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

PRIORITY HEALTH'S REPLY BRIEF
IN SUPPORT OF ITS MOTION TO DISMISS[1]

By continuing to address the alleged actions of 29 separate defendants as if they were part of a single, unified effort, Relator's Omnibus Response in Opposition to Defendants' Motions to Dismiss (Dkt. No. 187 – "Opposition") underscores exactly why her Second Amended Complaint (Dkt. No. 121 – "SAC") should be dismissed as to Priority Health—because it fails to plead any knowingly false or fraudulent activity ***by Priority Health*** with any particularity, as Rule 9(b) requires. In her Opposition, Relator urges the Court to do something that is, to the best of our knowledge, unprecedented: to deny a motion to dismiss claims governed by Rule 9(b) despite the fact that Relator has not pled a single individualized, substantive allegation against Priority Health, but has instead relied entirely on group-pled allegations against all 29 "Defendants" or all 27 defendants that she calls "Plans" (none of whom she alleges conspired with Priority Health). The Court should decline Relator's invitation to break this new legal ground.

[1] Priority Health also joins in the arguments contained in the separate reply briefing by its co-defendants, to the extent applicable to Priority Health, as if fully set forth herein.

I. As to Priority Health, Relator Still Relies Solely on Group-Pled Allegations.

Priority Health is one of 27 Medicare Advantage ("MA") plan sponsors named as defendants (collectively, "MA Plan Defendants"), each of whom allegedly contracted with Defendant American Imaging Management, Inc. ("AIM") for pre-authorization review related to medical imaging services. (SAC ¶¶ 6, 23.) These 27 alleged MA Plan Defendant-AIM contracts were separate engagements; Relator does not allege that Priority Health conspired or otherwise coordinated with any of the other 26 MA Plan Defendants (some of whom are direct competitors). In her 47-page SAC, Relator has not made a single substantive allegation about what Priority Health specifically knew, intended, disregarded, claimed, stated, disclosed, did, or failed to do, and her 53-page Opposition similarly makes no such individualized argument. Instead, Relator alleges a fraudulent scheme conducted by AIM, and then simply asserts that Priority Health (and, by extension, seemingly every other MA plan sponsor that ever contracted with AIM) must have been part of, and played an identical role in, that scheme. Such "mass production" of generic FCA allegations falls far short of the particularity required by Rule 9(b).

II. Group-Pled Allegations Such as These Fail to Satisfy Rule 9(b) as a Matter of Law.

By lumping together Priority Health and more than two dozen others into generalized pleadings about what "Defendants" or "Plans" did or did not do, Relator aptly illustrates one of the dangers that Rule 9(b) is intended to prevent: a plaintiff tarring one defendant with allegations about what a completely unrelated defendant knew, said, or did, in order to create an aura of "guilt by association." *See U.S. ex rel. Keeler v. Eisai, Inc.*, 568 F. App'x 783, 793–94 (11th Cir. 2014) (Rule 9(b) may make *qui tam* claims difficult to bring, but is "necessary to prevent '[s]peculative suits against innocent actors for fraud' and charges of guilt by association.") (citing *U.S. ex rel. Claussen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1308 (11th

Cir. 2002); *U.S. ex rel. Cooper v. Blue Cross & Blue Shield of Fla.*, 19 F.3d 562, 566–67 (11th Cir. 1994) (*per curiam*)); *U.S. v. Am. at Home Healthcare and Nursing Servs., Ltd.*, No. 14-CV-1098, 2017 WL 4122740 at * 2 (N.D. Ill. Sept. 18, 2017) (Blakey, J.) ("Rule 9(b) is … more significant in cases with multiple defendants"); *U.S. ex rel. Graziosi v. Accretive Health, Inc.*, No. 13-CV-1194, 2017 WL 1079190, at *6 (N.D. Ill. Mar. 22, 2017) (Dow, J.) (dismissing non-particularized claims because, *inter alia*, "the fact that [two hospital defendants] allegedly had the same type of agreement with [the primary defendant] as [a third hospital defendant did] is insufficient to overcome Relator's failure to allege any specific facts concerning the operation of the purported [primary defendant's] … scheme at [the first two hospital defendants].").

As the Seventh Circuit has clearly stated, a complaint sounding in fraud must inform each defendant of the nature of its own alleged role, and "lumping" defendants together in group-pled allegations does not satisfy Rule 9(b)'s particularity requirement:

> [I]n a case involving multiple defendants … "the complaint should inform each defendant of the nature of his alleged participation in the fraud." [*DiVittorio v. Equidyne Extractive Indus.*, 822 F.2d 1242, 1247 (2d Cir. 1987)]; *see also Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1175 (2d Cir.1993) ("Rule 9(b) is not satisfied where the complaint vaguely attributes the alleged fraudulent statements to 'defendants.'"); *Balabanos v. North Am. Inv. Group, Ltd.*, 708 F. Supp. 1488, 1493 (N.D. Ill. 1988) (stating that in cases involving multiple defendants "the complaint should inform each defendant of the specific fraudulent acts that constitute the basis of the action against the particular defendant"). We previously have rejected complaints that have "lumped together" multiple defendants. For instance, in *Sears v. Likens*, 912 F.2d 889, 893 (7th Cir. 1990), we affirmed the district court's dismissal of the plaintiff's complaint with prejudice because the complaint was "bereft of any detail concerning who was involved in each allegedly fraudulent activity." Instead, "the complaint lump[ed] all the defendants together and [did] not specify who was involved in what activity." *Id.*; *see also Design, Inc. v. Synthetic Diamond Technology, Inc.*, 674 F. Supp. 1564, 1569 (N.D. Ill. 1987) (discussing the prohibition on lumping defendants together).

Vicom, Inc. v. Harbridge Merchant Servs., 20 F.3d 771, 778 (7th Cir. 1994).[2]

Here, the SAC's substantive allegations focus almost entirely on AIM, itself. Then, in an attempt to create the impression that AIM's clients were all identical participants in, or at least identically aware of, AIM's alleged scheme, Relator adds brief, individualized allegations concerning just five of the 27 MA Plan Defendants. (SAC ¶¶ 73, 118–20, 121, 126, 129–30, 145–47.) None of these individualized allegations concerns Priority Health, but Relator portrays them as "examples" supposedly representative of Priority Health (and of all other AIM clients) in a bootstrapped attempt to expand the potential scope of liability—exactly why Rule 9(b) bars "lumped together" pleading against multiple defendants in the first place.

III. Group-Pled Allegations Cannot Be Saved By Baldly Asserting that All Defendants Engaged in the Same Conduct.

Relator argues that this type of "group pleading is appropriate where multiple defendants engaged in the same conduct." (Opposition at 16.) But that is an entirely circular argument here. Relator has simply asserted that all 27 MA Plan Defendants engaged in identical fraudulent schemes with AIM—through undifferentiated group pleading. She has not made a single, individualized allegation against Priority Health. Accordingly, even if Relator were correct that some degree of group pleading is allowed when multiple defendants engaged in the same

[2] *Accord, e.g., U.S. ex rel. Takemoto v. Nationwide Mut. Ins. Co.,* No. 16-CV-365 (2d Cir. Jan. 20, 2017) (Summary Order) (affirming dismissal of group-pled FCA allegations against multiple insurance company defendants and also affirming district court's denial of leave to amend); *U.S. ex rel. Dolan v. Long Grove Manor, Inc*., No. 10-CV-0368, 2014 WL 3583980, at *6 (N.D. Ill. July 18, 2014) (Bucklo, J.) ("relator is not entitled to embark on a fishing expedition against thirteen entities (not to mention three individuals) based on the fraud he claims to have witnessed as an employee of one of them") (internal citation omitted); *U.S. ex rel. Walner v. Northshore University Healthsystem*, 660 F. Supp. 2d 891, 897 (N.D. Ill. 2009) (Kendall, J.) (dismissing FCA claims because relator failed to plead each defendant's "role in the fraud, including but not limited to who submitted the false claim"); *Stop Illinois Health Care Fraud, LLC v. Sayeed*, No. 12-CV-9306, 2016 WL 4479542, at *4 (N.D. Ill. Aug. 25, 2016) (Coleman, J.) (dismissing FCA complaint against multiple defendants that "lack[ed] the specificity with respect to who did what when as mandated by Rule 9(b)."); *U.S. ex rel. Oughatiyan v. IPC The Hospitalist Co., Inc.*, No. 09-CV-05418, 2015 WL 718345, at *6–7 (N.D. Ill. Feb. 17, 2015) (Lefkow, J.) (dismissing FCA claims against multiple, non-differentiated defendants); *Suburban Buick, Inc. v. Gargo*, No. 08-CV-0370, 2009 WL 1543709 at *4 (N.D. Ill. May 29, 2009) (Gettleman, J.) (dismissing RICO counts where plaintiff failed to identify which of the six counts applied to which defendants).

conduct, one first has to make that predicate showing through individualized pleading (with particularity)—something Relator hasn't even attempted here.

Moreover, the cases Relator cites in defense of her group pleading approach do not support her argument; they actually support Priority Health's arguments for dismissal:

- In *U.S. ex rel. Myers v. Am.'s Disabled Homebound, Inc.*, the relator sued a corporation, its president, two of its employees, and another corporation that shared the same president. No. 14-CV-8525, 2018 WL 1427171, at *7 (N.D. Ill. Mar. 22, 2018) (Durkin, J.). The court held that group pleading was permissible as to these related entities and individuals because the relator alleged that all of the defendants shared liability for making the same false claim. *Id.* Here, in contrast, there is no allegation that Priority Health is related to any other MA Plan Defendant, or that it joined any of them in making any common claim for government payment.

- In *U.S. ex rel. Zverev v. USA Vein Clinics of Chicago, LLC*, the relator sued a cardiovascular surgeon and various limited liability companies purportedly owned or controlled by him, and specifically alleged that the different defendants were "structured and operated as an integrated unit." 244 F. Supp. 3d 737, 748–49 (N.D. Ill. 2017) (Tharp, J.). Relator makes no such allegation about Priority Health and any other defendant in this case.

- In *Motorola, Inc. v. Lemko Corp.*, the court actually dismissed the plaintiff's fraud count for failure to satisfy Rule 9(b) and state a claim. No. 08-CV-05427, 2010 WL 1474795 (N.D. Ill. Apr. 12, 2010) (Kennelly, J.). In so doing, the court recognized that "[a] fraud complaint that 'lumps all the defendants together and does not specify who was involved in what activity' typically does not satisfy Rule 9(b)," but declined to dismiss on that ground because the relevant allegation against each defendant truly was identical and, thus, would have necessitated verbatim repetition across six separate paragraphs. *Id.* (quoting *Sears*, 912 F.2d at 893). The *Motorola* complaint also included numerous individualized allegations against the various defendants, who were alleged to be co-conspirators. *See id.* (Second Amended Complaint, Dkt. No. 290, Dec. 18, 2009). None of that is true in this case.[3]

[3] Other cases Relator cites similarly support Priority Health's arguments for dismissal. *See U.S. ex rel. Swoben v. United Healthcare Ins., Co.*, 848 F.3d 1161, 1180 (9th Cir. 2016) (dismissing certain defendants where complaint offered only general allegations and "describe[d] some details of a generalized scheme, but … provide[d] no details linking [those] defendants to the scheme"); *U.S. ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849 (7th Cir. 2009) (partially dismissing complaint where relator offered no facts showing that defendant committed fraud during negotiations with the government). The cases Relator cites in which motions to dismiss on Rule 9(b) grounds were denied turned on the inclusion of particularized factual allegations addressing all of the required elements of the claims at issue as to each defendant—unlike Relator's approach here. *See U.S. ex rel. Trombetta v. EMSCO Billing Servs., Inc.*, Nos. 96-CV-0226, 99-CV-0151, 2002 WL 34543515 (N.D. Ill. Dec. 5, 2002) (Gottschall, J.) (relator's

IV. Relator Has Failed to Sufficiently Plead Reckless Disregard by Priority Health.

In another attempt to save her complaint from dismissal (because it fails to sufficiently allege the requisite scienter), Relator contends that the SAC "raises a plausible inference that Defendant MA Plans were at least reckless." (Opposition at 42.) The Seventh Circuit defines reckless disregard in the FCA context as "grossly negligent or with reason to know of facts that would lead a reasonable person to realize that it was submitting false claims." *Thulin v. Shopko Stores Operating Co.*, 771 F.3d 994, 1000 (7th Cir. 2014) (quoting *U.S. ex rel. Watson v. King-Vassel*, 728 F.3d 707, 713 (7th Cir. 2013)). Vague allegations that a corporation acted with reckless disregard simply by virtue of its size, sophistication, or reach are not sufficient to "nudge" a relator's claims "across the line from conceivable to plausible." *Thulin*, 771 F.3d at 1001 (relator's vague allegations that defendant acted recklessly did not satisfy Rule 9(b)).

Here, Relator's reckless disregard argument fails because Relator does not allege any facts showing that Priority Health ever had reason to believe that it was submitting false claims. Relator alleges that the MA Plan Defendants "purchased . . . denial rates more than five times that available under Medicare rules" (Opposition at 42) but Relator does not, in fact, allege any facts showing what the actual AIM denial rates were for Priority Health's MA beneficiaries. Relator merely alleges that, to win business from MA plans, AIM promised denial rates as high as 5% to 9%. (SAC ¶ 48.) Relator then generally alleges, "on information and belief," that AIM

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claims against several closely-related corporations and their sole owner and CEO satisfied Rule 9(b) where relator offered detailed allegations of various fraudulent techniques used by defendants by pointing to specific disparities in the defendants' coding practices and including excerpts from memoranda and meeting minutes); *U.S. ex rel. Cieszyski v. LifeWatch Services, Inc.*, No. 13-CV-4052, 2015 WL 6153937 (N.D. Ill. Oct. 19, 2015) (Schenkier, Mag. J.) (relator satisfied Rule 9(b) by pleading specific examples of defendant's fraudulent scheme); *Leveski v. ITT Educ. Servs. Inc.*, 719 F.3d 818 (7th Cir. 2013) (relator satisfied Rule 9(b) where complaint included specific details of relator's personal and direct knowledge of defendant's business and fraud); *U.S. ex rel. McCarthy*, No. 11-CV-7071, 2014 WL 4924445 (N.D. Ill. Sept. 30, 2014) (Coleman, J.) (relator satisfied Rule 9(b) by describing who prepared, signed, and submitted all certificates of compliance to government, and identified "timelines and specific examples" of defendants' fraudulent scheme); *U.S. ex rel. Salmeron v. Enter. Recovery Sys., Inc.*, 464 F. Supp. 2d 766, 768 (N.D. Ill. 2016) (Shadur, J.) (relator satisfied Rule 9(b) by describing in detail defendant's role in fraudulent scheme, approximate time when she became aware of scheme, and how she learned of the scheme).

"never failed to meet a contractual denial target for any insurance plan with whom it contracted." (SAC ¶ 50.) As the Seventh Circuit has noted, "'on information and belief' can mean as little as 'rumor has it.'" *U.S. ex rel. Bogina v. Medline Indus., Inc.*, 809 F.3d 365, 370 (7th Cir. 2016) (holding that "allegations based on 'information and belief' . . . won't do in a fraud case"). Here, such allegations fail to raise a plausible inference of reckless disregard by Priority Health.

V. Priority Health Does Not Rely on Mere "Technical" Defenses or Information Asymmetries.

Relator also argues that Priority Health relies on mere "technical" defenses in seeking dismissal of this action. (Opposition at 3, 25.) But there is nothing "technical" about holding Relator's meritless *qui tam* complaint to the rules of pleading and the required elements of the claims she has chosen to assert. Indeed, courts in this circuit routinely dismiss FCA matters for the very reasons advanced here by Priority Health. *See, e.g., U.S. ex rel. Bellevue v. Universal Health Servs. of Hartgrove, Inc.*, 867 F.3d 712, 721 (7th Cir. 2017) (affirming dismissal on public disclosure grounds), *cert. denied*, 138 S. Ct. 1284 (2018); *U.S. v. Sanford-Brown, Ltd.*, 840 F.3d 445, 448 (7th Cir. 2016) (granting summary judgment to defendant because alleged non-compliance was not material to payment decision); *U.S. ex rel. Grenadyor v. Ukrainian Vill. Pharmacy, Inc.*, 772 F.3d 1102, 1106 (7th Cir. 2014) (affirming dismissal for failure to plead false claim with particularity).

While Relator attempts to avoid dismissal by noting that the Seventh Circuit has cautioned litigants and courts against taking an "overly rigid view" of Rule 9(b), (Opposition at 12), the Seventh Circuit has also made clear that "flexibility in the face of information asymmetries should not be conflated with whistling past the rules of civil procedure." *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Tr. v. Walgreen Co.*, 631 F.3d 436, 446 (7th Cir. 2011) (granting motion to dismiss for failure to satisfy Rule 9(b)). Regardless of the

circumstances, a relator "still must use some alternative means of injecting precision and some measure of substantiation into their allegations of fraud." *U.S. & State of Ill. ex. rel. Gray v. United Healthcare Ins. Co., et al.*, 15-CV-07137 (N.D. Ill. June 12, 2018) (Durkin, J.) (granting motion to dismiss MA-based FCA claims); *see also Uni*Quality, Inc. v. Infotronx, Inc.*, 974 F.2d 918 (7th Cir. 1992) (dismissing complaint based on Rule 9(b) deficiency). Here, with respect to Priority Health, Relator has offered no such thing. The simple fact remains that Relator has entirely failed to allege: anything about what Priority Health actually did in response to AIM's purportedly-improper coverage denials (e.g., ratify some/all of them?, overrule any of them?, etc.); anything about any claim for government reimbursement Priority Health actually may have submitted and any relationship of any such claim to AIM's purported activities; or anything about what Priority Health specifically knew or recklessly disregarded concerning AIM's purported activities. These deficiencies in Relator's SAC are not "technical"; they are, as a matter of law, fatal.

CONCLUSION

In short, Relator is asking this Court to do something unprecedented: to permit her to lump together more than two dozen, completely unrelated defendants in group pleadings merely because they share a common characteristic of having contracted with the same party (AIM) whom Relator alleges engaged in non-compliant activities. Not one of the cases Relator cites in her Opposition supports such an extraordinary end run around Rule 9(b), nor has Relator given this Court any reason to break from well-established precedent that requires individualized pleading with particularity.

WHEREFORE, for the reasons set forth above and also in Priority Health's motion to dismiss and supporting memorandum, Priority Health respectfully requests that this Court grant its Motion to Dismiss Relator's Second Amended Complaint, with prejudice.

Date: July 6, 2018

Respectfully submitted,

PRIORITY HEALTH

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CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2018, a copy of the foregoing document was filed electronically through the Court's CM/ECF system and will be sent electronically to all persons identified on the Notice of Electronic Filing.

/s/ Sheila M. Prendergast