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UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

KAISER FOUNDATION HEALTH PLAN INC., *et al*.,

Defendants.

No. 2:19-cv-0559-DAD-JDP

UNITED STATES' STATEMENT OF INTEREST IN RESPONSE TO DEFENDANTS' MOTION TO TRANSFER UNDER 28 U.S.C. § 1404

Hearing Date: June 18,2024
Time: 1:30 p.m.
Judge: Hon. Dale A. Drozd
Courtroom: 4, 15th Floor

I. INTRODUCTION

Pursuant to 28 U.S.C. § 517, the United States respectfully submits this Statement of Interest ("SOI") addressing Defendants' motion to transfer this action to the Northern District of California. (Dkt. No. 109). Although the United States has not intervened in this *qui tam* action, it remains a real party in interest. *See* 31 U.S.C. § 3730(d); *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 934–35 (2009). And, because the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733, is the United States' primary civil tool for prosecuting fraud against the government, the United States has a substantial interest in FCA actions even when it has not intervened.

The United States is specifically concerned about the transfer of this case to the Northern District of California because Defendants' ultimate objective is to seek consolidation of this action with an intervened FCA action, *United States ex rel. Osinek v. Kaiser Permanente, et al.*, No. 3:13-cv-3891 (N.D. Cal.), which has been in active discovery for more than two years. The proposed benefits of consolidation cited by Defendants in support of transfer are illusory. This action presents, at most, minimal and generalized common factual or legal issues and its transfer will not result in judicial convenience. To the contrary, this Court recently dismissed Relator's claims in this action to the extent they alleged the same "general fraudulent scheme" as one of the claims proceeding in the Northern District. (Dkt. No. 104 at 13). Transfer would increase the trial judge's already substantial burden in managing the *Osinek* action and the previously consolidated actions and would likely delay the completion of discovery and other pre-trial matters in those actions.

II. SUMMARY OF THE PENDING *QUI TAM* ACTIONS

A. The *Osinek* Actions

On June 3, 2021, the United States obtained an order consolidating six *qui tam* actions against Defendants and other Kaiser Permanente entities in the Northern District

of California before the Honorable Edward M. Chen.[1] All six complaints contained allegations regarding efforts by Kaiser to have Kaiser's own physicians add lucrative diagnoses to patient medical records in order to increase Medicare reimbursement. The United States did not seek to transfer and consolidate the *Mazik* action, as to which the United States had previously declined to intervene a year earlier, given that *Mazik* did not contain any allegations regarding Kaiser having its *own* physicians adding diagnoses to patient medical records but, rather, alleged only that Kaiser submitted diagnoses relating to claims by external, *non*-Kaiser physicians. (Dkt. No. 17). On July 27, 2021, the United States filed a notice of partial intervention in all six cases in the Northern District with respect to allegations that Defendants Kaiser Foundation Health Plan, Inc., Kaiser Foundation Health Plan of Colorado, The Permanente Medical Group, Inc., Southern California Permanente Medical Group, and Colorado Permanente Medical Group, P.C. engaged in a scheme to submit false diagnosis codes to Medicare Advantage by having Kaiser's own physicians improperly add diagnoses via addenda to Kaiser patients' medical records. The United States declined to intervene as to all other allegations in the six cases.

Kaiser moved to dismiss the declined portions of the five *qui tam* actions filed after *Osinek* based on the "first-to-file" provision of the FCA, 31 U.S.C. § 3730(b)(5). As this Court is well aware, that provision bars a person from bringing a *qui tam* action "related to" a previously-filed FCA action based on the same underlying material facts. In May 2022, Judge Chen dismissed the *Arefi* and *Stein* cases entirely and dismissed all FCA claims in *Bicocca*, leaving only claims under California state law which relator

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The order consolidated the following matters:

1. *United States ex rel. Osinek v. Kaiser Permanente*, No. 3:13-cv-03891-EMC (N.D. Cal.).
2. *United States ex rel. Arefi v. Kaiser Found. Health Plan, Inc.*, No. 3:16-cv-01558-EMC (N.D. Cal.).
3. *United States ex rel. Stein v. Kaiser Found. Health Plan, Inc.*, No. 3:16-cv-05337-EMC (N.D. Cal.).
4. *United States ex rel. Bryant v. Kaiser Permanente*, No. 3:18-cv-1347-EMC (N.D. Cal.).
5. *United States ex rel. Bicocca v. Permanente Med. Grp., Inc.*, No. 3:21-cv-03124-JSC (N.D. Cal.).
6. *United States ex rel. Taylor v. Kaiser Permanente*, No. 3:21-cv-03894-JSC (N.D. Cal.).

Bicocca subsequently voluntarily dismissed. *United States ex rel. Osinek v. Permanente Med. Grp., Inc.*, 601 F. Supp. 3d 536, 574 (N.D. Cal. 2022); Order Granting Defendants' Request for Final Judgment, *Osinek* Dkt. No. 229 (Nov. 15, 2022).

Judge Chen permitted relators in the *Taylor* and *Bryant* cases to proceed with distinct claims, which have been narrowed even further since that time. In June 2023, Judge Chen decided Kaiser's motions to dismiss the complaints in *Taylor* and *Bryant*. In *Taylor*, Judge Chen held that the relator sufficiently pled a fraudulent scheme relating to the diagnosing of conditions by Defendant Colorado Permanente Medical Group. *United States ex rel. Osinek v. Kaiser Permanente*, No. 13-cv-03891-EMC, 2023 WL 4053797 (N.D. Cal. June 15, 2023). The declined claims being pursued in *Taylor* are that (1) despite knowledge of high error rates in diagnosis codes submitted by non-Kaiser providers in Colorado, Kaiser did a "one-way" review of such codes, only looking for codes to add and failing to review the ones submitted; (2) Kaiser failed to review and submitted for payment invalid diagnosis codes generated as a result of natural language processing software applied to Kaiser internal medical records; and (3) Kaiser saw evidence of high error rates in certain diagnosis categories and did nothing to resolve these issues. In *Bryant*, Judge Chen held that the relators sufficiently pled a fraudulent scheme relating to submission of certain diagnoses for risk adjustment purposes under the Affordable Care Act ("ACA"). *United States ex rel. Osinek v. Kaiser Permanente*, No. 13-cv-03891-EMC, 2023 WL 4054914 (N.D. Cal June 15, 2023). There are no claims with respect to the Medicaid program and no claims being pursued by relators on behalf of any state.

As to the United States' claims, Judge Chen held that the United States sufficiently alleged that Kaiser engaged in a fraudulent scheme to submit false claims to Medicare Advantage based on untruthful diagnoses added by Kaiser physicians via addenda to patients' medical records after their encounters with patients. *United States ex rel. Osinek v. Kaiser Permanente*, No. 13-cv-03891-EMC, 2023 WL 4054279 (N.D.

Cal. June 15, 2023).

B. The *Mazik* Action

In January 2022, Defendants asked this Court to stay the *Mazik* action until Judge Chen decided the first-to-file issues before him in the consolidated action. (Dkt. No. 68). In support of their request for a stay, Defendants represented that the case before this Court was also "vulnerable to a first-to-file motion" (Dkt. No. 68 at 3), but Defendants did not ask the Court to transfer this action to the Northern District for it to decide whether this action was barred by the FCA's first-to-file provision or for any other reason. Following Judge Chen's decision on first-to-file issues in May 2022, the stay in this matter was lifted. (Dkt. No. 72).

After the stay of this action was lifted, Defendants still did not move to transfer the action to the Northern District. Instead, in July 2022, Defendants filed a motion to dismiss this action, alleging that it was barred by the *Taylor* action under the first-to-file provision. (Dkt. No. 78).

On February 13, 2024, this Court issued an Order granting Defendants' motion to dismiss in part and allowing Relator Mazik to file a Second Amended Complaint. *Mazik v. Kaiser Permanente, Inc.*, No. 19-cv-00559-DAD-KJN, 2024 WL 584162 (E.D. Cal. Feb. 13, 2024). The Court held that Mazik's federal FCA claims were barred by *Taylor* to the extent that they were based on "a general fraudulent scheme wherein defendants knowingly requested CMS reimbursements premised on erroneous diagnosis codes." *Id.* at *7. Mazik's claim focusing on Defendants' tampering with compliance software, however, was not barred precisely because the facts related to this alleged wrongdoing were not the same or similar to the facts alleged in *Taylor*. *Id*. As the Court held, "the nature of wrongdoing claimed by relator Mazik here involves different material elements from the wrongdoing alleged in the Taylor Complaint." *Id.* (brackets and quotation marks omitted).

After the Court's decision, Mazik filed a Second Amended Complaint ("SAC")

under the federal FCA for Medicare fraud as well as under the California, Colorado, Georgia, Hawaii, Virginia, and Washington False Claims Acts for Medicaid fraud. (Dkt. No. 107). In the SAC, Mazik reiterated his allegations as to tampering with compliance software and alleged that Kaiser did this because it wanted to submit outside providers' diagnosis codes—the codes that *non*-Kaiser physicians included in their claim forms—to Medicare and Medicaid to increase payments. *Id*. at ¶¶ 6, 50 & 107.

Only after this Court expended its time and resources deciding Kaiser's motion to dismiss and Mazik filed his SAC in part to avoid any overlap with the actions in the Northern District did Kaiser move to transfer for the purpose of consolidation.

III. ARGUMENT

Defendants now request that the Court transfer this action so it can be consolidated with the currently pending actions in the Northern District.[2] However, there is no basis for consolidation because the claims in this action are not in common with those in the Northern District. *See Sw. Marine, Inc. v. Triple A Machine Shop, Inc*., 720 F. Supp. 805, 806-07 (N.D. Cal. 1989) (denying request to consolidate actions that did not allege the same fraudulent scheme and "[t]he facts necessary to prove the claims in the respective actions [were] not in common."). To determine whether to consolidate, federal district courts "weigh[] the interest of judicial convenience against the potential for delay, confusion and prejudice caused by consolidation." *Id*. at 807. Judicial convenience is determined by whether there are common factual and legal issues in the cases for which consolidation is sought such that there will be substantial duplication of effort by the courts if the cases are not consolidated. *Id*. If commonality is lacking (such as here), then there is little or no judicial convenience to be gained.

[2] Defendants state that they will seek consolidation or "coordination" with the actions in the Northern District. But there is no real or practical distinction between the two. Accordingly, the arguments made in this Statement of Interest concerning consolidation apply to "coordination" as well.

A. The Cases Have Distinct Factual and Legal Issues

Factually, this case is not in common with the Northern District cases. While all of the cases involve Kaiser's participation in Medicare Advantage, the similarity stops there. Medicare Advantage is a massive program through which Kaiser annually receives billions of dollars in federal payments. Just because the cases all involve Medicare Advantage does not make them factually similar. *See, e.g.*, *Tecson v. Lyft, Inc.*, No. 18-cv-06782-YGR, 2019 WL 1903263, at *3 (N.D. Cal. Apr, 29, 2019) (finding that two cases against same rideshare company defendant both alleging that company violated same telecommunications statute by sending text messages were not factually similar, where one case involved text messages sent to former drivers and other case involved text messages sent to recruit new drivers, because "[t]he transactions pertaining to the cases would [] differ"). There is extremely little, if any, factual overlap in the remaining claims, as this Court recognized in its February 13, 2024 Order granting Defendants' motion to dismiss on first-to-file grounds to the extent Relator's claims overlapped with those in the *Taylor* matter and permitting Relator to pursue only factually distinct claims in this action.

First, the Northern District cases have nothing to do with Kaiser's alleged tampering with compliance software. Indeed, the only reason Mazik's claims survived the first-to-file analysis is because they were factually distinct from the claims in the Northern District cases. *Mazik*, 2024 WL 584162, at *7 ("[T]he nature of wrongdoing claimed by relator Mazik here involves different material elements from the wrongdoing alleged in the Taylor Complaint.") (brackets and quotation marks omitted). None of the Northern District cases have any allegations remotely related to the software issue alleged in the *Mazik* matter. Accordingly, there is no reason to believe that there will be

overlapping discovery between this action and those in the Northern District.[3] *See Sw. Marine*, 720 F. Supp. at 807 (denying consolidation because there would not be a "substantial duplication of effort" if the actions proceeded separately); *Tecson*, 2019 WL 1903263, at *3-4 (denying motion to relate cases).

Second, *Mazik* is exclusively focused on claims associated with *external*, non-Kaiser providers; specifically, "out-of-network" providers who have not entered into agreements to participate in Kaiser's provider networks. *See* Mazik's SAC, Dkt. No. 107 ¶¶ 2, 47. By contrast, the Northern District cases are almost exclusively focused on diagnosis codes associated with Kaiser's own *internal* providers. The United States' intervened claims in the Northern District do not involve external providers at all—its claims concern improper addenda added by Kaiser-employed providers. Some of the claims in the declined *Taylor* matter do involve non-Kaiser providers, but those are not the "out-of-network" providers at issue in *Mazik* but rather outside hospitals who entered into contracts with Kaiser to provide care to beneficiaries enrolled in Kaiser Medicare Advantage plans.

Third, unlike the cases proceeding in the Northern District, Mazik is pursuing state-law claims alleging Medicaid (as opposed to Medicare) fraud under California, Colorado, Georgia, Hawaii, Virginia, and Washington law. Mazik's SAC, Dkt. No. 107, ¶¶ 139-194. Consolidating this case with the Northern District cases would thus introduce multiple state claims and an entirely new federal healthcare program—Medicaid versus Medicare—into an already highly complex set of cases.

Fourth, contrary to Defendants' argument (Dkt. No. 109 at pages 8-9), the compliance activities in *Taylor* differ from those alleged in this case and do not appear to involve the same individuals. *Taylor* focuses on Defendants' failure to conduct audits of

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[3] Notably, Defendants do not argue that there is a need to transfer and consolidate or coordinate for the purpose of document discovery. To the extent that some documents produced by Defendants in *Osinek* and *Taylor* might be relevant to this action, Defendants can readily reproduce them.

medical records to determine whether the records substantiate the validity of the diagnosis codes, that is, to confirm that the patient had the conditions and were treated for them. Such audits are conducted by medical record reviewers and certified diagnosis coders. This action focuses on Defendants' failure to use available software functions to determine claims and billing errors by external providers seeking payments from Defendants. Billing and accounts payable auditors like Mazik perform such reviews. Notably, in their motion, Defendants have not identified specific witnesses who are likely to be deposed both in this action and the currently pending actions in the Northern District.

Finally, the potential for conflicting decisions with respect to common legal issues is extremely low. The facts and claims in this case and the facts and claims in the Northern District cases are different, and because they "involve different facts and claims[,] the judge in each case would be focused on resolving separate issues of law and fact for different parties. The rulings in each case would not interfere with one another." *Tecson*, 2019 WL 1903263, at *4 (denying motion to relate cases).

Defendants identify only one legal issue that is purportedly in common: whether the submission of diagnoses are claims for payments under 31 U.S.C. § 3729(b)(2), which defines a "claim" simply as a request or demand for money presented to the government or contractors for the government. (Dkt. No. 109 at 9). However, this Court and Judge Chen have already treated diagnoses as claims for payment. In its recent decision, this Court held that Mazik sufficiently alleged materiality based on his allegation that Defendants purposely tampered with the compliance software to avoid discovering errors that, if fixed, would have reduced payments to them. *Mazik*, 2024 WL 584162, at *9. In reaching this conclusion, the Court cited *United States ex rel. Silingo v. WellPoint, Inc.*, 904 F.3d 667, 673 (9th Cir. 2018), in which the Ninth Circuit recognized that "if enrollee diagnoses are overstated, then the capitation payments to Medicare Advantage organizations will be improperly inflated." Logically then, the submission of

risk-adjusting diagnoses to CMS are "claims" because they request or demand increased payments. No court has held otherwise, Judge Chen included. *See, e.g.*, *Osinek*, 2023 WL 4053797, at *4 ("[M]ateriality is supported by allegations that CMS makes risk-adjustment payments based directly on the diagnosis codes submitted by health plans."); *Osinek*, 2023 WL 4054914, at *12 ("[M]ateriality may be inferred based on allegations that risk adjustment is tied directly to diagnosis codes submitted by health plans."). Notably, Defendants did not try to transfer this case when moving to dismiss on first-to-file grounds, despite that the fact that the Northern District was also deciding a first-to-file motion and applying the same common first-to-file law as this Court was. Having not claimed that that common issue presented the risk of inconsistent legal rulings then, Defendants cannot credibly claim that this lone issue regarding whether diagnoses are claims for payment presents a significant risk of inconsistent rulings now.

For these reasons, the risk of inconsistent legal rulings by this Court and Judge Chen does not warrant transfer.

B. Consolidation Presents Significant Potential for Delay

The determination of whether to transfer for the purpose of consolidation should end once it is determined that there are limited factual and legal issues in common and, thus, no judicial convenience to be gained from consolidation. Under those circumstances, judicial convenience would not outweigh any potential for delay, confusion or prejudice caused by consolidation. But, even if this Court concludes otherwise, it should then consider the likelihood that consolidation will impose additional delays.

Consolidation would likely delay the completion of discovery in *Osinek*, *Taylor* and *Bryant*, where the parties are more than two years into fact discovery. The underlying factual issues in this action are different and, thus, the relevant documents and witnesses will be different. Because the relevant documents and witnesses will be different, this action also will likely generate distinct discovery disputes. In addition,

because this case involves different factual and legal issues, consolidation will add to and, thus, likely delay the completion of other pre-trial activities in the Northern District, especially summary judgment motion practice.

For these reasons, consolidation presents the real potential of disrupting the discovery and pre-trial schedule already set by Judge Chen. Judge Chen recently approved a five-page revised pre-trial schedule that required months of negotiations among the parties and motions practice focusing on the highly specific discovery issues presented by the actions pending in the Northern District. The disruption caused by introducing yet another case—which is at the beginning of discovery and which has distinct factual and legal issues—will likely negatively impact Judge Chen's management of the Northern District actions as well as the United States' and the Northern District relators' efforts to complete discovery and other pre-trial matters in accordance with the recently set schedule. Given the potential negative impacts of transfer, future consolidation does not support Defendants' motion to transfer. *See, e.g.*, *Pratt v. Rowland*, 769 F. Supp. 1128, 1133 (N.D. Cal. 1991) ("The Ninth Circuit has frequently held that a motion for transfer may properly be denied where, as here, a case has been pending for some time in the original court or where a transfer would lead to delay.") (citing cases).

IV. CONCLUSION

Even if the Court were to transfer this case to the Northern District, there is no guarantee that it would be assigned to Judge Chen or that it would be related to or consolidated with the existing Northern District cases, given the difference in factual and legal issues and the significant potential for delay. *See, e.g.*, *Tecson*, 2019 WL 1903263, at *4 (denying motion to relate cases). The United States respectfully requests that the Court consider its concerns and arguments about Defendants' motion to transfer this action for the purpose of consolidating it with *Osinek*, *Taylor,* and *Bryant* in the Northern District of California. This action should not be transferred for that purpose.

See, e.g., *Espineli v. Toyotal Motor Sales U.S.A., Inc.*, No. 2:17-cv-00698-KJM-CKD, 2018 WL 1569570, at *3 (E.D. Cal. Mar. 30, 2018) (discussing how "even if this case were transferred to the Central District, there is no guarantee it would be consolidated with the [Central District] action, and thus, no guarantee of any efficiency gained through transfer," and denying motion to transfer).

Dated: April 22, 2024

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