

improperly conflates the numerous defendants and fails to adequately plead her claims against any of the defendants, let alone properly stating a claim against Defendant.²

2. Relator's scant allegations omit the necessary details that are "the *sine qua non* of a False Claims Act violation." *United States ex rel. Dolan v. Long Grove Manor, Inc.*, No. 10 C 368, 2014 WL 3583980, at *3 (N.D. Ill. July 18, 2014). Relator, a former employee of AIM, attempts to substitute general allegations regarding AIM's purported utilization management services for detailed allegations of false claims or false statements that were actually submitted to the Government. Of the 159 paragraphs in the SAC, Relator references Defendant in only 8 of them.³

certain medical services and issue determinations as to whether such services are medically necessary) and that AIM performed the utilization management using guidelines that were more stringent than purported Medicare rules. *See* Dkt. 121 at ¶¶ 5-7. Notably, Relator's theory of the case is based upon the AIM guidelines being more stringent than nonbinding guidance that has been issued by Medicare contractors, despite the fact that such nonbinding guidance cannot form the basis of a False Claims case. *See, e.g.*, Dkt. 121 at ¶ 82 (Relator basing allegations on so-called National Coverage Determinations and Local Coverage Determinations, which are neither statutes nor regulations (and which are not alleged to be either statutes or regulations), and which are, instead sub-regulatory guidance).

² Relator's attempt to impermissibly lump the defendants together is improper under the FCA. *See Suburban Buick, Inc. v. Gargo*, No. 08 C 0370, 2009 WL 1543709 at *4 (N.D. Ill. May 29, 2009) (a complaint that is brought under Federal Rule of Civil Procedure 9(b) "should not lump multiple defendants together, but should inform each defendant of the specific fraudulent acts that constitute the basis of the action against the particular defendant.").

³ Relator first alleges that Defendant is not an Anthem insurance plan. *See* Dkt. 121 at ¶ 23. Relator's other allegations against Defendant all refer to its relationship with AIM and a purported CMS audit of Defendant. *See, e.g., id.* at ¶¶ 118, 119, 121, 126, 130, 145, 147. These allegations do not discuss any actual claims or provide any details regarding Defendant's relationship with, or submission of claims or statements to, the Government. *Id.* Rather, the sum total of Relator's allegations against Defendant note that it was audited by the Centers for Medicare and Medicaid Services ("CMS") (*Id.* at ¶ 119), that AIM had purportedly attempted to use a "hybrid" approach for utilization review for Defendant (*Id.* at ¶ 126), that Defendant had at some unspecified point approved AIM's use of guidelines that deviated from purported Medicare Rules (although the alleged "Rules" that Relator references are actually merely nonbinding guidance), and that, in 2014, Defendant insisted that AIM perform utilization review in a manner that is fully compliant (*Id.* at ¶ 145). Notably, despite the express allegation that CMS had audited Defendant relating to AIM's purported denials (*Id.* at ¶ 119), Relator fails to make any allegation that CMS or any other Government agency took any action against Defendant. In other words, despite Relator's express allegation that the Government was aware of the wrongdoing that constitutes the Relator's theory of the case, there is no allegation (nor could there be any allegation) that the Government demanded any reimbursement from Defendant, recouped any payments, or discontinued Defendant's status as a Medicare Advantage plan.

3. However, the SAC is entirely bereft of any allegations that set forth even a single claim or statement that Defendant made to the Government, let alone a purportedly false claim or statement. The SAC also lacks any of the requisite particularity in its allegations relating to Defendant and does not include a single allegation setting forth the identity of any individuals at Defendant who made any false claims or statements, the locations from which or to which such false claims or statements were purportedly made, the date(s) upon which any purported false claims or statements were made, the time period of any purported wrongdoing on the part of Defendant, or any explanation as to how any of Defendant's conduct led to the submission of false claims or resulted in the Government making any unwarranted payment to Defendant. *See* Dkt. 121 at ¶¶ 118, 119, 121, 126, 130, 145, 147. Without more, the absence of such details is fatal to Relator's claims against Defendant. *See, e.g., United States. ex rel. Keen v. Teva Pharms. USA Inc.*, No. 15 C 2309, 2017 WL 36447, at *4 (N.D. Ill. Jan. 4, 2017) (dismissing the relator's claims and holding that the relator did "not meet her pleading burden" where the relator had failed to identify the individuals who had made false statements or when such statements were made, and had failed to provide "at least concrete examples of false statements and false claims.") (internal quotation and citation omitted).

4. The AIM Defendants' Motion to Dismiss and Memorandum in Support set forth numerous bases for dismissing all of Relator's claims in this action. Specifically, dismissal is sought on the following grounds: (1) Relator has failed to plead the submission of a false claim; (2) Relator has not pled any of her allegations or claims with the requisite particularity; (3) Relator's allegations in the SAC fail to satisfy the FCA's materiality requirements; and (4) Relator's claims are based upon prior public disclosures and are, therefore, barred by the FCA's public disclosure bar. Each of the grounds for dismissal that are raised in the AIM Defendants'

Motion to Dismiss provides an independent basis that warrants the dismissal of Relator's claims in the SAC. Moreover, each of these significant deficiencies in Relator's SAC applies with equal force to the Relator's claims against Defendant.

5. Certain grounds for the dismissal of the SAC are particularly notable in connection with Defendant. The arguments for dismissal based upon materiality and the public disclosure bar are linked directly to Relator's allegations against Defendant and are particularly pertinent to Defendant. For example, Relator alleged that Defendant was audited by the CMS in 2013 or 2014, including in connection with denial rates. *See* Dkt. 121 at ¶ 126.⁴ Notably, Relator does not, and could not, allege that CMS refused to make any future payments to Defendant or that CMS demanded any refunds from Defendant. *See id.* Relator's scant allegations regarding Defendant serve to confirm that any purported issues that were raised in the SAC are not material to the Government's decision to pay claims, and also reflect that the underlying theory in the SAC was already publicly disclosed to the Government through the referenced CMS audit.

6. Accordingly, Defendant moves to dismiss the SAC and joins in the aforementioned AIM Defendants' Motion to Dismiss, and Defendant joins in and incorporates all of the arguments and authorities that are set forth in the AIM Defendants' Memorandum in Support as if such arguments and authorities were fully set forth herein.

WHEREFORE, Defendant respectfully moves to dismiss the SAC and joins in the AIM Defendants' Motion to Dismiss and, for the reasons set forth herein, as well as the reasons that are articulated more fully in the AIM Defendants' Motion to Dismiss and Memorandum in

⁴ Notably, Relator has also alleged that, in 2014, Defendant expressly refused the use of the so-called AIM Guidelines, which are the very guidelines that provide the backbone of Relator's alleged theory of wrongdoing in the SAC. *See* Dkt. 121 at ¶ 126.

Support, respectfully requests that this honorable Court dismiss all of Relator's claims against Defendant with prejudice.

Dated: March 13, 2018

Respectfully submitted,

/s/ David J. Pivnick
Christina M. Egan
David J. Pivnick
McGuireWoods LLP
77 W. Wacker, Suite 4100
Chicago, Illinois 60601-1818
Telephone: 312.750.8644
Facsimile: 312.698.4502
cegan@mcguirewoods.com
dpivnick@mcguirewoods.com

*Attorneys for Blue Cross and Blue Shield of
North Carolina*

