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

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

DEFENDANT BLUE CROSS AND BLUE SHIELD OF NORTH CAROLINA'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS, AND JOINDER IN THE AIM DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS, THE RELATOR'S SECOND AMENDED COMPLAINT

Defendant Blue Cross and Blue Shield of North Carolina ("BCBSNC"), by and through its attorneys, McGuireWoods LLP, hereby submits this Reply in Support of Its Motion to Dismiss, and Joinder in American Imaging Management, Inc. and other named defendants' (the "AIM Defendants") Reply in Support of Their Motion to Dismiss, the Second Amended Complaint ("SAC") (Dkt. 190).

INTRODUCTION

BCBSNC's Motion to Dismiss established that Relator had failed to plead a claim under the False Claims Act, 31 U.S.C. § 3729, *et seq.* (the "FCA"). *See* Dkt. 157. Amongst other defects, Relator failed to identify a single claim (let alone a false claim) or statement submitted to the Government, failed to plead with the requisite particularity, failed to adequately plead materiality, and attempted to bring claims that are precluded by the FCA's public disclosure bar. These defects are apparent on the face of the SAC, and the arguments for dismissal are well-supported by legal authority. Put simply, Relator could not point to allegations in the SAC that

identified any actual claim (let alone a false claim) or that included the requisite particularity as to BCBSNC, because no such allegations exist.

It is unsurprising that Relator has resorted to obfuscation in responding to the well-supported arguments for dismissal. In her Opposition, Relator attempts to chart a course around the actual pleading requirements in the hopes that it will distract from her deficient allegations. Relator attempts to accomplish this through numerous approaches, including mischaracterizing her own allegations in an attempt to justify her impermissible group pleading, ignoring binding precedent establishing that she was required to plead the actual submission of false claims, and attempting to expand the scope of the FCA. Relator's arguments are belied by established legal authority and are not supported by the cases she cites.

Based on the myriad pleading defects in the SAC, and for the reasons that are set forth in BCBSNC's Motion to Dismiss (Dkt. 157), as well as in the AIM Defendants' Motion to Dismiss and Reply (Dkts. 144, 145, 190), which BCBSNC joins and incorporates herein, this Court should dismiss Relator's claims against BCBSNC in the entirety.[1]

ARGUMENTS

I. RELATOR'S GROUP PLEADING FAILS TO SATISFY RULE 9(b)

It is uncontested that claims brought under the FCA must be pled with Rule 9(b) particularity. Relator's SAC fails to satisfy this standard. One of the more egregious defects is Relator's persistent attempt to lump the 27 different Defendants together – an approach that has been repeatedly rejected as improper. *See, e.g.*, *Sears v. Likens*, 912 F.2d 889, 893 (7th Cir. 1990) (affirming dismissal where "the complaint lump[ed] all the defendants together and [did]

[1] BCBSNC adopts and incorporates by reference the AIM Defendants' Motion to Dismiss and Reply in support thereof. In this Reply and Joinder, BCBSNC emphasizes certain arguments that are most pertinent; however, BCBSNC expressly joins and incorporates all of the AIM Defendants' arguments, including the arguments discussed herein and the other arguments for dismissal, such as Relator's failure to adequately allege materiality and the applicability of the public disclosure bar.

not specify who was involved in what activity"); *U.S. ex rel. Grenadyor v. Ukranian Vill. Pharmacy, Inc.*, 895 F. Supp. 2d 872, 879 (N.D. Ill. 2012) (finding that allegations lumping multiple defendants together were improper); *U.S. ex rel. Walner v. NorthShore Univ. Healthsystem*, 660 F. Supp. 2d 891, 897 (N.D. Ill. 2009) (dismissing FCA claims where relator had impermissibly lumped defendants together, reasoning that the relator "fail[ed] to differentiate among Northshore and the other individuals mentioned and fails to plead each Defendant's role in the fraud, including but not limited to who submitted the false claim.").

A review of the SAC demonstrates that Relator's pertinent allegations are not specific to BCBSNC and that Relator simply attempts to group all Defendants together. Relator's Opposition ignores the allegations in the SAC, doubles down on her group pleading approach, improperly attempts to amend her SAC, and cites to readily distinguishable and inapposite case law. Relator's arguments fail for multiple reasons.

A. Relator's Actual Allegations Demonstrate that the Insurance Plan Defendants Are Not All Similarly Situated

A central theme in the Opposition is that the Insurance Plan Defendants are all similarly situated. This is inaccurate and belied by the actual text of the SAC. For example, Relator acknowledges that not all of the Insurance Plan Defendants were guaranteed cost savings by AIM. *See* Dkt. 121 at ¶ 45 ("AIM frequently promised, upon pain of penalty, to deliver cost savings."). Relator also expressly acknowledged that AIM entered into different contracts with the Insurance Plan Defendants. *See id.* at ¶ 46 ("[i]n AIM's marketing to prospective clients, and ***in many of its contracts with insurance plans***, AIM promised to deny requests at specific rates to hit cost savings goals." (emphasis added)); *id.* at ¶ 47 ("AIM also agreed to hold harmless ***certain insurance plans*** for any shortfall in the guaranteed cost savings." (emphasis added)).

The SAC is littered with allegations affirmatively demonstrating that the Insurance Plan Defendants are not similarly situated and, specifically, that the Insurance Plan Defendants have differing relationships (and different contracts) with AIM. Relator has failed to identify the specific Insurance Plan Defendants who are subject to her allegations. Relator's sparse allegations against BCBSNC lack such particularity.

B. Relator Fails to Specify BCBSNC's Role in Any Alleged Fraud

Relator also contends that she alleged each Defendants' purported role in the alleged fraud. This too is belied by the actual text of the SAC. Relator's primary allegations of purportedly non-compliant conduct are contained in Paragraphs 9 and 59-106. *See* Dkt. 121 at ¶¶ 9, 59-106. These paragraphs concern only the purported manner in which AIM performed utilization review. As the AIM Defendants correctly point out in their Motion to Dismiss, such allegations are ill-pled and conclusory. However, more importantly for purposes of BCBSNC's Motion, none of these allegations pertain to BCBSNC. Moreover, Relator fails to include any allegation setting forth whether any of these alleged actions by AIM were taken on behalf of BCBSNC (and, if so, which actions).

Similarly, Relator attempts to justify her deficient pleadings by contending repeatedly that "Defendants" made purported "admissions" that demonstrate the propriety of her allegations. *See* Dkt. 187 at 15. In making this argument, Relator ironically uses improper group pleading to justify her deficient allegations in the SAC. Specifically, Relator refers to purported admissions in Paragraphs 110, 113, 115, 116, 129, 141, and 146 of the SAC. *See* Dkt. 187 at 15 (referring to the purported admissions and citing only to these Paragraphs). These Paragraphs do not reference BCBSNC. Relator fails to reference purported admissions by BCBSNC.

Notably, Relator's limited allegations against BCBSNC actually serve to distinguish it favorably. Relator alleges that, at least as of 2014, BCBSNC insisted that AIM perform any

utilization review in a manner that is fully compliant. *See* Dkt. 121 at ¶ 145. This allegation undercuts Relator's assertions of purported wrongdoing on the part of BCBSNC. Moreover, because this allegation is made as to BCBSNC but not as to other Defendants, it aptly demonstrates the impropriety of Relator's group pleading.

Relator's approach to pleading fails to meet the particularity standard of Rule 9(b) and warrants the dismissal or Relator's claims against BCBSNC.

C. Relator Cannot Amend the SAC Through Her Opposition

Confronted with multiple well-founded Motions to Dismiss, Relator tries to amend and supplement her allegations through her Opposition. This is most evident in Relator's attempt to characterize and tweak her allegations regarding the Insurance Plan Defendants (including BCBSNC). For example, the Opposition contends that: "[i]n the instant case, the role of each Defendant MA Plan is identical," and that "Defendant MA Plans all . . . signed contracts that promised specific denials and cost savings." *See* Dkt. 187 at 25, 50-51. No such allegations are contained anywhere in the SAC. In fact, as noted above, Relator's own allegations regarding the Insurance Plan Defendants demonstrate that the contracts with AIM were not uniform and that not all such contracts included any assurances regarding denial rates or savings. *See supra* at 3-4. Having failed to actually plead that the Insurance Plan Defendants' contracts were all the same,[2] Relator cannot now credibly make that assertion in her Opposition.

[2] For purposes of the Motion to Dismiss, Relator's allegations in the SAC are taken as true. However, Relator does not get the benefit of her attempts to amend the SAC through her Opposition, particularly where these newfound contentions are contradicted by the SAC. Notably, Relator cannot credibly allege that the Insurance Plan Defendants were all similarly situated given her acknowledgment that they had different contracts with AIM. Put differently, Relator cannot truthfully plead that the Insurance Plan Defendants all entered into identical contracts with AIM, all were promised cost savings, all were promised denial rates, all relied upon AIM for the provision of the same services, all filed similar claims with the Government or all had the same interactions with CMS.

Moreover, Relator's attempt to amend the SAC through her Opposition is wholly improper. It is well-established that a complaint cannot be amended through briefs opposing a motion to dismiss. *See*, *e.g.*, *Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 348 (7th Cir. 2012) (explaining that "[i]t is a basic principle that the complaint may not be amended by the briefs in opposition to a motion to dismiss"); *Duffy v. Ticketreserve, Inc.*, 722 F. Supp. 2d 977, 990 (N.D. Ill. 2010) ("A plaintiff may not supplement or amend his complaint by presenting new facts or theories in his briefing in opposition to a motion to dismiss."). The Motions to Dismiss should be resolved based on the actual allegations in the SAC. Those allegations, amongst other dispositive pleading defects, fail to adequately state a claim. Relator's new assertions of purported fact in her Opposition should be disregarded and cannot salvage the SAC.

D. Relator Relies on Cases that Are Entirely Inapposite

Relator cites to a limited number of cases to support her argument that group pleading is permitted in certain circumstances. These cases are inapposite. The allegations in those cases were dramatically different in nature than those in the SAC, and the respective courts' rulings were limited to the specific facts of those cases. For example, in *U.S. ex rel. Myers v. Am. Disabled Homebound, Inc.*, the relator alleged that all of the defendants were liable for the alleged claims, but the court accepted this pleading approach only because the relator included specific, fact-based allegations against the various defendants. No. 14-8525, 2018 WL 1427171, at *7 (N.D. Ill. Mar. 22, 2018) (noting that the relator alleged specifically that one defendant had made the certifications, one defendant had instructed the relator to code improperly to increase reimbursements, and one defendant was an officer of the defendant company who had knowledge or acted with reckless disregard). The *Myers* decision was based upon the specific allegations raised as to each Defendant. No such specificity is included in Relator's SAC.

Relator's reliance on *U.S. ex rel. Zverev v. USA Vein Clinics of Chi., LLC* is similarly unavailing. 244 F. Supp. 3d 737, 748-49 (N.D. Ill. 2017). As an initial matter, the *Zverev* court recognized that "[s]imply lumping defendants together because they share a common nomenclature is not enough." *Id.* at 748. The *Zverev* court accepted the group pleadings only because the relator expressly alleged that one individual defendant controlled all of the entity defendants, practiced at each of these entities, and caused them each to submit fraudulent billing submissions. *Id.* Such detailed allegations provided the *Zverev* defendants with notice of their alleged fraud. No such detailed allegations are brought against BCBSNC. Moreover, Relator does not, and cannot, allege that BCBSNC is controlled by AIM and Relator fails to include any details of purportedly fraudulent billing submissions.

In short, Relator cites authority confirming the general rule that fraud must be pled with particularity as to each of the named Defendants. Relator also relies on cases that were decided based upon specific factual nuances that do not exist here. Relator's group pleading is improper and fails to satisfy the particularity requirement of Rule 9(b). As such, Relator's claims against BCBSNC should be dismissed.

II. RELATOR'S FAILURE TO IDENTIFY A SINGLE FALSE CLAIM WARRANTS THE DISMISSAL OF THE SAC

"It is well-settled that, under the False Claims Act, the Relator must provide at least some representative examples of false claims for reimbursement." *U.S. ex rel. Swift v. DeliverCareRx, Inc.*, No. 14-7976, 2015 WL 10521636, at *4 (N.D. Ill. Oct. 26, 2015) (citations omitted). As BCBSNC argued in its Motion to Dismiss, Relator has failed to identify a single claim or statement that was submitted to the Government, let alone identifying any *false* claim or statement. Without more, this pleading deficiency warrants the dismissal of Relator's claims against BCBSNC. *See, e.g.*, *U.S. ex rel. Keen v. Teva Pharms. USA Inc.*, No. 15-2309, 2017 WL

36447, at *4 (N.D. Ill. Jan. 4, 2017) (dismissing the relator's claims because she did "not meet her pleading burden" where she failed to provide "at least concrete examples of false statements and false claims." (quotation omitted)); *U.S. ex rel. West v. Ortho-McNeil Pharm., Inc.*, No. 03-8239, 2007 WL 2091185, at *7 (N.D. Ill. July 20, 2007) (dismissing the relator's FCA complaint as being insufficient because the relator had "not set forth the circumstances of any particular false statement or cited a single example of a false claim").

In her Opposition, Relator does not even attempt to contend that she identified any false claims or false statements in the SAC. Relator could not plausibly make such an assertion. Rather, Relator first contends that this is merely a "technical" argument. *See* Dkt. 187 at 11. The applicable pleading requirements are not simply technical arguments; rather, a failure to plead appropriately is an entirely appropriate grounds for dismissal. Here, Relator's failure to identify even a single false claim or statement is at the crux of the case. *See U.S. ex rel. Tucker v. Nayak*, No. 06- 662, 2009 WL 1684484, at *3 (S.D. Ill. June 15, 2009) (holding that "[e]vidence of a concrete false claim" is "the crux of an FCA case."). Relator cannot avoid her failure to satisfy the applicable pleading standard simply by arguing that it is "technical."

Relator then attempts to confuse the issue by arguing that "Defendants' contention that Relator fails to plead the submission of false claims ignores the fact that claims inevitably result from operating a Medicare Advantage plan." *See* Dkt. 187 at 26. Relator is not only unable to cite to any allegations in the SAC that would pertain to *any* actual claims to the Government, but Relator uses the Opposition to deliberately conflate the submission of claims with the submission of false claims. BCBSNC has correctly pointed out (as have the other Defendants) that Relator has failed to identify a single false claim. Relator was required to identify *false or fraudulent*

claims. Relator's retort that it can be inferred that the Insurance Plan Defendants must have submitted some unspecified claims to the Government misses the point.

Relator also cites to readily distinguishable cases in an attempt to obscure this pleading deficiency. For example, Relator relies upon *U.S. ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849, 854-55 (7th Cir. 2009). *See* Dkt. 187 at 27. In *Lusby*, the relator included allegations of specific contract terms, pled facts about non-compliance with the contract terms and false certifications of compliance, and identified specific shipment dates, and provided details of payments. *Id.* at 855. These details were deemed to be sufficient to state a claim. *Id.* However, Relator's SAC does not identify a single specific contract or detail any specific contract terms involving BCBSNC. Relator similarly fails to identify any specific dates of services or payments involving BCBSNC. Quite simply, Relator's reliance on *Lusby* is misplaced and does not justify her deficient allegations.[3]

An allegation of an actual false claim is a fundamental requirement of pleading an action under the FCA. Relator's failure to satisfy this requirement warrants the dismissal of the SAC. Her excuses for that failure and her request for the Court to draw unsupported inferences of claims should be rejected. *See Corsello v. Lincare, Inc.*, 428 F.3d 1008, 1013 (11th Cir. 2005) ("Because it is the submission of a fraudulent claim that gives rise to liability under the [FCA], that submission must be pleaded with particularity and not inferred from the circumstances."). Accordingly, Relator's claims against BCBSNC should be dismissed.

[3] Relator also relies upon *U.S. ex rel. Presser v. Acacia Mental Health Clinic, LLC*, 836 F.3d 770 (7th Cir. 2016). *See* Dkt. 187 at 12, 20, 26. *Presser* is factually distinct. As an initial matter, the Seventh Circuit found that Presser had set forth the fraudulent scheme at issue "clearly and specifically" and that the allegations reflected that the defendant "allegedly billed Medicaid for a completely different treatment." *Id.* at 779. Presser also alleged that one defendant informed her that "almost all" of defendants' patients dealt with Medicare. *Id.* at 778. Conversely, Relator has failed to plead her allegations with the requisite specificity. As to BCBSNC, Relator includes virtually no details about BCBSNC or its relationship with AIM. The *Presser* court accepted the relator's allegations of false claims only after finding that the relator's fraud scheme was well-pled. Here, the paucity of allegations against BCBSNC belies any such finding, and Relator's conclusory assertions that claims must have been submitted to the Government by "Defendants" does nothing to satisfy her obligation to identify actual false claims.

III. THE SUPREME COURT HAS EXPRESSLY STATED THAT THE FCA IS NOT "AN ALL-PURPOSE ANTIFRAUD STATUTE"

Attempting to shoehorn her allegations into a cognizable theory, Relator repeatedly asserts that the FCA is intended "to reach all types of fraud." *See* Dkt. 187 at 12, 33, n.13 (citing *Cook Cnty. v. U.S. ex rel. Chandler,* 538 U.S. 119, 129 (2003)). Relator's position is untenable.

First, *Chandler* involved a determination as to whether a municipality could be named as a defendant in an FCA case. *Chandler*, 538 U.S. at 122 (explaining that "the question is whether local governments are amenable to such suits, and we hold that they are."). Relator is citing *dicta* from an inapposite case decided more than a decade prior to *Escobar*.

Second, *Escobar* squarely addressed this issue. *See Universal Health Servs., Inc. v. U.S. ex rel. Escobar*, 136 S. Ct. 1989, 2003 (2016). Not only is *Escobar* a seminal case decided more than a decade after *Chandler*, but the Supreme Court expressly found that the FCA is not "an all-purpose antifraud statute." *Id.* (internal quotation marks and citation omitted). The Supreme Court has rejected the overly expansive and unbounded interpretation of the FCA that Relator is promulgating. Relator has failed to satisfy the applicable pleading standard and her attempt to manufacture an overly broad interpretation of the FCA has been rejected by the Supreme Court.

CONCLUSION

For the foregoing reasons, as well as the reasons that are articulated more fully in BCBSNC's Motion to Dismiss (Dkt. 157), and in the AIM Defendants' Motion to Dismiss, Memorandum in Support, and Reply Memorandum (Dkts. 144, 145, 190), this honorable Court should dismiss all of Relator's claims against BCBSNC with prejudice.

Dated: July 6, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, David J. Pivnick, an attorney, hereby certify that on July 6, 2018, I caused a copy of the foregoing Defendant Blue Cross and Blue Shield of North Carolina's Reply in Support of Its Motion to Dismiss, and Joinder in the AIM Defendant's Reply in Support of Their Motion to Dismiss, the Relator's Second Amended Complaint to be electronically filed with the Clerk of the Court. Notice of this filing will be sent by operation of the Court's CM/ECF system to all counsel of record indicated on the electronic filing receipt.

/s/ David J. Pivnick
David J. Pivnick