

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE EDWARD M. CHEN, JUDGE

UNITED STATES OF AMERICA, ex rel.)	
RONDA OSINEK,)	
)	
Plaintiffs,)	Consolidated Case
VS.)	No. 13-cv-03891-EMC
)	
KAISER PERMANENTE, FOUNDATION)	And Related Cases
HEALTH PLAN, INC., and THE)	Nos. 16-cv-1558-EMC
PERMANENTE MEDICAL GROUP, INC.,)	16-cv-5337-EMC
)	18-cv-1347-EMC
Defendants.)	21-cv-3124-EMC
)	21-cv-3894-EMC

San Francisco, California
Tuesday, November 16, 2021

TRANSCRIPT OF PROCEEDINGS

APPEARANCES: (By Zoom Webinar)

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(Appearances continued, next page)

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1 Tuesday - November 16, 2021

1:29 p.m.

2 P R O C E E D I N G S

3 **THE COURTROOM DEPUTY:** Court is now in session, the
4 Honorable Edward M. Chen is presiding.

5 Calling Consolidated Action 13-3891, Osinek et al. versus
6 Kaiser Permanente.

7 Counsel, please state your appearances for the record,
8 beginning with counsel for plaintiffs.

9 **MR. WOLINSKY:** Ben Wolinsky for the United States.

10 **THE COURT:** All right. Good afternoon, Mr. Wolinsky.

11 **MR. WOLINSKY:** Good afternoon, Your Honor.

12 **MS. ZEMAN:** Hello, this is Amy Zeman on behalf of
13 relator Osinek.

14 **THE COURT:** Thank you, Ms. Zeman.

15 **MR. ZINBERG:** Abram --

16 **MR. CHOE:** Good afternoon -- good afternoon, Your
17 Honor. Shiwon Choe on behalf of the government.

18 **THE COURT:** All right. Good afternoon, Mr. Choe.

19 **MR. ZINBERG:** Abram Zinberg, on behalf of relators
20 Stein and Bone.

21 **THE COURT:** All right. Thank you, Mr. Zinberg.

22 **MR. RONICKHER:** Michael Ronickher, on behalf of
23 relator James Taylor.

24 **THE COURT:** All right, thank you, Mr. Ronickher.

25 **MS. QUINN:** Good afternoon, Your Honor. Janel Quinn

1 on behalf of relator Bicocca.

2 **THE COURT:** Good afternoon, Ms. Quinn.

3 **MS. QUINN:** Good afternoon.

4 **THE COURT:** And does that cover everybody? Everybody
5 made their appearances?

6 All right.

7 **MR. LEVISS:** Your Honor, I'm sorry. This is David
8 Leviss, on behalf of defendants.

9 **THE COURT:** All right. Thank you, Mr. Leviss.
10 Anybody else?

11 **MS. STEINBERG:** Anne Steinberg on behalf of
12 defendants.

13 **THE COURT:** All right. Thank you, Ms. Steinberg.

14 I think that covers everybody on the screen. All right.
15 Good afternoon, everyone.

16 So the question is whether we sort of bifurcate the motion
17 practice here, and hear the first-to-file matter first. And it
18 seems to me that the outcome, if -- if the first-to-file rule
19 were found to be applicable here to some or all of the
20 subsequent filed actions, that would have an impact at least on
21 the number of 12(b)(6) merits motions.

22 So, why not? I understand there is some delay because
23 when you bifurcate, you know, you extend things out. But we're
24 probably talking about extending the schedule by perhaps one to
25 two months, while we adjudicate the first-to-file question.

1 So I know the relators have filed an opposition to that,
2 but let me understand what, what is wrong with that proposal.

3 **MR. RONICKHER:** Sure. I can speak to that, since I
4 handled the meet-and-confer for relators. Although I don't
5 want to give the impression that I'm speaking for every single
6 relator currently, --

7 **THE COURT:** Certainly.

8 **MR. RONICKHER:** -- I think I can at least tee it up.

9 So our primary concern has to do with the fact that what
10 sounds like it would be more efficient I think may create
11 actually a bit of a morass in terms of moving the case forward.

12 One of the reasons for that, Your Honor, is that what
13 Kaiser proposes is moving on first to file against, we presume,
14 five of the relators, while moving on all grounds against the
15 United States and the Osinek complaint, but holding those other
16 arguments in abeyance as against the other relators.

17 And from my perspective, that causes two potential
18 problems, regardless of the outcome of the motions. If the
19 United States and Osinek win on their motions to dismiss,
20 Kaiser will have the opportunity to try to re-litigate that
21 outcome on some of the same issues when they move on the same
22 topics against the relators.

23 And even if Kaiser does win against the United States and
24 Osinek, it has an impact on the relators who've not been
25 permitted to weigh in on issues and arguments that will also

1 apply against their complaints down the road in the case. So
2 my concern with the sort of bifurcation is that it has the
3 Court reach different issues on different complaints at
4 different times.

5 I think it'd be simpler -- while there's more briefing, I
6 think it would be simpler to address everything simultaneously,
7 and let the Court decide what to --

8 **THE COURT:** Why wouldn't --

9 **MR. RONICKHER:** I'm sorry?

10 **THE COURT:** Why wouldn't a response to that be:
11 Let's simply defer merits analysis on all? Why take it
12 piecemeal? Let's just hear the first to file, see what we're
13 dealing with and who's left, and then we hear based on who's
14 left, or if everybody's left, then we deal with the merits at
15 that point.

16 Would you have an objection to that?

17 **MR. RONICKHER:** I would not.

18 I should specify that I speak only for my relators' behalf
19 on this point --

20 **THE COURT:** Sure.

21 **MR. RONICKHER:** -- because we have not discussed
22 that.

23 **THE COURT:** All right. Well, let me hear from
24 defendants whether there's a problem with staging it slightly
25 differently. That is, hear the first to file first, figure

1 out sort of what the dimensions of this case is, and who's in
2 and who's out, and which allegations are in and out, and then
3 we deal with the merits, the 12(b)(6) questions.

4 **MR. LEVISS:** So Your Honor, we would not be opposed
5 to delaying merits-based briefing against the DOJ intervention
6 complaint for the Osinek complaint until after first to file
7 is resolved.

8 It would obviously require adjusting our deadline to
9 respond, but we would be fine with that.

10 **THE COURT:** All right. Well, let me ask the other
11 relators. It sort of answers the sort of two bites or
12 potentially conflicting, you know, merits outcome. It does
13 mean a little bit more delay. But on the other hand, it may
14 make things more efficient, depending on what happens.

15 So, other comments from the relators?

16 (No response)

17 **THE COURT:** Anyone?

18 **MS. QUINN:** Relator Bicocca would not be opposed to
19 that, Your Honor.

20 **MS. ZEMAN:** And regarding relator Osinek.

21 **THE COURT:** Um --

22 **MR. ZINBERG:** Your Honor, just so I understand what's
23 being proposed, the bifurcation would be just the
24 first-to-file issues, but none of the motions to dismiss.

25 **THE COURT:** Right.

1 **MR. ZINBERG:** I don't think we would object to that
2 either.

3 **THE COURT:** Okay. Well, seems to me that makes
4 sense. And there's a logic to do -- of looking at the
5 first-to-file question because that will help define the
6 dimensions of this, and may inform the scope of the 12(b)(6)
7 merits questions as well.

8 What is the government's proposal if we did that, in terms
9 of timing? What are you proposing in terms of the timing of
10 that first-to-file motion?

11 **MR. WOLINSKY:** Well, Your Honor, we'd defer to the
12 Court in terms of what would be most efficient. If we're
13 going to do a staged briefing, we -- I don't know that we
14 would have to have a date, at the moment, to propose. We'd
15 have to see what would be the new date.

16 **THE COURT:** Okay. Well, maybe the thing to do is to
17 have you meet and confer, and figure out a scheduling. You
18 know, obviously I'd have to rule on the first to file, so we'd
19 need some breathing space between hearing that and then the
20 filing of the 12(b)(6). But at least, I kind of want to get a
21 sense -- I assume, sooner rather than later. That the first
22 to file is something that -- a motion that can be filed fairly
23 soon?

24 I guess that's my question. When could you file that?

25 **MR. LEVISS:** Your Honor, so, speaking for the

1 defendants since it would be our first-to-file motion, we just
2 received relators' amended complaints yesterday.

3 **THE COURT:** Yeah.

4 **MR. LEVISS:** Some of which have made substantial
5 changes; others have not. So we would need a little bit of
6 time with those.

7 We had proposed keeping the same deadline as the original
8 schedule for responding to complaints, January 18th, for our
9 first-to-file briefs. And I would propose that we maintain
10 that as the deadline.

11 **THE COURT:** Remind me. Did you all anticipate a
12 regular 35-day briefing schedule? Or does it need to be
13 changed from the normal local rule notice provision?

14 **MR. LEVISS:** Our proposed schedule would not involve
15 any changes from the current case schedule. I think -- it did
16 extend the relators' time to oppose beyond the original --
17 beyond the regular deadlines. But the schedule, it's
18 consistent with your current case schedule.

19 The only addition we made was adding a deadline following
20 a decision on the first to file. We suggested that we could
21 file our 12(b)(6) motions 30 days after receiving a ruling.

22 **THE COURT:** All right. Why don't we maintain the
23 schedule -- I don't have it right in front of me, but I'm
24 reminded that the first brief is going to be filed
25 January 18th, you said?

1 **MR. LEVISS:** Correct.

2 **THE COURT:** And then opposition, and then reply, and
3 then hearing? What's the hearing date we had set?

4 **MR. LEVISS:** It's May 5th, with the case-management
5 conference on February 15th.

6 **THE COURT:** Okay. Any objection to just using that
7 schedule to hear the first stage of this bifurcated process?

8 **MR. WOLINSKY:** (Shakes head)

9 **THE COURT:** Okay, I'm not hearing any objection. So
10 why don't we go ahead and do that.

11 And my intent is probably to be prepared, once I rule on
12 that, then entertain the merits motions, 12(b)(6) motions,
13 probably as you say, 30 days after determination by this Court
14 on the first motion.

15 So hopefully that means we'll get to the merits probably
16 some time in March or April. At least, we'll start that
17 briefing process.

18 And I assume, then -- I don't know, by June or something
19 we would have that phase completed.

20 **MR. LEVISS:** Makes sense. But with the Court's
21 indulgence, I think the schedule will have to relieve Kaiser
22 of its obligation to respond to the complaints that it's not
23 moving to dismiss on January 18th.

24 **THE COURT:** Yeah. I think that's appropriate. Given
25 that we are deferring the motion to dismiss, and the intent is

1 to file a motion to dismiss. So I will grant that relief.

2 **MR. WOLINSKY:** I apologize, Your Honor. Our
3 understanding was that the merits briefing would -- wouldn't
4 change, or we would have an opportunity to meet and confer
5 about how that would affect the -- the complaint, as you
6 mentioned.

7 **THE COURT:** Yeah. Well, I think that's right. And
8 that's why there's going to be some pause after I rule. I'd
9 like for you to meet and confer on the schedule.

10 But the idea of having that process start around 30 days
11 after I rule on the first motion seems about right. I mean, if
12 you need more time to meet and confer, I mean, that's okay.
13 But I didn't want it to drag on for months and months and
14 months, is the main thing.

15 **MR. WOLINSKY:** (Nods head)

16 **THE COURT:** And, let me ask. I -- this is a bit
17 unusual to have this many *qui tam* cases.

18 Has there been any -- I know this has been done
19 informally, or maybe formally in other cases where there have
20 been some coordination by the various relators, and in some
21 cases, an agreement actually reached in terms of a consolidated
22 complaint or something along those lines. I don't know. Is
23 that something that is possible in this case?

24 I don't know if I'm raising this for the first time,
25 whether there's been any thought. And maybe it's an awkward

1 moment. But, I understand the difficulties here. And -- but I
2 guess that's -- that's one approach that has occurred in some
3 cases. I just don't know whether that's something that may be
4 a possible approach here.

5 **MR. RONICKHER:** I think I can say, while
6 acknowledging you probably did create an awkward moment, that
7 we're -- certainly speaking for my relator, we're hopeful we
8 can resolve, at least as among the relators, without judicial
9 intervention. But, that's not done yet.

10 **THE COURT:** Yeah. All right. Well, I throw that out
11 there, because that obviously could be an answer to at least
12 this phase, to a certain extent. But otherwise, let's
13 proceed. And I'll expect to see the first brief by the
14 defendants on January 18th.

15 And, let's see, we have a CMC scheduled for February. I'm
16 wondering if it makes sense to -- whether it still makes sense
17 to hear that in the midst of the briefing. Should we move --
18 advance that prior to briefing, just to see where things are
19 at, whether anything has changed?

20 **MR. LEVISS:** Defendants would be fine with that.
21 We're certainly anxious to proceed with the case as
22 expeditiously as possible.

23 **THE COURT:** All right. Why don't -- Angie, is there
24 something just before the 18th that's available for a CMC?

25 **THE COURTROOM DEPUTY:** Okay, Your Honor. The 11th,

1 January 11th is available. And January 4th.

2 **THE COURT:** Let's do January 11th. Is that 1:30? Or
3 2:30?

4 **THE COURTROOM DEPUTY:** Correct, 1:30.

5 **THE COURT:** January 11th, 1:30, by Zoom. To do kind
6 of a check-in to make sure we're kind of on track.

7 And if there's been any developments on the relators-side
8 or anything else, you can bring that to my attention if that
9 changes anything. Otherwise, I'm just going to assume that we
10 are going to move forward, as planned.

11 **MR. WOLINSKY:** Your Honor, the one issue I think with
12 bumping up the CMC is that would trigger discovery at the time
13 that would be more maybe lopsided vis-à-vis the briefing,
14 which is one of the reasons that we had negotiated the
15 stipulation to have the CMC when it is currently scheduled.

16 **THE COURT:** Well, why don't we have the discovery
17 keyed to the original CMC date, which would be -- as if it
18 were going to happen on the 15th of February. So your
19 correlative discovery dates won't change, but I'm just having
20 an early check-in, basically.

21 **MR. WOLINSKY:** That makes good sense, Your Honor.
22 Thank you.

23 **THE COURT:** All right?

24 **MR. LEVISS:** Thank you, Your Honor.

25 **THE COURT:** So, we'll see you in January.

1 **MR. WOLINSKY:** Thank you, Your Honor.

2 **MR. LEVISS:** Thank you, Your Honor.

3 **MR. RONICKHER:** Thank you, Your Honor.

4 **MS. STEINBERG:** Thank you, Your Honor.

5 **MS. ZEMAN:** Thank you, Your Honor.

6 **THE COURT:** Thanks a lot.

7 (Proceedings concluded)

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CERTIFICATE OF REPORTER

I, BELLE BALL, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Belle Ball

/s/ Belle Ball

Belle Ball, CSR 8785, CRR, RDR

Friday, December 17, 2021