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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 FOUNDATION HEALTH PLAN INC., et al.,

Defendants.

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

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS RELATOR'S FIRST AMENDED COMPLAINT

Hearing Date: October 18, 2022
Time: 1:30 p.m.
Judge: Hon. John A. Mendez
Courtroom: 6, 14th Floor

As the Motion to Dismiss ("Motion") explained, Relator Jeffrey Mazik's FAC does not make out any claim for relief.[1] His Opposition to Defendants' Motion ignores many of Defendants' arguments and legal citations, and like his FAC, relies on conclusory statements untethered to specific factual allegations. The Court should dismiss Mazik's claims in full.

I. The First-to-File Bar Requires Dismissal of Mazik's FCA Fraud Claim

The Court must dismiss Mazik's federal FCA fraud claim (Count I) under the FCA's jurisdictional first-to-file bar because Dr. James Taylor brought a *qui tam* action based on the same material facts as Mazik's complaint years before Mazik did. Mot. at 7–10. In disputing that the first-to-file bar applies, Mazik relies heavily on *Osinek*'s holding that the first-filed complaint there did not bar certain allegations in the Taylor complaint. Opp'n at 4–5. But that holding is irrelevant here, where Taylor's complaint is the first-filed complaint—instead, the Court must compare Taylor's and Mazik's complaints.[2]

Mazik has not pointed to any differences between his and Taylor's complaints that would save his FCA fraud claim from dismissal under the first-to-file bar. In fact, Mazik concedes that his and Taylor's complaints cover a similar geography and involve allegedly improper coding by external providers, which Mazik admits is a "***central component***" of the alleged fraud. Opp'n at 8 (emphasis added). The only factual distinction Mazik attempts to make between the complaints is that his complaint focuses on "defunct compliance operations." *Id.* at 8. But so does Taylor's complaint, which alleges that Defendants failed to correct errors uncovered by audits, failed to conduct follow-up audits, and failed to utilize monitoring tools at Defendants' disposal—and all with respect to external providers. Mot. at 9–10. Because Taylor alleges defunct compliance operations with respect to external providers, his complaint was sufficient to give the United

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[1] Defendants attempted to file this Reply on September 26, 2022 but could not access the Eastern District's e-filing system due to an apparent technical issue with the system. Accordingly, Defendants' counsel sent the Reply to Mazik's counsel by email on September 26 under Local Rule 134(c)(2). This Reply relies on the same abbreviations and acronyms as the Motion.

[2] Mazik also misunderstands *Osinek*'s holding. *See* Opp'n at 6 n.7. Judge Chen granted the first-to-file motion in full with respect to the *Arefi*, *Stein*, and *Bicocca* complaints and dismissed claims in all of the later-filed complaints. *U.S. ex rel. Osinek v. Permanente Med. Grp.*, 2022 WL 1422944, at *26 n.17, *29 (N.D. Cal. May 5, 2022). And Mazik ignores Judge Chen's holding about the operative complaints for the first-to-file analysis, relying on citations to his FAC rather than his original complaint as required. *See id.* at *11; Mot. at 8 n.7.

States grounds to investigate Defendants' oversight of external providers and discover Mazik's allegations. *Id.*; *see also U.S. ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204, 1209 (D.C. Cir. 2011) (first-to-file bar applied where "the allegations of the first complaint [gave] the government grounds to investigate all that is in the second"); *Osinek*, 2022 WL 1422944, at *12 (similar and collecting cases).

While Taylor does not describe the exact software that Mazik does, such a minor factual difference cannot circumvent the first-to-file bar. The Ninth Circuit has rejected an identical facts test; it is enough that Taylor's and Mazik's claims are based on the same material facts: that Defendants failed to adequately monitor external-provider data. *See U.S. ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1189 (9th Cir. 2001) (noting that bar of "identical" actions would "decrease incentives to promptly bring qui tam actions," allow "recovery for the same conduct," and permit FCA claims to proceed that "have no additional benefit for the government" since the first-filed action already gave the United States grounds to investigate the alleged fraud); *U.S. ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 378 (5th Cir. 2009) ("simply adding factual details . . . to the essential or material elements of a fraud claim" will not save subsequent *qui tam* complaint from dismissal under first-to-file bar); *Osinek*, 2022 WL 1422944, at *11, *26 (first-to-file bar applied where complaints alleged "the same kind of conduct"); *U.S. ex rel. Marion v. Heald Coll., LLC*, 2015 WL 4512843, at *3 (N.D. Cal. July 24, 2015) (first-to-file bar required dismissal of complaint that was "more detailed" than first-filed complaint but simply alleged factual variation of same type of scheme).

II. Mazik's Federal FCA Fraud Claim Fails to Satisfy Rules 8 and 9(b)

Falsity. The FAC does not plausibly allege that Defendants submitted a single false claim to CMS. Mot. at 11–12. The Motion explains why each of Mazik's falsity allegations is deficient. *Id.* at 12–14. The Opposition largely glosses over this analysis and doubles down on the allegation that Defendants disabled certain editing rules on the ClaimsXten compliance tool that allegedly was used to evaluate claims data from the Georgia region. Opp'n at 12–13; FAC ¶ 59. Merely alleging that Defendants disabled rules does not allege fraud with particularity—Mazik does not allege what those disabled rules did or why disabling them lacked legitimate

reasoning. *See* Mot. at 11. Nor does it explain ***how*** disabling editing rules would result in the submission of false claims. *Id.* The Opposition argues that a different compliance software made by Verisk revealed "overpayments" that ClaimsXten did not, Opp'n at 13, but the FAC does not describe the Verisk software in any detail or allege what type of "overpayments" were identified—*e.g.*, whether the alleged overpayments resulted from false risk-adjustment data or what payer, if any, made the alleged overpayments. In any event, the FAC alleges that the Verisk tool was used on claims data from only the Georgia region; while Mazik names Colorado- and California-based entities as defendants, he names no Georgia-specific entities, so it is not clear on the face of the FAC which Defendant's conduct could even be at issue. *See* FAC ¶¶ 58–59.

Materiality. The FAC's bare recitation of the materiality standard without any factual support also fails to satisfy Rule 8 or 9(b). Mot. at 12–13; *see Universal Health Servs., Inc. v. United States*, 579 U.S. 176, 194 (2016). The Opposition does no better. It mentions materiality only once in a sentence full of legal conclusions: "the Complaint also sufficiently pleads 'falsity' and 'materiality' via allegations describing how Kaiser knowingly submitted falsely inflated risk adjustment data . . . and knowingly received outsized capitation rate payments from the government as a result." Opp'n at 14. Materiality, falsity, and knowledge are distinct elements, so whether any claims were false or submitted knowingly says nothing about CMS's willingness to pay those claims—the key materiality question. *See* Mot. at 12.

Conspiracy. The Opposition does not address Defendants' argument that Mazik fails to allege a conspiracy, *id.* at 13, so the Court should dismiss his conspiracy claims with prejudice. *Narang v. Gerber Life Ins. Co*., 2018 WL 6728004, at *4 (N.D. Cal. Dec. 21, 2018) (collecting cases and observing that "[c]ourts have [] held that a plaintiff's failure to oppose a defendant's argument was a concession that such claims should be dismissed"); *see also* E.D. Cal. L.R. 230(c) (failure to file opposition may be construed as a non-opposition).

III. Mazik's State FCA Fraud Claims Fail to Satisfy Rules 8 and 9(b)[3]

Mazik's state FCA fraud claims fail not only for the same reasons that his federal FCA

[3] Mazik concedes that he must establish the same elements for his state FCA fraud claims as his federal FCA fraud claim. Opp'n at 14.

fraud claim fails, but also because they lack an adequate description of the relevant Medicaid programs. While Mazik broadly alleges that state Medicaid programs operate on a similar payment model as Medicare Advantage, FAC ¶ 33, the FAC lacks any material description of the programs. Mazik does not describe Defendants' business operations in any of the relevant states, nor does he even allege that any Defendant contracts with any state Medicaid program. Mot. at 13. He similarly does not allege that any of the Defendant PMGs in California and Colorado submitted claims to the out-of-state Medicaid programs at issue. Mazik argues that he need not identify who submitted the claims to the Medicaid programs, Opp'n at 14–15, but as Mazik himself recognizes, Rule 9(b) requires him to identify the "who" of any alleged fraud. *See id.* at 12–13. Given the FAC's deficiencies, the Court cannot reasonably infer that any Defendant submitted ***any*** claims—***false or otherwise***—to the state Medicaid programs at issue.

As the Motion argued, and the Opposition does not contest, Mazik also fails to describe the compensation structure of the Medicaid programs, so he has not alleged the "how" of any fraud on state entities. Mot. at 13–14; *see U.S. ex rel. Everest Principals, LLC v. Abbott Lab'ys, Inc.*, 2022 WL 3567063, at *9 (S.D. Cal. Aug. 18, 2022) (dismissing state FCA claims where "Relator has not alleged with particularity ***how*** any false claims were submitted to ***each*** state identified in the FAC" (emphases added)); *U.S. ex rel. Nowak v. Medtronic, Inc.*, 806 F. Supp. 2d 310, 357 (D. Mass. 2011) (dismissing state FCA claims where the relator did not "allege some specificity with respect to ***each*** asserted state" (emphasis added)). This omission is fatal: without allegations about how each state's Medicaid program compensated Defendants, Mazik cannot adequately allege FCA claims based on submissions to those programs. For example, the state Medicaid programs may not use a risk-adjustment program similar to Medicare Advantage to determine health plan payments. If the programs do not rely on diagnosis data to determine payments, alleged errors in the data may not have been material to the programs' payment decisions.[4]

[4] The Opposition fails to address the argument that Mazik brought the Georgia claims under the wrong statute. Mot. at 14 n. 11. The Court should dismiss Count IV for that reason alone. *See Narang*, 2018 WL 6728004, at *4; E.D. Cal. L.R. 230(c).

IV. Mazik's Fraud Claims Fail Because They Rely on Improper Group Pleading

Mazik cannot rely on group allegations to make out claims against each Defendant because he alleges that Defendants serve different functions. One is a nonprofit health plan that provides health coverage to members (KFHP); another is a nonprofit hospital (KFH); and the others are geographically diverse, physician-run groups providing health care to unique member populations (the PMGs). Mot. at 14. The Opposition cites *U.S. ex rel. Anita Silingo v. WellPoint, Inc.*, 904 F.3d 667, 678 (9th Cir. 2018), but *Silingo* does not help Mazik. Opp'n at 15. *Silingo* emphasized that collective allegations can satisfy pleading standards only where defendants engaged in exactly the same conduct, but not where "different actors play[] different parts." 904 F.3d at 677; *see also United States v. Prime Healthcare Servs. Inc.*, 2020 WL 11884833, at *5 (C.D. Cal. Apr. 14, 2020) (rejecting use of collective allegations where allegations showed "independence within [the] corporate structure"). Given the different roles and functions of the Defendants, Mazik cannot use collective allegations to satisfy pleading standards. Mot. at 14–15.

V. Mazik's Retaliation Claims Fail to Allege Notice of a Protected Activity

The Opposition ignores Defendants' argument that Mazik's retaliation claims fail because he does not identify which Defendant employed him. Mot. at 15. The Opposition also fails to address Defendants' argument that the FAC's allegations do not support the inference that any Defendant had notice that Mazik was engaged in a protected activity. *Id.* "If an employee's job duties include compliance and reporting," as Mazik's did, "that employee must suggest he intends to bring an FCA claim or otherwise report the misconduct to the regulatory authority for an employer to be sufficiently on notice[.]" *U.S. ex rel. Mooney v. Fife Dermatology, PC*, 2022 WL 3715763, at *2 (D. Nev. Aug. 29, 2022). Mazik has not attempted to allege any such facts. Mazik instead argues that he needs to allege only that he believes he was terminated because of his investigation into the practices specified in the complaint, citing *U.S. ex rel. Campie v. Gilead Sciences, Inc.*, 862 F.3d 890, 909 (9th Cir. 2017). Opp'n at 12. But Mazik quotes *Campie*'s discussion of the causation element of a retaliation claim, not what allegations are sufficient to plead ***notice*** of the protected activity, which is the relevant element here. The Court should dismiss the retaliation claims.

Dated: September 27, 2022

Respectfully submitted,

By: /s/ *Dimitri D. Portnoi*
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