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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA *ex rel.* KATHY ORMSBY,

Plaintiff,

v.

SUTTER HEALTH and PALO ALTO MEDICAL FOUNDATION,

Defendants.

Case No. 3:15-cv-01062-LB

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

Date: October 24, 2019
Time: 9:30 a.m.
Courtroom: Courtroom C, 15th Floor

Hon. Laurel Beeler

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I. INTRODUCTION

Relator seeks to expand this action to include practices at several institutions not mentioned at all in the original sealed Complaint or in the government's Complaint-in-Intervention. No person reading the original Complaint, however, could reasonably conclude that it contained particularized allegations of fraud at institutions other than the Palo Alto Medical Foundation (PAMF). Certainly, the government understood the allegations to be about PAMF only. It announced its intervention in the sealed Complaint without limitation and followed up with a Complaint with allegations only concerning PAMF. The Relator understood this as well, as the Complaint contained no specific allegation about any activity outside of PAMF—and the Amended Complaint concedes that all other allegations are only on information and belief. Moreover, the Amended Complaint is the first time the names of other Sutter facilities are mentioned at all—and just in boilerplate, identification allegations. Likewise, Sutter understood the Complaint concerned PAMF, knowing that PAMF was the only facility at which Relator worked. Original Compl. (ECF No. 1) ¶ 11; Am. Compl. (ECF No. 52) ¶ 8.

This should lead to the dismissal of Relator's Amended Complaint for three reasons:

First, when the government intervened in the sealed Complaint, it intervened in the entire action. The result, under the False Claims Act's plain text and the Ninth Circuit's clear precedent, is that the government has taken over the action entirely. The Relator is not authorized to expand this case beyond the allegations of the Complaint-in-Intervention.

Second, the partial intervention doctrine—judicially created and not endorsed in this Circuit—cannot apply, because the government's intervention was as broad as the sealed Complaint and it did not decline to intervene in any way. The Complaint-in-Intervention contains the same causes of action against the same defendants. This is not a "magic words" trap; it is a common-sense interpretation of what actually happened.

Third, the Amended Complaint does not come close to the level of particularized fraud allegations that Rule 9(b) requires. Vague assertions about general policies at institutions where Relator did not work, or a "Sutter-wide" push to raise risk adjustment scores (which is not itself inappropriate), are many steps removed from particularized allegations of fraud at other facilities

that were not even mentioned until the Amended Complaint. And the so-called "collective allegations" theory does not create a life-ring saving Relator from having to make particularized allegations going to the core elements of her claims.

The Court should dismiss Relator's Amended Complaint without leave to amend.

II. DISCUSSION

A. Relator May Not Pursue Claims Beyond the Government's Intervention

1. When The Government Intervenes, It "Take[s] Over" The Entire Action

The words in the statute are clear and direct. The False Claims Act permits a relator to bring "a civil action" on behalf of the government for violation of the statute. 31 U.S.C. § 3730(b). Once the government intervenes in the suit, though, it "take[s] over the action." *Id.* § 3730(b)(4)(B). At that point, the statute's plain language directs that the government "shall have the primary responsibility for prosecuting the action," *id.* § 3730(c)(1), including authority to "file its own complaint or amend the complaint of [the relator] to clarify or add detail to the claims in which the Government is intervening and to add any additional claims," *id.* § 3731(c). Only when "the Government elects not to proceed with the action" does the relator have "the right to conduct the action." *Id.* § 3730(c)(3).

Unsurprisingly, case law in the Ninth Circuit follows the plain language of the statute. For example, "[t]he statute does not state that the Government may intervene in part of the action or as to certain counts or certain claims for relief." *United States ex rel. Bennett v. Biotronik, Inc.*, 876 F.3d 1011, 1020 (9th Cir. 2017). Congress "carefully crafted" the amendments to the FCA to enable the government to "take control of the course of the litigation." *United States ex rel. Stillwell v. Hughes Helicopters, Inc.*, 714 F. Supp. 1084, 1090 (C.D. Cal. 1989). And the leading False Claims Act treatise agrees: "if the government elects to intervene, Sections 3730(b) and (c) clearly provide that the government controls the action." Boese, *Civil False Claims and Qui Tam Actions*, § 4.05[B].

Relator acknowledges this authority only in a footnote, and claims that it is not binding here because *Bennett* involved a different implication of the government's takeover. Opp'n at

16; *id.* n.16. But that is beside the point: The Ninth Circuit's decision in *Bennett* rested on its interpretation of the key provision here—Section 3730(b)(2), the provision of the False Claims Act that "describes the process of the Government's intervention in a *qui tam* action." *Bennett*, 876 F.3d at 1020. Citing that provision, the Ninth Circuit observed that the government may "intervene and proceed with *the action*," (emphasis added), and indicated that such intervention constitutes a takeover of the action. *Id.* Ninth Circuit precedent is crystal clear on this point.

Relator seeks to avoid this result by arguing that "action" does not really mean action, and that, one supposes, Congress meant to say "claim" at every turn. Read closely, the provisions that Relator cites do not support the argument at all. Section 3730(h)(1) provides protection from retaliation for lawful acts by an employee "in furtherance of *an action* under this section." "[T]his section" refers to "*civil actions* for false claims," not to single claims for relief. 31 U.S.C. § 3730. Section 3731(e) estops a defendant, after final judgment in a related criminal proceeding, from denying the essential elements of an offense in "any action" brought under Sections 3730(a) or (b). Both Sections 3730(a) and (b) refer to "a civil action." And Section 3732(b) provides for federal jurisdiction over any action brought under state law "if the action arises from the same transaction or occurrence as an action brought under section 3730," which, again, refers to "civil actions." These provisions support the common-sense conclusion that "action" means "civil action," not separate claims.

Relator also argues that that if "take over the action" means the government takes over the entire action, then there would be some kind of conflict with the government's right to consent to dismissing a relator's claims, Section 3730(b)(1), and the relator's right to object to a dismissal, Section 3730(c)(2)(A). Opp'n at 15. That is wrong. Both provisions just show the government's authority over the action. The first provision concerns when a relator seeks dismissal before government intervention—clarifying that the government can stop this if it chooses. The second provision allows a relator to object to a dismissal, but dismissal of the action is still the government's decision. There is nothing in these provisions supporting the argument that "action" does not mean "action."

In sum, the government intervened in the action with a Complaint alleging the same claims against the same defendants as the under-seal Complaint. Relator cannot expand the action. The issue is straightforward and the Court's analysis should begin and end here.

2. **There Is No "Partial Intervention" In This Circuit Or In This Case**

To try to expand this action, Relator argues the government only "partially intervened," and urges this Court to accept partial intervention as an unwritten exception to the direct language of the False Claims Act discussed above. This argument would require the Court to accept two incorrect premises: (1) that the original Complaint made particularized allegations concerning institutions where Relator did not work, and (2) that the idea of partial intervention should be adopted in this Circuit.

a. The Sealed Complaint

The first step in assessing Relator's argument is to focus on the sealed Complaint. Because that Complaint does not make legally sufficient allegations of fraud at the four institutions Relator seeks to add to this case, there is no way to interpret the government's intervention as a decision not to intervene in allegations against the four unnamed institutions.

The original Complaint asserts three claims for violation of the False Claims Act against "Defendant Sutter" and "Defendant PAMF" based on allegations that Relator learned "first-hand" as a PAMF employee. Original Compl. ¶¶ 5-6. In fact, the original Complaint never identifies any specific Sutter affiliate other than PAMF, or any official at a Sutter affiliate other than PAMF. On the few occasions where the original Complaint does mention Sutter's "other affiliates"—in passing, collective references—it does so as background or in an attempt to bolster the suggestion of alleged fraud at PAMF, not to state claims against other unidentified affiliates. *See id.* ¶¶ 5, 9, 90, 114, 119. On a plain reading of this Complaint, Relator cannot plausibly argue that she asserted "claims" against any non-PAMF affiliate. *Id.* ¶¶ 124-26 (asserting claims against "Sutter and PAMF"); *id.* ¶ 131 (same); *id.* ¶ 139 (same).

The government read it the same way. In its notice of intervention, the government explained that it was intervening in the action and that it "intend[ed] to file its own complaint against Defendants Sutter Health and Palo Alto Medical Foundation . . . and potentially other

affiliated entities." ECF No. 26, ¶¶ 1-2. It then filed a Complaint-in-Intervention against the same defendants asserting the same claims (and three additional ones) as those alleged in Relator's original Complaint. Indeed, the government's Complaint largely mirrors Relator's original Complaint—to include using some of the same alleged examples of false claims at PAMF. *Compare* Original Compl. ¶ 117(a)-(e) *with* Govt. Compl. ¶ 133(a)-(i). And, like Relator's original Complaint, the government's does not identify any specific Sutter affiliate other than PAMF.

Relator's Amended Complaint suggests the same conclusion. In her new Complaint, Relator identifies Sutter's other affiliates by name, Amend. Compl. ¶ 11, mentions an audit and alleged training issues at Sutter Gould, *id.* ¶¶ 100, 107, and asserts that fraud "did not occur just at PAMF but throughout its network of affiliates," *id.* ¶ 6. But all of this just reinforces what was not in Relator's original, sealed Complaint. Relator's original Complaint did not identify any Sutter affiliate other than PAMF, and certainly did not make the (conclusory) allegations regarding Sutter Gould that Relator makes in her Amended Complaint. Those allegations were added only after the government and Sutter settled a dispute concerning the other institutions. Relator's attempt to expand her claims after the settlement confirms that her original Complaint was limited to Sutter and PAMF—it did not assert claims of fraud at the non-PAMF affiliates.

b. There Is No "Partial Intervention"

The next requirement for Relator's argument is to accept the idea of a partial intervention doctrine and interpret its scope. Relator's authority for this argument is a collection of largely out-of-circuit district court cases. The only Circuit-level authority Relator discusses is *United States ex rel. Merena v. SmithKline Beecham Corp.*, 205 F.3d 97, 101 (3d Cir. 2000), to argue that partial intervention is appropriate because interpreting "take over the action" to mean entire action would be "inconsistent with the multi-claim nature of FCA actions." Opp'n at 15-16. What the *Merena* case was primarily about, however, is whether the government may prevent a relator from receiving a share of the proceeds attributable to a claim that is subject to dismissal under the public disclosure bar. It does not stand for the proposition that a relator can expand the scope of a case beyond the government's intervention.

Nearly all of Relator's other citations are out-of-circuit, lower court cases that focus only on the question whether a relator may proceed with a separate claim when the government specifically declined to intervene on that claim. *See, e.g.*, *United States v. Public Warehousing Co. K.S.C.*, 242 F. Supp. 3d 1351, 1357-58 (N.D. Ga. 2017) (permitting relator to pursue certain claims after intervention when the government did not intervene on those claims). That is not the case here, and so this and Relator's other cases are inapplicable.

Nor should Relator's cases be taken to mean that all trial courts outside this Circuit endorse partial intervention. In *Brooks*, for example, Judge Parrish concluded, after an exhaustive analysis of intervention doctrine, that "[t]he right to continue as a party to the action is more limited than the right to conduct the action, and it does not encompass the right to add defendants and claims to the action." *United States ex rel. Brooks v. Stevens-Henager College, Inc.*, 359 F. Supp. 3d 1088, 1124-25 (D. Utah 2019).

Relator attempts to distinguish *Brooks* by arguing that "*Brooks* concerned a relator who added new claims and new defendants *after* the government had already intervened." Opp'n at 14. But that is precisely what Relator is attempting to do here: add new claims involving alleged fraud at Sutter's non-PAMF affiliates after the government has already intervened. Contrary to Relator's arguments, *Brooks*, by prohibiting a relator from expanding the scope of her claims after the government took over the action, controls the circumstances presented here.[1]

3. **The Government Fully Intervened In This Action**

Relator's case authority for her argument that she has standing to pursue different claims alongside the government generally involve the government's decision *not* to intervene in certain claims originally asserted by a relator. They do not stand for the proposition that Relator suggests here: that once the government intervenes, a relator has *carte blanche* to pursue her own complaint by adding in new claims that the government could have added, but did not.

[1] Curiously, Relator claims that *Brooks* is Defendants' "sole support" for the principle that a relator may not pursue additional claims after the government has taken over a False Claims Act case. Opp'n at 11. Of course it isn't. As is clear from Defendants' Motion to Dismiss, MTD at 3-4, Defendants' primary support for their argument is the text of the statute. And *Brooks* itself cites the Ninth Circuit's decision in *Bennett*, which of course, Defendants also rely on.

Relator leans heavily on *United States ex rel. Dresser v. Qualium Corp.*, 2016 WL 3880763 (N.D. Cal. July 18, 2016), but even applying the *Dresser* analysis, Relator's case should be dismissed. In *Dresser*, a relator asserted theories of Medicare fraud in connection with sleep tests and sleep disorder-related devices. The government intervened in part, after which the relator continued to pursue claims alleging a different scheme to violate Medicare. The court permitted her to proceed "as to the claims that [she] is pursuing on her own." *Id.* at *10.

Relator contends that *Dresser* shows that the government need not use "magic words" to identify the scope of its intervention before a relator can pursue separate claims. Opp'n at 13. But *Dresser* does not stand for that proposition. In fact, in *Dresser*, the government explicitly stated that it was "interven[ing] with respect to allegations that Defendants submitted claims for payment in violation of Medicare rules and regulations for services performed at unapproved locations; for services performed by unqualified or unlicensed personnel; and for durable medical equipment supplied to Medicare beneficiaries." *Dresser*, No. 12-cv-01745 (N.D. Cal. 2015), ECF No. 15. And it said just as explicitly that it "decline[d] to intervene as to any allegations in the [relator's] Complaint that are not related to the [aforementioned] allegations." *Id.* The relator then filed an amended complaint based on schemes that the relator alleged in her original complaint, but as to which the government *declined to intervene*. It was on this basis that the relator in *Dresser* was allowed to proceed.

Here, however, when the government intervened, it filed a Complaint-in-Intervention against the same defendants asserting the same claims as those alleged in Relator's original Complaint. The government did not, as it did in *Dresser*, carve out claims as "non-intervened."

There are many examples of courts dismissing intervened actions where the government's intervention covers the relator's original complaint. For example, in *United States ex rel. Feldman v. City of New York*, 808 F. Supp. 2d 641, 648-49 (S.D.N.Y. 2011), the court held that a relator's amended complaint was "superseded in its entirety" by the government's complaint where the government asserted "the same causes of action under the FCA as [the relator]" and where the two complaints were "predicated on nearly identical factual allegations of wrongdoing." Other cases follow the same principle—a principle that applies with equal

force here. *See, e.g.*, *United States ex rel. Raggio v. Jacintoport Int'l, LLC*, 2013 WL 2462109, at *2 (D.D.C. June 7, 2013) (dismissing relator's amended complaint where the "amended claims [were] identical to the Government's Complaint").

Relator argues that she mentioned "system-wide failure at Sutter" in her original Complaint, and contends that the government did not intervene as to that aspect of her suit. Opp'n at 9. But the original Complaint referred to supposed "system-wide" fraud only in passing, as background to Relator's claim to have first-hand knowledge of fraud at PAMF. That much is clear from the fact that the original Complaint names Sutter and PAMF and sought to hold them *both* liable for all of the alleged fraud—something that makes sense only if all of the alleged fraud on which the claims were based concerned activities at PAMF, and makes no sense if the alleged fraud occurred elsewhere (because not even Relator can claim that there would be any basis for holding PAMF liable for claims submitted by other affiliates). *See*, *e.g.*, Original Compl. ¶¶ 124-26 (asserting that "*Sutter* and *PAMF* are liable under the False Claims Act").

Finally, the timing here is revealing. Only *after* the government filed its Complaint—and Relator learned that the government had separately reached a settlement with Sutter concerning alleged overpayments at other affiliates—did Relator seek to expand the scope of her claims so that they would include submissions at those other affiliates as well. The False Claims Act does not allow a Relator to add in such additional claims after the fact. To hold otherwise would allow relators to manufacture a new complaint to try to secure recoveries that the government itself obtains through alternative means, such as the settlement that it reached here—which Relator no doubt intends to claim she should share in.

Relator's other arguments for why the government's intervention was only "partial" are also wrong. Relator contends that partial intervention is shown by the fact that the government's Complaint "is silent about the Sutter-wide fraud and the misconduct Relator alleges occurred at Sutter's other affiliates." Opp'n at 10. But the government's Complaint repeats nearly all of the references to alleged Sutter-wide coding failures that Relator made in her original Complaint. *See* Govt. Compl. ¶¶ 58, 68, 78, 89. And the government makes these allegations for the same purpose that Relator did in her original Complaint: to bolster claims for relief against Sutter and

PAMF. That Relator is arguing that these allegations by the government constitute "silence" regarding fraud at Sutter's other affiliates just makes it all the more obvious that her original Complaint did not assert claims involving the other Sutter affiliates, either.

Relator next points to the government's notice of intervention as supporting her view that the government only "partially" intervened here. That notice reads, "The United States intends to file its own complaint against Defendants Sutter Health and Palo Alto Medical Foundation . . . and potentially other affiliated entities." ECF No. 26. Relator argues that because the government did not file its own Complaint against "other affiliated entities," then it did not intervene as to Sutter's non-PAMF affiliates. Opp'n at 9.

Here, again, Relator's argument is self-defeating. Relator is correct that the government's Complaint did not assert claims against Sutter's non-PAMF affiliates. *But neither did Relator's original Complaint*. The government could not decline to intervene as to claims never asserted in the original Complaint. Nor could it decline to intervene against defendants not named in Relator's original Complaint. Under these circumstances, the government's statement that it might bring claims against "other affiliated entities" simply reflects its discretion under Section 3731(c) "to add any additional claims with respect to which the Government contends it is entitled to relief." The fact that the government *could* have expanded the action in this way does not undermine its full intervention in Relator's original Complaint.

Finally, Relator invokes the government's $30 million settlement agreement with Sutter and Sutter's non-PAMF affiliates as support for the argument that the government was not intervening against these other affiliates. Specifically, Relator points out that under paragraph 3 of the settlement, the government reserved the right to pursue a variety of claims, including under the False Claims Act, which "would be nonsensical and extraneous" if the government had fully intervened. Opp'n at 10. But that argument proceeds from a false premise: Relator never asserted claims against Sutter's non-PAMF affiliates, so any reservation of rights as to those affiliates has no bearing on the government's full intervention in this action. Here, the government intervened in the same claims for relief against the same defendants outlined in

Relator's original Complaint. Whatever the possible implications of the settlement's reservation of rights, it does not undermine the totality of the government's intervention here.

B. The Amended Complaint Fails The Rule 9(b) Particularity Requirement

Dismissal is also appropriate for Relator's failure to satisfy Rule 9(b). "An actual false claim is the sine qua non of an FCA violation." *United States ex rel. Edman v. Ma Labs., Inc.*, 2018 WL 6016148 at *3 (C.D. Cal. May 3, 2018). Under Rule 9(b)'s heightened pleading standard, a relator must allege a specific false claim or set forth "*particular* details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted." *Ebeid ex rel. United States v. Lunwitz*, 616 F.3d 993, 998-99 (9th Cir. 2010) (emphasis added).

Relator's Amended Complaint concedes that she cannot make specific allegations about institutions other than PAMF. It states: "Relator – upon knowledge with respect to her own acts and those she personally witnessed, and upon information and belief with respect to all other matters – maintains her allegations of a Sutter-wide fraud." Am. Compl. at 1:15-18. It should not be unexpected that Relator cannot make specific allegations of fraud outside of PAMF. She only worked at PAMF.

1. Relator Fails to Allege a False Claim or Particular Details of a Scheme to Submit False Claims at the Non-PAMF Affiliates

As discussed above, Relator's sole justification for proceeding with her own Complaint is that "Sutter's fraud did not occur just at PAMF *but throughout its network of affiliates* as Relator witnessed first-hand." Am. Compl. ¶ 6. But Relator's allegations about activities outside of her experience at PAMF are just boilerplate claims of "Sutter-wide" policies, with no detail about whether those policies were implemented at each institution, what specific affects they had, and whether this led to any particular false claim. Every allegation outside of PAMF relies on this boilerplate, information-and-belief pleading, such as: (1) a "Sutter-wide" effort to increase risk adjustment scores, *id.* ¶¶ 64, 68, 70, 73, 76, 78; (2) a lack of "Sutter-wide" training on coding, *id.* ¶¶ 109-111, 113; (3) inaccurate coding "Sutter-wide," *id.* ¶ 91; (4) audit failures "across Sutter's affiliates," *id.* ¶¶ 98-99; and (5) Sutter's unwillingness to expand audits "Sutter-wide," *id.*

¶¶ 107, 120. But none of these allegations, or any of the other "Sutter-wide" allegations that Relator highlights in her opposition (at 21), constitute "particularized supporting detail" regarding a scheme to submit false claims at Sutter East Bay Medical Foundation, Sutter Pacific Medical Foundation, Sutter Medical Foundation, or Sutter Gould Medical Foundation. The Amended Complaint lacks any particularized allegations showing that any of these non-PAMF affiliates identified codes that they then failed to delete, or that any of them recklessly failed to identify codes that they should have deleted. These omissions are fatal—having chosen to differentiate her Complaint from the government's based on a theory that fraud occurred at non-PAMF affiliates, Relator must plead particularized facts suggesting fraud at those affiliates.

United States ex rel. Duxbury v. Ortho Biotech Prods., L.P., 579 F.3d 13 (1st Cir. 2009) helps illustrate the shortcomings in Relator's Amended Complaint. In *Duxbury*, the relator alleged that the defendant drug maker violated the False Claims Act by providing kickbacks to eight different healthcare providers that resulted in the submission of false claims. *Id.* at 30-31. The relator identified individuals at each of the eight providers, the specific illegal kickbacks at issue at each provider, and provided information regarding the amounts of the false claims by the providers. *See, e.g.*, *id.* at 30 (quoting Relator's Am. Compl. ¶ 211d) ("In 1997-98 Western Washington Cancer Treatment Center in Olympia, Washington received more than $5,000 of free commercially packaged Procrit from Defendant under the direction of Robert Ashe so that Western Washington could submit the free product for reimbursement to Medicare under the false and fraudulent certification that the provider had paid for the product."). The First Circuit, noting that it was "a close call," concluded that the allegations satisfied Rule 9(b). *Id.* at 30. The court explained that even though the relator "alleged the submission of false claims across a large cross-section of providers" he adequately supported these allegations by identifying "the who, what, where, and when of the allegedly false or fraudulent representation . . . *as to each of the eight medical providers*[.]" *Id.* (emphasis added).

Relator's Amended Complaint here is a far cry from the "close call" in *Duxbury*. It contains no particularized allegations of fraudulent activity at the non-PAMF affiliates, such as details of the individuals involved at each affiliate, the basis upon which to allege that coding at

each affiliate was "false," or estimates of the value of false claims at each affiliate. For a Complaint purporting to allege fraud throughout Sutter's "network of affiliates," Relator has remarkably little to say about what was actually taking place at any non-PAMF affiliate.

In arguing that her allegations are sufficient, Relator relies extensively on allegations of audits that turned up unsupported codes at PAMF and Sutter Gould, Am. Compl. ¶ 100, and allegations that Sutter increased its average risk adjustment scores "across all affiliates," *id.* ¶ 85. None of those allegations indicates fraud. At most, Relator's allegations suggest a "mere opportunity" for fraud at the non-PAMF affiliates, which does not suffice under Rule 9(b). *Foglia v. Renal Ventures Mgmt., LLC*, 754 F.3d 153, 158 (3d Cir. 2014). And in terms of the required particularity, the allegations actually *undermine* Relator's fraud claims. Relator specifically acknowledges Sutter's various audits, the deletion of unsupported diagnosis codes following those audits, and the return of payments to the government for improper coding at the non-PAMF affiliates. Am. Compl. ¶ 99 (explaining the deletion of "thousands of unsupported diagnosis codes" found in the Peak Audit and RADV audit); *id.* ¶ 7 ("Sutter refunded CMS $30 million in overpayments for the improper coding at Sutter affiliates other than PAMF."). These allegations are obviously *not* a particularized allegation that Sutter identified unsupported codes and then failed to return the associated payments. Indeed, they show exactly the opposite. And the very fact that Relator is relying on audits at non-PAMF affiliates that resulted in those affiliates voluntarily returning payments to the government indicates that Relator cannot offer any particularized allegations showing that such codes were identified and then not deleted. Relator is merely speculating, making allegations of fraud at affiliates to which she had no connection in the hope of a fortuitous recovery. Rule 9(b) is intended to prevent exactly that. *See United States ex rel. Swoben v. United Healthcare Ins. Co.*, 848 F.3d 1161, 1180 (9th Cir. 2016) ("mere conclusory allegations of fraud are insufficient").[2]

[2] Relator's opposition (at 22) also overstates the allegations set forth in paragraph 100 of her Complaint regarding the Delete Project. Contrary to Relator's argument, paragraph 100 does not specifically allege that the Delete Project found unsupported diagnosis codes at Sutter Gould. Instead, the Complaint alleges in two separate sentences that Relator was aware that the "Delete Project" and another audit were ongoing at PAMF and Sutter Gould *while she was at PAMF*, and that the Delete Project found unsupported codes for 2012 dates of service. The only allegation specific to Sutter Gould is that the Delete Project audit took place there.

Relator's risk adjustment allegations also are generalized, Sutter-wide claims that fail Rule 9(b). Am. Compl. ¶ 85 (alleging that "Sutter increased its average HCC by 21% across all affiliates" and "had a system-wide increase of 25% in its RAF score"). For one thing, Relator does not actually allege that the increased average was the result of increased scores at non-PAMF affiliates. Further, at bottom, Relator's theory rests on the entirely speculative notion that the scores went up as a result of fraud rather than as a result of legitimate efforts to better document diagnoses. Without particularized allegations on such points, Relator has failed to adequately plead fraud at the non-PAMF affiliates. As another court confronted with similar claims recently held, there is nothing improper or fraudulent about attempting to do a better job capturing patient diagnoses. *United States ex rel. Integra Med Analytics, LLC v. Baylor Scott & White Health*, 2019 WL 3713756, at *5 (W.D. Tex. Aug. 5, 2019).

2. A "Collective Fraud" Theory Does Not Relieve Relator of Complying with Rule 9(b)

Relator attempts to get around her lack of particularized allegations of fraud at the non-PAMF affiliates by arguing that "[a]ll the Sutter affiliates are subject to Sutter's inflated RAF scheme in the same way." Opp'n at 19. Relying on *United States ex rel. Silingo v. Wellpoint, Inc.*, 904 F.3d 667 (9th Cir. 2018), Relator contends that where a single member of an alleged fraudulent conspiracy acts as the "hub" (here, Sutter), the "parallel actions of the 'spokes'" (here, the non-PAMF affiliates) can be addressed by "collective allegations." Opp'n at 20.

Relator's reliance on *Silingo* is misplaced. In *Silingo*, the defendant "spokes" (Medicare Advantage organizations) were found to have engaged in the same fraudulent scheme with a contractor "hub," namely by retaining the "hub" to fraudulently increase capitation payments. *Id.* at 674, 678. The relator in *Silingo* pleaded specifically how the MA organization "spokes" engaged in the allegedly fraudulent scheme, for example by accepting health assessment reports and risk adjustment data from the "hub" that they knew contained fraudulent diagnosis codes. The court held that because each of the "spokes" was alleged to have participated in, and contributed to, the hub's fraud in precisely the same way, the relator could impute the

specifically pled allegations to each of the MA organizations. *Id.* at 678. There was no dispute that the key elements of the alleged fraud were pleaded with particularity.

The instant case is different. Here, unlike *Silingo*, the Amended Complaint does not allege a central actor who generated unsupported diagnosis codes on behalf of "spokes" that perpetrated a fraud in precisely the same way. Instead, the Amended Complaint alleges that one Sutter affiliate (PAMF) knowingly or recklessly generated false claims, and then speculates that others likely did so as well. This is not enough for a "collective allegations" theory under *Silingo*, where the court found that the relator provided specific factual support regarding the defendants' contracts with the "hub" and rejected the argument "that the complaint provide[d] inadequate detail of their submission of false claims." *Id.* at 678. Under *Silingo*, then, collective allegations may be used to attribute *particularized* allegations applicable to one actor to other actors engaged in the same alleged fraud—it does not support Relator's apparent view that collective allegations can be a *substitute* for particularity. Here, without particular details of fraud at the non-PAMF affiliates, Relator cannot rely on a "collective allegations" theory to satisfy Rule 9(b). *See Swoben*, 848 F.3d at 1184 ("The flaw in [relator]'s allegations is not the use of collective allegations, but the failure to allege particular details of the scheme. . . .").

3. **Relator's Remaining Arguments Fail**

Relator's remaining arguments do not save her Complaint. Relator argues that the $30 million settlement between Sutter, Sutter's non-PAMF affiliates, and the government is evidence of fraud. Opp'n at 21, 22. But it is clear from the settlement agreement itself that the $30 million is evidence of Sutter and the non-PAMF affiliates *properly returning* funds that they concluded may have been the result of overpayments. Even Relator characterizes the settlement as a "refund of improper overpayments," but argues that the refund only reflected "*some* of the overpayments" obtained at the non-PAMF affiliates. Opp'n at 24. That allegation only reinforces what is missing in the Amended Complaint. To allege wrongful retention of an overpayment, a relator must allege that a defendant knowingly avoided or decreased "an obligation to pay or transmit money or property to the Government." 31 U.S.C. § 3729(a)(1)(G). Therefore, if Relator wants to rely on the $30 million refund of improper payments as evidence

of *fraud*, then she must allege with particularity that the non-PAMF affiliates had an "obligation" to refund more than the $30 million in payments *already returned*. Relator has not done so, and so the settlement cannot be indicative of fraud. *See United States v. Mount Sinai Hosp.*, 2015 WL 7076092, at *13 (S.D.N.Y. Nov. 9, 2015) (relators adequately alleged fraud based on overpayments where the defendants had a "duty" to return the overpayments, but failed to do so).

Finally, Relator contends that it is improper "to weigh potentially competing inferences" on whether Sutter's efforts to increase risk adjustment scores at its affiliates "were pursued through illegitimate means rather than indisputably permissible means, such as training doctors to do a better job of accurately capturing diagnosis codes." Opp'n at 23 (quoting MTD at 7). But on a motion to dismiss, "courts *must* . . . consider an 'obvious alternative explanation' for defendant's behavior." *Eclectic Props. East, LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 996 (9th Cir. 2014) (emphasis added). Here, the "obvious alternative explanation" is that the non-PAMF affiliates sought to maximize coding opportunities consistent with existing law governing Medicare diagnoses,[3] and sought training materials and guidance from Relator to ensure their physicians did so appropriately. *See* Am. Compl. ¶ 114 (alleging that "Relator's peers in Sutter's other affiliates" asked for "materials to train their physicians" on coding); *id.* ¶ 66 (alleging that "Relator's team at PAMF" provided training to "counterparts at other affiliates to facilitate proper training on" diagnostic coding). Therefore, Relator's Amended Complaint at most asserts a "possible" theory of liability rather than a "plausible" entitlement to relief. Accordingly, it cannot survive dismissal. *Integra*, 2019 WL 3713756, at *5 (dismissing complaint where relator's allegations were "equally consistent" with the conclusion that Defendants were properly taking advantage of coding opportunities to maximize Medicare reimbursement").

III. CONCLUSION

For the foregoing reasons, and the reasons outlined in Defendants' Motion to Dismiss, the Court should not permit Relator to expand the allegations in this case beyond the intervened Complaint and should therefore dismiss Relator's Amended Complaint.

[3] CMS has indicated there is nothing "inappropriate, unethical, or otherwise wrong with hospitals taking full advantage of coding opportunities to maximize Medicare payment that is supported by documentation in the medical record." 72 Fed. Reg. 47130, 47180 (Aug. 22, 2007).

DATED: September 30, 2019

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