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

MODA HEALTH PLAN, INC.'S SUPPLEMENTAL REPLY IN SUPPORT OF MOTION TO DISMISS RELATOR'S SECOND AMENDED COMPLAINT

Defendant Moda Health Plan, Inc. (hereinafter "Moda Health") hereby submits this Supplemental Reply in Further Support of Movants' Motion to Dismiss Relator's Second Amended Complaint.

Moda Health was among the group of defendants who made a pre-answer motion to dismiss Relator's Second Amended Complaint. (Doc. # 145). While Moda Health joins Movants' Reply in Further Support of Motion to Dismiss, it also files this Supplemental Reply to specifically address certain issues specific to Moda Health.

As mentioned in Movants' Reply, Relator has not set forth a ***single*** allegation of wrongdoing specific to Moda Health in the entire 169 paragraphs that comprise the Second Amended Complaint. The only allegation that even mentions Moda Health is a single sentence stating that Moda Health is a "non-Anthem insurance" plan. (*See* Second Amended Complaint "SAC" at Docket No. 121, ¶ 23). Relator otherwise merely includes Moda Health in the caption

and preamble of her SAC. This obviously is insufficient to assert a cause of action under the False Claims Act.

Rather than alleging any specific fraudulent conduct, Relator instead relies exclusively on vague "group pleadings" claiming that the 16 Medicare Advantage Plan Defendants (the "MA Plan Defendants") hired American Imaging Management, Inc. ("AIM") and that, based on a statistical analysis of denials, the MA Plan Defendants would have been aware that AIM was improperly denying coverage. *See* SAC. These allegations lack the sufficient particularity required under Fed. R. Civ. P. 9(b). Indeed, Relator does not, for example, identify a single insured under a Moda Health Medicare Advantage Plan who was wrongfully denied coverage. Nor does Relator identify when any wrongful denials were issued. Similarly, Relator does not identify why or how the purported denial was improper. Even assuming that setting forth allegations based on statistics alone is sufficient for the purposes of alleging a FCA cause of action, which they are not, Relator still completely fails to identify what percentage of Moda Health claims were denied. Relator also does not, likely because she cannot, provide representative examples of improper denials being issued to insureds under a Moda Health Medicare Advantage Plan.

As repeatedly held by this Court, "to comply with Rule 9(b), a complaint '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.'" *United States v. America at Home Healthcare and Nursing Services, Ltd.*, No. 14-cv-1098 JRB, 2017 WL 2653070 at *9 (N.D. Ill. 2017). "Rule 9(b) is of special importance in a case involving multiple defendants." *Id.* at *5. "Where there are allegations of a fraudulent scheme with more than one defendant, the complaint should inform each defendant of the specific fraudulent acts that

constitute the basis of the action against the particular defendant." *Id.* Relator has failed to meet this basic requirement.

In *America at Home Healthcare and Nursing Services*, the defendants made a motion to dismiss a FCA claim arising out of allegations of impermissible "upcoding" and improper certifications being issued by the defendants. *Id.* at *9. The defendants contended that the relator engaged in group pleading and failed to set forth specific allegations of wrongdoing. The Honorable John Blakey recognized that "reference to collective groups of defendants . . . would be insufficient under Rule 9(b)." *Id.* He further found that while there were sufficient particularized allegations with regard to some of the defendants, with regard to the defendant Kim Richards, the group pleading allegations were insufficient even when coupled with four additional specific allegations wrongdoing. In particular, Judge Blakey held:

> These sweeping allegations may list Defendant Richards by name, but they each lack the other elements of particularity required by Rule 9(b). Some allegations — such as those related to improper certifications and upcoding — raise broad, multi-year time periods without listing any representative examples or specifics. Others , such as Defendant Richards' payment of illegal kickbacks, fail to identify the particular AAH employee involved. Under Rule 9(b), this is not enough.

Id. at *10. The allegations against Moda Health in the instant case are no different.

In this case, as described above, the lack of particularity is even more egregious. Moda Health is basically a forgotten entity that has just been added to a list of defendants and the caption. There are no specific allegations of any conduct on the part of Moda Health. Like in *America at Home*, here Relator simply raises broad multi-year time periods without listing any representative examples or specifics. Even in Relator's opposition Moda Health is only mentioned twice, in footnotes, where the defendants are literally listed.

In sum, Relator essentially contends that all she needs to do to sufficiently state a cause of action under the FCA is claim that an insurance plan at some point hired AIM to process claims.

This is not and cannot be the standard of particularity required by Fed. R. Civ. P. 9(b). For the foregoing reasons, and those set forth in the original Motion and Movants' Reply in Support of Motion to Dismiss, Moda Health Plan, Inc. respectfully requests that this Court dismiss this action, with prejudice.

Dated: July 5, 2018

Respectfully submitted,

MODA HEALTH PLAN, INC.

By: */s/ David M. Goldhaber*
One of Its attorneys

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CERTIFICATE OF SERVICE

The undersigned certifies that on July 6, 2018 this document was electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record at their e-mail addresses on file with the Court.

/s/ *David M. Goldhaber*