

**IN THE 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.

No. 1:15-cv-006937

Hon. Jorge L. Alonso

**DEFENDANTS PROVIDENCE HEALTH PLAN
AND PROVIDENCE HEALTH ASSURANCE'S REPLY IN SUPPORT OF MOTION
TO DISMISS RELATOR'S SECOND AMENDED COMPLAINT**

Relator's Response in Opposition to Movants' Motions to Dismiss (the "Response"), like its Second Amended Complaint ("SAC"), is devoid of facts showing wrongdoing by defendants Providence Health Plan and Providence Health Assurance (collectively referred to herein as the "Providence Plans"). The Relator falls far short of stating with particularity what claims the Providence Plans submitted to the Government, how the Providence Plans' conduct resulted in any fraudulent misrepresentation to the Government, how the Providence Plans could have knowledge of any false claims, or why any alleged improper conduct by the Providence Plans could have been material to the Government's decisions to pay anything to the Providence Plans. Indeed, in the entirety of her 47 page SAC and 53 page Response, the Relator makes no substantive allegation about the Providence Plans or their alleged wrongdoing at all. The Relator fails to state a plausible FCA violation against the Providence Plans, let alone with the requisite particularity required by Federal Rule of Civil Procedure 9(b). Consequently, her claims against the Providence Plans should be dismissed with prejudice.

The Providence Plans also join in the Movants' Reply in Support of the Motion to Dismiss, filed on July 6, 2018. As is set forth in that Reply, as well as in the Motion to Dismiss filed at docket number 145 by the AIM Defendants and other insurance plan defendants, the Motion to Dismiss filed at docket number 102 by Health First, and the Motion to Dismiss filed at docket number 152 by Blue Cross Blue Shield of Michigan Mutual Insurance Company, the Relator's SAC fails with respect to all Defendants because: (1) she still has not pled the submission of a false claim by any defendant; (2) she has not pled a scheme of intentional fraud; (3) she fails to plead facts sufficient to satisfy the materiality requirements for an FCA claim; and (4) her claims are barred by the FCA's public disclosure and original source provisions. The Providence Plans join in and incorporate by reference the Movants' Reply in Support of the

Motion to Dismiss. The SAC should be dismissed for the reasons set forth therein, and in any event should be dismissed as to the Providence Plans for the additional reasons set forth herein.

ARGUMENT

The Relator's Response makes no attempt to address its failure to plead with particularity an FCA violation *by the Providence Plans*. As is set forth in the Providence Plan's Motion to Dismiss, there is no specific allegation anywhere in the SAC as to any improper conduct by the Providence Plans, how the Providence Plans would have had any knowledge of AIM's alleged conduct, or how AIM's alleged conduct was connected to any claim for payment or statement made to the government by the Providence Plans. The SAC makes no allegations about the Providence Plans' denial rates, about their communications with AIM, or about the propriety of any particular denials of imaging services for members of the Providence Plans. The SAC does not even allege that the Providence Plans in fact had higher than average denial rates, or had knowledge of such through correspondence or other events. The SAC fails to identify even one false claim that the Providence Plans submitted to the Government. On top of all of this, the Relator did not even know which Providence entities contracted with AIM until informed by undersigned counsel after naming an incorrect Providence entity.

The Relator's Response does not deny this lack of pleading with any particularity, but instead argues the sufficiency of group pleading as the sole basis to salvage her claims against the Providence Plans. As is discussed in the Movants' Reply to the Motion to Dismiss, such group pleading does not satisfy Rule 9(b) in this case. *See* Movants' Reply at 8-10. While group pleading could suffice in a case where the claims against each Defendant have identical factual bases, that is not so here—each MA Plan had different interactions with AIM, different contracts with AIM, and different denial rates.

Importantly, the SAC makes no allegation that the Providence Plans had *actual knowledge* of any fraudulent scheme. As a fallback, in her Response, the Relator argues that the MA Plans (including the Providence Plans) were at least reckless in contracting with AIM. Dkt. 187 at 41-43. However, this argument, too, is based on impermissible group pleading and not actually supported by the allegations in the SAC. For example, the Relator claims that the MA Plans were reckless because they received information that denial rates were more than five times that available under Medicare rules. *Id.* at 42. Ignoring that this is factually misleading, *see* Reply at 7, n.4, the SAC does not even make such an allegation, let alone with respect to the Providence Plans. *See* Dkt. 181 at 42 (citing to paragraphs 7 and 46 of the SAC, which paragraphs *do not* allege that every MA Plan had excessive denial rates). As another example, the Relator claims that the MA Plans were reckless because they “chose AIM’s unlawful UM review process over other more compliant review products that AIM offered.” *Id.* at 43. Again, this contention is missing entirely from the SAC. Paragraphs 128 and 129 of the SAC, on which the Relator relies, in no way allege that *every Defendant MA Plan* chose a noncompliant UM review process, and the paragraphs certainly do not allege that the Providence Plans chose such a process. Similarly, the Relator claims that the MA Plans discussed Medicare compliance with AIM directly, but again, the cited paragraphs make no such allegation about all Defendant MA Plans or the Providence Plans. *See id.* (citing paragraphs 144, 145, and 146 of the SAC, which allege only that “many”—but not all—of the AIM contracts contained certain language, and then allege specific examples of discussions with other Defendant MA Plans—not the Providence Plans).

These are just a few of the examples of the ways in which the Relator’s group pleading fails to sufficiently allege any wrongdoing by the Providence Plans. The SAC is devoid of any

allegation as to the “who, what, where, when, or how” of the Providence Plans’ alleged involvement in any fraud. *See Bank of Am., N.A., v. Knight*, 725 F.3d 815, 818 (7th Cir. 2013). As such, the SAC should be dismissed with prejudice as against the Providence Plans.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the Movants’ Reply and the Providence Plans, AIM, Health First, and BCBSM Motions to Dismiss, the Providence Plans respectfully request that the Court dismiss with prejudice all of the Relator’s claims against the Providence Plans.

Dated: July 6, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the above document was filed through the CM/ECF system and will be served upon the attorneys of record by electronic means on July 6, 2018.

/s/ Lauren B. Rainwater
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