

1 DAVID DEATON (S.B. # 205713)
ddeaton@omm.com
2 STEPHEN M. SULLIVAN (S.B. # 245314)
ssullivan@omm.com
3 CAITLIN M. BAIR (S.B. # 256994)
cbair@omm.com
4 DIMITRI D. PORTNOI (S.B. # 282871)
dportnoi@omm.com
5 O'MELVENY & MYERS LLP
6 Two Embarcadero Center
7 San Francisco, California 94111
Telephone: (415) 984-8700
8 Facsimile: (415) 984-8701

K. LEE BLALACK, II (admitted *pro hac vice*)
lblalack@omm.com
DAVID J. LEVISS (admitted *pro hac vice*)
dleviss@omm.com
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
Telephone: (202) 383-5300
Facsimile: (202) 383-5414

9 *Attorneys for Defendants Kaiser Foundation*
10 *Health Plan, Inc.; Kaiser Foundation Health*
11 *Plan of Colorado; The Permanente Medical*
12 *Group, Inc.; Southern California Permanente*
Medical Group; and Colorado Permanente
Medical Group, P.C.

13 *[Additional Counsel Listed on Signature Page]*

14
15
16
17 **UNITED STATES DISTRICT COURT**
18 **NORTHERN DISTRICT OF CALIFORNIA**

19
20 UNITED STATES OF AMERICA ex rel.
RONDA OSINEK,

21
22 Plaintiff,

23 v.

24 KAISER PERMANENTE, et al.,

25 Defendants.
26
27
28

Case No. 3:13-cv-03891-EMC

**JOINT REPORT ON COURT-ORDERED
MEET AND CONFER REGARDING
DEFENDANTS' MOTION TO STAGE FED.
R. CIV. P. 12 BRIEFING**

(CAPTION CONTINUED)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES OF AMERICA ex rel.
NASER AREFI, AJITH KUMAR and PRIME
HEALTHCARE SERVICES, INC.,

Plaintiff,

v.

KAISER FOUNDATION HEALTH PLAN,
INC., et al.,

Defendants.

Case No. 3:16-cv-01558-EMC

**JOINT REPORT ON COURT-
ORDERED MEET AND CONFER
REGARDING DEFENDANTS'
MOTION TO STAGE FED. R. CIV. P.
12 BRIEFING**

UNITED STATES OF AMERICA ex rel.
MARCIA STEIN and RODOLFO BONE,

Plaintiff,

v.

KAISER FOUNDATION HEALTH PLAN,
INC., et al.,

Defendants.

Case No. 3:16-cv-05337-EMC

**JOINT REPORT ON COURT-
ORDERED MEET AND CONFER
REGARDING DEFENDANTS'
MOTION TO STAGE FED. R. CIV. P.
12 BRIEFING**

UNITED STATES OF AMERICA ex rel.
GLORYANNE BRYANT and VICTORIA
HERNANDEZ,

Plaintiff,

v.

KAISER PERMANENTE, et al.,

Defendants.

Case No. 3:18-cv-01347-EMC

**JOINT REPORT ON COURT-
ORDERED MEET AND CONFER
REGARDING DEFENDANTS'
MOTION TO STAGE FED. R. CIV. P.
12 BRIEFING**

(CAPTION CONTINUED)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES OF AMERICA and
STATE OF CALIFORNIA ex rel. MICHAEL
BICOCCA,

Plaintiffs,

v.

PERMANENTE MEDICAL GROUP, INC.,
et al.,

Defendants.

Case No. 3:21-cv-03124-EMC

**JOINT REPORT ON COURT-
ORDERED MEET AND CONFER
REGARDING DEFENDANTS'
MOTION TO STAGE FED. R. CIV. P.
12 BRIEFING**

UNITED STATES OF AMERICA ex rel.
JAMES M. TAYLOR,

Plaintiff,

v.

KAISER PERMANENTE, et al.,

Defendants.

Case No. 3:21-cv-03894-EMC

**JOINT REPORT ON COURT-
ORDERED MEET AND CONFER
REGARDING DEFENDANTS'
MOTION TO STAGE FED. R. CIV. P.
12 BRIEFING**

1 Pursuant to the Clerk’s Notice of October 22, 2021, Dkt. No. 108, the United States of
2 America; Defendants Kaiser Foundation Health Plan, Inc., Kaiser Foundation Health Plan of
3 Colorado, The Permanente Medical Group, Inc., Southern California Permanente Medical Group,
4 and Colorado Permanente Medical Group, P.C. (collectively, “Defendants”); and Relators Ronda
5 Osinek, James Taylor, M.D., Naser Arefi, Ajith Kumar, Prime Healthcare Services, Inc., Marcia
6 Stein, Rodolfo Bone, Gloryanne Bryant, Victoria Hernandez, and Michael Bicocca, M.D.
7 (collectively, “Relators”), by their respective counsel, submit the following joint report on their
8 November 1, 2021 meet and confer concerning Defendants’ pending motion to stage Federal Rule
9 of Civil Procedure (“Rule”) 12 briefing.

10 **I. Procedural History**

11 On October 7, 2021, the parties filed a Joint Stipulation reflecting their agreement on a
12 request to continue the case management conference and to set a motion-to-dismiss briefing
13 schedule. Dkt. No. 99. The Joint Stipulation reported that the parties had conferred about a
14 briefing schedule but were unable to reach agreement on Defendants’ request to stage Rule 12
15 briefing. *Id.* ¶ 10. The parties also proposed a briefing schedule on Defendants’ motion for leave
16 to stage Rule 12 briefing given the impasse on the issue. *Id.* ¶¶ 10–11.

17 On October 10, 2021, the Court granted the parties’ Joint Stipulation and set a briefing
18 schedule on Defendants’ motion for leave to stage Rule 12 briefing. Dkt. No. 104. Pursuant to
19 this schedule, Defendants filed their Motion to Stage Fed. R. Civ. P. 12 Briefing (“Motion”) on
20 October 22, 2021. Dkt. No. 107. In response, the Court issued a Clerk’s Notice, ordering the
21 parties to meet and confer on the subject of the Motion and “report back on their meet and confer
22 by 11/4/2021.” Dkt. No. 108. The Court noted that if the parties were not able to reach a
23 compromise, “each party should state its last proposal/offer of compromise.” *Id.* The parties met
24 and conferred on November 1, 2021, as ordered, but remain unable to reach a compromise.
25 Accordingly, they set forth their positions as follows:

26 **II. Defendants’ Position**

27 In their Motion, Defendants explained that the False Claims Act’s (“FCA”) first-to-file bar
28 prohibits repetitive suits, and may require dismissal in whole or in part of one or more of the five

1 Relator complaints filed after *Osinek* (the “Later-Filed Complaints”). Mot. at 6 (citing 31 U.S.C.
2 § 3730(b)(5)). Because Defendants intend to bring a motion based on the first-to-file bar
3 potentially against all of the Later-Filed Complaints, they proposed briefing dismissal arguments
4 in two stages. First, Defendants propose to file (1) their first-to-file motion against the Later-
5 Filed Complaints, (2) a response to the United States’ complaint-in-intervention, and (3) a
6 response to the *Osinek qui tam* amended complaint by January 18, 2022, the current deadline for
7 Defendants to file their responses to all complaints. *Id.* Second, within thirty days of the Court’s
8 decision on the first-to-file motion, Defendants would file any motions to dismiss on other Rule
9 12(b) grounds against any Later-Filed Complaints that survive the first-to-file motion. *Id.*

10 The Motion explained that Defendants’ request to stage Rule 12 briefing would streamline
11 early briefing and preserve the resources of both the Court and the parties. *See id.* at 6–7.
12 Briefing the first-to-file issue at the same time as all Rule 12 arguments on seven separate
13 complaints would be needlessly complex and unwieldy. Such an approach would require the
14 Court and the parties to spend time and resources on arguments that could be mooted by the first-
15 to-file motion. A staged approach could save the time and resources equivalent to drafting, filing,
16 and considering the merits of five motions to dismiss, oppositions, and replies.¹ And should the
17 Court deny the first-to-file motion in its entirety, little would be lost—the parties could address
18 the remaining arguments in the second round of briefing limited to Rule 12 arguments unrelated
19 to the first-to-file issue.

20 During the meet and confer, Relators rejected any form of staged briefing.² Instead,
21 counsel for Relators stated that they would be amenable to extending Defendants’ current
22 deadline to file dismissal motions and agree to increased page limits on the motions, coupled with
23 a stay of discovery during the length of any such extension. Defendants could not agree to such a

24
25 ¹ To be clear, Defendants intend to file a single motion under the first-to-file bar, consolidating
26 their arguments as to all the Later-Filed Complaints into one brief. While Defendants may
27 request a page-limit extension for this motion, it will be far more efficient for the Court to decide
28 this single motion before the parties brief and the Court considers five separate motions to dismiss
on other grounds.

² The United States did not take a position on Defendants’ Motion during the call.

1 proposal because it does not further any of the benefits of staged briefing. It would require the
 2 parties to engage in potentially unnecessary briefing and would further delay discovery in a case
 3 where the government has already taken discovery for eight years.

4 In response, counsel for Defendants referred to the Motion and the efficiency interests
 5 served by staged Rule 12 briefing given the number of Relator complaints at issue. Counsel for
 6 Defendants also noted that a Rule 12(c) motion for judgment on the pleadings provides an
 7 alternative opportunity for staged briefing here, which Defendants may elect if the Court does not
 8 grant successive Rule 12(b) briefing, but that Defendants believe staged briefing at the outset
 9 before answering Relators' complaints would maximize efficiencies for the Court and all parties.
 10 *See Artec Grp., Inc. v. Klimov*, 2016 WL 8223346, at *1 n.2 (N.D. Cal. Dec. 22, 2016) (Chen, J.)
 11 (electing to hear successive Rule 12(b) motions, observing that “judicial economy favor[ed]
 12 resolution of [a defendant’s] motion because [the defendant] would be able to renew the same
 13 arguments presented . . . in a Rule 12(c) motion for judgment on the pleadings after filing an
 14 answer”). Nonetheless, the parties were not able to reach agreement.

15 Relators falsely characterize Defendants as seeking “two bites” at dismissal. Defendants
 16 propose making all of their Rule 12 dismissal arguments *once*, but in two stages—because the
 17 first stage may render all or part of the second stage *completely unnecessary*. Staging will not
 18 require this Court or the parties to repeat efforts; as explained, it can only save resources.³

19 Given that the parties were not able to come to an agreement during the meet and confer,
 20 Defendants request that the Court order staged Rule 12 briefing consistent with the request in
 21 Defendants' Motion.

22 **III. Relators' Position**

23 Handling Motions to Dismiss in a single round is straightforward and a better use of the
 24

25 ³ Relators also ask this Court to follow cases where courts have considered first-to-file and other
 26 Rule 12 arguments simultaneously, but not one of the cases they cite involved multiple later-filed
 27 *qui tam* complaints, let alone five. Defendants are unaware of a published decision addressing
 28 these issues simultaneously among so many overlapping consolidated complaints. Given the
 complexity of this case and the number of *qui tam* complaints at issue, the Court should exercise
 its discretion to stage pre-answer Rule 12 motions.

1 parties' and the Court's resources. Despite the complexity of consolidated cases, the default
2 approach contemplated by the Rules is efficient here. Indeed, courts in this circuit routinely
3 decide Motions to Dismiss presenting arguments regarding the False Claims Act's first-to-file bar
4 in a single decision along with any other grounds for dismissal. *See e.g., United States ex rel.*
5 *Barrett v. Allergan, Inc.*, 2019 WL 4675756 (C.D. Cal. 2019); *United States ex rel. Chin v. CVS*
6 *Pharmacy, Inc.*, 2017 WL 4174416 (C.D. Cal. 2017); *United States ex rel. Savage v. CH2M Hill*
7 *Plateau Remediation Co.*, 2015 WL 5794357 (E.D. Wash. 2015); *United States ex rel. Harris v.*
8 *Alan Richty, Inc.*, 2006 WL 3761339 (W.D. Wash. 2006).

9 Defendants simply want two bites at Motions to Dismiss, and their supposed efficiency
10 rationale falls apart on examination. A court's resolution of first-to-file issues requires a close
11 examination of the complaints involved, similar to that required to address any other Motion to
12 Dismiss arguments Defendants would prefer to raise later, obviating any supposed efficiency.
13 When analyzing whether a later-filed action is "based on the facts underlying the pending action,"
14 courts in the Ninth Circuit ask whether the claims in the later-filed complaint are based on the
15 same "material facts" as the claims in the earlier-filed complaint. *See United States ex rel.*
16 *Hartpence v. Kinetic Concepts Inc.*, 792 F.3d 1121, 1131-32 (9th Cir. 2015). Mechanically, the
17 test entails a side-by-side, claim-by-claim comparison of the two complaints. *Id.* at 1131
18 (comparing alleged schemes and permitting later filed complaint); *see also, e.g., Barrett*, 2019
19 WL 4675756 *3-4 (same). The mere fact that all Relator complaints here involve allegations of
20 fraud against the Medicare Advantage program is just a sign of Kaiser's line of business; it is not
21 a meaningful part of the first-to-file analysis, which requires a review of what is actually pleaded.
22 *See, e.g., Barrett*, 2019 WL 4675756 *4 (different fraudulent scheme by same defendant and
23 same drug not barred). That same level of review will be required when analyzing any other
24 Motion to Dismiss arguments. Permitting two rounds of briefing, and potentially having the
25 Court analyze several Relator complaints in detail twice, would thus needlessly require the Court
26 to duplicate its efforts. It is telling that Defendants have not cited a single instance of Courts
27
28

1 permitting the type of multiple rounds of briefing that they seek.⁴

2 Defendants propose to file a consolidated Motion to Dismiss on first-to-file issues, but
3 Relators, who have different complaints and stand in different positions, will nonetheless be
4 required to respond individually. The Court, in keeping with the careful review required by the
5 caselaw, will need to examine those responses and complaints in detail, eliminating the supposed
6 efficiency of Defendants' proposal. At the same time, the Court will be weighing Defendants'
7 proposed Motions to Dismiss against the United States' and Osinek's complaints, which will
8 likely raise arguments identical to those Defendants will raise against other Relators. It would be
9 more straightforward, and more efficient, for the Court to resolve all those arguments at the same
10 time, especially given that any nuance to the Defendants' arguments on particular complaints
11 would require the same type of judicial review as the first-to-file decision. With a single round of
12 Motions, the Court will have the benefit of seeing the full complement of arguments on both sides
13 of each complaint and making its decisions on a complete record, without duplicating efforts.⁵

14 In a show of good faith, Relators offered Defendants additional pages and time for their
15 Motions to Dismiss that include first-to-file arguments so that Defendants would not have to file
16 them simultaneously with their Motions directed against the Government and *Osinek* Complaints
17 and would have some relief from to the page limits of the local rules. While Relators initially
18 proposed five additional pages and thirty additional days, counsel made clear that those numbers
19 were negotiable. Relators also proposed as an initial offer that any discovery on those complaints
20 be delayed by the same amount.

21 In brief, Relators proposed as an opening position regarding Kaiser's Motions to Dismiss
22 Relators' complaints other than Osinek's:

- 23 1. Five additional pages
24

25 ⁴ Defendants' citation to Rule 12(c) does not support their position. Under the Rules, any arguments
26 Defendants wish to raise under 12(b) must be raised before they file a responsive pleading.

27 ⁵ Should the Court then decide to resolve certain questions but not others, it will at least have had
28 the benefit of complete briefing, with little additional work for parties who will be grappling with
the same set of issues regardless.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

2. Deadline of February 17, 2022 (thirty days after the current responsive pleading deadline of January 18, 2022)
3. Discovery on those complaints to be delayed by thirty days

Defendants elected not to make any counterproposal and stood instead on the position they took in the brief to the Court that spurred the Meet and Confer order.

In the end, Defendants do not really seek efficiency—there is nothing more efficient than a single round of Rule 12(b) briefing conducted on a structured schedule that allows ample time and space for Defendants to raise all of their Rule 12(b) challenges, as Relators have proposed. Instead, what Defendants are really seeking here are two attempts at dismissal and the opportunity to delay answering Relators’ complaints for as long as possible. This is not efficiency, but gamesmanship. Accordingly, Relators request that the Court deny Defendants’ request for multiple rounds of Rule 12 briefing, but they remain open to reasonable requests as to the timing and length of Defendants’ potential Motions to Dismiss, as well as the related discovery schedule.

IV. United States’ Position

The United States defers to the Court’s judgment as to what is most efficient in this regard.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: November 4, 2021

Respectfully submitted,

By: /s/ David J. Levis
DAVID J. LEVISS
K. LEE BLALACK, II
DAVID DEATON
STEPHEN M. SULLIVAN
CAITLIN M. BAIR
DIMITRI D. PORTNOI

*Attorneys for Defendants Kaiser
Foundation Health Plan, Inc.; Kaiser
Foundation Health Plan of Colorado;
The Permanente Medical Group, Inc.;
Southern California Permanente
Medical Group; and Colorado
Permanente Medical Group, P.C.*

By: /s/ Benjamin Wolinsky
BENJAMIN WOLINSKY
SHIWON CHOE
**United States Attorney's Office
Northern District of California**
450 Golden Gate Avenue, Box 36055
San Francisco, California 94102-3495
Telephone: (415) 436-7200
Facsimile: (415) 436-6748
benjamin.wolinsky@usdoj.gov
shiwon.choe@usdoj.gov

JAMIE ANN YAVELBERG
PATRICIA L. HANOWER
ARTHUR S. DI DIO
GARY R. DYAL
LAURIE A. OBEREMBT
**United States Department of Justice
Civil Division
Commercial Litigation Branch**
P.O. Box 261
Ben Franklin Station
Washington, DC 20044
Telephone: (202) 514-3345
Facsimile: (202) 616-3085

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Attorneys for the United States of America

By: /s/ Eric H. Gibbs
ERIC H. GIBBS
DYLAN HUGHES
AMY MARIE ZEMAN
Gibbs Law Group, LLC
505 14th Street, Suite 1110 Oakland,
CA 94612
Telephone: (510) 350-9700
Facsimile: (510) 350-9701
ehg@classlawgroup.com
dsh@classlawgroup.com
amz@classlawgroup.com

Attorneys for Relator Ronda Osinek

By: /s/ Michael James Ronickher
MICHAEL JAMES RONICKHER
EDWARD ALLEN BAKER
MAX VOLDMAN
RONNY VALDES
Constantine Cannon, LLP
1001 Pennsylvania Ave, NW,
Suite 1300N
Washington, DC 20004
Telephone: (202) 204-3053
mronickher@constantinecannon.com
ebaker@constantinecannon.com
minman@constantinecannon.com
rvaldes@constantinecannon.com
mvoldman@constantinecannon.com

MARY ALICE INMAN
Constantine Cannon LLP
150 California Street
Suite 1600
San Francisco, CA 94111
Telephone: (415) 639-4001
Facsimile: (415) 639-4002
minman@constantinecannon.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Attorneys for Relator James Taylor

By: /s/ Mark S. Hardiman
MARK S. HARDIMAN
SALVATORE ZIMMITTI
Nelson Hardman LLP
100 Glendon Ave, 14th Floor
Los Angeles, CA 90024
Telephone: (310) 203-2800
Facsimile: (310) 203-2727
mhardiman@nelsonhardiman.com
szimmitti@nelsonhardiman.com

Attorneys for Relators Naser Arefi, Ajith Kumar, and Prime Healthcare Services, Inc.

By: /s/ William K. Hanagami
WILLIAM K. HANAGAMI
Hanagami Law, APC
913 Tahoe Boulevard, Suite 5
Incline Village, NV 89451-7414
Telephone: (833) 716-8570
Facsimile: (833) 716-8569
bill@hanagami.com

ABRAM ZINBERG
The Zinberg Law Firm APC
412 Olive Avenue Suite 528
Huntington Beach, CA 92648-5142
Telephone: (714) 374-9802
Facsimile: (714) 969-0910
abramzinberg@gmail.com

Attorneys for Relators Marcia Stein and Rodolfo Bone

By: /s/ Peter Scott Rukin
PETER SCOTT RUKIN
Rukin Hyland & Riggin LLP

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1939 Harrison Street, Suite 290
Oakland, CA 94612
Telephone: (415) 421-1800 Ext. 201
Facsimile: (415) 421-1700
prukin@rukinhyland.com

ROGER A. LEWIS
Goldberg Kohn Ltd.
55 East Monroe Street, Suite 3300
Chicago, IL 60603-5792
Telephone: (312) 201-4000
roger.lewis@goldbergkohn.com
matthew.organ@goldbergkohn.com

*Attorneys for Relators Gloryanne
Bryant and Victoria Hernandez*

By: /s/ Janel Quinn
JANEL QUINN
The Employment Law Group, P.C.
1717 K Street NW, Suite 1110
Washington, DC 20006
Telephone: (202) 261-2813
Facsimile: (202) 261-2835
jqinn@employmentlawgroup.com

J. BERNARD ALEXANDER III
Alexander Morrison + Feher, LLP
1900 Avenue of the Stars, Suite 900
Los Angeles, CA 90067
Telephone: (310) 394-0888
Facsimile: (310) 394-0811
balexander@amflp.com

Attorneys for Relator Michael Bicocca

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

ATTESTATION

Pursuant to Local Rule 5-1(i)(3), I hereby attest that the other signatories listed, on whose behalf this filing is submitted, concur in the filing’s content and have authorized the filing.

DATED: November 4, 2021

/s/ David J. Levis