals, Inc.,* 3:05-CV-0627-L, 2008 WL 3850522 (N.D. Tex. Aug. 19, 2008) (Ordering relators' complaints and all parts of the case to be unsealed, except for the government's applications for an extension of time); *United States ex rel. Costa v. Baker & Taylor, Inc.,* 955 F.Supp 1188, 1189 (N.D. Cal 1997) (ordering records unsealed and recognizing defendants' "legitimate interest in building their defense while the evidence is still fresh"); *United States ex rel. Mikes v. Straus,* 846 F. Supp. 21, 23 (S.D.N.Y. 1994)(unsealing status report because of potential use to defense). "The FCA clearly contemplates the lifting of the seal on the relator's complaint." *United States ex rel. Erickson v. Univ. of Wash. Physicians*, 339 F. Supp. 2d 1124, 1126 (W.A. Wa. 2004); *see also United States*

ex rel. Yannacopolous v. Gen. Dynamics, 457 F. Supp. 2d 854, 860 (N.D. Ill. 2006) (unsealing entire record). 'The legislative history of [the FCA] also indieates that 'once thc Government has elected whether to intervene . . . unsealing of the complaint is virtually automatic.'" *United States ex rel. Fender v. Tenet Healthcare Corp.*, 105 F. Supp. 2d 1228, 1230 (N.D. Ala. 2000) (quoting *United States ex rel. McCoy v. Ca. Med. Review, Inc.*, 715 F. Supp. 967, 968 n.1 (N.D. Cal. 1989)). Unlcss the petition is made public, HFD and ADC will not be able to analyze and investigate the allegations of the Relator, and more prccious timc will pass; exculpatory evidence will go stale and/or be lost or destroyed and potential defenses to the elaims will vanish.

The need to prepare a defense provides ample reason to unseal documents in FCA litigation. *See, e.g., United States ex rel. Howard v. Lockheed Martin Corp.,* No. 1:99-CV-285, 2007 WL 1513999 (S.D. Ohio 2007) at *3 (ordering *in camera* review and, ultimately, unsealing of record after defendant asserted that sealed documents were necessary to evaluate statute of limitations and first-to-file defenses); *Yannacopolous,* 457 F. Supp. 2d at 860 (recognizing relevance of sealed documents to statute of limitations defense); *United States ex rel. Health Outcomes Tech. v. Hallmark Health Sys., Inc.,* 349 F. Supp. 2d 170, 174 (D. Mass. 2004) (unsealing entire case file and recognizing that "defendants have a legitimate interest in obtaining the documents because they may be hclpful... in establishing defenses sueh as exhaustion of the limitations pcriod or improper venue").

In this case, even eertain unredacted statements support a number of potential defenses.[7] For example, it appears the petition was filed on April 24, 2012, many months after the State had begun taking administrative action against HFD and ADC, thus invoking the "first-to-file"

[7] Only one partially unredacted complaint has been madc available. That complaint relates to the "Malone Defendants."

jurisdictional bar.[8] The petition itself recounts a history that repeatedly proves the Relator was not the "original source" of the allegations against HFD or ADC. In addition, the petition provides some evidence that the allegations were "publicly disclosed" prior to the filing of this lawsuit. All of these are jurisdictional bars that would strip the Relator of standing and may require this lawsuit to be dismissed as to ALL defendants. It would certainly prevent the Relator from pursuing further claims against HFD and ADC in an administrative proceeding.[9]

The one-sided nature of this litigation, and the State's clear intent to proceed against HFD and ADC with a final overpayment hearing at SOAH, where the administrative law judge is given much less discretion and authority, makes it particularly important for HFD and ADC to simply see the petition in an unredacted form. Those administrative hearings are proceeding to final merits hearing, while the State holds this civil case in its back pocket. Allowing the government "to be fully engaged in its discovery, without giving the defendants the opportunity even to answer the complaint" is improper. *U.S. ex rel. Costa v. Baker & Taylor, Inc.*, 955 F. Supp. 1188, 1190 (N.D. Cal. 1997) (ordering record unsealed).

The right to respond to allegations is fundamental in all litigation. *See, e.g., Finch v. Fort Bend Independent School Dist,* 333 F.3d 555, 562 (5th Cir. 2003) ("The essential requirements of procedural due process under the Constitution are notice and an opportunity to respond."). If the State and the Relator have allegations against HFD and ADC, those parties have a right to know the charges that have been leveled against them, and to defend themselves against the Relators' and the State's allegations. HFD and ADC require that the full TMFPA petition be unsealed so

[8] The TMFPA "first to file" bar is set out in 36.113(a).

[9] Both HFD and ADC have completed an administrative "payment hold" hearing, and will require a final administrative "overpayment hearing" sometime in the future. The dates for those administrative overpayment hearing has not yet been set.

that they may timely pursue the "first-to-file," "original source," and "public disclosure" bars to suit.

B. HFD and ADC, as well as the public, have a right to see the unredacted petition.

Courts have long recognized a "presumption of public access to judicial records." *Securities & Exchange Comm. v. Van Waeyenberghe,* 990 F.2d 845, 848 (5th Cir. 1993); *see also Nixon v. Warner Commc'ns, Inc.,* 435 U.S. 589, 597 (1978) ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents ... ."); *Littlejohn v. BIC Corp.,* 851 F.2d 673, 678 (3d Cir. 1988) (noting that the presumption of public access to judicial records is "beyond dispute" and "serves to promote trustworthiness of the judicial process, to curb judicial abuses, and to provide the public with a more complete understanding of the judicial system") (internal citations and quotations omitted); *United States v. Valencia,* No. CREVI H-04-514, 2006 WL 3707867, at *5 (S.D. Tex. Aug. 25, 2006) (noting "a strong common law right to access judicial records and proceedings"). "Although the common law right of access to judicial records is not absolute, 'the district court's discretion to seal the record of judicial proceedings is to be exercised charily.'" *Van Waeyenberghe,* 990 F.3d at 848 (quoting *Federal Savings & Loan Ins. Corp. v. Blain,* 808 F.2d 395, 399 (5th Cir. 1987)). In exercising this discretion, courts "balance the public's common law right of access against the interests favoring nondisclosure." *Id; see also Trowbridge v. Law Offices of Mark S. Stewart & Assoc., P.C.,* No. 4:06-CV-221-A, 2006 WL 2751312, at *8 (N.D. Tex. Dec. 21, 2006) (finding that "the tradition of public access to judicial documents prevails in this case over any interest the parties might have in nondisclosure").

These principles apply in TMFPA cases. In requiring the unsealing of documents in *qui tam* actions, numerous courts have cited the "long-standing public policy of open access to

complaints and other matters on file with the Court." *United States ex rel. Dahlman v. Emergency Physicians Prof. Assoc.*, No. Civ. 02-590, 2004 WL 287559, at *2 (D. Minn. Jan. 5, 2004) (unsealing entire record); *see also United States ex rel. Permison v. Superlative Tech., Inc.*, 492 F. Supp. 2d 561, 563-64 (E.D. Va. 2007) (denying motion to reseal documents and reeognizing "general and well-settled principle that the public has a presumptive eommon law right of aceess to court documents"); *Yannacopolous*, 457 F.Supp.2d at 858 (unsealing documents in recognition of "the strong interest in public disclosure"); *United States ex rel. Tiesinga v. Dianon Sys., Inc.*, No. 3:02CV1573, 2006 WL 2860606 at * 1 (D. Conn. 2006) (rejecting the argument that presumption did not apply because materials were initially permitted to be filed under seal).

Unsealing the entire petition is particularly important in this case. The allegations in a TMFPA ease are of special eoncern to the public. "[T]he presumption in favor of public access to eourt filings is espeeially strong where, as here, the filings involve matters of particular concern to the publie, such as allegations of fraud against the government." *Permison*, 492 F. Supp. 2d at 564; *see also Erickson*, 339 F. Supp. 2d 1124, 1127 (reeognizing public interest in *qui tam* allegations concerning miseonduct relating to public institution).

C. Given that HFD and ADC have been investigated for fraud and have already had a hearing on those fraud claims, the State cannot artieulate harm sufficient to keep the petition under seal.

The Government has the burden of asserting a specific and substantial interest to justify keeping otherwise public documents under seal. *See, e.g., Tiesinga*, 2006 WL 2860606, at *1. In *United States ex rel. Pacific v. Doctors Care Health Serv., Inc.*, No. 05-14017 CIV, 2007 WL 1140934 at *2 (S.D. Fla. 2007), the Government, in its Notice of Intervention, requested that the complaint and several motions be unsealed, but asked the court to keep under seal "all other files in the action." The court rejected this requcst as vague, overbroad, and insufficient:

> Not only did the United States fail to identify the documents it seeks to keep under seal, but it failed to provide to the Court any reason why the unidentified documents shall remain under seal indefinitely .... As the United States has not provided good cause or ample jurisdiction for keeping the entire record under seal, the Court denies the request to keep the unidentified documents under seal.

Id. (concluding that the "case shall be completely unsealed"); *see also Permison,* 492 F. Supp. 2d at 564 (noting that public right to access documents is not "easily overridden" and rejecting relators' attempt to reseal based on "vague and hypothetical eoncerns" of retaliation).

Likewise here, the State cannot articulate a sufficient basis for keeping the petition under seal as to HFD and ADC. There is no mechanism for partially unsealing a petition. In fact, Human Resources Code § 36.103 speaks to service of the unsealed petition on a *qui tam* defendant. The idea that a TMPFA petition can be unsealed in a piecemeal fashion as to both Defendants and allegations is without authority. HFD and ADC know that they have been investigated by the HHSC-OIG for allegations of fraud and other misconduct. Those allegations were tested in an administrative hearing. Surely, "the purposes sought to be achieved by the sealing have evaporated," *Tiesinga* 2006 WL 2860606, at *1, so it is difficult to fathom how the State can justify hiding the petition from public view, especially as to HFD and ADC.

In summary, the necessity of providing the entire, unredacted petition to HFD and ADC is obvious. Having chosen to levy an administrative payment hold against HFD and ADC based on an alleged "credible allegation of fraud," and then pursue those same fraud claims in an administrative hearing, the State should not be permitted to hold back allegations and/or hide its hand. From an investigatory or evidentiary perspective, there is nothing that the State can gain by being secretive; the only purpose for hiding the petition at this point is tactical. This is gamesmanship. The State must provide HFD and ADC with notice and an opportunity to answer the TMPFA charges, regardless of the forum in which it chooses to pursue its claims.

PRAYER

Harlingen Family Dentistry and Antoine Dental Center pray that the Court unseal the Relator's petition in full.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing motion was served via facsimile and certified mail, return receipt requested on this 8TH day of July, 2013 on the following:

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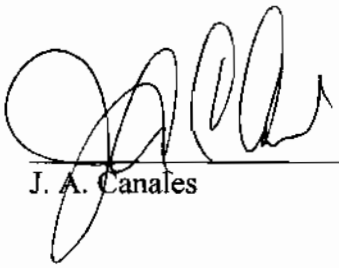

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