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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

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

Plaintiffs,

v.

KAISER PERMANENTE, INC. *et al.*,

Defendants.

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

PRELIMINARY JOINT RULE 26(f)
REPORT AND PROPOSED LIMITED
DISCOVERY PLAN

Pursuant to Federal Rule of Civil Procedure 26(f), the parties to this action have met and conferred on the topics outlined in this report, and hereby jointly submit the following:

1. NATURE OF THE CASE

(a) *Plaintiff-Relator's Statement of the Case*

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

In his Complaint, Mazik alleges that Defendants violated the federal False Claims Act (“FCA”), 31 U.S.C. § 3729 (Count I), and several state analogue statutes (Counts II–VIII), by running a “sham” compliance program that systematically resulted in the submission of artificially inflated risk adjustment data to Medicare, Medicaid and other publicly-funded government healthcare programs. Specifically, Mazik alleges that, in an effort to “make the company appear as though it was engaged in comprehensive and meaningful fraud-prevention efforts,” Kaiser procured various compliance software programs designed to detect fraud, waste, and abuse in claims data submitted by external providers—but then purposefully configured those programs to function at minimum capacity and/or disabled key features so as to systematically overlook errors and anomalies in claims data that was then submitted to government healthcare programs for payment. Compl. ¶¶ 44–86.

The Complaint further alleges that Defendants undertook various retaliatory actions against

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

Mazik for raising his concerns about these issues with colleagues and supervisors at Kaiser, including and culminating in the termination of his employment, in violation of applicable federal and state anti-retaliation laws (Counts IX–XII).

(b) Defendants’ Statement of the Case

Defendants include the nonprofit Kaiser Foundation Health Plan (“KFHP”), the nonprofit Kaiser Foundation Hospitals (“KFH”), three physician-directed regional Permanente Medical Groups—the Permanente Medical Group (“TPMG”), Southern California Permanente Medical Group (“SCPMG”), and Colorado Permanente Medical Group (“CPMG”). These separate legal entities collectively operate along with other affiliated entities under the trade name Kaiser Permanente.

Plaintiff-Relator brings claims on behalf of the United States under federal False Claims Act claims for submissions to the Medicare Advantage program. The United States has declined to intervene in those claims. Plaintiff-Relator also brings claims on behalf of the states of California, Colorado, Georgia, Hawaii, Virginia, and Washington under each state’s respective False Claims Act for submissions to state Medicaid programs.² Every plaintiff state has declined to intervene in those claims brought on its behalf. ECF No. 67.

Plaintiff-Relator’s factual allegations focus on diagnosis data received from external providers (i.e., healthcare providers that are not affiliated with the Kaiser Permanente trade name). Plaintiff-Relator alleges that Defendants failed to correct errors in that data, resulting in overpayments from various state and federal entities. Plaintiff-Relator also brings various

² While First Amended Complaint initially brought claims on behalf of Maryland, those claims were dismissed following Maryland’s decision not to intervene in claims brought on its behalf. ECF No. 67.

employment claims against Defendants for alleged retaliation. Defendants dispute that Plaintiff-Relator has adequately alleged any claims and have moved to dismiss all claims.

2. PROGRESS IN THE SERVICE OF PROCESS; JURISDICTION AND VENUE

In a Joint Stipulation filed with the Court on January 28, 2022, ECF No. 68, and entered by the Court on January 31, 2022, ECF No. 69, Defendants KFHP and KHF stated that they accepted service of the First Amended Complaint. Defendants TPMG, SCPMG, and CPMG stated that they “will accept service of the FAC as a substitute for the parties erroneously named[.]” Plaintiff-Relator filed a Certificate of Service stating that Defendants had accepted service on February 1, 2022. ECF No. 70. The parties do not anticipate any disputes with respect to either service of process, subject matter jurisdiction, personal jurisdiction, or venue in this Court.

3. AMENDMENT OF PLEADINGS; JOINDER OF ADDITIONAL PARTIES

The original complaint in this case was filed under seal on April 1, 2019, and subsequently amended on April 2, 2021. *See* First Amended Complaint [hereinafter, the “Complaint”] (Apr. 2, 2021), ECF No. 48. No further amendments or joinder of additional parties are anticipated at this time.

4. PENDING MOTIONS AND IMPACT ON DISCOVERY

Defendants have filed a motion to dismiss, ECF No. 78, which is fully briefed and pending before the Court. While that motion remains pending before the Court, the parties propose to proceed with the preliminary discovery plan described herein, on the understanding that all other discovery will be stayed pending the Court’s determination that Plaintiff-Relator has adequately alleged his claims. If the Court approves of this plan, the parties will proceed with the limited scope of discovery described herein, and then schedule another Rule 26(f) conference within 30 days following the latest of (1) this Court’s decision on the pending motion to dismiss if the Court denies the motion in full, or (2) this Court’s denial of any subsequent motions to dismiss based on

Plaintiff-Relator's amended pleadings (should the Court grant leave to amend in the decision on the motion to dismiss, or shortly thereafter).

At that time, the parties will set out a proposed schedule for future proceedings, including cut-off dates for discovery, law and motion, and the scheduling of pretrial and trial; an estimated trial time; and whether modification of standard pretrial procedures is warranted. The parties reserve their rights to consider what further motion practice may be necessary after the Court has decided the Motion to Dismiss and the parties have clarity on what claims will remain in the case.

5. INITIAL DISCLOSURES

The parties have agreed to exchange the initial disclosures required under Rule 26(a)(1) no later than September 29, 2022.

6. SCOPE OF PRELIMINARY DISCOVERY

The parties jointly propose to conduct a preliminary phase of discovery as follows.

- (a) Not before September 21, 2022, Plaintiff-Relator will serve upon Defendants a first set of requests for documents, relating solely to the retaliation claims in the complaint. The parties have agreed that the scope of these requests will be limited to seeking (1) Plaintiff-Relator's personnel files, (2) Plaintiff-Relator's performance reviews, and (3) any documents directly discussing Plaintiff-Relator's performance or termination. Plaintiff-Relator will not seek any documents about the underlying alleged false claims described in FAC that Plaintiff-Relator alleges were the subject of his whistleblowing activities. However, Defendants will not withhold documents that are otherwise responsive to the enumerated categories on the basis that they refer to alleged false claims. Defendants will produce all documents responsive to this first set of document requests within 30 days thereafter.
- (b) Not before September 21, 2022, Plaintiff-Relator will serve upon Defendants a first set written interrogatories relating solely to the state-specific claims in the complaint. The parties have agreed that the scope of these interrogatories will be limited to seeking (1) the identity of the relevant state-sponsored healthcare plans that Defendants operated in each of the plaintiff states, either directly or through subsidiary and/or affiliate entities during the relevant period, and (2) the total amount of medical diagnosis risk-adjusted payments for medical coverage received from Medicaid programs in each of the plaintiff states during the relevant period. Defendants will provide a substantive written response to each of those interrogatories within 30 days thereafter.

- (c) Not before September 28, 2022, Plaintiff will serve upon Defendants a second set of requests for documents sufficient to show (1) structure of any databases used by Defendants to store information relevant to medical diagnosis risk-adjustment submissions to state Medicaid programs in the plaintiff states during the relevant period and (2) any processes used by Defendants to collect and submit medical diagnosis risk-adjustment data to state Medicaid programs in the plaintiff states during the relevant period.
- (d) All other discovery will be bifurcated and stayed until such time as the parties have met-and-conferred to develop the principal Rule 26 discovery plan for this case, which the parties have agreed to do within 30 days following the latest of (1) this Court's decision on the pending motion to dismiss if the Court denies the motion in full, or (2) this Court's decision on any subsequent motions to dismiss based on Plaintiff-Relator's amended pleadings (should the Court grant leave to amend in the decision on the motion to dismiss, or shortly thereafter). At that time, the parties will address the subjects on which discovery may be needed, an estimated timeline for completion of discovery, whether any changes should be made in the limitations on discovery imposed under the Civil Rules, and the timing of disclosure of expert witnesses.

7. ELECTRONICALLY STORED INFORMATION (“ESI”)

The parties propose to stay ESI discovery until such time as the parties develop the principal Rule 26 discovery plan for this case following the Court's determination that Plaintiff-Relator has adequately alleged his claims. Defendants will not produce ESI discovery until the parties have agreed upon a protocol governing the production of ESI and a protective order. Meanwhile, the parties have instituted appropriate legal holds to preserve all potentially relevant ESI in order to comply with their preservation obligations.

8. PRIVILEGE CLAIMS

The parties recognize that in this action, each party will review and disclose large quantities of information and documents through the discovery process. As a result, information and documents produced to another party could include materials that could have been withheld in whole or in part upon the basis of a privilege or protection. To allow for expeditious and efficient discovery and to establish a party's obligations upon the receipt of another party's privileged or protected content, prior to initiating the discovery process, the parties will meet and confer

regarding a mutually agreeable order regarding the non-waiver of privileged and protected material.

9. CONFIDENTIALITY

The parties recognize that disclosure and discovery activity in this action is likely to involve production of confidential information, proprietary information, personally identifiable information, protected health information, and certain other private information for which special protection from public disclosure and from use for any purpose other than prosecuting this action may be warranted. Accordingly, the parties believe that a protective order governing the designation of confidential materials is necessary. Prior to producing any documents, the parties will meet and confer regarding a mutually agreeable protective order.

10. SPECIAL PROCEDURES

The parties do not believe this case is appropriate for reference to a special master or a United States Magistrate Judge. The parties do not believe this case is appropriate for reference to the Judicial Panel on Multidistrict Litigation or for application of the Manual for Complex Litigation.

11. RELATED CASES

Defendants have filed a Motion to Dismiss Count I of Plaintiff-Relator's complaint (ECF No. 78) because they contend it is based on the same material facts as an earlier-filed *qui tam* complaint and therefore is jurisdictionally barred by the False Claims Act's first-to-file bar, 31 U.S.C. § 3730(b)(5). That *qui tam* complaint, *U.S. ex rel. Taylor v. Kaiser Permanente*, Case No. 21-cv-3894 (N.D. Cal.), Dkt. No. 1, was consolidated with five other *qui tam* actions alleging FCA violations against various Kaiser Permanente-affiliated entities on June 25, 2021. *See U.S. ex rel. Osinek v. Kaiser Permanente*, Case No. 13-cv-3891 (N.D. Cal.), Dkt. No. 61.

12. SETTLEMENT AND ADR

The parties agree that alternative dispute resolution and settlement are premature at this time but agree to revisit this prospect as the case progresses.

13. MISCELLANEOUS

The parties have not identified other matters not addressed above that would further facilitate the just and expeditious disposition of this matter.

14. MODIFICATION

This agreement may be modified by an agreement signed by the parties or by the Court for good cause shown.

Dated: September 13, 2022

Respectfully submitted,

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LAW OFFICE OF JEREMY L. FRIEDMAN

/s/ Adam Pollock

Adam Pollock

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