

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

UNITED STATES, ex rel. DR. SUSAN NEDZA,	)	
	)	
Relator,	)	Case No. 15-cv-6937
	)	
v.	)	Judge Alonso
	)	Magistrate Judge Cox
AMERICAN IMAGING MANAGEMENT, INC.,	)	
et al.,	)	
	)	
Defendants.	)	
	)	

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**DEFENDANTS REGENCE BLUECROSS BLUESHIELD OF OREGON, REGENCE BLUECROSS BLUESHIELD OF UTAH, REGENCE BLUESHIELD, REGENCE BLUE SHIELD OF IDAHO, AND ASURIS NORTHWEST HEALTH’S MOTION TO DISMISS AND JOINDER IN AMERICAN IMAGING MANAGEMENT, INC.’S MOTION TO DISMISS THE RELATOR’S SECOND AMENDED COMPLAINT**

Defendants Regence BlueCross BlueShield of Oregon (“Regence Oregon”), Regence BlueCross BlueShield of Utah (“Regence Utah”), Regence BlueShield, Regence Blue Shield of Idaho (“Regence Idaho”), and Asuris Northwest Health (“Asuris” and collectively, the “Regence Plans”), by and through their attorneys, McGuireWoods LLP, hereby submit this Motion to Dismiss and Joinder to American Imaging Management, Inc. and other named defendants’ (the “AIM Defendants”) Motion to Dismiss the Second Amended Complaint (Dkt. 144) and Memorandum in Support of Defendants’ Motion to Dismiss (“Memorandum in Support”) (Dkt. 145), and further state as follows:

1. On February 23, 2018, Relator filed her Second Amended Complaint (“SAC”) directed at 29 different defendants. Dkt. 121. The SAC contends that one of the defendants – American Imaging Management, Inc. (“AIM”) – allegedly conducted utilization review in a

manner that purportedly deviated from Medicare guidelines and that the remaining defendants (including the Regence Plans) engaged AIM to perform such utilization review.<sup>1</sup>

2. In the SAC, Relator improperly conflates the numerous defendants and fails to adequately plead her claims against any of the named defendants, let alone properly stating a claim against the Regence Plans.<sup>2</sup>

3. 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.

4. The allegations against the Regence Plans are particularly sparse. Of the 159 paragraphs in the SAC, four of the Regence Plans – Regence Oregon, Regence Utah, Regence BlueShield, and Asuris – are mentioned in only a single, nonsubstantive paragraph. *See* Dkt. 121 at ¶ 23 (alleging only that Anthem is not the parent company of Regence Oregon, Regence Utah,

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<sup>1</sup> Relator's SAC purports to bring claims against numerous defendants that are insurance companies that operate Medicare Advantage plans, as well as against AIM. *See* Dkt. 121. Relator alleges that the Medicare Advantage plans contracted with AIM to provide utilization management (i.e. to evaluate 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 Act 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).

<sup>2</sup> 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.").

Regence BlueShield, and Asuris).<sup>3</sup> The failure to include a single substantive allegation against any of Regence Oregon, Regence Utah, Regence BlueShield or Asuris convincingly demonstrates the inadequacy of Relator's claims.

5. Relator's allegations against Regence Idaho are similarly *de minimis* in nature and entirely inadequate. Relator references Regence Idaho in a scant four paragraphs of the SAC, none of which provide any of the requisite details for Relator to properly state a claim under the FCA. *See* Dkt. 121 at ¶¶ 23, 73, 120, 129.<sup>4</sup> Relator alleges only that: (1) Regence Idaho is a "non-Anthem insurance plan[]"; (2) that Regence Idaho was audited by the Centers for Medicare and Medicaid Services ("CMS") in 2014 and that AIM was aware of that audit; (3) through the 2014 audit CMS cited Regence Idaho for noncompliance due to AIM's utilization management practices; and, (4) "[o]n October 6, 2014, Defendant Regence of Idaho told AIM, including Christiane Shah, that it preferred to stay on the existing [utilization management] model rather than the 'more compliant' hybrid model." *Id.* Relator fails to plead any other conduct by Regence Idaho, and fails to allege a single false claim or statement that Regence Idaho submitted to the Government. Such sparse allegations are deficient under any pleading standard, let alone under the heightened pleading requirements of Federal Rule of Civil Procedure 9(b), and fail to satisfy the elements of an FCA claim under either 31 U.S.C. §§ 3729(a)(1)(A) or (B). *See United States ex rel. Fowler v. Caremark RX, L.L.C.*, 496 F.3d 730, 741 (7th Cir. 2007); *Thulin v. Shopko Stores Operating Co.*, 771 F.3d 994, 998 (7th Cir. 2014).

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<sup>3</sup> None of the Regence Plans are Anthem insurance plans. Accordingly, any knowledge that Relator is attempting to impute to the other defendants generally cannot plausibly be imputed to the Regence Plans.

<sup>4</sup> Paragraph 126 of the SAC vaguely refers only to "Defendant Regence[.]" Relator's allegation is unclear as to which of the Defendants is being referenced, because Regence BlueCross BlueShield of Oregon, Regence BlueCross BlueShield of Utah, Regence BlueShield, and Regence Blue Shield of Idaho are all defendants.

6. The SAC is entirely bereft of any allegations that set forth even a single claim or statement that any of the Regence Plans 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 the Regence Plans and does not include a single allegation setting forth the identity of any individuals at any of the Regence Plans 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 any of the Regence Plans, or any explanation as to how any of the Regence Plans' conduct led to the submission of false claims or resulted in the Government making any unwarranted payment to the Regence Plans. *See* Dkt. 121 at ¶¶ 23, 73, 120. Without more, the absence of such details is fatal to Relator's claims against the Regence Plans. *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).

7. 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. Each of these significant deficiencies in Relator's SAC applies with equal force to the Relator's claims against the Regence Plans.

8. The arguments for dismissal are particularly compelling in connection with the Regence Plans. The absence of a single substantive allegation against any of Regence Oregon, Regence Utah, Regence BlueShield or Asuris plainly establishes that Relator's claims against these defendants should be dismissed. The meager allegations against Regence Idaho are similarly lacking and warrant dismissal.

9. Moreover, the AIM Defendants' arguments for dismissal based upon materiality and the public disclosure bar are implicated by Relator's allegations against Regence Idaho. Relator alleged that Regence Idaho was audited and purportedly cited by CMS in 2014. *See* Dkt. 121 at ¶¶ 73, 120. Notably, Relator does not, and could not, allege that CMS refused to make any future payments to Regence Idaho or that CMS demanded any refunds from Regence Idaho. *See id.* Relator's limited allegations regarding Regence Idaho 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.

10. Accordingly, the Regence Plans move to dismiss Relator's claims against them with prejudice, and the Regence Plans join in the aforementioned AIM Defendants' Motion to Dismiss and join in and incorporate 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, the Regence Plans respectfully move to dismiss Relator's claims against them and join 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 Support, respectfully request that this honorable Court dismiss all of Relator's claims against the Regence Plans with prejudice.

Dated: March 13, 2018

Respectfully submitted,

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