

David M. Siegal
212 692 6281
dmsiegal@mintz.com



Chrysler Center
666 Third Avenue
New York, NY 10017
212 935 3000
mintz.com

MINTZ

Via Email

November 12, 2020

David S. Stone
Stone & Magnanini LLP
100 Connell Drive, Suite 2200
Berkeley Heights, NJ 07922

Stephen A. Weiss
Seeger Weiss LLP
77 Water Street, 8th Floor
New York, NY 10005

Re: *United States, et al., ex rel. SW Challenger, LLC v. eviCore healthcare MSI, LLC, No. 19-2501*

Dear David and Stephen:

On behalf of eviCore healthcare MSI, LLC (eviCore), we write pursuant to Rule II.B.1 of Judge Marrero's Individual Practices to set forth the basis of eviCore's anticipated Motion to Dismiss SW Challenger, LLC's (SW Challenger or Relator) Second Amended Complaint (SAC). Below, we identify the reasons that the claims in the SAC for False Claims (Count I), False Statements (Count II), Reverse False Claims (Count III), Conspiracy (Count IV), State-law violations (Counts V-XX), and Retaliation (XXI-XXII) fail the pleading requirements of Federal Rules of Civil Procedure 8(a) and 9(b) and should be dismissed with prejudice. In addition, SW Challenger's causes of action are barred by the FCA's public disclosure bar, and the FCA's statute of limitations precludes any conduct before May 2014.

First, the SAC fails plausibly to allege that eviCore caused *any* claim for clinical services to be submitted to CMS by any Medicare Advantage Organization (MAO). To establish a False Claims Act violation, Relators, as a threshold matter, must allege such a claim was submitted to CMS. In particular, the SAC alleges that as a result of eviCore's "auto-approval" processes, eviCore caused MAOs to submit claims for services that "were going to be paid ultimately by government healthcare programs." SAC ¶ 63. Yet, Relators cannot plausibly allege a connection of eviCore's allegedly excessive approval of *services*—which eviCore strongly disputes—to any claim that any eviCore health plan client actually submitted to the government. Indeed, SW Challenger *cannot* allege such a connection because CMS's payments to MAOs depend on member diagnoses, *not* the amount of services provided to a specific beneficiary. See SAC ¶ 4. Therefore, even assuming SW Challenger's allegations are true (and they are not), the SAC does not and cannot plausibly allege that eviCore's purported approval of too many clinical services caused MAOs to submit *any claims*, much less false claims, to the government. *Leeds v. Meltz*, 85 F.3d 51, 53 (2d Cir. 1996) ("While the pleading standard is a liberal one, bald assertions and conclusions of law will not suffice.").

Second, the SAC does not identify any terms of any contracts with health plans that eviCore purportedly breached. The SAC makes the conclusory assertion that by using "auto-approval" procedures, (1) eviCore "failed to satisfy its contractual requirements [with MAOs] and thus failed to provide necessary medical review functions for CMS and the Qui Tam States," (SAC ¶ 31) and (2) as a result of this failure, that eviCore provided "worthless" prior authorization services to MAOs who contract with CMS to perform this function. *Id.* ¶ 32. But the SAC *never once* identifies a specific contract, much less a single term or requirement within any contract, between eviCore and any MAO

MINTZ

November 12, 2020
Page 2

that eviCore allegedly violated. *United States ex rel. Ladas v. Exelis, Inc.*, 824 F.3d 16, 26- 27 (2d Cir. 2016) (hypotheses, conclusory statements, and assertions “not supported by particularized allegations of fact” do not satisfy Rule 9(b)).

Additionally, the SAC asserts no plausible, particular facts to support the conclusory claim that eviCore provided “worthless services” to its health care plan clients, or to the government. eviCore is a leading utilization management company that enables better outcomes for patients, providers and health plans. SW Challenger does not—and cannot—meet the high bar requiring proof that “no service[s] at all” were performed under any contract with an MAO, much less that “no services” were performed from the perspective of the federal program. See *United States ex rel. Kolchinsky v. Moody's Corp.*, No. 12-cv-1399, 2018 U.S. Dist. LEXIS 41117, at *14 (S.D.N.Y. Mar. 13, 2018) (relator failed to demonstrate that defendant’s ratings service was so deficient that it was akin to no service at all, where he acknowledged that *only some* of defendant’s ratings were erroneous).

Third, the SAC fails to plausibly allege the elements for its “reverse” false claims count. The SAC fails to allege that eviCore received any money from any federal or state health care program, or that eviCore had any obligation to pay money to the government. *United States ex rel. Foreman v. AECOM Gov’t Servs.*, 454 F. Supp. 3d 254, 268 (S.D.N.Y. Apr. 13, 2020) (“A complaint that ‘makes no mention of any financial obligation that the [defendant] owed to the government’ and ‘does not specifically reference any false records or statements used to decrease such an obligation’ must be dismissed.”).

Fourth, the SAC’s conspiracy claim fails because the SAC alleges no agreement between eviCore and any other party to violate the FCA. Accordingly, pursuant to the intracorporate doctrine, this count must be dismissed. *Reich v. Lopez*, 38 F. Supp. 3d 436, 463 (S.D.N.Y. 2014) (“Under the intracorporate conspiracy doctrine, the officers, agents, and employees of a single corporate entity, each acting within the scope of [his] employment, are legally incapable of conspiring together.”).

Fifth, the SAC’s state-law claims also fail for the same reasons. The SAC lacks plausible state-specific allegations to support state-law violations. For example, the SAC fails to specify which states contracted with which Medicaid Managed Care Organizations (MCOs), let alone which of those Medicaid MCOs subcontracted with eviCore, and fails to provide any specifics about the terms of those subcontracts. *Lab. Corp. of Am. Holdings*, No. 1:07-cv-05696, 2015 U.S. Dist. LEXIS 155601, at *21 (S.D.N.Y. Nov. 17, 2015) (“Where Relator has not sufficiently pled its allegations in any state, it would be illogical to allow those deficient allegations to support state-law claims.”).

Sixth, the SAC is also barred by the public disclosure doctrine. The “public disclosure” bar applies in this case because the SAC allegations are “substantially the same” as allegations disclosed in a previously filed federal civil case in which the government was a party, and from information previously published widely in the news media. We refer you (and will refer the court, ultimately) to (1) the CareCore complaint filed under the FCA on May 11, 2017^{1/} and (2) the federal press announcement of the CareCore settlement under the FCA in May 2017^{2/} as well as related press

^{1/}See *United States ex rel. Miller v. CareCore National LLC*, 13-cv-01177-RJS (S.D.N.Y.).

^{2/}See SAC ¶ 53 (“Acting U.S. Attorney Announces \$54 Million Settlement of Civil Fraud Lawsuit Against Benefits Management Company for Improper Authorization Of Medical Procedures, (2017), <https://www.justice.gov/usao-sdny/pr/acting-us-attorney-announces-54-million-settlement-civil-fraud-lawsuit-against-benefits>.”).

MINTZNovember 12, 2020
Page 3

coverage. Because of the prior public disclosures, SW Challenger's case is barred and must be dismissed unless it is an "original source" of the information.

Plaintiff SW Challenger, an LLC, simply cannot be an original source, since it has no independent knowledge of anything. Put another way, an entity cannot have knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions. See *Federal Recovery Services, Inc. v. U.S.*, 72 F.3d 447, 452 (5th Cir. 1996) (dismissing action where corporate relator did not have "direct and independent knowledge" to qualify as "original source"); *United States ex rel. Precision Co. v. Koch Industries, Inc.*, 971 F.2d 548, 552 (10th Cir. 1992).

The public disclosure bar to the SAC, and ground for dismissal, is not cured by the purported attempt in the SAC to add "Jane Doe 1" and "Jane Doe 2" as parties. Furthermore, as a matter of law, the "Jane Doe" plaintiffs cannot be anonymized without basis. This court has made clear that the use of anonymous *qui tam* relators is inconsistent with the statutory purpose of the FCA's *qui tam* provisions. See e.g. *United States v. UCB, Inc.*, No. 14-cv-2218, 2017 U.S. Dist. LEXIS 30725, at *10 (S.D.N.Y. Feb. 24, 2017) (denying motion to proceed under pseudonym in FCA action where public "interest in knowing the party's identity" outweighed relator's speculative fear of employment retaliation).

Second Circuit law also strongly disfavors permitting claims to be brought under pseudonyms, and thus "Jane Doe 1" and "Jane Doe 2" are not valid relators, and should be stricken. *Doe v. N.Y. State Dep't of Health*, No. 1:20-cv-04817, 2020 U.S. Dist. LEXIS 170560, at *3 (S.D.N.Y. Sept. 17, 2020) (citing *United States v. Pilcher*, 950 F.3d 39, 45 (2d Cir. 2020) ("[P]seudonyms are the exception and not the rule, and a party seeking to receive the protections of anonymity . . . must make a case rebutting the presumption of disclosure.")). The SAC articulates no basis for permitting two former employees to proceed anonymously.

Finally, the statute of limitations bars all claims prior to May 21, 2014. The SAC reasonably relates back to the conduct alleged in the FAC filed on May 21, 2020, and thus the six-year statute of limitations extends to May 21, 2014. Because the initial complaint was filed under seal in this matter, was not provided to eviCore, and remains under seal today, eviCore is precluded from ascertaining whether the SAC relates back to the allegations in the initial complaint under Rule 15(c)(1)(B). We request that Relators stipulate to a Motion to Unseal the Initial Complaint. If Relators will not stipulate to the unsealing of the initial complaint, eviCore will file a Motion to Unseal the Initial Complaint concurrently with its Motion to Dismiss. See 31 U.S.C. § 3730(b).

Relators' two retaliation claims also fail. The failure of the SAC to identify Jane Does 1 and 2 deprives eviCore of the ability to defend itself. Further, the SAC fails to allege that eviCore took any adverse employment action against the unidentified plaintiffs, who as the SAC concedes, voluntarily resigned. *Id.* ¶ 135. It is well settled that minor disruptions in the workplace, including "petty slights" or "minor annoyances" such as the productivity requirements or verbal warnings alleged here (*id.* ¶¶ 148-49, 162), fail to qualify. See, e.g., *Hiralall v. Sentosacare, LLC*, No. 13 Civ. 4437, 2016 U.S. Dist. LEXIS 35781, at *38 (S.D.N.Y. Mar. 18, 2016). The SAC further fails to allege any facts to suggest that eviCore took any adverse employment action "because of" any allegedly protected conduct.

For these reasons, among others, SW Challenger's SAC should be dismissed, for the reasons outlined above.

MINTZ

November 12, 2020
Page 4



Sincerely,

A handwritten signature in blue ink, appearing to read 'David M. Siegal', written in a cursive style.

David M. Siegal
Member

cc: Hon. Victor Marrero (Via ECF)
All Counsel of Record (Via ECF)
Laurence J. Freedman (Via Email, pro hac vice application forthcoming)
Brian P. Dunphy (Via Email, pro hac vice application forthcoming)

105149067