

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE**

UNITED STATES OF AMERICA,)	
EX REL. ROBERT A. CUTLER,)	
)	
Plaintiff,	)	Case No. 3:21-cv-748
)	
v.	)	JUDGE RICHARDSON
	)	MAGISTRATE JUDGE FRENSELY
CIGNA CORP. et al,)	
	)	FALSE CLAIMS ACT
Defendants.	)	JURY DEMAND
)	

**RELATOR’S MOTION FOR LEAVE TO AMEND THE FIRST AMENDED
COMPLAINT**

Pursuant to Rule 15 of the Federal Rule of Civil Procedure, Relator Robert A. Cutler (“Relator”), by and through undersigned counsel, hereby moves this Court for leave to amend his Complaint. Relator has conferred with all other parties through counsel, and the government does not oppose this motion. This motion is opposed by Defendants only. In support of this motion, Relator has contemporaneously submitted a Memorandum in Support of Motion to Amend the First Amended Complaint. Specifically, Relator requests leave to file his Second Amended Complaint (Doc. 214-4) and the three sealed exhibits (Doc. 233).

For the reasons set forth in the accompanying memorandum, Relator requests that the Court grant leave to further amend his Complaint.

Respectfully submitted this 9th day of May, 2023.

/s/ Tara L. Swafford _____

THE SWAFFORD LAW FIRM, PLLC
Tara L. Swafford, BPR #17577
W. Lee Maddux, BPR #01235
Elizabeth G. Hart, BPR #30070
321 Billingsly Court, Suite 19
Franklin, Tennessee 37067
Telephone: (615) 599-8406
Facsimile: (615) 807-2355
tara@swaffordlawfirm.com
lee@swaffordlawfirm.com
betsy@swaffordlawfirm.com

Attorneys for Relator

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served
via email, U.S. Mail, or the Court's Electronic Filing System on:

Jean-David Barnea
Peter Max Aronoff
Samuel Dolinger
United States Attorney's Office
Southern District of New York
86 Chambers Street
New York, NY 10007
Email: jean-david.barnea@usdoj.gov
Email: peter.aronoff@usdoj.gov
Email: Samuel.dolinger@usdoj.gov

Charles Speth
David William Ogden
Howard M. Shapiro
Kevin Matthew Lamb
Wilmer Cutler Pickering Hale and Dorr LLP
1875 Pennsylvania Avenue NW
Washington, DC 20006
Email: charles.speth@wilmerhale.com
Email: david.ogden@wilmerhale.com
Email: howard.shapiro@wilmerhale.com
Email: kevin.lamb@wilmerhale.com

J. Alex Little
Thomas K. Potter, III
Burr & Forman, LLP
222 Second Avenue South
Suite 2000
Nashville, TN 37201
Email: alex.little@burr.com
Email: tpotter@burr.com

Kara F. Sweet
Assistant United States Attorney
719 Church Street, Suite 3000
Nashville, TN 37203
kara.sweet@usdoj.gov

Damian Williams
United States Attorney for the
Southern District of New York

Henry C. Leventis
United States Attorney for the
Middle District of Tennessee

on this 9th day of May 2023.

/s/ Tara L. Swafford
Tara L. Swafford

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE**

UNITED STATES OF AMERICA,)	
EX REL. ROBERT A. CUTLER,)	
)	
Plaintiff,	)	Case No. 3:21-cv-748
)	
v.	)	JUDGE RICHARDSON
	)	MAGISTRATE JUDGE FRENSELY
CIGNA CORP. et al,)	
	)	FALSE CLAIMS ACT
Defendants.	)	JURY DEMAND
)	

**RELATOR’S MEMORANDUM IN SUPPORT OF MOTION TO AMEND THE
FIRST AMENDED COMPLAINT**

Relator Robert A. Cutler (“Relator”), by and through undersigned counsel, submits the Memorandum in Support of his Motion to Amend the First Amended Complaint. As discussed below, leave should be freely allowed in this situation because there is no prejudice to Defendants.

PROCEDURAL HISTORY

This action asserts claims under the False Claims Act, U.S.C. §§ 3729-3733. Relator filed his original Complaint under seal in the U.S. District Court for the Southern District of New York on October 2, 2017. On June 11, 2019, while this case was still under seal, Relator filed a First Amended Complaint (Doc. 12, the “Amended Complaint”) to, among other things, add additional legal theories and allegations. On August 2, 2020, the Amended Complaint was unsealed.

On September 15, 2020, Defendants filed a letter with the Court requesting a pre-motion conference for their anticipated motion to dismiss the Amended Complaint. (Doc. 56) (the “2020

Letter”). In that letter, Defendants argued that Relator’s Amended Complaint should be dismissed because the allegations were based on public disclosures and because Relator had not “identifie[d] a single instance in which a 360 exam actually resulted in an inappropriate payment.” (*Id.* at p. 2-3.) Relator filed a response on September 21, 2020 (the “2020 Response Letter”) in which he advised Defendants that he could “clarify the allegations” and provide a “list of representative examples [of fraudulent claims].” (Doc. 60 at p. 3.) Relator requested 14 days from the date of the filing to further amend the complaint. (*Id.*) Defendants failed to respond to this request.

On September 29, 2021, venue transferred from the Southern District of New York to this Court, and Relator’s present counsel assumed the representation shortly thereafter. Defendants then moved to dismiss the Amended Complaint on December 16, 2022. That motion is presently pending before the Court.

In their memorandum of law accompanying the Motion to Dismiss, Defendants argued the same points as in their 2020 Letter, namely that the Amended Complaint is deficient because the allegations are based on public disclosures and because Relator has not provided a representative example of a fraudulent claim that was presented to the Government. (Doc. 196, pp. 42-45). In response to that argument, Relator attached a proposed Second Amended Complaint. (Doc. 214-4.) The exhibits to the proposed Second Amended Complaint are filed under seal as attachments to Doc. 233. This Court has instructed Relator that per Local Rule 15.01, a motion to amend is necessary to pursue the amendment. (Doc. 234.) Accordingly, Relator files the instant motion that is opposed by Defendants but not the government.

LEGAL STANDARD

Under Fed. R. Civ. P. 15, leave to amend a pleading should be “freely given when justice so requires.” The Sixth Circuit applies this standard with “liberality” on the basis that claims ought to be “decided on the merits rather than the technicalities of pleadings.” *Moore v. City of Paducah*, 790 F.2d 557, 559 (6th Cir. 1986) (quoting *Tefft v. Seward*, 689 F.2d 637, 639 (6th Cir. 1982)); *Newberry v. Silverman*, 789 F.3d 636, 645 (6th Cir. 2015) (quoting *Janikowski v. Bendix Corp.*, 823 F.2d 945, 951 (6th Cir. 1987)). Therefore, except in the case of undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by prior amendments, undue prejudice to the opposing party, or futility of the amendment, leave should be freely given. *Leary v. Daeschner*, 349 F.3d 888, 905 (6th Cir. 2003 (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962))). The determination as to whether justice requires permission to amend the pleading is within the district court’s sound discretion. *Moore*, 790 F.2d at 559.

LAW AND ARGUMENT

This Court should grant Relator leave to file the proposed Second Amended Complaint and its exhibits because he can correct the deficiencies alleged by Defendants. As previously noted, Defendants have argued that Relator did not identify a representative false claim that was presented to the Government for payment. In their memorandum of law supporting the Motion to Dismiss, Defendants cited a line of cases claiming that the failure to provide such a representative claim is grounds for dismissal. *See, e.g., Chesbrough v. VPA, P.C.*, 655 F.3d 461, 470 (6th Cir. 2011). *U.S. ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 501 F.3d 493, 510 (6th Cir. 2007). Without conceding the point that a relator must provide a representative example to show that a claim was presented for payment (a point which Relator in any event disputes), Relator is nevertheless able to satisfy this alleged requirement because he possesses Defendants’ records that show that fraudulent ICD codes were submitted to CMS.

The Second Amended Complaint includes as an exhibit a list maintained by Defendants showing the ICD codes which were actually submitted to CMS in 2015 for certain of its members in East Texas (the “Historical HMR”). (Doc. 214-4, Second Amended Compl., Doc.233 Ex. B). Also included as an exhibit are the relevant page extracts from the Historical HMR showing codes for systolic congestive heart failure, chronic kidney disease and hypertensive heart disease with heart failure which were submitted to CMS for Plan Member No. 781097593 in 2015.¹ Below these page extracts within the same exhibit is a copy of a 360 Form for a 360 performed in 2016 for this same member. By comparing these documents one can see that the serious conditions reported to CMS in 2015 for this member do not appear on the 2016 Form.² This example clearly shows that false claims were submitted in 2015.

Defendants also claimed in the Motion to Dismiss that that the allegations in the Amended Complaint are barred by the public disclosure rule. In particular, Defendants argue that the Amended Complaint does not show how Relator supplied the Government with information that was independent of publicly disclosed allegations, thus making him the “original source” of the information. (Doc. 196, p. 42.) The proposed Second Amended Complaint resolves the claimed deficiency by asserting that the information on which the claims are based was not publicly known at the time it came into Relator’s possession and that the information was disclosed directly to Relator during an arbitration that occurred in New York. (Doc. 214-4, Second Amended Compl., ¶ 100-101). These allegations would satisfy the original source requirement.

¹ The conditions are indicated with hand-marked arrows.

² More specifically, the 2016 360 Form does not indicate that any of health conditions reported in 2015 are current or historical, and the member’s heart rate is reported as totally normal.

Justice so requires that Relator be granted leave to file the Second Amended Complaint. The deficiencies alleged by Defendants are mere technicalities in the pleadings. Relator's amendment simply clarifies allegations which are already addressed in the Amended Complaint. In paragraph 43 of the Amended Complaint, Relator referred to the existence of the Historical HMR and stated that the documents contain "diagnoses previously reported to CMS by Cigna-HealthSpring." (Doc. 12, ¶ 43.) And in paragraph 100 of the Amended Complaint, Relator indicated that "[t]o the extent that the facts alleged in this Complaint have been previously disclosed to the public or the government in any fashion, Relator is an 'original source.'" (*Id.* at ¶ 100.) The Second Amended Complaint expounds on these allegations but does not change them or the legal theories in any way.

Relator should also be granted leave to amend in this instance because this case no longer resides in the Southern District of New York, where the legal standard for showing the presentment of a claim to the Government varies from the standard applied in the 6th Circuit. For example, the courts in the Second Circuit have expressly stated that a representative example of a false submission is one way, but not the only way, to satisfy the presentment requirement. *See U.S. ex. rel. Ross v. Independent Health Corp.*, No. 12-CV-299S, 2023 WL 24055 at *10 (W.D.N.Y. Jan. 3, 2023) (noting that "[w]e do not require the complaint to identify representative examples of actual false claims"); *but see U.S. ex. rel. Sheldon v. Keetering Health Network*, 816 F.3d 399, 413-414 (6th Cir. 2016) (observing that the standards applied in other circuits may not apply to the 6th Circuit). Indeed, in the Second Circuit, a relator can satisfy the presentment requirement if plausible allegations are asserted that lead to a strong inference that specific claims were submitted, and also no representative examples need be provided if the claims submitted and the dates on which they were submitted are within the Defendants' knowledge and

control. See *U.S. ex rel. Chorchos v. American Medical Response*, 865 F.3d 71, 83 (2d. Cir 2017); *U.S. v. Laboratory Corp. of America Holdings*, No. 1:07-cv-05696, 2022 WL 3718265 at *4 (S.D.N.Y. Aug. 29, 2022). The allegations in the Amended Complaint were meant to satisfy the Second Circuit's requirements. With the unanticipated transfer of this case to this jurisdiction, Relator should be permitted leave to conform his pleadings to the requirements of the Sixth Circuit.

Moreover, there is no undue delay, bad faith or dilatory motive in seeking leave to amend the Complaint. Defendants have known for more than 2 years that Relator has been planning to file an amendment in order to clarify the allegations and add a representative example of a false claim. Relator had proposed a deadline for filing the amendment in his 2020 Response Letter, but Defendants never responded to it. Neither did Defendants bother to object or dispute Relator's statement that he intended to further amend the Complaint. Further, the case management order in this case sets a deadline of September 14, 2033 for amending pleadings. (Doc. 229, p. 6.)

Defendants will not suffer any undue prejudice by allowing the proposed amendment. While the amendment seeks to correct the alleged deficiencies raised in the Motion to Dismiss, the mere pendency of a motion to dismiss does not constitute prejudice. See *U.S. v. Methodist Le Bonheur Healthcare*, Case No. 3:17-cv-00902, 2021 WL 2932747 at *3 (M.D. Tenn. May 12, 2021). Indeed, this Court has previously noted that judicial economy would be preserved by allowing defendants' substantive legal arguments to be addressed in a single decision (*Id.*). In any event, the determination of whether prejudice would occur involves assessing whether an amendment would result in additional discovery, cost, or preparation to defend against new facts or theories, none of which are present here as formal discovery has yet to begin.

CONCLUSION

Based on the foregoing, it is evident that the interests of justice would be served by allowing Relator to further amend the Complaint. Accordingly, Relator should be granted leave to file his proposed Second Amended Complaint.

Respectfully submitted this 9th day of May, 2023.

/s/ Tara L. Swafford

THE SWAFFORD LAW FIRM, PLLC
Tara L. Swafford, BPR #17577
W. Lee Maddux, BPR #01235
Elizabeth G. Hart, BPR #30070
321 Billingsly Court, Suite 19
Franklin, Tennessee 37067
Telephone: (615) 599-8406
Facsimile: (615) 807-2355
tara@swaffordlawfirm.com
lee@swaffordlawfirm.com
betsy@swaffordlawfirm.com

Attorneys for Relator

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served
via email, U.S. Mail, or the Court's Electronic Filing System on:

Jean-David Barnea
Peter Max Aronoff
United States Attorney's Office
Southern District of New York
86 Chambers Street
New York, NY 10007
Email: jean-david.barnea@usdoj.gov
Email: li.yu@usdoj.gov
Email: peter.aronoff@usdoj.gov

Charles Speth
David William Ogden
Howard M. Shapiro
Kevin Matthew Lamb
Wilmer Cutler Pickering Hale and Dorr LLP
1875 Pennsylvania Avenue NW
Washington, DC 20006
Email: charles.speth@wilmerhale.com
Email: david.ogden@wilmerhale.com
Email: howard.shapiro@wilmerhale.com
Email: kevin.lamb@wilmerhale.com

J. Alex Little
Thomas K. Potter, III
Burr & Forman, LLP
222 Second Avenue South
Suite 2000
Nashville, TN 37201
Email: alex.little@burr.com
Email: tpotter@burr.com

Kara F. Sweet
Assistant United States Attorney
719 Church Street, Suite 3000
Nashville, TN 37203
kara.sweet@usdoj.gov

Damian Williams
United States Attorney for the
Southern District of New York

Henry C. Leventis
United States Attorney for the
Middle District of Tennessee

on this 9th day of May 2023.

/s/ Tara L. Swafford
Tara L. Swafford