

UNITED STATES DISTRICT COURT  
 SOUTHERN DISTRICT OF INDIANA  
 NEW ALBANY DIVISION

UNITED STATES OF AMERICA, ex rel.	)	
PEGGY ABNER and LINDA KENDALL,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	4:05-cv-106-DFH-WGH
	)	
JEWISH HOSPITAL HEALTH CARE	)	
SERVICES, INC., and	)	
SCOTT MEMORIAL HOSPITAL,	)	
	)	
Defendants.	)	

**MAGISTRATE JUDGE’S REPORT AND RECOMMENDATION  
 ON MOTION FOR DEFAULT AND ORDER TO SHOW CAUSE**

This matter is before the Honorable William G. Hussmann, Jr., United States Magistrate Judge, on the Relators’ Motion for Default and Order to Show Cause filed on September 23, 2008. (Docket No. 107). Responses in opposition were filed on October 9, 2008, by Defendant Jewish Hospital (Docket No. 117) and Defendant Scott Memorial Hospital (Docket No. 120). A reply to Defendants’ response was filed by the Relators on October 10, 2008. (Docket No. 123). On October 13, 2008, Relators filed a Motion to Supplement [Relators’] Reply to Response to Motion for Default (Docket No. 124), which motion was granted on October 15, 2008 (Docket No. 126).

The Magistrate Judge conducted a hearing on the record on January 15, 2009. (Docket No. 159). Relators filed a Motion to Court to Consider Misleading Submission as Part of Relators’ Prior Motion Pursuant to FRCP 37 on February 20,

2009 (Docket No. 186), and a Memorandum in Support of that motion was filed on March 3, 2009 (Docket No. 198). A response in opposition to the motion to consider Scott Memorial's patient lists as a false and misleading submission was filed by Jewish Hospital on March 19, 2009 (Docket No. 205) and by Scott Memorial Hospital on March 23, 2009 (Docket No. 207). Relators' reply in support of their motion to consider Scott Memorial's patient lists as a false and misleading submission was filed on March 27, 2009. (Docket No. 211). A further response in opposition to the motion to consider false and misleading submission as and against Jewish Hospital was filed by Jewish Hospital on May 7, 2009 (Docket No. 230), and a further reply was filed by the Relators on May 18, 2009 (Docket No. 236). A Motion to Strike Relators' Motion Requesting Court to Consider Motion for False and Misleading Submission Against Jewish Hospital was filed on May 21, 2009. (Docket No. 240).

Relators' original motion in this case at Docket No. 107 sought the extraordinary remedy of default for the failure to produce certain discovery materials. After an exhaustive review of the materials listed above, the Magistrate Judge is unable to determine that Relators have shown that the Defendants in this case have both failed to comply with a discovery order and done so willfully or in bad faith. *Allen v. Interstate Brands Corp.*, 186 F.R.D. 512, 514 (S.D. Ind. 1999) (citing *Ladien v. Astrachan*, 128 F.3d 1051, 1056 n. 5 (7th Cir. 1997)). This case concerns technical billing requirements for the submission of various types of blood tests to Medicare and state Medicare payors. While Scott Memorial

Hospital's responses have at times been incomplete, they have notified the Court in a reasonably prompt manner when new information has come to their attention. Relators have failed to demonstrate willful or bad faith failure to comply with discovery orders to date. The Magistrate Judge, therefore, **RECOMMENDS** that the Motion for Default (Docket No. 107) be **DENIED**. The Motion to Strike (Docket No. 240) should be **DENIED**, as well.

You are hereby notified that the District Judge may reconsider any pretrial matter assigned to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B). Any party shall have ten (10) days from the date of service to file written objections to this Report and Recommendation.

**SO ORDERED.**

**Dated:** September 16, 2009

  
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William G. Hussmann, Jr.  
United States Magistrate Judge  
Southern District of Indiana

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