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9 UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

10  
11 UNITED STATES OF AMERICA *et al.*,  
*ex rel.* JEFFREY MAZIK,

12 Plaintiffs,

13 v.

14 KAISER PERMANENTE, INC. *et al.*,

15 Defendants.  
16

Case No. 2:19-cv-0559-JAM-KJN

PLAINTIFF-RELATOR'S  
OPPOSITION TO DEFENDANTS'  
MOTION TO DISMISS

17  
18 Plaintiff-Relator Jeffrey Mazik hereby submits the following memorandum, in opposition  
19 to the Motion to Dismiss (ECF No. 78, "Defs' MTD") filed by Defendants Kaiser Foundation  
20 Health Plan, Inc., Kaiser Foundation Hospitals, The Permanente Medical Group, Inc., Southern  
21 California Permanente Medical Group and Colorado Permanente Medical Group, P.C.  
22 (collectively, "Kaiser" and/or "Defendants"). For the reasons below, Defendants' motion should  
23 be denied in its entirety.  
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1 **BACKGROUND**

2 Plaintiff-Relator Jeffrey Mazik (“Mazik”) is a former Kaiser compliance officer who  
3 initiated this *qui tam* whistleblower action on behalf of the United States and several state plaintiffs  
4 (California, Colorado, Georgia, Hawaii, Maryland, Virginia, and Washington), based on conduct  
5 that he observed over the course of nearly a decade while employed by and/or working with  
6 Defendants.<sup>1</sup>

7 Mazik is the first and *only* relator to have filed a *qui tam* action for violations of the False  
8 Claims Act (“FCA”), 31 U.S.C. § 3729, arising from the perspective and observations of an insider  
9 with direct knowledge of Kaiser’s defunct compliance operation. Mazik details unique and  
10 material elements of fraud. His allegations cannot be characterized as parasitic “piggyback  
11 claims”; indeed, there is no dispute that Mazik is the original source for all the information in his  
12 Complaint.

13 In his Complaint, Mazik alleges that Defendants violated the federal FCA (Count I), and  
14 several state analogue statutes (Counts II–VIII), by running a “sham” compliance program that  
15 systematically resulted in the submission of artificially inflated risk adjustment data to Medicare,  
16 Medicaid, and other government healthcare programs. The gravamen of the Complaint is that, in  
17 an effort to “make the company appear as though it was engaged in comprehensive and meaningful  
18 fraud-prevention efforts,” Kaiser procured various compliance software programs designed to  
19 detect fraud, waste, and abuse in claims data submitted by external providers—but then  
20 purposefully configured those programs to function at minimum capacity and/or disabled key  
21 features so as to systematically overlook errors and anomalies in claims data that was then

22  
23 <sup>1</sup> The original complaint in this case was filed under seal on April 1, 2019, and subsequently  
24 amended on April 2, 2021. *See* First Amended Complaint [*hereinafter*, the “Complaint”] (Apr. 2,  
2021) (ECF No. 48).

1 submitted to government healthcare programs for payment. Compl. ¶¶ 44–86.<sup>2</sup> In addition, the  
2 Complaint further alleges that Defendants undertook various retaliatory actions against Mazik for  
3 raising his concerns about these issues with colleagues and supervisors at Kaiser, including and  
4 culminating in the termination of his employment, in violation of applicable federal and state anti-  
5 retaliation laws (Counts IX–XII).

6 While the instant case was still pending under seal, Mazik learned that six other *qui tam*  
7 actions had been filed against Kaiser and consolidated in the U.S. District Court for the Northern  
8 District of California between 2013 and 2021. *U.S. ex rel. Osinek, et al. v. Kaiser et. al.*,  
9 consolidated at No. 13-cv-03891 (N.D. Cal.).<sup>3</sup> As is relevant here, the first-filed such action was  
10 commenced by plaintiff-relator Ronda Osinek in 2013 [the “Osinek Complaint”], and the second  
11 by Dr. James Taylor in 2014 [the “Taylor Complaint”].<sup>4</sup>

12 The motion pending before this Court is very similar to the motion filed in that case, where  
13 Kaiser sought to dismiss the complaints filed by Dr. Taylor and all other subsequent plaintiff-  
14 relators under the FCA’s “first-to-file” bar, 31 U.S.C. § 3730(b)(5). That motion was largely  
15 denied in a recent written decision authored by the Hon. Edward M. Chen, which serves as a  
16 blueprint for disposing of the motion presently before this Court. *See U.S. ex rel. Osinek v.*  
17 *Permanente Med. Group, Inc.*, --- F.Supp.3d ---, 2022 WL 1422944, at \*1–2, 6 (N.D. Cal. May 5,  
18 2022) (allowing complaints filed by Dr. Taylor and other subsequent relators to proceed alongside  
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20 <sup>2</sup> In an effort to avoid repetition, the factual allegations giving rise the federal FCA claim in the  
21 Count I and the state law claims in Counts II–VIII are merely summarized here; a more detailed  
22 discussion of those specific allegations, pp. 8–15.

23 <sup>3</sup> The existence of these cases was not known to Mazik until the seal was lifted from that docket,  
24 on or around July 29, 2021.

<sup>4</sup> The four other subsequently filed actions on the Osinek docket (*e.g.*, Arefi, Stein, Bryant, and  
Bicocca) are irrelevant to the present motion.

1 the first-filed Osinek Complaint to the extent that the claims therein are premised upon “materially  
2 different” factual allegations concerning the “nature of [Defendants’] wrongdoing”).

3 Defendants now seek to dismiss the instant case by arguing that the allegations here are  
4 essentially the same as those presented in the Taylor Complaint, *see* Defs’ MTD at 7–10. In  
5 addition, or in the alternative, Defendants also argue that the Complaint should be dismissed for  
6 failure to state claim, *id.* at 10–15.

7 Defendants’ boilerplate motion to dismiss, which largely repeats the same arguments  
8 already rejected in *Osinek*, should be denied in its entirety. The motion should be denied as to  
9 Count I because the “nature of [the] wrongdoing” alleged by Mazik is “materially different” from  
10 the facts alleged in the Taylor Complaint, *Osinek*, 2022 WL 1422944, at \*24—and as to Counts  
11 II–VIII because they are brought on behalf of state plaintiffs that are not named or implicated in  
12 the previously filed complaints. The motion should also be denied as to the retaliation claims in  
13 Counts IX–XII, because those causes of action are fully supported by the factual allegations set  
14 forth in the Complaint.

## 15 ARGUMENT

### 16 I. Count I is not subject to dismissal under the FCA’s first-to-file bar.

#### 17 A. The first-to-file bar only precludes successive *qui tam* actions that are based 18 on the same material facts.

19 Importantly, the FCA’s statutory bar against successive actions (*i.e.*, the first-to-file bar) is  
20 not “so broad” as Defendants claim in their motion (Defs’ MTD at 7). If it was, then neither Dr.  
21 Taylor nor any of the other plaintiff-relators in *Osinek* would have been permitted to proceed with  
22 their subsequently filed *qui tam* actions against the same Kaiser Defendants. *But see Osinek*, at  
23 \*24 (denying motion to dismiss because factual allegations in “[t]he *Taylor* case... differ[ed]...  
24 materially from *Osinek* in three ways”).

1 As Judge Chen noted in *Osinek*, the first-to-file bar is designed to strike the right balance  
2 between providing appropriate “incentives for whistleblowers” to come forward, while also  
3 discouraging potentially “opportunistic” would-be plaintiffs from filing successive *qui tam* actions  
4 based on allegations that have already been disclosed in a previously filed complaint. *Osinek*, at  
5 \*1, 11 (citing *U.S. ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1187 (9th Cir. 2001)).

6 To that end, the FCA precludes *qui tam* plaintiffs from bringing “a related action based on  
7 the facts underlying” a previously filed action, 31 U.S.C. § 3730(b)(5), but still leaves plenty of  
8 room for cases involving “materially distinct” allegations against the same defendants. *Osinek*, at  
9 \*17 (citing *U.S. ex rel. Todd Heath v. AT&T, Inc.*, 791 F.3d 112 (D.C. Cir. 2015) and *U.S. ex rel.*  
10 *Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 379 (5th Cir. 2009)); *see also Osinek*, at  
11 \*12 (“[The statute] is designed to allow recovery when a *qui tam* relator puts the government on  
12 notice of potential fraud ... but to bar copycat actions that provide no additional material  
13 information.”) (quoting *U.S. ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204, 1210 (D.C. Cir. 2011)).

14 In order to determine whether a subsequently filed complaint is “related,” within the  
15 meaning of § 3730(b)(5), “the Ninth Circuit applies a ‘material facts’ test,” *Osinek*, at \*11 (citing  
16 *Lujan*, 243 F.3d at 1188–89), which “consider[s] ‘whether the later-filed [c]omplaint alleges a  
17 fraudulent scheme [that] the government already would be equipped to investigate based on the  
18 first-filed [c]omplaint.’” *Osinek*, at \*12 (quoting *Batiste*, 659 F.3d at 1209).<sup>5</sup> The leading Ninth  
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21 <sup>5</sup> Other circuits largely apply the same test by a different name. *See, e.g., U.S. v. Millenium*  
22 *Labs., Inc.*, 923 F.3d 240, 253 (1st Cir. 2019) (“look[ing] to the actual mechanism (the ‘essential  
23 facts’) of the fraud,” to determine whether a subsequently filed *qui tam* complaint is sufficiently  
24 distinct from the first to proceed on its own); *see also U.S. ex rel. Heath v. AT & T, Inc.*, 791  
F.3d 112, 121 (D.C. Cir. 2015) (“Similarity is assessed by comparing the complaints side-by-  
side, and asking whether the later complaint “alleges a fraudulent scheme the government  
already would be equipped to investigate based on [the first] [c]omplaint.”); *U.S. ex rel. Branch*  
*Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 377 (5th Cir. 2009) (explaining that courts

1 Circuit case on the “material facts” test for resolving first-to-file issues is *U.S. ex rel. Hartpence*  
2 *v. Kinetic Concepts, Inc.*, 792 F.3d 1121 (9th Cir. 2015) (en banc), which is noticeably absent from  
3 Defendants’ recitation of applicable case law. *Accord U.S. ex rel. Savage v. CH2M Hill Plateau*  
4 *Remediation Co.*, 2015 WL 5794357, at \*9 (E.D. Wash. Oct. 1, 2015).

5 As explained in *Hartpence*, dismissal is warranted when “the plaintiff in the later-filed  
6 suit” provides “no additional benefit to the government” in his complaint, *Osinek*, at \*12 (quoting  
7 *Hartpence*, 792 F.3d at 1125, 1131–32). But if the later filed suit provides “information about a  
8 different form of fraud,” without which the government “might not have investigated beyond” the  
9 specific “fraudulent ... practices” alleged in the first complaint, then the subsequent action must  
10 be allowed to proceed. *Id.*<sup>6</sup>

11 **B. The *Osinek* decision rejected the same arguments that Defendants seek to**  
12 **propound here.**

13 Applying the principles espoused in *Hartpence* to Defendants’ first-to-file motion in the  
14 *Osinek* cases, Judge Chen compared the *Osinek* Complaint to four other subsequently filed *qui*  
15 *tam* actions and found claims that were sufficiently distinct to proceed in all but one of those cases.

16  
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19 “uniformly ask ... whether the later-filed action alleges the same material or essential elements  
of fraud described in the [previously] pending action.”).

20 <sup>6</sup> The *Hartpence* decision arose from two separate *qui tam* complaints against the same medical  
21 device manufacturer, for improperly billing Medicare. The district court initially granted the  
22 defendants’ motion to dismiss, finding that the second complaint was barred because it “named  
the same defendants, arose out of the same time period... involved [the same]... billing practices  
23 for the same therapy device, alleged incorrect use of the same billing codes,” and even “shared  
‘100 nearly identical paragraphs,’” with the first-filed complaint. *Hartpence*, 792 F.3d at 1131.  
24 On appeal, however, the Ninth Circuit reversed, finding that the subsequently filed action could  
proceed because it included additional allegations “based on different material facts” that  
provided at least some “additional benefit to the government.” *Id.* at 1131–32.

1 See *Osinek*, 2022 WL 1422944, at \*18–29.<sup>7</sup> As noted by Judge Chen, all of the complaints involved  
2 some amount of overlap; at the highest level of abstraction, all the relators alleged some version  
3 of facts that involves Kaiser bilking the government through the submission of falsely inflated risk  
4 adjustment data. See *Osinek*, at 22–23 (*Osinek* and *Taylor* are “related cases,” insofar as both  
5 generally allege that Kaiser violated Medicare regulations by submitting risk adjustment data with  
6 codes that “did not have proper support and were diagnosed even when a patient was not treated  
7 for that condition.”).

8 Even so, however, Judge Chen concluded that each of the subsequently filed complaints  
9 brought different factual allegations to bear; allegations that “differ[ed] materially,” from those in  
10 the first-filed complaint and therefore were not subject to dismissal under the first-to-file bar.  
11 *Osinek*, 2022 WL 1422944, at \*24. The critical distinction between the *Osinek* and the Taylor  
12 Complaint, he explained, is in the “nature of [the] wrongdoing” alleged in each case. *Id.* Although  
13 both complaints generally refer to Kaiser’s use of data mining practices as a central component of  
14 its upcoding scheme, the *Osinek* Complaint focuses on how Kaiser’s internal coders used  
15 algorithm-based software to identify “high-value” Hierarchical Conditions Categories (“HCCs”),  
16 and then “pressure[d] its physicians” (*i.e.*, physicians who are employed directly by Kaiser) to  
17 change the original diagnoses and documentation entered into a medical record at the time of  
18 service in order to “capture the high[er] value HCCs” through the “addenda” process. *Id.* at \*4–5.  
19 The Taylor Complaint, by contrast, explains how Kaiser used Natural Language Processing  
20 (“NLP”) software to identify new and additional diagnoses not included in the original claims that  
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23 <sup>7</sup> The motion to dismiss was granted as to the Stein action but denied, in part, with respect to  
24 Taylor, Bryant and Biccoca, such that all three of those actions are now proceeding alongside  
*Osinek*. The Arefi case was voluntarily dismissed.

1 it received from external providers (*i.e.*, physicians who are not employed by Kaiser), and then  
2 included those additional diagnoses in its risk adjustment data, without further inquiry. *Id.* at \*23–  
3 24. Specifically, Dr. Taylor alleged that “Kaiser developed its own NLP ... program” to “search...  
4 electronic medical records... find words that, individually or in combination, indicate that a patient  
5 has certain diagnoses”; if a particular code was identified as being potentially appropriate by two  
6 Kaiser coders, then it would be deemed a “True Positive,” and included in claim submissions to  
7 CMS for payment without further review, verification or support—notwithstanding Kaiser’s  
8 knowledge that this process led to the inclusion of unsupported diagnostic codes in its risk  
9 adjustment data. *Id.* at \*24 (quoting Taylor Compl. ¶¶ 191–200) (noting that “*Taylor* asserts a  
10 problem with Kaiser failing to evaluate the True Positives results yielded by the NLP program”).

11 Thus, while both Osinek and Taylor described data mining practices that Kaiser employs  
12 to essentially pad its risk adjustment data, the Taylor Complaint charges Kaiser with “exploiting  
13 True Positives... [which] is different from ... the exploitation of high-value conditions [alleged in  
14 the Osinek Complaint].” *Id.* at \*24. “[U]nder... the material facts test,” then, “*Taylor* should not  
15 be deemed related to *Osinek*,” because the Osinek Complaint would not necessarily lead “the  
16 government to question the True Positive results yielded by the NLP program... [or] Kaiser[’s]  
17 [failure]... to evaluate the True Positives results yielded by the NLP program.” *Id.* (“[T]his is  
18 different from *Osinek* which is focused on the exploitation of high-value conditions... Thus, Dr.  
19 Taylor ... has ‘significant information to contribute of [his] own.’”).

20 **C. The “nature of the wrongdoing” at issue here is materially distinct from the**  
21 **allegations in any other previously filed action.**

22 Here, as in *Osinek*, the Court must decide whether the “nature of the wrongdoing” alleged  
23 in this action is sufficiently distinct from facts alleged in previously filed complaints to proceed  
24 past the motion to dismiss stage.

1 Defendants contend that *Mazik* is subject to dismissal based on its purported similarities to  
2 *Taylor* and seek dismissal because both complaints generally relate to Kaiser’s handling of claims  
3 from external providers. *See* Defs’ MTD at 8–9 (“Both Dr. Taylor and Mazik base the alleged  
4 external-provider schemes on allegations of false diagnosis codes generated from external-  
5 provider data, so their complaints share the same underlying material facts.”).

6 As Judge Chen aptly observed in *Osinek*, however, the key question is not whether the  
7 complaints have similarities, but rather, whether “the nature of wrongdoing” alleged in a  
8 subsequent action is “materially different” from the allegations disclosed in previously filed  
9 complaints, *Osinek*, at \*24.

10 There are, of course, similarities between the two cases. Like *Taylor*, the allegations in  
11 *Mazik* generally pertain to a “nationwide or corporate-wide fraud” to increase the payments that  
12 Defendants received from various government entities by knowingly submitting false, fraudulent,  
13 and/or unsupported diagnostic codes in its risk adjustment data. *Osinek*, at \*24. And like *Taylor*,  
14 *Mazik* also alleges that Kaiser’s failure to correct “improper coding by external providers,” *id.*,  
15 was a central component of that fraud. *Id.*

16 But while it is true that both *Taylor* and *Mazik* generally relate to Kaiser’s handling of  
17 claims from external providers, the “nature of the wrongdoing,” *id.*, alleged in each case is  
18 materially different. *Taylor* concerns Kaiser’s data mining practices—and more specifically, its  
19 use of proprietary NLP software to identify and incorporate additional diagnoses into its claims  
20 data—despite knowing that the software yielded high rates of false positives for certain diagnoses.  
21 *Osinek*, at \*24.

22 *Mazik*, by comparison, focuses almost exclusively on Kaiser’s defunct compliance  
23 operations, including but not limited to its intentional manipulation of fraud detection software to  
24

1 purposefully ignore known instances of fraud, waste, and abuse. Compl. ¶¶ 44, 46–74. Simply put,  
2 the “nature of wrongdoing” alleged here is quite different from that alleged in *Taylor*, or any other  
3 previous *qui tam* action against Kaiser.

4 The principal theory of fraud set forth in Mazik’s Complaint is that Kaiser’s compliance  
5 program was a “complete sham,” implemented only to “make the company appear as though it  
6 was engaged in comprehensive and meaningful fraud-prevention efforts,” when it was in fact,  
7 “purposefully overlook[ing]” easily identifiable instances of “fraudulent upcoding” by external  
8 providers. Compl. ¶ 44. Specifically, “[i]n an effort to appear facially compliant” with applicable  
9 regulations, Kaiser used well-recognized compliance software and “contract[ed] with various data  
10 analytics vendors” to “review ... claims [data] submitted by external providers.” *Id.* ¶¶ 47, 51, 44,  
11 56, 57. These products, according to Mazik, were designed to flag coding errors and anomalies so  
12 as to prevent fraud, waste, and abuse, “if used properly.” *Id.* ¶ 48. But Kaiser did not use those  
13 tools as they were designed; instead, Kaiser would “intentionally disable” and/or deactivate key  
14 functionalities and features, so as to render those programs ineffective or minimally effective. *Id.*  
15 ¶¶ 48–61. This was no accident, alleges Mazik; indeed, the Complaint recounts numerous instances  
16 where Mazik brought these issues to the attention of his superiors, who either did nothing, or  
17 actively thwarted his efforts to make things right. *Id.* ¶¶ 57–69, 81, 86.

18 Mazik is the *only* relator to have filed an FCA claim arising from Kaiser’s sham compliance  
19 program from the perspective of an insider and original source<sup>8</sup> with direct knowledge of the  
20 wrongdoing by which the company was manipulating its own compliance software tools and  
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23 <sup>8</sup> Similarly, “[b]ecause original sources are still permitted to bring a *qui tam* complaint [even]  
24 after public disclosure, Congress clearly believed that original sources possessed valuable  
information that would assist the government in prosecution of false claims actions.” *Campbell*  
*v. Redding Med. Ctr.*, 421 F.3d 817, 822 (9th Cir. 2005).

1 programs. He is the first to put the government on notice about Kaiser’s practice of acquiring and  
2 utilizing recognized fraud-detection programs to make it appear as though it has a robust  
3 compliance operation, but purposefully configuring those programs to overlook readily  
4 identifiable instances of fraud, waste, and abuse from external providers. He is the very opposite  
5 of the “opportunistic” plaintiff. *See Hartpence*, 792 F.3d at 1131 (citing *Lujan*, 243 F.3d at 1187,  
6 for the proposition that dismissal is improper where it would not “serve the dual purposes of the  
7 first-to-file bar... ‘to promote incentives for whistle-blowing insiders and prevent opportunistic  
8 successive plaintiffs.’... [Indeed], allowing [such] claims for related but distinct fraud[s]... [is  
9 more favorable, because]... [it] encourages broader investigation and increases the total potential  
10 for recovery [by the government].”).

11 And since no other relator has filed a complaint that would necessarily lead the government  
12 to an investigation into the fraud arising from these aspects of Kaiser’s compliance operation, the  
13 Mazik Complaint is quite clearly “materially different” in that it provides new information and  
14 “additional benefit to the government.” *Hartpence*, 792 F.3d at 1131–32; *accord Osinek*, at \*12–  
15 13. Accordingly, the federal FCA claim in Count I is not foreclosed by the first-to-file bar.

16 **II. Counts II–VIII allege separate state claims on behalf of state plaintiffs that are**  
17 **not named in the Taylor Complaint.**

18 Further, the fraud alleged in the instant case is significantly broader in scope than any of  
19 the previously filed actions. As explained in *Osinek*, the scope of the fraud described in the other  
20 actions is limited to the Medicare Part C program, also known as Medicare Advantage. And while  
21 Mazik has also alleged a fraud that implicates Kaiser’s Medicare Advantage plans, the fraud  
22 alleged here extends to other types of government-sponsored healthcare plans that are financed, in  
23 part, by state funds, such as Dual Eligible Special Needs Plans (D-SNPs) and Medicaid managed  
24 care plans offered by Kaiser in the states of California, Colorado, Georgia, Hawaii, Maryland,

1 Virginia and Washington. Compl. ¶¶ 33–36, 70–74, 85–93, 131–85. To that end, Counts II through  
2 VIII, which allege independent state law violations on behalf of separate state plaintiffs not named  
3 in any other previously filed complaint, would proceed *even if* the federal FCA claim in Count I  
4 were subject to dismissal under the first-to-file bar.

5 **III. The retaliation claims set forth in Counts IX–XII are fully supported by the**  
6 **factual allegations in the Complaint.**

7 As alleged in Counts IX through XII, Mazik was employed by Kaiser for nearly a decade  
8 without issue, but was swiftly retaliated against when he began raising concerns and objections to  
9 what he viewed as unlawful and fraudulent conduct across its compliance operations. Compl. ¶¶  
10 94–112, 186–98.

11 In order to state a claim for retaliation under 31 U.S.C. § 3730(h), a plaintiff need only  
12 allege “(1) that he or she engaged in activity protected under the statute; (2) that the employer  
13 knew [that]... [he] engaged in protected activity; and (3) that the employer discriminated against  
14 the plaintiff because he or she engaged in protected activity.” *Menciondo v. Centinela Hosp. Med.*  
15 *Ctr.*, 521 F.3d 1097, 1103 (9th Cir. 2008)). “[U]nlike a FCA violation claim, a FCA retaliation  
16 claim ‘does not require a showing of fraud and therefore need not meet the heightened pleading  
17 requirements of Rule 9(b).’” *Id.*

18 Each of the elements are clearly alleged here, and also suffice to establish claims for  
19 retaliation and wrongful termination under the state analogue statutes. As alleged in the Complaint,  
20 Mazik had an objectively reasonable, good faith belief that Kaiser’s sham compliance operation  
21 was resulting in fraud on government-funded healthcare programs and engaged in protected  
22 conduct by reporting his concerns internally, to supervisors and others, on multiple occasions.  
23 Compl. ¶¶ 60–66, 97–98. Although his supervisors often displayed “indifference,” and/or a “lack  
24 of interest,” in “following up” on these concerns, *id.* ¶¶ 61–62, 65–66, there were also instances

1 where they expressly thwarted his efforts to investigate, address, or correct the issues he observed,  
2 such as when a supervisor warned him to “[not] say a word,” on a call with the U.S. Department  
3 of Health & Human Services’ Office of Inspector General, *id.* ¶¶ 77–82—or when his manager  
4 scolded him for flagging suspected overpayments related to a procedure code error, placed him on  
5 a Performance Improvement Plan (“PIP”), restricted his access to the related software program,  
6 and forbade him from communicating his concerns to other employees, *id.* ¶¶ 98–108. When  
7 Mazik complained of these retaliatory actions, he was essentially ignored, and sidelined even  
8 further by his manager’s supervisor, *id.* ¶¶ 109. He then asked for a meeting with human resources,  
9 which was rescheduled on multiple occasions, and ultimately never occurred; he was then notified  
10 of his termination, purportedly based on performance-related issues, *id.* ¶¶ 110–11.

11 Moreover, while it is impossible to conclusively establish that the termination was  
12 motivated by Mazik’s engaging in protected conduct at this juncture, it has been deemed  
13 “sufficient at the pleading stage for [a]... plaintiff ‘to simply give notice that he believes the  
14 defendant terminated him because of his investigation into the practices specified in the  
15 complaint.’” *U.S. ex rel. Campie v. Gilead Scis., Inc.*, 862 F.3d 890, 909 (9th Cir. 2017). Mazik has  
16 gone above and beyond that threshold requirement here.

17 In sum, the allegations giving rise to Mazik’s retaliation claims are well-pleaded and fully  
18 set forth in the Complaint, and Defendants have failed to offer any compelling argument as to why  
19 any of those claims should be dismissed.

20 **IV. The Complaint does not otherwise fail to state a claim.**

21 Defendants’ alternative theory that the Complaint falls short of threshold pleading  
22 standards is equally flawed. While particularity is required, this commonsense requirement is  
23 hardly the magic bullet that Defendants would like it to be. From a practical standpoint, it just  
24 means that “[t]he ‘who, what, when, where, and how’” must be alleged in “sufficient detail to put

1 [d]efendant[s] on notice ‘of the particular misconduct which is alleged to constitute the fraud  
2 charge.’” *U.S. v. Hughes*, No. 20-cv-00321, --- F.Supp.3d ---, 2020 WL 2512408, at \*2 (E.D. Cal.  
3 May 15, 2020) (Mendez, J.) (quoting *U.S. ex rel. Ebeid v. Lungwitz*, 616 F.3d 993, 998 (9th Cir.  
4 2010) and *U.S. ex rel. Swoben v. United Healthcare Ins. Co.*, 848 F.3d 1161, 1180 (9th Cir. 2016)).  
5 Plaintiff-Relator Mazik has plainly done so here.

6 For example, the first purported defect that Defendants identify in the Complaint concerns  
7 a specific instance where Mazik observed that his employer had purposefully “deactivated” certain  
8 features in a software program called McKesson ClaimsXten, which he describes as “the principal  
9 software program” that Kaiser was supposedly using to flag instances of fraud, waste and abuse in  
10 claims data from external providers. Compl. ¶¶ 55–63. In the Complaint, Mazik specifically  
11 explains that ClaimsXten is a “rules-driven auditing” software program that “if used properly,  
12 detects abusive billing and prevents wasteful payments,” but that was rendered ineffective when  
13 his employer decided to “de-activate 25 of the 54 editing rules.” *Id.* ¶¶ 55–57. Mazik further  
14 explains how he assessed the impact of de-activating these features by running the same claims  
15 data through a comparable software program from another vendor called Verisk, where such  
16 features had not been disabled or deactivated; he started by looking at claims from external  
17 providers in the Georgia region and went on to conduct a similar analysis for all other regions  
18 where Kaiser had claims data from external providers—and in each of those instances, he observed  
19 that ClaimsXten was consistently failing to flag substantial overpayments that were readily  
20 identifiable in Verisk. *Id.* ¶¶ 58–63.

21 Against this backdrop, Defendants argue that these allegations do not satisfy the  
22 “particularity” requirement because Mazik “does not explain the purpose of those 25 rules, how  
23 deactivating those rules could result in inaccurate diagnosis codes or overpayments, or why  
24

1 declining to use the rules lacked a legitimate basis.” Defs’ MTD at 11. To be clear, however, that  
2 is *precisely* what the Complaint sets forth—*i.e.*, that “the purpose” of those rules was to detect  
3 instances of fraud, waste and abuse, and that “deactivating those rules,” did, *in fact*, “result in”  
4 inaccurate diagnosis codes [and] overpayments.” *See* Compl. ¶¶ 55–74. The Complaint also  
5 describes Mazik’s efforts to address these issues with his superiors, who did not proffer any  
6 “legitimate basis” for their decision to keep the software configured as such. *See id.*<sup>9</sup>

7 Contrary to Defendants’ insistence, the Complaint also sufficiently pleads “falsity” and  
8 “materiality” via allegations describing how Kaiser knowingly submitted falsely inflated risk  
9 adjustment data, together with false certifications as to the accuracy of that data, and knowingly  
10 received outsized capitation rate payments from the government as a result. Compl. ¶¶ 2–6, 19–  
11 29, 40–74. Taken as true, these allegations plainly satisfy all requisite elements of a federal FCA  
12 claim. *See Silingo v. WellPoint, Inc.*, 904 F.3d 667, 673 (9th Cir. 2018) (“The importance of  
13 accurate data certifications and effective compliance programs is obvious: if enrollee diagnoses  
14 are overstated, then the capitation payments to Medicare Advantage organizations will be  
15 improperly inflated.”).

16 And since the operative provisions of the state FCA statutes at issue in this case essentially  
17 mirror the federal statute, all of the requisite elements of those claims are equally well-pleaded. To  
18 the extent that Defendants fault the Complaint for failing to identify the names of the state-specific  
19 Medicaid plans offered by Kaiser in five of the seven plaintiff states, *see* Defs’ MTD at 14, no  
20

21  
22 <sup>9</sup> Defendants go on to make several other arguments in this vein, claiming that Mazik “does not  
23 explain the nature of these overpayments,” “does not allege any specifics about the alleged errors,”  
24 or “how these purported overpayments occurred.” *See, e.g.*, Defs’ MTD at 11:23–12:10. But each  
of these topics is, in fact, “explain[ed]” and addressed in great detail in the Complaint. *See, e.g.*,  
Compl. ¶¶ 2–6, 19–23, 40–63, 69, 71.

1 such requirement is imposed by the analogue FCA statutes; Plaintiff-Relator observed that  
2 Kaiser’s sham compliance operation was causing both the federal government and the named state  
3 plaintiffs to pay more than it should in risk-adjusted capitation rates to Kaiser, and has explained  
4 the mechanisms through which that occurred in substantial detail. The precise subsidiaries and/or  
5 trade names that Kaiser used to operate in those states is a non-material aspect of this case that is  
6 properly discoverable at the initial disclosure phase of discovery, and needs not to be identified at  
7 the pleading stage. (Further, the complaint can be later amended, if necessary, to include these  
8 details.)

9 Finally, Defendants’ claim that the Complaint “impermissibly groups defendants,” Defs’  
10 MTD at 14–15, is of no moment. Indeed, the Ninth Circuit has rejected nearly identical arguments  
11 in at least two other FCA actions against other Medicare Advantage organizations. *See Silingo*,  
12 904 F.3d at 677 (“In a bit of *deja vu* ... [the] Medicare Advantage organizations faulted ... the  
13 complaint ... for using ‘collective allegations to refer to the defendants rather than differentiating  
14 among them[,]’ ... [But] ‘[t]here is no flaw in a pleading ... where collective allegations are used  
15 to describe the actions of multiple defendants who are alleged to have engaged in precisely the  
16 same conduct.’”) (quoting *Swoben*, 848 F.3d at 1184).

### 17 CONCLUSION

18 For these reasons, Defendants’ motion to dismiss should be denied in its entirety.

19 Dated: August 29, 2022

Respectfully submitted,

20 POLLOCK COHEN LLP

21 /s/ Adam Pollock

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23 *Counsel for Plaintiff Relator Jeffrey Mazik*  
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