

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

UNITED STATES OF AMERICA
ex rel. ROBERT A. CUTLER,

Plaintiff,

v.

CIGNA CORP. *et al.*,

Defendants.

Civil Action No. 3:21-cv-00748

District Judge Eli J. Richardson

Magistrate Judge Jeffrey S. Frensley

JURY DEMAND

**DEFENDANTS' RESPONSE IN OPPOSITION TO
RELATOR'S MOTION FOR LEAVE TO AMEND**

Defendants (collectively, "Cigna") were surprised by Relator Robert Cutler's motion for leave to amend (Doc. No. 236) because he did not notify Cigna about his intent to file the motion or request Cigna's position, despite his assertion that he did. Failure to comply with the conference requirement under Local Rules 7.01 and 15.01—which this Court has twice reiterated in orders governing the proceedings in this case—is sufficient grounds to deny the motion. More fundamentally, Cutler's motion should be denied because amendment would be futile. Indeed, the proposed amendment does not cure any of the defects Cigna has already identified in Cutler's operative complaint—specifically, that Cutler has abandoned the only claim on which the Government did not intervene; the public disclosure bar and Rule 9(b) mandate dismissal of his claims; and his claims otherwise fail for the same reasons as the Government's. In any event, such a belated filing—years after Cutler was alerted to these defects and said that he would amend his complaint—will unduly delay the proceedings and prejudice Cigna.

PROCEDURAL BACKGROUND

As Cigna explained in its memorandum in support of its motion to dismiss Cutler's

complaint (Doc. No. 199), Cutler filed this *qui tam* action under seal in October 2017 while his former company was in the midst of an arbitration against Cigna contesting payment terms for 360 exams. In June 2019, Cutler filed an amended complaint, which asserts three broad sets of supposed FCA violations. *See* Doc. No. 12.

First, Cutler alleges that “[a]ll diagnosis codes derived from in-home 360 assessments” were “ineligible for submission to” the Centers for Medicare & Medicaid Services (“CMS”) and “false” under the FCA because, he alleges, these assessments were designed to be a “data-gathering exercise rather than a legitimate medical encounter.” *Id.* ¶ 56. Second, Cutler claims that Cigna pressured vendors “to record on 360 forms” complex health conditions that he alleges the vendors’ clinicians “lacked or were denied the tools and the means necessary to diagnose.” *Id.* ¶ 57. And he alleges that it was “impossible” for “generalist” clinicians like nurse practitioners to diagnose “most risk-adjusting conditions” in the context of a 360 exam conducted in the member’s home. *Id.* ¶ 59. Finally, Cutler alleges that the diagnoses from in-home exams that Cigna reported to CMS lacked support in the medical record and were based on patient self-reports, prior history, or medication use, purportedly in contravention of CMS coding rules. *Id.* ¶¶ 85-89.

In September 2020, Cigna and Cutler discussed Cutler’s amended complaint through pre-motion conference letters filed in the U.S. District Court for the Southern District of New York (where this case was then pending). After Cigna explained the reasons why it intended to file a motion to dismiss the amended complaint (*see* Doc. No. 56)—reasons that were almost identical to those it submitted more than two years later to this Court—Cutler stated the following:

Relator is confident that the Complaint can withstand Defendants’ motion, however he will amend it to further clarify the allegations. Realtor [sic] can, for example, list representative examples of 360 exams and cite testimony from the aforementioned arbitration confirming that claims derived from the 360 Forms were submitted. Relator proposes a deadline of 14 days following the date of the

pre-motion conference in which to file the amendment.

Doc. No. 60 at 3. Cutler never filed the amendment.¹

Subsequently, in December 2020, Cigna filed a motion to transfer the case to the U.S. District Court for the Middle District of Tennessee. *See* Doc. No. 71. In September 2021, Judge Karas held a hearing on that motion and transferred the case. *See* Doc. No. 127. In November 2021, counsel for Cutler filed their notice of appearance. Doc. No. 151.

In January 2022, after investigating Cutler's allegations for more than four years and expressly declining to intervene on Cutler's first theory, the Government moved to partially intervene. Doc. No. 157 at 1. On October 14, 2022, the Government filed its complaint-in-intervention. Doc. No. 178. Although the parties conferred about a motion to dismiss briefing schedule multiple times before and after the Government's intervention, Cutler never raised his intent to amend his complaint.

In December 2022, Cigna filed its motions to dismiss the Government's complaint-in-intervention and Cutler's first amended complaint. *See* Doc. Nos. 195 and 198. Cigna argued that, under the False Claims Act, the Government's complaint-in-intervention supersedes Cutler's amended complaint with respect to the claims on which the Government has intervened, and Cutler's only non-intervened claim is that the diagnoses of chronic conditions reported by Cigna from in-home exams were *per se* invalid for payment purposes. *See* Doc. Nos. 198 at 1; 199 at 48. Cigna explained that this theory is foreclosed by the False Claims Act's public disclosure bar and squarely conflicts with CMS's decision to permit the submission of such diagnoses for payment purposes. Doc. Nos. 198 at 1; 199 at 48-54. Cigna further explained that

¹ Despite Cutler's suggestion that he failed to amend because Cigna did not respond to this aspect of his letter, Doc. 237 at 2, he points to no federal or local rule that required a response by Cigna to his 14-day proposal for him to seek leave to amend his complaint.

Cutler cannot move forward on his other claims because they were superseded by the Government's complaint-in-intervention and, in any event, fail for the same reasons the Government's claims fail, are likewise foreclosed by the public disclosure bar, and have not been adequately pled with the particularity required by Rule 9(b). Doc. Nos. 198 at 1; 199 at 54-55.

Between February and April 2023, Cigna had a number of communications with Cutler, and the Court issued two relevant orders. These communications and orders can be summarized as follows:

- On February 15, 2023, the due date of Cutler's response to Cigna's motion to dismiss, Cutler emailed the parties to request their positions on a motion to seal exhibits to a proposed second amended complaint that he intended to attach to his response. *See* Exhibit 1 (February 15, 2023 Emails Between Cutler, the Government, and Cigna). In its response, Cigna did not oppose the protection of protected health information ("PHI") through filing under seal but objected to any filing containing PHI absent a protective order. *Id.* Cigna also noted that it reserved the right to oppose the proposed amended complaint on the ground that Cutler did not have Cigna's consent or the Court's leave to amend. *Id.* That same day, Cutler then proceeded to file the proposed second amended complaint as an exhibit to his response, Doc. No. 214-4, along with other exhibits such as a redacted 360 form and redacted health management report ("HMR") form, Doc. No. 214-1, and requested the Court's leave to amend in his opposition, Doc. No. 214 at 1, but did not file a motion to seal any exhibits containing PHI (or a motion for leave to amend).
- On February 17, 2023, Cutler emailed the Government and Cigna stating that he needed to file a motion to redact the 360 and HMR forms he attached to his response. *See* Exhibit 2 (February 17, 2023 Emails Between Cutler, the Government, and Cigna). Cigna stated in response that it did not oppose the redaction of PHI, but otherwise reserved its rights to seek appropriate relief with respect to the document. *See id.*
- On March 30, 2023, the Court issued a revised initial case management order, which, among other things, stated that motions to amend "must comply with Local Rules 7.01 and 15.01, unless otherwise ordered by the Court." Doc. No. 229 at 6.
- On April 3, 2023, following the entry of a protective order in this case, Cutler emailed the parties requesting their position on a motion to file under seal three exhibits to his proposed amended complaint. *See* Exhibit 3 (April 3-4, 2023 Emails Between Cutler, the Government, and Cigna). Cigna responded that it did not object provided that the exhibits are deemed "Discovery Material" subject to the Court's protective order and are marked as "CONFIDENTIAL PHI – SUBJECT TO PROTECTIVE ORDER" or "PHI – SUBJECT TO PROTECTIVE ORDER." Cigna otherwise reserved its rights concerning the filing, including on the ground that Cutler did not have Cigna's consent or the Court's leave to file any amended complaint or exhibits. *See id.*

- On April 10, 2023, the Court issued an order noting that Cutler attached a proposed second amended complaint to his response to Cigna’s motion to dismiss. Doc. No. 234. The Court explained that “if the Relator wishes to file a second-amended complaint, he must do so by filing the appropriate motion for leave to amend under Local Rule 15.01,” and that “[a]s stated in the Court’s revised initial case management order (Doc. No. 229), motions to amend or to add parties must be filed on or before September 14, 2023 and must comply with Local Rules 15.01 and 7.01.” *Id.*

Cigna has had no contact with Cutler since the parties exchanged initial disclosures on April 10, 2023.

CUTLER’S PROPOSED SECOND AMENDED COMPLAINT

Cutler states that his proposed amendment cures two deficiencies identified by Cigna’s motion to dismiss: first, it alleges a representative example of an allegedly false claim as required by Federal Rule of Civil Procedure 9(b), and second, it alleges that Cutler is an “original source” of the information supporting his allegations, as required by the False Claims Act, 31 U.S.C. § 3730(e)(4)(A). Doc. Nos. 237 at 3-4; 214-4 ¶¶ 100-105.

Cutler supports his complaint with three exhibits. Exhibit A consists of three “sampl[es] of 360 Comprehensive Assessment Forms relating to the 2016 service year that contain the medical treatment records for Cigna patients in East Texas,” Doc. No. 232 at 2, from which Cutler contends Defendants “extracted and submitted [allegedly invalid diagnosis codes] to CMS for risk adjustment purposes on or about May 4, 2018,” Doc. No. 214-4 ¶ 103. Exhibit B represents “a list that contains all of the diagnostic codes submitted to CMS by Cigna for the 2015 service year for certain members enrolled in the plans in East Texas.” Doc. No. 232 at 2. Cutler contends that by comparing Exhibit B to Exhibit A, “one can find specific submissions that were made to CMS in 2015 that were false.” Doc. No. 214-4 ¶ 105. Lastly, Cutler presents Exhibit C, which contains excerpts of Exhibits A and B, to reveal a supposed discrepancy between a single patient’s 2015 submitted diagnostic codes and the patient’s 2016 360 and HMR forms. *Id.*

LEGAL STANDARD

Although under Federal Rule of Civil Procedure 15 “a court ‘should freely give leave [to amend a complaint] when justice so requires,’ the right to amend is not absolute or automatic.” *Tucker v. Middleburg-Legacy Place*, 539 F.3d 545, 551 (6th Cir. 2008) (quoting Fed. R. Civ. P. 15(a)(2)). “[L]eave to amend is properly denied if the proposed amendments would be futile and would not withstand a Rule 12(b)(6) motion to dismiss.” *Lee v. Stewart*, 2020 WL 6054336, at *5 (M.D. Tenn. Mar. 26, 2020), *report and recommendation adopted*, 2020 WL 4333746 (M.D. Tenn. July 28, 2020), *aff’d*, 2021 WL 6932349 (6th Cir. Aug. 24, 2021); *see also Miller v. Calhoun Cnty.*, 408 F.3d 803, 817 (6th Cir. 2005). Leave to amend may also “be denied when it would result in undue delay, prejudice to the opposing party, or repeated failure to cure deficiencies in the complaint.” *Phelps v. McClellan*, 30 F.3d 658, 662 (6th Cir. 1994).

ARGUMENT

I. CUTLER FAILED TO CONFER WITH CIGNA, AS REQUIRED BY THE LOCAL RULES AND THE COURT’S ORDERS

Pursuant to Local Rule 7.01(a)(1), a motion must “state that counsel for the moving party has conferred with all other counsel, and whether or not the relief requested in the motion is opposed.” Similarly, pursuant to Local Rule 15.01(a)(2), a motion to amend must “state that counsel for the moving party has conferred with all opposing counsel about the proposed amendment and whether or not the motion to amend is opposed.” Pursuant to Paragraph I of the Court’s case management order, a motion to amend “must comply with Local Rules 7.01 and 15.01, unless otherwise ordered by the Court.” Doc. No. 229 at 6. And pursuant to this Court’s April 10, 2023 order regarding Cutler’s attempt to attach a proposed second amended complaint to his motion to dismiss response, a motion to amend “must comply with Local Rules 15.01 and 7.01.” Doc. No. 234 at 1.

Cigna has had no contact with Cutler since the Court's order regarding amendment and the parties' exchange of initial disclosures on April 10, 2023. And despite his statement that he "conferred with all other parties through counsel" before moving for leave to amend, Doc. No. 236, Cutler neither notified Cigna of his intent to file the motion nor sought Cigna's position regarding the motion. While Cutler correctly predicted that Cigna would "oppose[]" his motion, the purpose of pre-motion conferences is "not to simply determine whether the motion will be opposed," but "for litigants to attempt to resolve, or at least narrow, the disputed issues to prevent unnecessary waste of time and effort on any given motion." *Alexander v. FBI*, 186 F.R.D. 197, 199 (D.D.C. 1999). Litigants are not entitled to unilaterally determine and report another party's likely position; they must confer about the motion they intend to file.

Courts in this district regularly deny motions for failure to comply with Local Rules 7.01(a)(1) and 15.01(a)(2). *See, e.g., Lee v. Vanderbilt Univ.*, 2022 WL 1094654, at *9 (M.D. Tenn. Apr. 12, 2022) (denying a motion due to a failure to confer in violation of Local Rule 7.01(a)(1), among other deficiencies); *Vasser v. Mapco Express, LLC*, 2021 WL 5154211, at *1 (M.D. Tenn. Aug. 19, 2021) (denying a motion due to a failure to confer in violation of Local Rule 7.01(a)(1)); *Massiah v. Tenn. State Univ.*, 2022 WL 2911804, at *1 (M.D. Tenn. July 22, 2022) (denying a motion due to failure to confer in violation of Local Rule 7.01(a)(1), among other deficiencies); *Tenpenny v. Prime Now, LLC*, 2020 WL 12894953, at *6-7 (M.D. Tenn. July 16, 2020) (agreeing with magistrate judge's denial of motion to amend for failure to comply with Local Rules 7.01(a) and 15.01). The Court should do so here, particularly given the fact that this latest violation of the Local Rules comes after Cutler previously violated the Local Rules and was specifically ordered by the Court to comply with Local Rules 7.01 and 15.01 when filing a motion to amend.

II. CUTLER'S AMENDMENT WOULD BE FUTILE

More fundamentally, the motion for leave should be denied because amendment would be futile. As Cigna explained in its reply memorandum in support of its motion to dismiss, Doc. No. 225 at 46-47, “leave to amend is properly denied if the proposed amendments would be futile and would not withstand a Rule 12(b)(6) motion to dismiss.” *Lee*, 2020 WL 6054336, at *5. That is the case here. Cutler’s proposed amendment fails to remedy any of the defects that prove fatal to his complaint. As Cigna explained, Cutler’s only claim on which the government did not intervene is that any diagnosis code reported from in-home 360 exams was *per se* invalid for risk-adjustment purposes. *See* Doc. No. 225 at 40-42. Not only is that theory foreclosed as a matter of law, but far from contesting that, Cutler has abandoned any such claim. *Id.*

Notably, Cutler does not argue that the proposed amendment has any bearing on whether he has abandoned the only non-intervened claim; he argues only that the proposed amendment would help him to overcome the False Claims Act’s public disclosure bar and to satisfy Rule 9(b)’s particularity requirement. *See* Doc. No. 237 at 4. Neither argument has merit.

A. The Proposed Amendment Does Not Overcome The Public Disclosure Bar

As Cigna explained in its motion to dismiss, the public disclosure bar mandates dismissal of a *qui tam* action “unless opposed by the Government, if substantially the same allegations ... were publicly disclosed” and the relator is not “an original source of the information.” 31 U.S.C. § 3730(e)(4)(A). It applies where (1) “before the filing of the *qui tam* complaint, there had been any public disclosures from which fraud might be inferred”; (2) “the allegations in the complaint are ‘substantially the same’ as those contained in the public disclosures”; and (3) the *qui tam* plaintiff is not an original source of the information. *U.S. ex rel. Rahimi v. Rite Aid Corp.*, 3 F.4th 813, 823, 823-26 (6th Cir. 2021). Each of these prongs continues to be met here because publicly available information about in-home assessments disclosed the same conduct Cutler

alleges, and nothing he alleges materially adds to that publicly disclosed information.

Cutler presents Exhibits A and B, Doc. Nos. 233-1 and 233-2, to his proposed second amended complaint as evidence that he was an “original source” of publicly disclosed information relating to his claims. But Cutler does not explain how any information he provided (from these exhibits or otherwise) “‘materially add[ed]’ to the public disclosure” or was such that it “‘would affect a person’s decision-making,’ [was] ‘significant,’ or [was] ‘essential.’” *U.S. ex rel. Advocs. for Basic Legal Equal., Inc. v. U.S. Bank, N.A.*, 816 F.3d 428, 431 (6th Cir. 2016). Nor do the exhibits change the fact that Cutler’s sole non-intervened claim rests on broad allegations that Cigna conducted in-home 360 exams merely to gather diagnoses rather than provide treatment—allegations entirely derivative of CMS’s public statements long before this lawsuit.

Cutler’s argument that his amended complaint “resolves” the public-disclosure deficiencies “by asserting that the information on which the claims are based was not publicly known at the time it came into Relator’s possession,” Doc. No. 237 at 4, fares no better. This extremely brief and conclusory statement should be disregarded, as courts will generally “not presume the truth of legal conclusions in the proposed amended complaint.” *Donaldson v. DeJoy*, 2022 WL 1670105, at *1 (E.D. Mich. May 25, 2022). Moreover, Cutler again offers no explanation of how these exhibits could plausibly render him an original source of new information that materially added to the public disclosures surrounding in-home exams. As Cigna detailed in its memorandum in support of its motion to dismiss, there were numerous public disclosures before Cutler filed his complaint in this case showing that the very conditions at issue here were being reported from in-home exams, that treatment was not provided at such exams, that the diagnostic tools were often limited, and that there were no other reports of the same diagnoses in the same year. *See* Doc. No. 199 at 48-52.

B. The Proposed Amendment Does Not Satisfy Rule 9(b)

Allegations under the False Claims Act must satisfy the heightened pleading standard of Rule 9(b), which requires a party to “state with particularity the circumstances constituting fraud,” Fed. R. Civ. P. 9(b), and to allege, “at a minimum, ... the time, place, and content of the alleged misrepresentation ...; the fraudulent scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud.” *U.S. ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 342 F.3d 634, 643 (6th Cir. 2003) (“*Bledsoe I*”) (quotation marks omitted). That standard “requires the relator’s complaint to include specific examples of the defendant’s claims for payment from the federal government.” *U.S. ex rel. SNAPP, Inc. v. Ford Motor Co.*, 532 F.3d 496, 506 (6th Cir. 2008) (citing *U.S. ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 501 F.3d 493, 510 (6th Cir. 2007) (“*Bledsoe II*”). The proposed amendment continues to fail this exacting standard.

As in his opposition to Cigna’s motion to dismiss, Doc. No. 214, Cutler argues here that the proposed amendment adds representative examples of the false claims at issue. Doc. No. 237 at 3. But his allegations merely point the Court to a 2,453-page list of all diagnosis codes Cigna supposedly submitted to CMS in 2015 for certain members enrolled in plans in East Texas. *See Id.* at 4. And they point to “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 [a particular Cigna member] in 2015.” *See id.* Cutler then argues that “[b]y comparing these documents one can see that the serious conditions reported to CMS in 2015 for [a] member do not appear on the 2016 Form.” *Id.* He then reaches for the bold, and entirely unsupported, conclusion that “[t]his example clearly shows that false claims were submitted in 2015.” *Id.*

Such conclusory assertions do not satisfy Rule 9(b)’s requirement to provide representative examples of actual claims for payment. *See SNAPP, Inc.*, 532 F.3d at 506 (“When

a relator alleges such a ‘complex and far-reaching fraudulent scheme’ to induce the government into making payments, ... *Bledsoe II* requires the relator’s complaint to include specific examples of the defendant’s claims for payment from the federal government.”) (citing *Bledsoe II*, 501 F.3d at 510). Cutler’s allegations merely describe a single patient for whom, he alleges, certain “conditions reported to CMS in 2015 ... do not appear on the 2016 Form.” Doc. No. 237 at 4. Far from providing the “who, what, when, where, and how of the alleged fraud” required by Rule 9(b), *Sanderson v. HCA-The Healthcare Co.*, 447 F.3d 873, 877 (6th Cir. 2006) (quotation marks omitted), Cutler does not explain how an in-home vendor’s omission of certain diagnoses from a single form in 2016 that were reported in 2015 provides representative “samples” of the alleged false claims for payment from in-home exams. Rule 9(b)’s requirement that a relator provide “representative samples of the broader class of claims” is meant to enable a defendant to “infer with reasonable accuracy the precise claims at issue by examining the relator’s representative samples.” *Bledsoe II*, 501 F.3d at 510-11. But Cutler offers no way that Cigna could infer anything from his new allegations or exhibits about the nature of the alleged fraud.

Indeed, Cutler alleges a far-reaching theory of fraud based on the invalidity of submitting diagnosis codes from in-home exams. But he offers no plausible explanation linking his supposed examples of false claims to his actual theory. As an initial matter, Cutler fails to allege that any of the 2015 codes allegedly submitted to CMS (Doc. No. 233-2, Exhibit B) were based on in-home exams. In addition, one cannot plausibly infer that a patient lacked a particular condition from the omission of the diagnosis on a single 360 form from an in-home exam in the subsequent year, particularly given that Cutler’s core theory is that in-home exams are too *unreliable* to be the basis for *any* diagnosis. Accordingly, this example of a single patient

prevents Cigna from “infer[ring] with reasonable accuracy the precise claims at issue” under Cutler’s far-reaching theory of liability. *Bledsoe II*, 501 F.3d at 510-11.

Moreover, the claim Cutler now seeks to press is subsumed in the government’s complaint-in-intervention, and thus is superseded by it. The Government’s complaint is “the operative complaint as to all claims in which the government has intervened,” *U.S. v. SavaSeniorCare, LLC*, 2016 WL 5395949, at *15 (M.D. Tenn. Sept. 27, 2016), whereas Cutler’s amended complaint “continues to be the operative” pleading only for “non-intervened claims.” *Id.*; see John T. Boese & Douglas W. Baruch, *Civil False Claims and Qui Tam Actions* § 4.04[B] (5th ed. 2022). The Government expressly declined to intervene only as to Cutler’s first and broadest set of allegations—that Cigna “committed *per se* [FCA] violations” by submitting diagnoses from in-home 360 exams that “did not involve the provision of medical treatment.” Doc. No. 13 at 1-2. But the Government sought and was granted intervention on “all” other “claims as to which it did not expressly decline to intervene,” Doc. No. 169 at 1, leaving the *per se* theory the only claim available to Cutler. And Cutler has disclaimed reliance on the *per se* theory, or on any theory of factual falsity, see Doc. No. 214 at 5, 12-13 & n.7—making the attempted inclusion of these exhibits even more confounding.

Nor can Cutler explain how his amended claim falls outside the claims on which the Government intervened. The Government intervened on, and filed its own complaint for, the allegation that Cigna submitted claims for payment for conditions that the patients did not have, including specifically heart failure and chronic kidney disease. See Doc. No. 178 ¶ 1. Here, because Cutler’s amended allegation is that Cigna submitted false claims in 2015 for heart failure and chronic kidney disease when the patient did not actually have those conditions, Cutler’s amendment is futile because he has, at most, amended a claim that has been superseded by the Government’s complaint-in-intervention. See Doc. No. 178 ¶ 1; *SavaSeniorCare*, 2016 WL

5395949, at *15.

Because Cutler's motion and proposed amendment fail to cure the defects of his complaint, his request for leave to amend should be denied.

III. GRANTING CUTLER LEAVE TO AMEND AGAIN AFTER YEARS OF LITIGATION AND A FULLY BRIEFED DISPOSITIVE MOTION WOULD BE HIGHLY PREJUDICIAL TO CIGNA

After six years of litigation, one amended complaint, and a fully briefed dispositive motion, Cutler now requests leave to amend his complaint again. That request should be denied.

During Cigna and Cutler's September 2020 discussion of the fatal defects in Cutler's amended complaint, Cigna explained the grounds on which it intended to seek dismissal (grounds almost identical to those it recently submitted to this Court). *See* Doc. No. 56. In response, Cutler stated that he was "confident that the Complaint can withstand Defendants' motion, however he will amend it to further clarify the allegations. Realtor [sic] can, for example, list representative examples of 360 exams and cite testimony from the aforementioned arbitration confirming that claims derived from the 360 Forms were submitted." Doc. No. 60 at 3.

Cutler never filed the amendment. Yet in his motion for leave, he repeatedly refers to his "2020 Response Letter" as evidence that Cigna was on notice that he would amend his complaint. In fact, Cutler's inaction over the course of more than two years would suggest the exact opposite.

As the Sixth Circuit has explained, delay can eventually "become 'prejudicial,' placing an unfair burden on the opposing party." *Morse v. McWhorter*, 290 F.3d 795, 800 (6th Cir. 2002). And "[t]he longer the period of unexplained delay, the less will be required of the nonmoving party in terms of a showing of prejudice." *Phelps*, 30 F.3d 658 at 663 (cleaned up). Here, after years of litigation and a fully briefed dispositive motion, the prejudice is readily

apparent. Cutler argues that “the mere pendency of a motion to dismiss does not constitute prejudice.” Doc. No. 237 at 6 (citing “*U.S. v. Methodist Le Bonheur Healthcare*, Case No. 3:17-cv-00902, 2021 WL 2932747, at *3 (M.D. Tenn. May 12, 2021)”²).² In this case, however, there is more than the mere pendency of Cigna’s motion to dismiss; there is Cutler’s inaction for more than two years after he had notice of his amended complaint’s defects and said he would file an amendment in response, as well as his lack of any persuasive explanation for failing to seek leave sooner or even to raise the issue during multiple discussions among the parties—both before and after the Government’s intervention—about the briefing schedule for Cigna’s motion to dismiss his amended complaint. *Supra* pp. 2-3 & n.1.

Given the unexplained delay and the disruption that amendment would cause to the orderly progress of this litigation, leave to amend should be denied.

CONCLUSION

For all of these reasons, the Court should deny the motion for leave to amend.

² Cutler’s Westlaw citation appears to be incorrect. The opinion found at 2021 WL 2932747 has a different name and does not address prejudice or amended complaints. Presumably, Cutler intended to cite *U.S. ex rel. Liebman v. Methodist Le Bonheur Healthcare*, 2021 WL 1907838, at *2 (M.D. Tenn. May 12, 2021), which acknowledges case law denying a motion to amend “to allow for resolution of a pending motion to dismiss” but explains that “prejudice generally requires more than merely the pendency of a motion to dismiss.”

Date: May 23, 2023

Respectfully submitted,

s/ David W. Ogden

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CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2023, I electronically filed the foregoing document with the Clerk of Court using this Court's CM/ECF system, which will send a Notice of Electronic

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s/ David W. Ogden _____
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Exhibit 1

From: [Lamb, Kevin](#)
To: [Barnea, Jean-David \(USANYS\)](#); [Tara Swafford](#); [Dolinger, Samuel \(USANYS\)](#); [Speth, Charles](#); [Aronoff, Peter \(USANYS\)](#); [Sweet, Kara \(USATNM\)](#)
Subject: RE: Request to Confer on Cutler's proposed motion to seal
Date: Wednesday, February 15, 2023 8:26:39 PM

Tara,

As discussed, Cigna does not consent to any disclosure of HIPAA Protected Health Information without a court order authorizing such disclosure. And we are deeply concerned about how Mr. Cutler has thousands of pages of protected health information for Cigna members improperly and potentially illegally in his possession. We are also concerned about any further disclosure of such information given the unique circumstances here, which include that on multiple prior occasions Mr. Cutler has mis-filed on public dockets protected information that should have been filed under seal (in several cases in contravention of court orders); that you only made us aware of your intent to file these documents today and did not provide copies of the documents to us in advance; and that, as you acknowledged, there is no requirement for Mr. Cutler to file a proposed amended complaint at this time, much less to attach thousands of pages of protected health information to a proposed complaint.

If you insist on filing the documents today, we expect that you will do so under seal in a manner that prevents any further disclosure of protected health information. If you choose to go forward, you may report our position as follows:

Defendants do not consent to any disclosure of protected health information without a court order as required by the HIPAA Privacy Rule. Because Relator has indicated that he intends to file even without a court order authorizing disclosure, Defendants agree that any such filing must be made under seal. Defendants reserve their right to seek any appropriate relief for improper disclosure based on their review of the exhibits, which were not shared with Defendants prior to the filing of this motion.

Of course, Defendants also reserve their rights to object to the proposed amended complaint and exhibits otherwise, including on the grounds that Mr. Cutler does not have our consent or the Court's leave to file any amended complaint.

Best,
Kevin

From: Barnea, Jean-David (USANYS) <Jean-David.Barnea@usdoj.gov>
Sent: Wednesday, February 15, 2023 1:06 PM
To: Tara Swafford <tara@swaffordlawfirm.com>; Lamb, Kevin <Kevin.Lamb@wilmerhale.com>; Dolinger, Samuel (USANYS) <Samuel.Dolinger@usdoj.gov>; Speth, Charles <Charles.Speth@wilmerhale.com>; Aronoff, Peter (USANYS) <Peter.Aronoff@usdoj.gov>; Sweet, Kara (USATNM) <Kara.Sweet@usdoj.gov>
Subject: RE: Request to Confer on Cutler's proposed motion to seal

EXTERNAL SENDER

The government does not oppose this request.

--J.D.

From: Tara Swafford <tara@swaffordlawfirm.com>
Sent: Wednesday, February 15, 2023 11:46 AM
To: Lamb, Kevin <Kevin.Lamb@wilmerhale.com>; Dolinger, Samuel (USANYS) <SDolinger@usa.doj.gov>; Speth, Charles <Charles.Speth@wilmerhale.com>; Aronoff, Peter (USANYS) <PAronoff@usa.doj.gov>; Sweet, Kara (USATNM) <KSweet@usa.doj.gov>; Barnea, Jean-David (USANYS) <JDBarnea@usa.doj.gov>
Subject: [EXTERNAL] Request to Confer on Cutler's proposed motion to seal

Counsel,

In connection with our response to the motion to dismiss that is being filed today, we are attaching a proposed Second Amended Complaint which will attach 3 exhibits that need to be filed under seal. We have prepared a motion to file them under seal and a memorandum in support, which is attached. We are reaching out to see whether we can state that counsel for the Cigna Defendants or counsel for the Government do not oppose our motion to seal. Please advise today. Thank you.

--Tara



Tara L. Swafford
321 Billingsly Ct., Suite 19
Franklin, TN 37067
615-599-8406 office
615-482-0187 mobile
615-807-2355 fax
tara@swaffordlawfirm.com

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Exhibit 2

From: [Lamb, Kevin](#)
To: [Tara Swafford](#); [Dolinger, Samuel \(USANYS\)](#); [Speth, Charles](#); [Aronoff, Peter \(USANYS\)](#); [Sweet, Kara \(USATNM\)](#); [Barnea, Jean-David \(USANYS\)](#)
Subject: RE: Cigna - Stay Motion Reply Brief Page Limits
Date: Friday, February 17, 2023 5:20:58 PM

Tara,

We do not object to redacting protected health information to render the document de-identified pursuant to HIPAA's De-Identification Standard, but given Mr. Cutler's past misuse of confidential Cigna documents, we continue to be concerned that the documents at issue, including the one you already filed, are not lawfully in his possession. For that reason, we want to make clear to the Court that Cigna's non-opposition to redacting PHI should not be taken to mean that Cigna consents to the filing itself. Please report our position as follows:

Defendants do not oppose the redaction of protected health information to render the document de-identified pursuant to HIPAA's De-Identification Standard, but reserve their rights to seek appropriate relief with respect to the exhibit at issue.

Best,
Kevin

From: Tara Swafford <tara@swaffordlawfirm.com>
Sent: Friday, February 17, 2023 3:33 PM
To: Lamb, Kevin <Kevin.Lamb@wilmerhale.com>; Dolinger, Samuel (USANYS) <Samuel.Dolinger@usdoj.gov>; Speth, Charles <Charles.Speth@wilmerhale.com>; Aronoff, Peter (USANYS) <Peter.Aronoff@usdoj.gov>; Sweet, Kara (USATNM) <Kara.Sweet@usdoj.gov>; Barnea, Jean-David (USANYS) <Jean-David.Barnea@usdoj.gov>
Subject: RE: Cigna - Stay Motion Reply Brief Page Limits

EXTERNAL SENDER

Kevin,

Given CIGNA's earlier statements, we do not want to exchange any PHI until a protective order is in place. Do you oppose the motion to redact?

--Tara

From: Lamb, Kevin <Kevin.Lamb@wilmerhale.com>
Sent: Friday, February 17, 2023 2:10 PM
To: Dolinger, Samuel (USANYS) <Samuel.Dolinger@usdoj.gov>; Tara Swafford <tara@swaffordlawfirm.com>; Speth, Charles <Charles.Speth@wilmerhale.com>; Aronoff, Peter (USANYS) <Peter.Aronoff@usdoj.gov>; Sweet, Kara (USATNM) <Kara.Sweet@usdoj.gov>; Barnea, Jean-David (USANYS) <Jean-David.Barnea@usdoj.gov>

Subject: RE: Cigna - Stay Motion Reply Brief Page Limits

Tara, could you please provide us with an unredacted copy of the document so that we can see what is being redacted?

Thanks,
Kevin

From: Dolinger, Samuel (USANYS) <Samuel.Dolinger@usdoj.gov>
Sent: Friday, February 17, 2023 2:01 PM
To: Tara Swafford <tara@swaffordlawfirm.com>; Speth, Charles <Charles.Speth@wilmerhale.com>; Aronoff, Peter (USANYS) <Peter.Aronoff@usdoj.gov>; Sweet, Kara (USATNM) <Kara.Sweet@usdoj.gov>; Barnea, Jean-David (USANYS) <Jean-David.Barnea@usdoj.gov>
Cc: Lamb, Kevin <Kevin.Lamb@wilmerhale.com>
Subject: RE: Cigna - Stay Motion Reply Brief Page Limits

EXTERNAL SENDER

No objection from the government.

Sam

Samuel Dolinger
Assistant United States Attorney
Southern District of New York
Tel: (212) 637-2677

From: Tara Swafford <tara@swaffordlawfirm.com>
Sent: Friday, February 17, 2023 11:30 AM
To: Speth, Charles <Charles.Speth@wilmerhale.com>; Dolinger, Samuel (USANYS) <SDolinger@usa.doj.gov>; Aronoff, Peter (USANYS) <PAronoff@usa.doj.gov>; Sweet, Kara (USATNM) <KSweet@usa.doj.gov>; Barnea, Jean-David (USANYS) <JDBarnea@usa.doj.gov>
Cc: Lamb, Kevin <Kevin.Lamb@wilmerhale.com>
Subject: [EXTERNAL] RE: Cigna - Stay Motion Reply Brief Page Limits

All,

We need to file a motion to allow the redaction we made to the 360 form, which was Exhibit A to the Relator's Response to the MTD. Can we state that the government and CIGNA do not oppose this? Please advise today. Thanks.

--Tara



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From: Speth, Charles <Charles.Speth@wilmerhale.com>
Sent: Friday, February 17, 2023 10:15 AM
To: Tara Swafford <tara@swaffordlawfirm.com>; Dolinger, Samuel (USANYS) <Samuel.Dolinger@usdoj.gov>; Aronoff, Peter (USANYS) <Peter.Aronoff@usdoj.gov>; Sweet, Kara (USATNM) <Kara.Sweet@usdoj.gov>; Barnea, Jean-David (USANYS) <Jean-David.Barnea@usdoj.gov>
Cc: Lamb, Kevin <Kevin.Lamb@wilmerhale.com>
Subject: RE: Cigna - Stay Motion Reply Brief Page Limits

Thank you both.

From: Tara Swafford <tara@swaffordlawfirm.com>
Sent: Friday, February 17, 2023 11:14 AM
To: Dolinger, Samuel (USANYS) <Samuel.Dolinger@usdoj.gov>; Speth, Charles <Charles.Speth@wilmerhale.com>; Aronoff, Peter (USANYS) <Peter.Aronoff@usdoj.gov>; Sweet, Kara (USATNM) <Kara.Sweet@usdoj.gov>; Barnea, Jean-David (USANYS) <Jean-David.Barnea@usdoj.gov>
Cc: Lamb, Kevin <Kevin.Lamb@wilmerhale.com>
Subject: Re: Cigna - Stay Motion Reply Brief Page Limits

EXTERNAL SENDER

Same with relator.

Tara L. Swafford
Swafford Law

321 Billingsly Court Suite 19
Franklin, TN 37067
615-599-8406 (office)
615-482-0187 (cell)

PRIVILEGED AND CONFIDENTIAL

From: Dolinger, Samuel (USANYS) <Samuel.Dolinger@usdoj.gov>
Sent: Friday, February 17, 2023 10:09:26 AM
To: Speth, Charles <Charles.Speth@wilmerhale.com>; Tara Swafford <tara@swaffordlawfirm.com>; Aronoff, Peter (USANYS) <Peter.Aronoff@usdoj.gov>; Sweet, Kara (USATNM) <Kara.Sweet@usdoj.gov>; Barnea, Jean-David (USANYS) <Jean-David.Barnea@usdoj.gov>
Cc: Lamb, Kevin <Kevin.Lamb@wilmerhale.com>
Subject: Re: Cigna - Stay Motion Reply Brief Page Limits

The government has no objection.

Sam

Samuel Dolinger
Assistant United States Attorney
Southern District of New York
Tel: (212) 637-2677

From: Speth, Charles <Charles.Speth@wilmerhale.com>
Sent: Friday, February 17, 2023 10:42:02 AM
To: Tara Swafford <tara@swaffordlawfirm.com>; Dolinger, Samuel (USANYS) <SDolinger@usa.doj.gov>; Aronoff, Peter (USANYS) <PAronoff@usa.doj.gov>; Sweet, Kara (USATNM) <KSweet@usa.doj.gov>; Barnea, Jean-David (USANYS) <JDBarnea@usa.doj.gov>
Cc: Lamb, Kevin <Kevin.Lamb@wilmerhale.com>
Subject: [EXTERNAL] Cigna - Stay Motion Reply Brief Page Limits

All,

In connection with Cigna's motion to stay discovery, we intend to file a motion to exceed page limits for our reply brief seeking 12 pages for reply. Please let us know whether you do not oppose the motion. We would like to get the motion on file today so please let us know at your earliest convenience. Thanks very much, and happy to discuss if helpful.

Charles C. Speth | WilmerHale
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charles.speth@wilmerhale.com

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Exhibit 3

From: [Lamb, Kevin](#)
To: [Tara Swafford](#); [Dolinger, Samuel \(USANYS\)](#); [Speth, Charles](#); [Sweet, Kara \(USATNM\)](#)
Cc: [Ogden, David](#); [Shapiro, Howard](#); alex.little@burr.com; [Aronoff, Peter \(USANYS\)](#); [Barnea, Jean-David \(USANYS\)](#); tpotter@burr.com
Subject: RE: Motion to Seal
Date: Tuesday, April 4, 2023 2:58:06 PM

Tara,

If you agree that the exhibits are “Discovery Material” subject to the Court’s protective order, and they are marked as “CONFIDENTIAL PHI – SUBJECT TO PROTECTIVE ORDER” or “PHI – SUBJECT TO PROTECTIVE ORDER,” Defendants will not object to the exhibits being filed under seal. We remain concerned, however, that Mr. Cutler has improperly retained confidential business records and PHI for Cigna members that he had no right to retain. We therefore want to be clear that Defendants do not consent to his filing of these exhibits and reserve all rights in this respect, including on the ground that Mr. Cutler does not have Defendants’ consent or the Court’s leave to file any amended complaint or exhibits.

Let us know if you have any questions or if it would be helpful to meet and confer further.

Best,
Kevin

From: Tara Swafford <tara@swaffordlawfirm.com>
Sent: Monday, April 3, 2023 11:22 PM
To: Dolinger, Samuel (USANYS) <Samuel.Dolinger@usdoj.gov>; Speth, Charles <Charles.Speth@wilmerhale.com>; Sweet, Kara (USATNM) <Kara.Sweet@usdoj.gov>
Cc: Ogden, David <David.Ogden@wilmerhale.com>; Shapiro, Howard <Howard.Shapiro@wilmerhale.com>; alex.little@burr.com; Aronoff, Peter (USANYS) <Peter.Aronoff@usdoj.gov>; Barnea, Jean-David (USANYS) <Jean-David.Barnea@usdoj.gov>; tpotter@burr.com; Lamb, Kevin <Kevin.Lamb@wilmerhale.com>
Subject: Motion to Seal

EXTERNAL SENDER

All,

The Relator has a motion to seal ready to file for the 3 exhibits to the proposed Amended Complaint since they contain PHI. Does the government oppose that motion? Does Cigna? Please advise tomorrow.



Tara L. Swafford
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