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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES et al.
ex rel. JEFFREY MAZIK,

Plaintiffs,

v.

KAISER FOUNDATION HEALTH PLAN, INC., KAISER FOUNDATION HOSPITALS, INC., and THE PERMANENTE MEDICAL GROUPS,

Defendants.

No.: 2:19-cv-00559 (DAD) (JDP)

Relator Jeffrey Mazik's Memorandum of Points and Authorities in Opposition to Defendant's Motion to Transfer for Consolidation

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Table of Authorities

Cases

Statutes

Relator Jeffrey Mazik hereby respectfully responds to the Motion to Transfer (ECF 109) filed by the Kaiser defendants seeking to transfer this case to the Northern District of California for consolidation with *United States ex rel. Osinek v. Kaiser Permanente*, No. 3:13-cv-3891 (N.D. Cal.)). The United States filed a Statement of Interest (ECF 111) opposing Kaiser's transfer motion.

Introduction

Relator opposes Kaiser's motion to transfer. Mazik chose to file his *qui tam* action in this District, and he prefers to stay here. Transfer to the Northern District would only frustrate purposes of judicial economy and unnecessarily prejudice Relator in his pursuit of litigation claims under the False Claims Act. While one of the claims asserted in this action is related to the broad theory of liability asserted against the Medicare Advantage Organization in the *Osinek* cases, the two actions are separate and distinct. Each action focuses on different factual mechanisms of fraud and different sets of relevant documents and witnesses. Since each action presents distinct causes of action, there is no possibility of conflicting judgments, and no judicial economy to be gained from transfer or consolidation. Indeed, consolidation would be infeasible, given the complexity of the cases, the divergence of material facts and the different procedural posture that each is in at the time of the transfer motion.

Relator's choice of forum is entitled to deference. Neither the United States nor Kaiser sought transfer or consolidation previously, and both Mazik and the United States oppose transfer and consolidation now. As such, the applicable factors of judicial economy and witness convenience simply do not weigh in favor of granting transfer. Accordingly, Relator respectfully requests that Defendants' motion be denied.

Background Facts

Mazik Claims Compared to *Osinek/Taylor* Claims

As narrowed by this Court's February 13, 2024, Order (ECF 104) and revised in the second amended complaint (ECF 107, "SAC"), Mazik's claims here are factually distinct from the claims raised in the *Osinek/Tayler* cases pending before Judge Chen in the Northern District of California. While one of Mazik's federal False Claims Act claims relates, in part, to the broad legal theory presented by the United States in the *Osinek/Taylor* cases, the facts that comprise that partially-related claim and all of Mazik's unrelated claims are not even at issue in the consolidated cases being litigated in the Northern District. Mazik intends to obtain discovery and prove his case here through witness testimony and data analyses that would not otherwise be obtained in *Osinek/Taylor*. And Mazik needs no part of the ongoing motion and discovery battles that have kept the parties mired in the cases pending before Judge Chen.

Mazik alleges that Kaiser engaged in "a deliberate scheme to defraud the United States by allowing non-Kaiser providers to submit to it, as a Medicare Advantage Organization, false claims for payment." SAC ¶45. "Because Kaiser is a recipient of Medicare and Medicaid funds, each false or fraudulent claim for payment by outside providers violates the False Claims Act." *Id*. Mazik explains the manner by which Kaiser allowed false claims to be made, the financial motive behind Kaiser's actions, and the injury to the United States. As for manner, Kaiser instituted a sham compliance program, under which it intentionally misused vendor-supplied fraud-detection software programs to avoid detecting claims errors. *See* ECF 104 at 4–6; SAC ¶¶ 49, 51-54. As for motive, Kaiser allowed overpayments to unaffiliated outside providers because the subsequent submission of unsupported diagnostic codes to CMS

served to increase the capitation rates that it received as a Medicare Advantage Organization from the government. *See* ECF 104 at 15:13–16:7; SAC ¶¶ 45, 50.

As for injury, Mazik summarizes the false claims resulting from the scheme:

> 76. Kaiser's intentional failure to properly oversee and monitor the claims of its external providers led to significant upcoding and overpayments, which were never corrected as required by law, and drove up capitation rates without any legitimate lawful basis, so that Kaiser and its partners could continue to line their own pockets at the public's expense.
>
> 77. Kaiser's claims for payment to CMS and the State Plaintiffs were false because they were knowingly derived from false data.
>
> 78. Kaiser's claims for payment were also false because Kaiser repeatedly provided expressly false certifications that its risk adjustment data submissions to CMS were "accurate, complete, and truthful," while knowing that the data were, in fact, plagued with errors, and despite knowing that those errors would cause CMS to pay unjustifiably and falsely higher capitation rates.
>
> 79. And Kaiser's claims for payment were also false because, as detailed above, Kaiser did not, inter alia: (a) have an effective system in place to monitor FDRs; (b) have an effective system for "promptly responding to compliance issues as they are raised, investigating potential compliance problems as identified in the course of self-evaluations and audits, correcting such problems promptly and thoroughly to reduce the potential for recurrence, and ensure ongoing compliance with CMS requirements" per 42 C.F.R. § 422.503(b)(4)(G); (c) undertake corrective actions; or (d) ensure that FDRs correct deficiencies.

(SAC, ECF 107.)

These claims by Mazik are factually distinct from the claims raised in *Osinek*. While "there are, of course, similarities between the two cases" – in that, both allege damages through falsely inflated risk adjustment factors – the mechanism by which the fraud alleged by Mazik operates is "not hinted at in the Taylor complaint." ECF 104 at 12:12–25; 13:1–2. As explained in the Government's Statement of Interest, all six consolidated cases are focused on how Kaiser's own physicians add lucrative diagnoses

codes to patient medical records to increase Medicare reimbursement. ECF 111 at 2:1–16. The United States is pursuing claims that Kaiser providers added these untruthful diagnosis codes in addenda to patients' records after their "encounters" with the patients. *Id.*, at 3:24-27. While Mazik primarily pursues false claims submitted by Kaiser due to *outside providers* who provided false codes through *claims* which Kaiser allowed by misuse of its compliance programs, the United States and relators in the *Osinek* cases are pursuing false claims submitted by Kaiser due to *Kaiser providers* who provided false codes through *encounters* which Kaiser failed to detect and correct through its encounter audits.

While Taylor does allege non-intervened claims involving non-Kaiser providers in Colorado, Taylor makes no allegations regarding sham compliance programs or the knowing failure to use fraud detection software tools. His claims remain focused on the audits of Kaiser medical records created through provider encounters. *Id.* at 3:4–22. Indeed, as further explained by the United States, Taylor's non-intervened claims do not even involve out-of-network providers at issue here. Rather, Taylor's allegations involve certain "outside hospitals who entered into contracts with Kaiser to provide care to beneficiaries enrolled in Kaiser Medicare Advantage plans." *Id.* at 7:11–15.

Procedural Posture

Mazik filed this action in April 2019. By then, five other relators had filed *qui tam* actions against Kaiser under the False Claims Act. As Kaiser acknowledges, all five and a sixth filed thereafter alleged "that Kaiser submitted claims to the Medicare Advantage Program … for risk-adjustment payments for diagnoses that its patients did not actually have and/or that were not actually addressed by the treating physician

during a patient encounter." Kaiser MPA, ECF 109, at 3:14–17 (emphasis supplied). All actions were filed under seal. In April 2021, Mazik – unaware of the other cases – filed an amended complaint. Mazik maintained his initial claims regarding Kaiser's sham compliance program over outsider claims, but in his amended complaint, Relator linked the original core facts to injury caused to the United States through falsely inflated capitation rates.

In June 2021, the United States sought to transfer and consolidate the other actions – but *not* Mazik's case – to the Northern District of California. In July 2021, the Government determined to intervene into the consolidated cases, and the seals were lifted. Thus, at the time the Government consolidated and intervened into the *Osinek* cases, it chose to neither consolidate nor intervene in Mazik's action, fully aware of Mazik's allegations regarding the use of outside physician claims to artificially inflate capitated payments. Clearly, the Government did not believe that this action should be consolidated or litigated with the others.

When this action was unsealed, Kaiser did not seek to have it transferred or consolidated with the *Osinek* cases. Instead, Kaiser and Mazik agreed to stay proceedings here until after Judge Chen ruled on Kaiser's motion to dismiss based on the first-to-file bar of the False Claims Act. (ECF 69; *see* 31 U.S.C. § 3730(b)(5).)

After Judge Chen issued his ruling in the *Osinek* cases, Kaiser filed a motion in this Court seeking to dismiss Mazik's claims under the first-to-file bar, arguing that the claims raised here were previously asserted in the pending *Taylor* case. Again, at the time it filed its motion, Kaiser chose not to seek to transfer *Mazik* to the Northern District, nor to raise the matter with Judge Chen. As shown in the record in this case, it

does not even appear that Kaiser gave notice to the Northern District case that it believed a related case was pending in this District.

In its February 13, 2024 Order, this Court granted Defendants' motion to dismiss Mazik's federal False Claims Act claims, "except to the extent relator alleges that defendants deliberately tampered with compliance software to ensure that it did not identify erroneous diagnosis codes." ECF 104 at 12:26–28. The Court noted that both actions broadly allege risk adjustment fraud based on erroneous diagnosis codes, but that the nature of wrongdoing claimed by Mazik – the tampering with compliance software – involves different "material elements" from the wrongdoing alleged in *Taylor*. *Id*. at 13:1–19. In reaching this conclusion, the Court pointed out that Taylor's allegations showed Kaiser's knowledge of the false diagnosis codes gained through audits of patient encounters, whereas Mazik's allegations showed Kaiser decided to disable the claims compliance software so the audits would *not* identify erroneous codes in the first place. *Id*. at 13:19–14:4. Because Mazik's claims focus on facts which compromised the audits relied upon by Taylor and which could not be discovered through Taylor's action, the Court determined that Mazik's federal False Claims Act claims would not be dismissed to the extent that inflated risk adjustments were derived from Kaiser's failure to use its compliance software.

Kaiser now moves to transfer this case so that it may be consolidated with the *Osinek* cases. It does so here, only *after* the Government chose not to consolidate or intervene in this case when it consolidated and intervened in the *Osinek* cases, *after* both this Court and Judge Chen, separately, ruled on Kaiser's motions to dismiss including the first-to-file bar, and *after* the consolidated cases were further narrowed

pursuant to a fully-developed case management schedule. As set forth herein, transfer would cause unnecessary inefficiencies, prejudicing the prosecution of both actions.

Legal Standard

Under 28 U.S.C. § 1404(a), "a district court may transfer any civil action to any other district or division where it might have been brought" for the convenience of parties and witnesses and in the interest of justice. 28 U.S.C. § 1404(a). "Section 1404(a) provides for transfer to a more convenient forum, not to a forum likely to prove equally convenient or inconvenient." *Pizana v. SanMedica Int'l LLC*, 2020 WL 469336, at *1–2 (E.D. Cal. Jan. 29, 2020) (Drozd, J.) (citations omitted). Consideration of a motion to change venue requires a two-step process. First, the court considers "the threshold question of whether the case could have been brought in the forum to which the moving party seeks to transfer the case." *Id*. If the movant makes this showing, the court makes an "individualized, case-by-case consideration of convenience and fairness, taking into account private and public interest factors." *Id*.

"The primary factors to be considered are convenience of witnesses and parties and concerns for judicial economy (including duplicative effort, waste of time and money). Other factors include plaintiff's choice of forum, administrative considerations, and the respective parties' contacts with the forum." *Right to Life of Cent. Cal. v. Bonta*, 614 F. Supp. 3d 729, 733 (E.D. Cal. 2022) (Drozd, J.) (quotations and citations omitted).

Consolidation of related actions may be a significant factor in the transfer decision. *A.J. Indus., Inc. v. U.S. Dist. Court for the Cent. Dist. of Cal.*, 503 F.2d 384, 389 (9th Cir. 1974). Such consolidation must be "feasible," however. *See ThermoLife Int'l LLC v. NeoGenis Labs Inc.*, 2021 WL 3290532, at *6–7 (D. Ariz. Aug. 2, 2021). Consolidation would be barred under Rule 42(a) when the cases embrace distinct fact

patterns, state separate causes of action, hold different procedural postures, and where consolidation of complex cases risks jury confusion or judicial inefficiencies. *See*, *e.g.*, *Molever v. Levenson*, 539 F.2d 996 (4th Cir. 1976). "[T]he interest of judicial convenience is weighed against the potential for delay, confusion, and prejudice caused by consolidation. Factors such as differing trial dates or stages of discovery usually weigh against consolidation. … Considerations of convenience and economy must yield to a paramount concern for a fair and impartial trial." *Lewis v. City of Fresno*, 2009 WL 1948918, at *1 (E.D. Cal. July 6, 2009) (citations omitted).

"The burden is on the moving party to show that transfer is appropriate." *Pizana*, 2020 WL 469336, at *2. "In general, courts considering motions for change of venue give significant deference to a plaintiff's choice of forum." *Alberts v. Pizzaman's Pavilion*, 2020 WL 6392564, at *4 (E.D. Cal. Nov. 2, 2020) (Drozd, J.).

Argument

This Court should decline to transfer this action to the Northern District under the second step of the inquiry under section 1404(a). None of the convenience and fairness factors asserted by Kaiser outweigh Mazik's choice of forum in this District, or the objections by the United States in its Statement of Interest.

I. Relator is entitled to deference in his choice of forum.

Relator has chosen the Eastern District as the forum in which to litigate this action. Courts generally accord "great weight" to the plaintiff's choice of forum. *Gurudu-Grp. LLC v. RAM Robinsons Automation Mach. LLC*, 2023 WL 4409830, at *3 (E.D. Cal. July 7, 2023) (quoting *Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987)). "Unless the balance of convenience is strongly in favor of the defendant, plaintiff's choice of

forum should not, or should rarely, be disturbed on a motion to transfer." *Partanen v. W. United States Pipe Band Ass'n*, 2021 WL 3472242, at *5 (E.D. Cal. Aug. 6, 2021) (quoting *E & J Gallo Winery v. F. & P. S.p.A.*, 899 F.Supp. 465, 466 (E.D. Cal. 1994)). This means the defendant is required to make a "strong showing of inconvenience" to tilt the balance and warrant "upsetting the plaintiff's choice of forum." *Id.* (quoting *Decker Coal Co. v. Commonwealth Edison Co.,* 805 F.2d 834, 843 (9th Cir. 1986)).

Here, Relator selected the Eastern District for this action, and he wishes to keep this venue. When given the opportunity to stipulate to a transfer of venue, Relator's counsel declined. *See* ECF 109-1, Grossman (Kaiser's counsel) Decl. ¶ 4. While Kaiser makes much out of Mr. Mazik's residency in the Northern District, this overlooks the nature of *qui tam* actions, which are filed in the name of the United States by relators, under seal, and served on the Government along with a written disclosure of substantially all material evidence and information in their possession. *See* 31 U.S.C. § 3730(b)(2). More than five years ago, when the action was filed, Relator and his counsel disclosed information to the Assistant United States Attorney in this District, Catherine Swann. Relator's counsel conferred with Ms. Swann through the declination decision, and through amendment to the initial complaint. While Ms. Swann is familiar with the claims and is actively monitoring this action, the AUSAs and investigators in the Northern District are already entangled in the *Osinek* cases. A transfer now would essentially force re-assignment of Mazik's case to attorneys who have already declined consolidation. Given this aligned opposition to the motion, the choice of forum factor should weigh heavily against transfer. *See Alberts*, 2020 WL 6392564, at *4 ("In

general, courts considering motions for change of venue give significant deference to a plaintiff's choice of forum.") (citations omitted).

II. Consolidation would be infeasible in this case.

The consolidation factor does not weigh in favor of transfer, as consolidation of Mazik's claims with the *Osinek* cases would be infeasible. Mazik raises state law Medicaid claims and employment retaliation claims that are entirely unrelated to the claims raised in the consolidated matters before Judge Chen. One of Mazik's federal *qui tam* claims, in part, relates legally to the broader theory presented in *Osinek*: *i.e.*, that the United States was damaged by paying high capitated amounts to the Medicare Advantage Organization based on inflated risk adjustments factors and false diagnosis codes. But the factual basis for proving Mazik's claim is not present in the consolidated cases. None of the evidence concerning Kaiser's contracts with third-party vendors for fraud detection software, Defendants' determination to turn off certain functionality on that software, or Relator's extensive interactions with Kaiser management regarding its mis- or non-use and resulting overpayment, is material to the *Osinek* actions. Yet, this evidence forms the basis for Mazik's claims. And while the United States in *Osinek* will focus on proof that Kaiser providers added false diagnostic codes in addenda after patient encounters, Mazik will focus on a different compliance system and database, to show Kaiser tampered with it to allow fraudulent claims by non-Kaiser providers.

Moreover, because Mazik's legal claims are distinct from the claims asserted in *Osinek,* there is effectively no possibility of inconsistent rulings between the two cases. Certainly, one court's analysis of a motion may benefit from the rulings of other courts addressing similar legal principles, as this Court cited Judge Chen's decision in *Osinek*

when it ruled on Kaiser's motion to dismiss. But a judicial determination in one case would not be binding in the judicial determination of the other. Whether Kaiser is responsible for false claims caused by its tampering with compliance software for detecting fraudulent claims by outside providers would be a determination that is simply unaffected by a different judicial determination that Kaiser physicians did or did not use false diagnostic codes to record patient encounters. And vice versa.

Transfer of this case to the Northern District would therefore waste time, energy, and money, without any gain in judicial efficiency. Indeed, it would remove Mazik's case from this Court's docket after briefing and decision on the motion to dismiss, and put it with a judge in the Northern District who would be new to the case. Even if the case is assigned to Judge Chen, the new judicial officer would have to open up his docket to a new case based on an entirely different set of facts and disputes.

And, as stated by the United States in opposition to the motion to transfer:

> 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. [ECF 111 at 6–7.]

And

> Consolidation would likely delay the completion of discovery in *Osinek*, *Taylor* and *Bryant*, where the parties are more than two years into fact discovery. [*Id.* at 9.]

Given this strong opposition by the United States, consolidation would be infeasible, and considerations of judicial economy would be best served by denial of the transfer motion.

III. Differences between this case and *Osinek* cases weigh against transfer.

Courts decline to transfer when there are material distinctions between the case in the transferor court and the case in the proposed transferee court. *See Cooke v. Town of Colorado City*, 2012 WL 5835401, at *2 (D. Ariz. Nov. 16, 2012) ("[T]here are substantial differences between the cases and, thus, a transfer is not warranted under these circumstances."); *Lexington Ins. Co. v. Scott Homes Multifamily, Inc.*, 2013 WL 4026883, at *2 (D. Ariz. Aug. 7, 2013) (same). This is because the "facts needed to prove many of the alleged actions" raise "new factual and legal issues that are not likely to be raised" in the case pending in the transferee court. *Cooke*, 2012 WL 5835401, at *2. As a result, "there is unlikely to be a substantial duplication of effort that would be saved if both cases were being heard by one judge." *Lexington Ins.*, 2013 WL 4026883, at *2.

As demonstrated here, in the Court's February 13, 2024 Order, and in the Government's Statement of Interest, this case is unlike the Northern District cases. It tackles completely different factual issues, and it asserts legal claims unrelated to the *Osinek* cases. In the one federal *qui tam* claim where there is some overlap, the claims are legally related only at the highest level of generality. This lack of similarity weighs against transfer.

Further, Mazik and the Government and relators in *Osinek* are in two different courts on two different time schedules. Notably, the *Osinek* case has already passed complex pleading battles, and the parties there are some two years into discovery. Indeed, as stated by the Government in the Statement of Interest, the *Osinek* case itself is complex, and the United States does not want to risk delays in its case scheduling while the Northern District considers an ill-supported consolidation motion.

To the extent that there are any factual or discovery matters where Mazik and the United States might benefit from shared or joint efforts, such can be accomplished through coordination between counsel, without transfer or consolidation. The United States remains the real party in interest in this declined case, and the AUSA in this District and/or Relator's counsel would work with attorneys in the Northern District to ensure efficiencies of the sort that are available to separate actions. Where any document production or deposition testimony in one case may be relevant to the other, Relator and DOJ can coordinate between them, without joining in the same district.

In short, whether or not consolidation is feasible, transfer of this case to the Northern District is not needed. This case raises different "factual and legal issues" than those in the *Osinek* cases. *See Cooke*, 2012 WL 5835401, at *2. Having the cases heard by one judge would not save a "substantial duplication of effort," and thus this factor weighs against transfer. *See Lexington Ins.*, 2013 WL 4026883, at *2.

IV. Relator should not be forced into the discovery of a different case.

By moving to transfer, Defendants seek to impose upon Relator a joint discovery process with *Oskinek*. But given the separate issues in the cases, this is unreasonable. Relator is entitled to his own discovery schedule.

A "dispute[]" between the parties regarding the "extent of overlapping discovery" counsels against transfer. *See In re Acetaminophen - ASD/ADHD Prod. Liab. Litig.*, 2023 WL 2843771, at *1 (U.S. Jud. Pan. Mult. Lit. Apr. 7, 2023). This is particularly so when the transferor and proposed transferee cases have "non-common issues," and the party "that purportedly would benefit from centralized discovery" is the party that "oppose[s] transfer." *Id.*

Here, Defendants claim that Relator's discovery should be streamlined with the *Osinek* matters. Kaiser MPA at 9. But Relator has differing discovery needs and seeks a separate discovery timeline. *See* Joint Status Report and Proposed Case Schedule, ECF No. 110. That proposed timeline would have the parties proceed with discovery 90 days after the *Osinek* cases. *Id*. It is improper to force transfer given the parties' dispute over their discovery needs. *See In re Acetaminophen*, 2023 WL 2843771, at *1. This counsels against transfer.

V. Convenience of witnesses does not weigh in favor of transfer.

Defendants claim that the convenience of the witnesses weighs "heavily in favor" of transfer. (Kaiser MPA at 10.) But Defendants' argument is based on a few witnesses currently employed by Kaiser and located in the Northern District. Convenience of persons employed by the party seeking transfer is "entitled to little weight because defendants will be able to compel the employee's testimony at trial." *Martinez v. San Diego Cnty.*, 2017 WL 1273822, at *3 (E.D. Cal. Apr. 4, 2017) (Drozd, J.) (quotations and citations omitted, cleaned up); *see also Bristow v. Lycoming Engines*, 2007 WL 1106098, at *4 (E.D. Cal. Apr. 10, 2007) ("a defendant's motion to transfer under section 1404(a) may be denied when the witnesses are employees of the defendant and their presence may be obtained by the party") (quotations and citations omitted).

Even if the Court were to consider the inconvenience to employee witnesses residing in the Northern District, the burden on them would not be great. A movant's request will be given less weight when many witnesses are within relatively close proximity to the current forum. *See Galliani v. Citimortgage, Inc.*, 2013 WL 101411, at *5 (E.D. Cal. Jan. 7, 2013) ("[T]ransfer may be denied when witnesses…are within the

100–mile reach of the subpoena power.") (quotations and citations omitted). Here, the geographic distance between this Court and the Kaiser witnesses is insufficient to warrant transfer. It is only 86 miles between the two courthouses, and even less distance between the courthouse in Sacramento and Kaiser's headquarters in Oakland.

The bulk of the other Kaiser employee witnesses are elsewhere, in southern California or in other states across the county. Courts do not consider the convenience of parties and witnesses who are located outside both the current and proposed transferee fora. *Bristow*, 2007 WL 1106098, at *4 n.2.

In sum, every potential witness listed by Defendants and most of those listed by Relator are current employees of Defendants, and the convenience of these employees is to be afforded little weight. Defendants will be able to compel those employees' testimony at trial. *See Martinez v. San Diego Cnty.*, 2017 WL 1273822, at *3. As for the former employees, most of those witnesses live outside both the Eastern and Northern Districts. *See* Tang (Human Resources Consultant) Decl., ECF 109-2 ¶¶ 5–28; *Bristow*, 2007 WL 1106098, at *4 n.2. Given the relative close proximity of this Court to Defendants' headquarters in Oakland, as a practical matter, any inconvenience of the witnesses is insufficient to outweigh Relator Mazik's choice of this District as the forum for his action.

Conclusion

For the foregoing reasons, the Court should deny Defendants' motion for transfer.

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Dated: May 14, 2024

Respectfully submitted

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