NOT FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARCIA STEIN; et al.,

Plaintiffs-Appellants,

and

UNITED STATES OF AMERICA,

Plaintiff,

v.

KAISER FOUNDATION HEALTH PLAN, INC., a California corporation; et al.,

Defendants-Appellees.

No. 22-15862

D.C. Nos. 3:16-cv-05337-EMC
3:13-cv-03891-EMC

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Edward M. Chen, District Judge, Presiding

Submitted November 8, 2024**
San Francisco, California

Before: BOGGS,*** S.R. THOMAS, and FORREST, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Danny J. Boggs, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

The en banc court remanded this case after holding that the False Claims Act's (FCA) first-to-file rule is not jurisdictional. *Stein v. Kaiser Found. Health Plan*, 115 F.4th 1244, 1247 (9th Cir. 2024). Given this decision, the district court's dismissal under the first-to-file rule *for lack of jurisdiction* cannot stand. But that does not mean the district court erred in dismissing this case. Consistent with our prior disposition, which addressed the district court's analysis of the relation of this action filed by Plaintiffs Marcia Stein and Rodolfo Bone (Relators) to the earlier-filed actions at issue, we conclude that the district court did not err in determining that the first-to-file rule bars this action, and we affirm.

1. ***"Related" Actions.*** An analysis of the first-to-file bar requires comparing the complaints at issue to those in relevant prior actions to determine whether the later-filed action is "related" to the earlier-filed action(s). 31 U.S.C. § 3730; *U.S. ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1188–89 (9th Cir. 2001); *see also U.S. ex rel. Hartpence v. Kinetic Concepts, Inc.*, 792 F.3d 1121, 1130–32 (9th Cir. 2015), *overruled on other grounds by Stein v. Kaiser Found. Health Plan, Inc.*, 115 F.4th 1244 (9th Cir. 2024). We review the district court's interpretation of the FCA de novo. *Hartpence*, 792 F.3d at 1126, 1130. Here, the district court concluded that the relevant complaints for comparison were Relators' initial complaint filed in this case and the complaints that were pending in the

potentially related actions when Relators' initial complaint was filed.[1] Relators suggest this was the wrong comparison and that the district court should have instead considered the operative complaints in both this action and the earlier-filed actions at the time it analyzed the first-to-file bar.

Without deciding whether the district court erred in selecting the proper comparators in applying the first-to-file bar, we conclude that any error was harmless because the district court considered in the alternative the allegations that Relators added in their amended complaint, which was the operative pleading at the time of the district court's analysis. *See U.S. ex rel. Osinek v. Permanente Med. Grp., Inc.*, 601 F. Supp. 3d 536, 570 n.16 (N.D. Cal. 2022). Moreover, although the plaintiffs in *Osinek* and *Taylor* amended their complaints between when the Relators filed their complaint and Kaiser filed its motion to dismiss, there were no material differences in the amended *Osinek* and *Taylor* complaints.

The "material facts" test determines whether an action is related and bars "later-filed actions alleging the same material elements of fraud described in an earlier suit." *Lujan*, 243 F.3d at 1188–89. The district court held that Relators' complaint was barred under the material-facts test because their complaint alleged lesser-included conduct that fell within the broad schemes alleged in *Osinek* and

[1]This meant considering the original complaints in *Osinek* and *Arefi*, but the amended complaint in *Taylor*.

Taylor. The district court explained that it would reach the same result even considering the aortic-atherosclerosis-related allegations in Relators' amended complaint. *Osinek*, 601 F. Supp. 3d at 570 n.16. Reviewing de novo, we agree. *Hartpence*, 792 F.3d at 1126, 1130.

Relators' action does not exist "completely independent" of the fraudulent schemes alleged in *Osinek*, *Taylor*, and *Arefi*. *Id.* at 1131. Rather, this action relates to fraud that is included *within* the broad schemes alleged in those earlier actions. It is true that the relators in *Osinek*, *Taylor*, and *Arefi* alleged more general conduct impacting diagnoses that were "*among*" those in the upcoding scheme, and here Relators' allegations focus specifically on why Kaiser's sepsis, malnutrition, and aortic-atherosclerosis diagnoses were unsupported. *Lujan*, 243 F.3d at 1185–86 (emphasis added) (citation omitted). But the difference is the Relators here simply provide more details about a few diagnoses "*within* the" overall upcoding scheme alleged in the prior actions. *Id.* (emphasis added) (citation omitted). Therefore, the first-to-file rule bars the Relators' complaint because the allegations in *Osinek*, *Taylor*, and *Arefi* "alerted the government to the essential facts of [the] fraudulent scheme." *Id.* at 1188.

2. ***Denial of Leave to Amend.*** We review the denial of leave to amend for abuse of discretion but review the futility of amendment de novo. *United States v. United Healthcare Ins. Co.*, 848 F.3d 1161, 1172 (9th Cir. 2016). Even if the district

court erred in concluding that amendment would be futile because the proper comparator was the Relators' initial complaint, which we do not decide, the district court nonetheless did not abuse its discretion. Dismissal without leave to amend was appropriate because Relators made no showing below—nor on appeal—that any amendment could cure their first-to-file deficiency. *See Metzler Inv. GMBH v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1072 (9th Cir. 2008); *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1051–52 (9th Cir. 2008).

AFFIRMED.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate electronic filing system or, if you are a pro se litigant or an attorney with an exemption from the electronic filing requirement, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1) Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) Purpose

A. Panel Rehearing:

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - A material point of fact or law was overlooked in the decision;
  - A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Rehearing En Banc

- A party should seek en banc rehearing only if one or more of the following grounds exist:
  - Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
  - The proceeding involves a question of exceptional importance; or

- The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing must be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- See Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- Attorneys must file the petition electronically via the appellate electronic filing system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-8000.

Petition for a Writ of Certiorari

- The petition must be filed with the Supreme Court, not this Court. Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov.

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
    - Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Maria Evangelista, maria.b.evangelista@tr.com);
    - **and** electronically file a copy of the letter via the appellate electronic filing system by using the Correspondence filing category, or if you are an attorney exempted from electronic filing, mail the Court one copy of the letter.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 10. Bill of Costs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form10instructions.pdf

9th Cir. Case Number(s)

Case Name

The Clerk is requested to award costs to *(party name(s))*:

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