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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA ex rel. RONDA OSINEK, Plaintiff, v. KAISER PERMANENTE, et al., Defendants	Case No. 3:13-cv-03891-EMC **REPLY BY CLAIMANT JEFFREY MAZIK IN SUPPORT OF MOTION FOR A SHARE OF SETTLEMENT PROCEEDS UNDER 31 U.S.C. § 3730(c)(5)** Date: April 2, 2026 Time: 1:30 pm Courtroom: 5 Hon. Edward M. Chen

(Caption continued on next page)

UNITED STATES OF AMERICA and STATE OF CALIFORNIA ex rel. GLORYANNE BRYANT and VICTORIA M. HERNANDEZ, Plaintiff, v. KAISER PERMANENTE, et al., Defendants	Case No. 3:18-cv-01347-EMC
UNITED STATES OF AMERICA ex rel. JAMES M. TAYLOR, Plaintiff, v. KAISER PERMANENTE, et al., Defendants	Case No. 3:21-cv-03894-EMC

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INTRODUCTION

In 1986, Congress amended the False Claims Act *qui tam* provisions, turning the Act into the most powerful litigative tool for disclosing, remedying and deterring fraud on the federal fisc. The elegance of the amended *qui tam* provisions is found in the way they encourage private citizens to pursue fraud actions on behalf of the United States, balanced against legitimate concerns of the government and other relators who might also seek to enforce the Act. For example, the first-to-file provision, 31 U.S.C. § 3730(b)(5), bars a would-be relator from intervening or bringing a related action based on the facts underlying a pending *qui tam* action. This protects the financial incentives for a relator to file a pending action from being diluted by a subsequent action on the same facts. Similarly, the government action bar, § 3730(e)(3), prevents a would-be relator from bringing an action based upon allegations or transactions which are already the subject of an action to which the United States is a party. This protects the government's efforts to obtain a remedy for false claims without interference by opportunistic would-be relators who seek to recover a share after the government has already commenced a formal proceeding on the same fraud.

Under the alternate remedy provision, § 3730(c)(5), the Act provides a relator with the same rights he would have in his *qui tam* action, if the government elects to pursue its claim through any alternate remedy proceeding. This provision ensures a relator's right to a share of the settlement proceeds when the government decides to pursue or settle the claim through alternate means. Rather than protect one relator from a subsequent action by another would-be relator, or protect the government from a subsequent action by a would-be relator, § 3730(c)(5) protects a relator from a subsequent action by the government which might deprive him of the same rights afforded in his *qui tam* action.

Jeffrey Mazik asks the Court to enforce the protections afforded by § 3730(c)(5) against the government. As demonstrated in his motion for a share of the settlement proceeds, Mr. Mazik had been pursuing a non-intervened *qui tam* action against Kaiser for violating the False Claims Act by submitting false claims for capitated payments on

its Medicare Advantage enrollees, using inflated risk adjustment factors (RAFs) that were based on false diagnoses codes. Based on his own insider information and retaliatory exposure at the hands of his employer, Mr. Mazik exposed that Kaiser accomplished the false claims for capitated payments by maintaining a sham compliance program, including the deliberate tampering with data analytic tools designed to expose false and inflated diagnoses codes. The government knew about Mr. Mazik's *qui tam* action and his extensive evidence in support of his claims; it elected not to intervene in Mr. Mazik's action, but instead pursue a recovery for the same false claims in this consolidated action; and it's settlement with Kaiser – the largest Part C settlement in the history of the False Claims Act – effectively resolved Mr. Mazik's federal *qui tam* claims for relief over the same false claims by Kaiser.

The government says Mr. Mazik is not entitled to any share of the settlement proceeds. Through his motion, however, Mr. Mazik shows that he is entitled to a share under § 3730(c)(5), and that the "same rights" guarantee a relator's share at the statutory floor of 25%. By requesting an award of 8% – the difference between that statutory floor and the share already agreed to by the parties to the consolidated action – Mr. Mazik ensured that his motion would comply with the minimum mandatory requirements of the 1986 amendments while also respecting the awards to the other relators.

In its opposition to the motion (ECF 442), the government makes little effort to engage in any factual analysis of Mr. Mazik's claims. Instead, it argues that Mr. Mazik's claims do not overlap with the claims pursued and settled by the United States, based on Mr. Mazik's opposition to Kaiser's motion to transfer his case to this District to be consolidated in this Court. The government not only misrepresents what was argued in the opposition, it overlooks the procedural posture and ruling in the transfer motion. Moreover, the government fails to engage with controlling legal authorities and the well-settled "one remedy" rule cited in the motion. Ultimately, the government urges an unacceptable position: that Kaiser's false claims for payment of capitated payments based on false risk adjustments created an endless fountain of recoveries on the same injury.

REPLY ARGUMENTS

I. Under the government's unacceptable formulation, Kaiser's false claims for inflated capitated payments in its Medicare Advantage program provided an endless fountain of False Claims Act recoveries

In its opposition, the government contends there is no connection between its amended complaint-in-intervention and Mr. Mazik's *qui tam* action, asserting without analysis that alleged software tampering "is unrelated to – and certainly did not 'hide' – the separate scheme through which Kaiser affirmatively pressured its own providers to add improper diagnoses to past patient records." ECF 442, at 9. Without citation to the record, the government states the "United States' settlement addressed only diagnoses added to the records of patients' visits with Kaiser providers," but "Mr. Mazik claims concern only diagnoses submitted to Kaiser following visits with external providers." *Id*.

> Mazik's ability to pursue his software tampering claims and recover the separate and distinct damages remains unchanged. [*Id*.]

Avoiding any substantive discussion of the "one recovery" rule, the government simply claims "there are no damages to credit in Mazik's action as a result of the settlement" because the "material facts and claims for reimbursement in the United States' and Mazik's actions are distinct, and the settlement agreement does not release Kaiser for any conduct other than that alleged in the United States' Amended Complaint." *Id.*, at 10 n.4.

And yet, the overlap is clear between the complaints by relators Osinek and Taylor, the government's complaints-in-intervention, and Mr. Mazik's amended complaints. All four alleged that Kaiser violated the False Claims Act by submitting false claims for capitated payment under the Medicare Advantage program. These false claims for payment involve overlapping Medicare Advantage enrollees, made during the same time periods. All four alleged that the claims for capitated payments were false because they were based on falsely inflated RAFs. And, all four alleged that the inflated RAFs were false because they were based on invalid diagnoses codes.

As part of the factual bases for this complex scheme of fraud, relator Osinek alleged that Kaiser engaged in efforts to conduct data-mining on its patient population to

find high value disease conditions, and to put pressure on internal providers to add diagnoses codes with higher value codes, including through addenda after the patients' visits. Relator Taylor uniquely alleged that the scheme included problems that were corporate-wide, involved coding by external physicians, and involved Kaiser's failure to evaluate True Positive results yielded by the Natural Language Processing Software.

And, as explained in detail in the moving papers – but not addressed or refuted by the government – Mr. Mazik uniquely alleged that Kaiser accomplished its RAF fraud scheme by deliberately tampering with compliance software to ensure that it did not identify erroneous diagnosis codes. By deactivated data analytic tools provided by vendors such as McKesson, Verisk and FICO, Kaiser intentionally prevented internal compliance officers from creating a paper trail for the fraud, allowing false diagnoses codes interwoven from encounters and claims to remain undetected in HealthConnect – Kaiser's massive electronic health records database.

In settling the amended complaint-in-intervention, the government released all claims included in its broadly worded Claim for Relief. ECF 240, at 102-104. By settling all "covered conduct" claims, defendants were released from liability for allegations that they "violated 31 U.S.C. § 3729(a)(1)(A) by knowingly presenting or causing to be presented, false or fraudulent claims for payment or approval to CMS, resulting in their receiving inflated Medicare payments from CMS to which they were not entitled," "Specifically, [they] presented or caused to be presented false claims for risk-adjustment payments in the form of improper diagnosis codes for Defendants' Medicare patients, in violation of CMS regulations and policies, which Defendants agreed to and were obligated to comply with." *Id.*, ¶¶378-379.

According to the opposition, notwithstanding the settlement and release, Mr. Mazik may now continue to pursue federal *qui tam* False Claims Act claims based upon the same false claims for capitated payments, based upon the same inflated risk adjustment factors for the same Medicare Advantage enrollees for the same period, and Kaiser is not even entitled to an offset for damages paid to the government in settlement.

Of course, if Mr. Mazik may continue in his *qui tam* action, that means the government could do the same. In other words, to defeat Mr. Mazik's entitlement to a share, the government contends that it could pursue and release claims against defendants for its RAF fraud, based on Osinek's allegations of data mining and pressure on internal physicians to add invalid diagnoses codes; after recovering hundreds of millions of dollars in damages, it could then pursue, settle and recover undiminished damages again for the same RAF fraud, based on Taylor's allegations of diagnoses codes from external providers; and then it could pursue, settle and recover undiminished damages again for the same RAF fraud, based on Mr. Mazik's allegations that Kaiser tampered with the data analytic tools that permitted the invalid diagnoses codes from both internal and external providers to persist undetected in the HealthConnect database.

Such an endless fountain of recovery on the same injury is clearly not permitted under the one recovery rule, *res judicata* or the doctrine against double recovery. This was made crystal clear by the Ninth Circuit in *United States ex rel. Barajas v. Northrop Corp*., 147 F.3d 905, 910 (9th Cir. 1998), when it held "The recovery in a *qui tam* case is not for each false statement or bad act done to the government; it is for 'a false or fraudulent claim for payment or approval.'" Mr. Barajas could not pursue claims that the dampening fluid "gums up in the cold" after the United States' settlement of the claims that Northrop "lied about whether the fluid was tested for gumming up," because "both wrongful acts arise out of the same attempt to get paid for flight data transmitters not up to specifications." The same is true here, although unique material facts were alleged by Dr. Taylor and Mr. Mazik, as compared to Ms. Osinek, all three actions – and the government's settlement itself – arose out of Kaiser's false and fraudulent claims for capitated payments based on inflated RAFs. Mr. Mazik cannot pursue damages again from Kaiser for the same fraud, and certainly without facing the legitimate claim by Kaiser that it is entitled to offset its damages by the amounts already paid.

See also United States ex rel. Bledsoe v. Cmty. Health Sys., Inc., 342 F.3d 634, 649-650 (6th Cir. 2003) ("If indeed the government settled Relator's claims, either

Defendants would assert an accord and satisfaction defense (which, if successful, would deny Relator part or all of his rightful share of the recovered funds), or Defendants would be forced to pay the civil penalties and double or treble damages associated with the very same claims for which they had already paid penalties and damages by way of the settlement. Under either result, adverse consequences (to either Relator or Defendants) would ensue that the FCA had not intended") (*citin*g S. Rep. 99-345, at 27, 1986 U.S.C.C.A.N. at 5292 ("While the Government will have the opportunity to elect its remedy, it will not have an opportunity for dual recovery on the same claim or claims").

II. The government misstates Mazik's opposition to the transfer motion.

Rather than address factual allegations and procedural postures in earnest, the government rests its contentions that Mazik's claims are "completely different" and "unrelated" on a selective misstatement of Mr. Mazik's opposition to Kaiser's motion in April of 2024 to transfer to this district for consolidation. *See* ECF 442, at 1, 4-5. Mr. Mazik's opposition to that motion, however, was actually more fact-based, and focused on his claims that were unrelated (state Medicaid claims and retaliation), and the unique material elements leading to recovery on the same fraud scheme. Nothing that Mr. Mazik wrote in that opposition determines the issues presented in the share motion.

As stated in the moving papers and above, it is true Mr. Mazik's claims focus on material elements and witnesses involving Kaiser's sham compliance efforts that were not alleged by relators Osinek and Taylor. As such, although Mr. Mazik brought a subsequent action based upon the same broad theory of fraud, his action survived the first-to-file motion filed by Kaiser. See ECF 439, at 13-15. As shown here, focusing on different material elements as part of a broad complex fraud does not turn related litigation claims over the same false claims for payment into unrelated claims.

Indeed, that mutliple relators alleged independent material allegations all in support of a single complex fraud scheme is hardly surprising. Congress anticipated that, "In the face of sophisticated and widespread fraud . . . only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds."

United States ex rel. Kathleen Bryant v. Cmty. Health Sys., 24 F.4th 1024, 1035 (6th Cir. 2022) (citing S. Rep. No. 99-345, at 2 (1986)). "Nowhere is such a 'coordinated effort' more salient than when multiple relators each describe pertinent aspects of a broad-reaching fraud." *Id*. In *Bryant*, seven different relators "uncovered multiple independent parts of the same complex scheme," and yet all seven recovered an allocation of the relator's share, and all of their attorneys were awarded fees. *Id*.

Mr. Mazik's opposition to the motion to transfer is entirely consistent with these principles. A close reading of the papers filed by Mr. Mazik demonstrates that the factual mechanisms may have differed, but one of Mr. Mazik's claims – his federal *qui tam* claim – was related. In his opposition, Mr. Mazik noted that each action was "separate and distinct," and focuses on "different factual mechanisms of fraud," but one claim "asserted in [Mazik's] action is related to the broad theory of liability asserted against the Medicare Advantage Organization in the *Osinek* cases." (Exh. J, Suppl. Friedman Decl., at 1).

> Citing Judge Drozd's order on the first-to-file motion, Mr. Mazik explained:
>
> While "there are, of course, similarities between the two cases" – in that, both allege damages through falsely inflated risk adjustment factors – the mechanism by which the fraud alleged by Mazik operates is "not hinted at in the Taylor complaint." ECF 104 at 12:12–25; 13:1–2. [Exh. J, at 3.]

Thus, at page 6 of the opposition, Mr. Mazik noted that his claims "focus on facts which compromised the audits relied upon by Taylor and which could not be discovered through Taylor's action." And at page 10, Mr. Mazik noted that "consolidation of Mazik's claims with the *Osinek* cases would be infeasible" because "Mazik raises state law Medicaid claims and employment retaliation claims that are entirely unrelated to the claims raised in the consolidated matters before Judge Chen." Mr. Mazik went on to say that "one" of his "federal *qui tam* claims, in part, relates legally to the broader theory presented in *Osinek*: i.e., that the United States was damaged by paying high capitated amounts to the Medicare Advantage Organization based on inflated risk adjustments factors and false diagnosis codes. *But the factual basis for proving Mazik's claim is not present in the consolidated cases*." (emphasis added). *Id*.

He also argued transfer was not necessary because "there is *effectively* no possibility of inconsistent rulings between the two cases." *Id*., at 10 (emphasis supplied). One court's legal analysis might benefit from the other's ruling on legal matters, as demonstrated in the first-to-file motion; but a judicial determination on the underlying facts would not present binding conflicts:

> Whether Kaiser is responsible for false claims caused by its tampering with compliance software for detecting fraudulent claims by outside providers would be a determination that is simply unaffected by a different judicial determination that Kaiser physicians did or did not use false diagnostic codes to record patient encounters. And vice versa. [*Id*., at 11.]

At page 13, Mr. Mazik expressly addressed the existence of the *related* claim – the claim now settled. Based upon his understanding of how the government would treat his declined *qui tam* action, he suggested that any necessary efficiencies could be gained by cooperation and coordination:

> To the extent that there are any factual or discovery matters where Mazik and the United States might benefit from shared or joint efforts, such can be accomplished through coordination between counsel, without transfer or consolidation. The United States remains the real party in interest in this declined case, and the AUSA in this District and/or Relator's counsel would work with attorneys in the Northern District to ensure efficiencies of the sort that are available to separate actions. Where any document production or deposition testimony in one case may be relevant to the other, Relator and DOJ can coordinate between them, without joining in the same district.[1]

No statement in the opposition provides a basis in equity to estop application of § 3730(c)(5). The government makes no showing of detrimental reliance. Nor does it deny that it drove the opposition to the motion. Ultimately, even Judge Drozd agreed with Kaiser that the claims overlapped, and that the potential efficiencies to be gained weighed in favor of transfer "only slightly." *Mazik* ECF 122, at 14 (Exhibit K). That amount of relatedness was insufficient to outweigh the balance of the other factors for keeping the related action pending in the Eastern District. The government stands alone in its contention that there is *no* overlap and that the claims are *completely unrelated*.

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[1]But, alas, the government made no effort to share information, alert Mr. Mazik of settlement discussions, or protect his rights to a share in settling his related claim.

III. The government's assertion that it did not incorporate software tampering allegations does not preclude Mazik's entitlement under § 3730(c)(5)

The contention that the amended complaint-in-intervention did not expressly incorporate Mr. Mazik's allegations of software tampering does not impact the outcome of this motion. Determination of Mr. Mazik's right to a share of the settlement turns on whether the government pursued and obtained a remedy on the claim asserted by Mr. Mazik, not whether Mr. Mazik caused the government to reach a settlement of that claim. Indeed, as posed by the Ninth Circuit, the purpose of the broad language of § 3730(c)(5) is to afford a share to relators like Mr. Mazik when the government "obtain[s] from a *qui tam* defendant a remedy that **could have been obtained** in an already-filed FCA action." *United States ex rel. Barajas v. United States*, 258 F.3d 1004, 1012 (9th Cir. 2001) (emphasis supplied). The government does not address let alone explain why this holding by the Ninth Circuit should not control Mr. Mazik's request for relief. It could have intervened and consolidated Mr. Mazik's action and obtained the same relief.

Besides, the government's stated subjective use of information furnished by Mr. Mazik is not very credible. As developed in the motion (ECF 439, at 9-10), the data analytics with which Mr. Mazik worked were key to exposure of risk adjustment fraud by Medicare Advantage organizations. These tools developed by Verisk, McKesson and FICO were designed to detect and delete billing code violations. Whether or not attorneys at the Department of Justice were aware of this, Kaiser had known for more than a decade that, with the tools activated, it could not establish or maintain a "one-way" data-mining effort – sufficient to protect "roughly $11 billion" in gross risk adjustment payments. Ex. D. In 2016, the Government Accountability Office used analytics to determine that CMS had improperly paid $14.1 billion to Medicare Advantage plans, by 2024 data analytics in the OIG toolkit became an industry standard, and this year, OIG requires two-way auditing and NPI-level monitoring. It is highly unlikely that the government negotiated $556 million without use of data analytic tools. And, any failure to use such tools would not diminish the relevancy and application of Mr. Mazik's factual allegations.

At any rate, the government does not deny that relator Taylor received a share of the settlement proceeds in this action, even though he was not the first in time to file a *qui tam* complaint against Kaiser for its broad RAF fraud scheme, and even though the complaint-in-intervention does not expressly incorporate Dr. Taylor's unique allegations. The government's avoidance of this fact speaks volumes. Dr. Taylor deserves a share of the settlement because his claims survived the first-to-file rule, they were pending at the time of the settlement, and the government reached a settlement and obtained a remedy. These same circumstances exist for Mr. Mazik. The significant difference is that the government elected to pursue its claim in Dr. Taylor's action, but it elected not to pursue its claim in Mr. Mazik's action. It is the potential unfair effect of this decision by the government against which § 3730(c)(5) was intended to protect.

Had the Court been called upon to determine an apportionment of shares between relators in an intervened case under § 3730(d)(1), there may have been more weight given to the government's articulation of the extent to which any relator's allegations contributed to the litigation or the settlement. Similarly, had Mr. Mazik sought a share higher than the statutory floor, or to invade the other relators' shares, the Court may have been required to measure Mr. Mazik's contributions against relators Osinek and Taylor. Given the posture of this motion and the government's silence on the issue, however, no such determination is needed. Once the Court determines that Mr. Mazik is entitled to *any* share, there is no roadblock to an award of 8%.

IV. No case cited by the government supports denial of Mr. Mazik's claim

Given the government relies solely on legal arguments rather than on factual analysis, it is surprising that its cited cases help Mr. Mazik. In support of its claim that entitlement to a share requires a showing that the government settled his claim, the government cites out-of-jurisdiction cases, none of which conflict with the broad holding by the Ninth Circuit in its *Barajas* opinions.

For example, in *Rille v. PricewaterhouseCoopers LLP*, 803 F.3d 368, 370 (8th Cir. 2015), the *en banc* Eighth Circuit asked: "When the government proceeds with an action

brought by a relator under the False Claims Act, and then settles both the claim brought by the relator and a *different claim that does not overlap factually* with the claim brought by the relator, is the relator entitled to a share of the proceeds of both claims?" (Emphasis supplied.) The court held the "relator may recover only from the proceeds of the settlement of the claim that he brought." *Id*. There, the relators alleging kickbacks and defective products, but were "more focused on a kickback scheme that the Government asserts did not exist." *Id*., at 370, 374. Some years later, the government moved to intervene, based upon information obtained from relators, but also from a defendant and non-party witnesses. After two years of negotiations, the government entered into a settlement of four specified "covered conduct" claims, none of which included kickbacks. *Id*., at 371. The *en banc* court said that "a relator seeking recovery must establish that there exists *an overlap* between [his] allegations and the conduct discussed in the settlement agreement." *Id*., at 373 (emphasis supplied) (quoting *Bledsoe*, 342 F.3d at 651). Given that relators had focused on an unrelated kickback claim and the record was unclear, the court remanded the case back for further proceedings. *Id*., at 374.[2] The case therefore has no application to Mr. Mazik's claim. Both the settled claims and Mr. Mazik's claim are predicated on false claims for capitated payments by Kaiser based on fraudulently inflated RAFs.[3]

Similarly, in *United States ex rel. Conyers v. Conyers*, 108 F.4th 351, 359-60 (5th Cir. 2024), the Fifth Circuit expressly held it had "not adopted [the] "factual overlap" test for § 3730(d)(1) settlements." And, it did not need to do so there, since "the facts of the

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[2]Two circuit judges dissented. *Id.,* at 375 (by Judge Bye, joined by Judge Smith). They noted that the question framed – when the government "settles both the claim brought by the relator and a different claim that does not overlap factually with the claim brought by the relator" – was not before them, "because the government never brought a different claim in the relators' action."

[3]Moreover, *Rille* supports Mr. Mazik's position that he is entitled to 8% of the proceeds – a number that not only comports with his statutory minimum but also leaves intact what exists of the Osinek non-overlapping share. See 803 F.3d at 373 (describing the recovery under § 3730(c)(5) and § 3730(d) as an "equivalence").

settled claims and the facts of Conyers's own claims do not 'overlap' in any relevant way." *Id*. The "covered conduct" claims described in the settlement alleged kickbacks accepted by three specified KBR employees – persons who were not identified by Conyers's allegations. Instead, Conyers had alleged improper use of trailers to deliver supplies, and kickback taken by two other specified KBR employees involving defective or non-existent trucks. The court held: "Yes, at a conceptual level, both claims happen to involve trucks and kickbacks. But the similarities stop there. The claims involve neither the same kickback schemes nor the same KBR employees." *Id*.

Here, however, the relationship between the government's settled claims and Mr. Mazik's related claim is more than "conceptual." Indeed, while Mr. Mazik alleged unique facts regarding software tampering, he sued upon the same false claims for payment of capitated payments based on the same inflated RAFs and the same allegations of invalid diagnoses codes. Unlike the isolated acts described by the two actions in *Conyers*, Mr. Mazik "independently" described "pertinent aspects" of the "same complex scheme" in a "broad-reaching fraud," as was the case in *Bryant.* See 24 F.4th at 1035.

Finally, the government cites *United States ex rel. Birchall v. Spinefrontier, Inc*., 2024 U.S. Dist. LEXIS 204367 (D. Mass. Nov. 4, 2024), where the district court awarded shares under § 3730(c)(5) to two sets of relators following a settlement of claims against individuals who were not even named in the relators' actions. Citing *Barajas* and *United States ex rel. Sun v. Baxter Healthcare Corp*., 892 F. Supp. 2d 341, 344 (D. Mass. 2012), the court held that the "reach of this subsection is quite broad." *Birchall*, at *15. And, citing *Bledsoe*, the court held "the inquiry is 'whether there exists *any overlap* between Relator's allegations and the conduct discussed in the settlement agreement.'" *Birchall*, at *16 (emphasis supplied). The court not only awarded a share to the first-to-file relator Birchall, but it also apportioned shares to later-filing relators Miller and Bennett. *Id*., at 6-7. The district court's functional application of § 3730(c)(5) not only undermines the government's position here, it squarely supports granting Mr. Mazik's claim.

Finally, the government cites *United States v. Van Dyck*, 866 F.3d 1130, 1135 n.3 (9th Cir. 2017), but does not cite *United States v. Couch*, 906 F.3d 1223, 1228-29 (11th Cir. 2018), both of which recognize the government's concession that a relator is entitled to a share under the alternate remedy when a criminal defendant pays a restitution and may credit that payment against *qui tam* damages. The government points out that *Van Dyck* held that the relator was not entitled to "intervene" in the criminal proceeding, but both courts held that such intervention was not required to obtain a share. Here, Mr. Mazik need not have intervened in this consolidated action. Instead, after filing his notice of a claim, he followed the Court's direction and filed a motion for a share. This Court clearly has jurisdiction over the settlement proceeds – a legal fact that is not disputed by the government. As such, his motion was timely and proper, and under the controlling authority as well as the clear wording of the Act, he is entitled to a share.

V. There is no dispute over Mr. Mazik's request for an 8% award

As noted above, the government contends that Mr. Mazik is not entitled to any share of the proceeds, but it does not take issue with his 8% request.[4] As such, should the Court agree with Mr Mazik on the threshold question of entitlement, no further proceedings are required, other than to have the government and Mr. Mazik confer to submit a proposed order calculating the award.

CONCLUSION

For the foregoing reasons, and those stated in the moving papers, Mr. Mazik respectfully requests that the Court recognize his entitlement to a share of the government's settlement proceeds, and awarded him 8% of the settlement amount.

[4]In stating that the Court need not analyze the apportionment issue, the government claims the request for 8% is arbitrary and not justified by Mr. Mazik. ECF 442 at 11, n.6. As fully explained, however, the 8% request is the statutory minimum apportionment for Mr. Mazik under § 3730(c)(5) that does not diminish or dilute the awards to relators Osinek and Taylor.

Respectfully submitted,

Dated: March 19, 2026

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By: /s/Jeremy L. Friedman
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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA ex rel. RONDA OSINEK, Plaintiff, v. KAISER PERMANENTE, et al., Defendants	Case No. 3:13-cv-03891-EMC **SUPPLEMENTAL DECLARATION OF JEREMY L. FRIEDMAN IN SUPPORT OF MOTION FOR A SHARE OF SETTLEMENT PROCEEDS** Date: April 2, 2026 Time: 1:30 pm Courtroom: 5 Hon. Edward M. Chen

(Caption continued on next page)

UNITED STATES OF AMERICA and STATE OF CALIFORNIA ex rel. GLORYANNE BRYANT and VICTORIA M. HERNANDEZ, Plaintiff, v. KAISER PERMANENTE, et al., Defendants	Case No. 3:18-cv-01347-EMC
UNITED STATES OF AMERICA ex rel. JAMES M. TAYLOR, Plaintiff, v. KAISER PERMANENTE, et al., Defendants	Case No. 3:21-cv-03894-EMC

Jeremy L. Friedman declares and states:

1. I am one of the attorneys representing Jeffrey Mazik, claimant in this action, and relator in a related action pending in the Eastern District of California, United States ex rel. Mazik v. Kaiser Foundation Health Plan et al., Case No. Case No. 2:19-cv-00559-DAD. I make this supplemental declaration in support of Mr. Mazik's reply on his motion for a share of the settlement proceeds in this action. It is based on my own personal knowledge. If called as a witness hereto, I would and could testify competently to the following.

2. On April 8, 2024, Kaiser defendants filed a motion to transfer Mr. Mazik's action from the Eastern District to this District so that defendants could request consolidation of Mr. Mazik's action with the consolidated action pending before this Court. That motion and supporting papers were filed as ECF 109 in Mr. Mazik's action.

3. After defendants' motion to transfer was filed, my co-counsel in this case was contacted by an attorney from the United States Attorney's Office for the Northern District of California who was assigned to work on the consolidated *Osinek* cases. We were informed that the government was opposed to the motion to transfer. After further discussions between my co-counsel and the government attorney, we were informed that the government would be filing a Statement of Interest opposing the motion. In light of the forthcoming Statement of Interest, Mr. Mazik's counsel determined to wait until the government filed its opposition before responding to defendants' motion.

4. On April 22, 2024, the government filed its Statement of Interest in response to defendants' motion to transfer. This statement was filed as ECF 111 in Mr. Mazik's action. On the same day, I signed a stipulation with defendants' counsel requesting an extension of time for Mr. Mazik to file a response to defendants' motion. In particular, in the stipulation, Mr. Mazik wrote that Relator Mazik required additional time to consider the government's position on the motion before filing the response. That stipulation was filed by defense counsel as ECF 112 in Mr. Mazik's action. Judge Drozd granted the request in a minute order entered the following day as ECF 113.

5. On May 14, 2024, I filed an opposition to Kaiser defendants' motion to transfer. The response was filed as ECF 114. Attached hereto as Exhibit J is a true and accurate copy of the opposition.

6. On June 14, 2024, Judge Drozd entered an order as ECF 122, denying defendants' motion to transfer. A true and accurate copy of this order is attached hereto as Exhibit K.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and accurate. Executed on the 19th of March, 2026.

/s/Jeremy L. Friedman
Jeremy L. Friedman

EXHIBIT J

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Attorneys for Plaintiff-Relator Jeffrey Mazik

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES et al.
ex rel. JEFFREY MAZIK,

Plaintiffs,

v.

KAISER FOUNDATION HEALTH PLAN, INC., KAISER FOUNDATION HOSPITALS, INC., and THE PERMANENTE MEDICAL GROUPS,

Defendants.

No.: 2:19-cv-00559 (DAD) (JDP)

Relator Jeffrey Mazik's Memorandum of Points and Authorities in Opposition to Defendant's Motion to Transfer for Consolidation

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Table of Authorities

Cases

Statutes

Relator Jeffrey Mazik hereby respectfully responds to the Motion to Transfer (ECF 109) filed by the Kaiser defendants seeking to transfer this case to the Northern District of California for consolidation with *United States ex rel. Osinek v. Kaiser Permanente*, No. 3:13-cv-3891 (N.D. Cal.)). The United States filed a Statement of Interest (ECF 111) opposing Kaiser's transfer motion.

Introduction

Relator opposes Kaiser's motion to transfer. Mazik chose to file his *qui tam* action in this District, and he prefers to stay here. Transfer to the Northern District would only frustrate purposes of judicial economy and unnecessarily prejudice Relator in his pursuit of litigation claims under the False Claims Act. While one of the claims asserted in this action is related to the broad theory of liability asserted against the Medicare Advantage Organization in the *Osinek* cases, the two actions are separate and distinct. Each action focuses on different factual mechanisms of fraud and different sets of relevant documents and witnesses. Since each action presents distinct causes of action, there is no possibility of conflicting judgments, and no judicial economy to be gained from transfer or consolidation. Indeed, consolidation would be infeasible, given the complexity of the cases, the divergence of material facts and the different procedural posture that each is in at the time of the transfer motion.

Relator's choice of forum is entitled to deference. Neither the United States nor Kaiser sought transfer or consolidation previously, and both Mazik and the United States oppose transfer and consolidation now. As such, the applicable factors of judicial economy and witness convenience simply do not weigh in favor of granting transfer. Accordingly, Relator respectfully requests that Defendants' motion be denied.

Background Facts

Mazik Claims Compared to *Osinek/Taylor* Claims

As narrowed by this Court's February 13, 2024, Order (ECF 104) and revised in the second amended complaint (ECF 107, "SAC"), Mazik's claims here are factually distinct from the claims raised in the *Osinek/Tayler* cases pending before Judge Chen in the Northern District of California. While one of Mazik's federal False Claims Act claims relates, in part, to the broad legal theory presented by the United States in the *Osinek/Taylor* cases, the facts that comprise that partially-related claim and all of Mazik's unrelated claims are not even at issue in the consolidated cases being litigated in the Northern District. Mazik intends to obtain discovery and prove his case here through witness testimony and data analyses that would not otherwise be obtained in *Osinek/Taylor*. And Mazik needs no part of the ongoing motion and discovery battles that have kept the parties mired in the cases pending before Judge Chen.

Mazik alleges that Kaiser engaged in "a deliberate scheme to defraud the United States by allowing non-Kaiser providers to submit to it, as a Medicare Advantage Organization, false claims for payment." SAC ¶45. "Because Kaiser is a recipient of Medicare and Medicaid funds, each false or fraudulent claim for payment by outside providers violates the False Claims Act." *Id*. Mazik explains the manner by which Kaiser allowed false claims to be made, the financial motive behind Kaiser's actions, and the injury to the United States. As for manner, Kaiser instituted a sham compliance program, under which it intentionally misused vendor-supplied fraud-detection software programs to avoid detecting claims errors. *See* ECF 104 at 4–6; SAC ¶¶ 49, 51-54. As for motive, Kaiser allowed overpayments to unaffiliated outside providers because the subsequent submission of unsupported diagnostic codes to CMS

served to increase the capitation rates that it received as a Medicare Advantage Organization from the government. *See* ECF 104 at 15:13–16:7; SAC ¶¶ 45, 50.

As for injury, Mazik summarizes the false claims resulting from the scheme:

> 76. Kaiser's intentional failure to properly oversee and monitor the claims of its external providers led to significant upcoding and overpayments, which were never corrected as required by law, and drove up capitation rates without any legitimate lawful basis, so that Kaiser and its partners could continue to line their own pockets at the public's expense.
>
> 77. Kaiser's claims for payment to CMS and the State Plaintiffs were false because they were knowingly derived from false data.
>
> 78. Kaiser's claims for payment were also false because Kaiser repeatedly provided expressly false certifications that its risk adjustment data submissions to CMS were "accurate, complete, and truthful," while knowing that the data were, in fact, plagued with errors, and despite knowing that those errors would cause CMS to pay unjustifiably and falsely higher capitation rates.
>
> 79. And Kaiser's claims for payment were also false because, as detailed above, Kaiser did not, inter alia: (a) have an effective system in place to monitor FDRs; (b) have an effective system for "promptly responding to compliance issues as they are raised, investigating potential compliance problems as identified in the course of self-evaluations and audits, correcting such problems promptly and thoroughly to reduce the potential for recurrence, and ensure ongoing compliance with CMS requirements" per 42 C.F.R. § 422.503(b)(4)(G); (c) undertake corrective actions; or (d) ensure that FDRs correct deficiencies.

(SAC, ECF 107.)

These claims by Mazik are factually distinct from the claims raised in *Osinek*. While "there are, of course, similarities between the two cases" – in that, both allege damages through falsely inflated risk adjustment factors – the mechanism by which the fraud alleged by Mazik operates is "not hinted at in the Taylor complaint." ECF 104 at 12:12–25; 13:1–2. As explained in the Government's Statement of Interest, all six consolidated cases are focused on how Kaiser's own physicians add lucrative diagnoses

codes to patient medical records to increase Medicare reimbursement. ECF 111 at 2:1–16. The United States is pursuing claims that Kaiser providers added these untruthful diagnosis codes in addenda to patients' records after their "encounters" with the patients. *Id.*, at 3:24-27. While Mazik primarily pursues false claims submitted by Kaiser due to *outside providers* who provided false codes through *claims* which Kaiser allowed by misuse of its compliance programs, the United States and relators in the *Osinek* cases are pursuing false claims submitted by Kaiser due to *Kaiser providers* who provided false codes through *encounters* which Kaiser failed to detect and correct through its encounter audits.

While Taylor does allege non-intervened claims involving non-Kaiser providers in Colorado, Taylor makes no allegations regarding sham compliance programs or the knowing failure to use fraud detection software tools. His claims remain focused on the audits of Kaiser medical records created through provider encounters. *Id.* at 3:4–22. Indeed, as further explained by the United States, Taylor's non-intervened claims do not even involve out-of-network providers at issue here. Rather, Taylor's allegations involve certain "outside hospitals who entered into contracts with Kaiser to provide care to beneficiaries enrolled in Kaiser Medicare Advantage plans." *Id.* at 7:11–15.

Procedural Posture

Mazik filed this action in April 2019. By then, five other relators had filed *qui tam* actions against Kaiser under the False Claims Act. As Kaiser acknowledges, all five and a sixth filed thereafter alleged "that Kaiser submitted claims to the Medicare Advantage Program … for risk-adjustment payments for diagnoses that its patients did not actually have and/or that were not actually addressed by the treating physician

during a patient encounter." Kaiser MPA, ECF 109, at 3:14–17 (emphasis supplied). All actions were filed under seal. In April 2021, Mazik – unaware of the other cases – filed an amended complaint. Mazik maintained his initial claims regarding Kaiser's sham compliance program over outsider claims, but in his amended complaint, Relator linked the original core facts to injury caused to the United States through falsely inflated capitation rates.

In June 2021, the United States sought to transfer and consolidate the other actions – but *not* Mazik's case – to the Northern District of California. In July 2021, the Government determined to intervene into the consolidated cases, and the seals were lifted. Thus, at the time the Government consolidated and intervened into the *Osinek* cases, it chose to neither consolidate nor intervene in Mazik's action, fully aware of Mazik's allegations regarding the use of outside physician claims to artificially inflate capitated payments. Clearly, the Government did not believe that this action should be consolidated or litigated with the others.

When this action was unsealed, Kaiser did not seek to have it transferred or consolidated with the *Osinek* cases. Instead, Kaiser and Mazik agreed to stay proceedings here until after Judge Chen ruled on Kaiser's motion to dismiss based on the first-to-file bar of the False Claims Act. (ECF 69; *see* 31 U.S.C. § 3730(b)(5).)

After Judge Chen issued his ruling in the *Osinek* cases, Kaiser filed a motion in this Court seeking to dismiss Mazik's claims under the first-to-file bar, arguing that the claims raised here were previously asserted in the pending *Taylor* case. Again, at the time it filed its motion, Kaiser chose not to seek to transfer *Mazik* to the Northern District, nor to raise the matter with Judge Chen. As shown in the record in this case, it

does not even appear that Kaiser gave notice to the Northern District case that it believed a related case was pending in this District.

In its February 13, 2024 Order, this Court granted Defendants' motion to dismiss Mazik's federal False Claims Act claims, "except to the extent relator alleges that defendants deliberately tampered with compliance software to ensure that it did not identify erroneous diagnosis codes." ECF 104 at 12:26–28. The Court noted that both actions broadly allege risk adjustment fraud based on erroneous diagnosis codes, but that the nature of wrongdoing claimed by Mazik – the tampering with compliance software – involves different "material elements" from the wrongdoing alleged in *Taylor*. *Id*. at 13:1–19. In reaching this conclusion, the Court pointed out that Taylor's allegations showed Kaiser's knowledge of the false diagnosis codes gained through audits of patient encounters, whereas Mazik's allegations showed Kaiser decided to disable the claims compliance software so the audits would *not* identify erroneous codes in the first place. *Id*. at 13:19–14:4. Because Mazik's claims focus on facts which compromised the audits relied upon by Taylor and which could not be discovered through Taylor's action, the Court determined that Mazik's federal False Claims Act claims would not be dismissed to the extent that inflated risk adjustments were derived from Kaiser's failure to use its compliance software.

Kaiser now moves to transfer this case so that it may be consolidated with the *Osinek* cases. It does so here, only *after* the Government chose not to consolidate or intervene in this case when it consolidated and intervened in the *Osinek* cases, *after* both this Court and Judge Chen, separately, ruled on Kaiser's motions to dismiss including the first-to-file bar, and *after* the consolidated cases were further narrowed

pursuant to a fully-developed case management schedule. As set forth herein, transfer would cause unnecessary inefficiencies, prejudicing the prosecution of both actions.

Legal Standard

Under 28 U.S.C. § 1404(a), "a district court may transfer any civil action to any other district or division where it might have been brought" for the convenience of parties and witnesses and in the interest of justice. 28 U.S.C. § 1404(a). "Section 1404(a) provides for transfer to a more convenient forum, not to a forum likely to prove equally convenient or inconvenient." *Pizana v. SanMedica Int'l LLC*, 2020 WL 469336, at *1–2 (E.D. Cal. Jan. 29, 2020) (Drozd, J.) (citations omitted). Consideration of a motion to change venue requires a two-step process. First, the court considers "the threshold question of whether the case could have been brought in the forum to which the moving party seeks to transfer the case." *Id*. If the movant makes this showing, the court makes an "individualized, case-by-case consideration of convenience and fairness, taking into account private and public interest factors." *Id*.

"The primary factors to be considered are convenience of witnesses and parties and concerns for judicial economy (including duplicative effort, waste of time and money). Other factors include plaintiff's choice of forum, administrative considerations, and the respective parties' contacts with the forum." *Right to Life of Cent. Cal. v. Bonta*, 614 F. Supp. 3d 729, 733 (E.D. Cal. 2022) (Drozd, J.) (quotations and citations omitted).

Consolidation of related actions may be a significant factor in the transfer decision. *A.J. Indus., Inc. v. U.S. Dist. Court for the Cent. Dist. of Cal.*, 503 F.2d 384, 389 (9th Cir. 1974). Such consolidation must be "feasible," however. *See ThermoLife Int'l LLC v. NeoGenis Labs Inc.*, 2021 WL 3290532, at *6–7 (D. Ariz. Aug. 2, 2021). Consolidation would be barred under Rule 42(a) when the cases embrace distinct fact

patterns, state separate causes of action, hold different procedural postures, and where consolidation of complex cases risks jury confusion or judicial inefficiencies. *See*, *e.g.*, *Molever v. Levenson*, 539 F.2d 996 (4th Cir. 1976). "[T]he interest of judicial convenience is weighed against the potential for delay, confusion, and prejudice caused by consolidation. Factors such as differing trial dates or stages of discovery usually weigh against consolidation. … Considerations of convenience and economy must yield to a paramount concern for a fair and impartial trial." *Lewis v. City of Fresno*, 2009 WL 1948918, at *1 (E.D. Cal. July 6, 2009) (citations omitted).

"The burden is on the moving party to show that transfer is appropriate." *Pizana*, 2020 WL 469336, at *2. "In general, courts considering motions for change of venue give significant deference to a plaintiff's choice of forum." *Alberts v. Pizzaman's Pavilion*, 2020 WL 6392564, at *4 (E.D. Cal. Nov. 2, 2020) (Drozd, J.).

Argument

This Court should decline to transfer this action to the Northern District under the second step of the inquiry under section 1404(a). None of the convenience and fairness factors asserted by Kaiser outweigh Mazik's choice of forum in this District, or the objections by the United States in its Statement of Interest.

I. Relator is entitled to deference in his choice of forum.

Relator has chosen the Eastern District as the forum in which to litigate this action. Courts generally accord "great weight" to the plaintiff's choice of forum. *Gurudu-Grp. LLC v. RAM Robinsons Automation Mach. LLC*, 2023 WL 4409830, at *3 (E.D. Cal. July 7, 2023) (quoting *Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987)). "Unless the balance of convenience is strongly in favor of the defendant, plaintiff's choice of

forum should not, or should rarely, be disturbed on a motion to transfer." *Partanen v. W. United States Pipe Band Ass'n*, 2021 WL 3472242, at *5 (E.D. Cal. Aug. 6, 2021) (quoting *E & J Gallo Winery v. F. & P. S.p.A.*, 899 F.Supp. 465, 466 (E.D. Cal. 1994)). This means the defendant is required to make a "strong showing of inconvenience" to tilt the balance and warrant "upsetting the plaintiff's choice of forum." *Id.* (quoting *Decker Coal Co. v. Commonwealth Edison Co.,* 805 F.2d 834, 843 (9th Cir. 1986)).

Here, Relator selected the Eastern District for this action, and he wishes to keep this venue. When given the opportunity to stipulate to a transfer of venue, Relator's counsel declined. *See* ECF 109-1, Grossman (Kaiser's counsel) Decl. ¶ 4. While Kaiser makes much out of Mr. Mazik's residency in the Northern District, this overlooks the nature of *qui tam* actions, which are filed in the name of the United States by relators, under seal, and served on the Government along with a written disclosure of substantially all material evidence and information in their possession. *See* 31 U.S.C. § 3730(b)(2). More than five years ago, when the action was filed, Relator and his counsel disclosed information to the Assistant United States Attorney in this District, Catherine Swann. Relator's counsel conferred with Ms. Swann through the declination decision, and through amendment to the initial complaint. While Ms. Swann is familiar with the claims and is actively monitoring this action, the AUSAs and investigators in the Northern District are already entangled in the *Osinek* cases. A transfer now would essentially force re-assignment of Mazik's case to attorneys who have already declined consolidation. Given this aligned opposition to the motion, the choice of forum factor should weigh heavily against transfer. *See Alberts*, 2020 WL 6392564, at *4 ("In

general, courts considering motions for change of venue give significant deference to a plaintiff's choice of forum.") (citations omitted).

II. Consolidation would be infeasible in this case.

The consolidation factor does not weigh in favor of transfer, as consolidation of Mazik's claims with the *Osinek* cases would be infeasible. Mazik raises state law Medicaid claims and employment retaliation claims that are entirely unrelated to the claims raised in the consolidated matters before Judge Chen. One of Mazik's federal *qui tam* claims, in part, relates legally to the broader theory presented in *Osinek*: *i.e.*, that the United States was damaged by paying high capitated amounts to the Medicare Advantage Organization based on inflated risk adjustments factors and false diagnosis codes. But the factual basis for proving Mazik's claim is not present in the consolidated cases. None of the evidence concerning Kaiser's contracts with third-party vendors for fraud detection software, Defendants' determination to turn off certain functionality on that software, or Relator's extensive interactions with Kaiser management regarding its mis- or non-use and resulting overpayment, is material to the *Osinek* actions. Yet, this evidence forms the basis for Mazik's claims. And while the United States in *Osinek* will focus on proof that Kaiser providers added false diagnostic codes in addenda after patient encounters, Mazik will focus on a different compliance system and database, to show Kaiser tampered with it to allow fraudulent claims by non-Kaiser providers.

Moreover, because Mazik's legal claims are distinct from the claims asserted in *Osinek,* there is effectively no possibility of inconsistent rulings between the two cases. Certainly, one court's analysis of a motion may benefit from the rulings of other courts addressing similar legal principles, as this Court cited Judge Chen's decision in *Osinek*

when it ruled on Kaiser's motion to dismiss. But a judicial determination in one case would not be binding in the judicial determination of the other. Whether Kaiser is responsible for false claims caused by its tampering with compliance software for detecting fraudulent claims by outside providers would be a determination that is simply unaffected by a different judicial determination that Kaiser physicians did or did not use false diagnostic codes to record patient encounters. And vice versa.

Transfer of this case to the Northern District would therefore waste time, energy, and money, without any gain in judicial efficiency. Indeed, it would remove Mazik's case from this Court's docket after briefing and decision on the motion to dismiss, and put it with a judge in the Northern District who would be new to the case. Even if the case is assigned to Judge Chen, the new judicial officer would have to open up his docket to a new case based on an entirely different set of facts and disputes.

And, as stated by the United States in opposition to the motion to transfer:

> Consolidating this case with the Northern District cases would thus introduce multiple state claims and an entirely new federal healthcare program—Medicaid versus Medicare—into an already highly complex set of cases. [ECF 111 at 6–7.]

And

> Consolidation would likely delay the completion of discovery in *Osinek*, *Taylor* and *Bryant*, where the parties are more than two years into fact discovery. [*Id.* at 9.]

Given this strong opposition by the United States, consolidation would be infeasible, and considerations of judicial economy would be best served by denial of the transfer motion.

III. Differences between this case and *Osinek* cases weigh against transfer.

Courts decline to transfer when there are material distinctions between the case in the transferor court and the case in the proposed transferee court. *See Cooke v. Town of Colorado City*, 2012 WL 5835401, at *2 (D. Ariz. Nov. 16, 2012) ("[T]here are substantial differences between the cases and, thus, a transfer is not warranted under these circumstances."); *Lexington Ins. Co. v. Scott Homes Multifamily, Inc.*, 2013 WL 4026883, at *2 (D. Ariz. Aug. 7, 2013) (same). This is because the "facts needed to prove many of the alleged actions" raise "new factual and legal issues that are not likely to be raised" in the case pending in the transferee court. *Cooke*, 2012 WL 5835401, at *2. As a result, "there is unlikely to be a substantial duplication of effort that would be saved if both cases were being heard by one judge." *Lexington Ins.*, 2013 WL 4026883, at *2.

As demonstrated here, in the Court's February 13, 2024 Order, and in the Government's Statement of Interest, this case is unlike the Northern District cases. It tackles completely different factual issues, and it asserts legal claims unrelated to the *Osinek* cases. In the one federal *qui tam* claim where there is some overlap, the claims are legally related only at the highest level of generality. This lack of similarity weighs against transfer.

Further, Mazik and the Government and relators in *Osinek* are in two different courts on two different time schedules. Notably, the *Osinek* case has already passed complex pleading battles, and the parties there are some two years into discovery. Indeed, as stated by the Government in the Statement of Interest, the *Osinek* case itself is complex, and the United States does not want to risk delays in its case scheduling while the Northern District considers an ill-supported consolidation motion.

To the extent that there are any factual or discovery matters where Mazik and the United States might benefit from shared or joint efforts, such can be accomplished through coordination between counsel, without transfer or consolidation. The United States remains the real party in interest in this declined case, and the AUSA in this District and/or Relator's counsel would work with attorneys in the Northern District to ensure efficiencies of the sort that are available to separate actions. Where any document production or deposition testimony in one case may be relevant to the other, Relator and DOJ can coordinate between them, without joining in the same district.

In short, whether or not consolidation is feasible, transfer of this case to the Northern District is not needed. This case raises different "factual and legal issues" than those in the *Osinek* cases. *See Cooke*, 2012 WL 5835401, at *2. Having the cases heard by one judge would not save a "substantial duplication of effort," and thus this factor weighs against transfer. *See Lexington Ins.*, 2013 WL 4026883, at *2.

IV. Relator should not be forced into the discovery of a different case.

By moving to transfer, Defendants seek to impose upon Relator a joint discovery process with *Oskinek*. But given the separate issues in the cases, this is unreasonable. Relator is entitled to his own discovery schedule.

A "dispute[]" between the parties regarding the "extent of overlapping discovery" counsels against transfer. *See In re Acetaminophen - ASD/ADHD Prod. Liab. Litig.*, 2023 WL 2843771, at *1 (U.S. Jud. Pan. Mult. Lit. Apr. 7, 2023). This is particularly so when the transferor and proposed transferee cases have "non-common issues," and the party "that purportedly would benefit from centralized discovery" is the party that "oppose[s] transfer." *Id.*

Here, Defendants claim that Relator's discovery should be streamlined with the *Osinek* matters. Kaiser MPA at 9. But Relator has differing discovery needs and seeks a separate discovery timeline. *See* Joint Status Report and Proposed Case Schedule, ECF No. 110. That proposed timeline would have the parties proceed with discovery 90 days after the *Osinek* cases. *Id*. It is improper to force transfer given the parties' dispute over their discovery needs. *See In re Acetaminophen*, 2023 WL 2843771, at *1. This counsels against transfer.

V. Convenience of witnesses does not weigh in favor of transfer.

Defendants claim that the convenience of the witnesses weighs "heavily in favor" of transfer. (Kaiser MPA at 10.) But Defendants' argument is based on a few witnesses currently employed by Kaiser and located in the Northern District. Convenience of persons employed by the party seeking transfer is "entitled to little weight because defendants will be able to compel the employee's testimony at trial." *Martinez v. San Diego Cnty.*, 2017 WL 1273822, at *3 (E.D. Cal. Apr. 4, 2017) (Drozd, J.) (quotations and citations omitted, cleaned up); *see also Bristow v. Lycoming Engines*, 2007 WL 1106098, at *4 (E.D. Cal. Apr. 10, 2007) ("a defendant's motion to transfer under section 1404(a) may be denied when the witnesses are employees of the defendant and their presence may be obtained by the party") (quotations and citations omitted).

Even if the Court were to consider the inconvenience to employee witnesses residing in the Northern District, the burden on them would not be great. A movant's request will be given less weight when many witnesses are within relatively close proximity to the current forum. *See Galliani v. Citimortgage, Inc.*, 2013 WL 101411, at *5 (E.D. Cal. Jan. 7, 2013) ("[T]ransfer may be denied when witnesses…are within the

100–mile reach of the subpoena power.") (quotations and citations omitted). Here, the geographic distance between this Court and the Kaiser witnesses is insufficient to warrant transfer. It is only 86 miles between the two courthouses, and even less distance between the courthouse in Sacramento and Kaiser's headquarters in Oakland.

The bulk of the other Kaiser employee witnesses are elsewhere, in southern California or in other states across the county. Courts do not consider the convenience of parties and witnesses who are located outside both the current and proposed transferee fora. *Bristow*, 2007 WL 1106098, at *4 n.2.

In sum, every potential witness listed by Defendants and most of those listed by Relator are current employees of Defendants, and the convenience of these employees is to be afforded little weight. Defendants will be able to compel those employees' testimony at trial. *See Martinez v. San Diego Cnty.*, 2017 WL 1273822, at *3. As for the former employees, most of those witnesses live outside both the Eastern and Northern Districts. *See* Tang (Human Resources Consultant) Decl., ECF 109-2 ¶¶ 5–28; *Bristow*, 2007 WL 1106098, at *4 n.2. Given the relative close proximity of this Court to Defendants' headquarters in Oakland, as a practical matter, any inconvenience of the witnesses is insufficient to outweigh Relator Mazik's choice of this District as the forum for his action.

Conclusion

For the foregoing reasons, the Court should deny Defendants' motion for transfer.

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Dated: May 14, 2024

Respectfully submitted

POLLOCK COHEN LLP
LAW OFFICE OF JEREMY L. FRIEDMAN

By: /s/ *Jeremy L. Friedman*
Jeremy L. Friedman

Counsel for Relator Jeffrey Mazik

EXHIBIT K

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JEFFREY MAZIK, et al.,

Plaintiffs,

v.

KAISER PERMANENTE, INC., et al.,

Defendants.

No. 2:19-cv-00559-DAD-JDP

ORDER DENYING DEFENDANTS' MOTION TO TRANSFER VENUE

(Doc. No. 109)

This matter is before the court on the motion to transfer venue filed on April 8, 2024 by defendants Kaiser Foundation Health Plan ("KFHP"), Kaiser Foundation Hospitals, Inc. ("KF Hospitals"), Permanente Medical Groups, Permanente Medical Group, Inc., Southern California Permanente Medical Group, and Colorado Permanente Medical Group, P.C.[1] (collectively, "defendants"). (Doc. No. 109.) On June 4, 2024, the pending motion was taken under submission. (Doc. No. 121.) For the reasons explained below, defendants' motion to transfer venue will be denied.

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[1] The court will refer to defendants Permanente Medical Groups, Permanente Medical Group, Inc., Southern California Permanente Medical Group, and Colorado Permanente Medical Group, P.C. collectively as "the PMG Defendants."

BACKGROUND

On March 26, 2024, relator Jeffrey Mazik filed his operative second amended complaint ("SAC") on behalf of the United States of America and the states of California, Colorado, Georgia, Hawai'i, Virginia, and Washington (collectively, "the plaintiff states") against defendants pursuant to the federal False Claims Act and the corresponding state statutes. (Doc. No. 107.) Previously, on December 1, 2021, the United States had filed a notice informing the court of its decision to decline to intervene; the plaintiff states had filed a similar notice on December 6, 2021. (Doc. Nos. 62, 66.) In his SAC, relator alleges the following.

"Kaiser Permanente" is an "integrated managed care consortium made up of three distinct but interdependent groups of entities": defendant KFHP, defendant KF Hospitals, and several regional Permanente Medical Groups, including the PMG defendants. (*Id.* at ¶ 15.) The PMG defendants are groups of physicians that "contract with the other Kaiser entities" to provide medical services. (*Id.*) Each PMG defendant operates within its individual territory and is funded primarily by reimbursements from its respective regional Kaiser Foundation Health Plan entity. (*Id.*) Defendant KF Hospitals is a nonprofit corporation headquartered in Alameda County, California that operates hospitals and provides facilities for the benefit of the PMG defendants. (*Id.*) It also receives its funding from defendant KFHP. (*Id.*) Defendant KFHP is a nonprofit corporation headquartered in Alameda County, California that enrolls members in health plans and provides medical services for its members through contracts with defendant KF Hospitals and the PMG defendants. (*Id.*)

Medicare beneficiaries may opt to receive benefits through private health plans instead of the traditional fee-for-service Medicare program. (*Id.* at ¶ 20.) Under that option, known as Medicare Advantage, the federal government pays Medicare Advantage organizations such as defendants a "capitated" (i.e., per enrollee) amount for the purpose of providing medical benefits. (*Id.*) The capitated rates vary depending on the health status of the enrollees; less healthy enrollees require more medical care, which necessitates higher capitation reimbursement payments to the Medicare Advantage organizations. (*Id.* at ¶¶ 21, 22.) Health status in turn depends on the diagnosis codes generated by healthcare providers following encounters with

enrollees. (*Id.* at ¶¶ 23, 24.) In sum, enrollees see doctors such as those in the PMG defendants, who then provide diagnosis codes to defendant KFHP, which then submits the diagnosis codes to the Centers for Medicare & Medicaid Services ("CMS"). (*Id.* at ¶¶ 2, 23.) CMS uses the diagnosis codes to adjust the capitation rate for each enrollee, a process known as "risk adjustment." (*Id.* at ¶ 24.) More severe diagnosis codes lead to higher capitation rates, resulting in greater profits for all defendants—including defendant KF Hospitals and the PMG defendants. (*Id.* at ¶ 50.) Many government-funded plans other than Medicare Advantage also rely upon "substantially the same model" of risk adjustment for capitation rates, such as state-funded Special Needs Plans and "various state-administered Medicaid programs" such as those in California, Hawai'i, Virginia, and Washington. (*Id.* at ¶¶ 35–39.)

Medicare regulations impose certain requirements on Medicare Advantage organizations such as defendants in an effort to curb the potential for organizations to submit unsupported diagnosis codes, which would lead to improperly high capitation rates and inflated revenues to providers. (*Id.* at ¶¶ 28, 29.) For instance, Medicare Advantage organizations must adopt and implement "an effective compliance program, which must include measures that prevent, detect, and correct non-compliance with CMS' program requirements as well as measures that prevent, detect, and correct fraud, waste, and abuse." (*Id.* at ¶ 30) (quoting 42 C.F.R. § 422.503(b)(4)(vi)). Medicare Advantage organizations must also certify the accuracy, completeness, and truthfulness of the data provided to CMS as a condition of receiving payment. (*Id.* at ¶ 31) (citing 42 C.F.R. § 422.504). Similarly, the organization must submit an annual attestation signed by its Chief Executive Officer or Chief Financial Officer certifying that the risk adjustment data submitted to CMS is "accurate, complete, and truthful," acknowledging that risk adjustment data "directly affects the calculation of CMS payments," and recognizing that "misrepresentations to CMS about the accuracy of such information may result in Federal civil action and/or criminal prosecution." (*Id.*) CMS also imposes strict requirements on Medicare Advantage organizations' contractual relationships with entities that provide medical services to the organization's members. (*Id.* at ¶ 32.) Finally, CMS requires organizations to take corrective actions where necessary to ensure compliance with applicable laws and regulations, including the requirement

to perform a "root cause analysis" to identify the source of any potential errors or issues. (*Id.* at ¶ 33) (citing 42 C.F.R. § 422.504). State-funded Special Needs Plans are expected to follow Medicare Advantage compliance regulations such as those listed above. (*Id.* at ¶ 39.)

Relator, a resident of California, is the former "Senior Practice Leader for Kaiser's National Compliance Office" and has over 25 years of experience in fraud control, auditing, and compliance. (*Id.* at ¶ 11.) He was employed by defendant KFHP from 2008 to 2017, joining as an "Information Technology Audit Specialist" in May 2008 and transitioning to the role of "Senior Practice Leader in the Fraud Control Program" in March 2012. (*Id.* at ¶ 12.) Relator's duties included working with regional compliance leadership to implement compliance and fraud control initiatives, using data analytics to improve compliance and fraud-mitigation initiatives, investigating potential fraud, and developing corrective action plans to address fraud risks. (*Id.* at ¶ 13.)

According to relator, since 2008 at the latest, defendants have schemed to defraud the federal government by allowing external, i.e., "non-Kaiser," healthcare providers to submit false diagnosis codes, which defendants in turn submit to CMS in order to inflate their capitation rates. (*Id.* at ¶¶ 45, 49.) In particular, defendants intentionally fail to properly use fraud-detection tools to monitor claims errors. (*Id.* at ¶¶ 49, 51.) Defendants contract with data analytics vendors to review their external provider claims for each region. (*Id.* at ¶ 52.) The vendors provide software applications that perform various types of reviews. (*Id.*) For instance, some programs "detect claims that are incorrectly billed . . . [while] other programs identify intentionally manipulated claims that technically fall within plan rules . . . ." (*Id.*) However, defendants intentionally misused these programs and used them at minimum capacity, such as by disabling key features, in order to reduce the chances of detecting claims errors. (*Id.* at ¶¶ 53, 54.) In this way, defendants were actively working to avoid detecting and correcting fraudulent claims. (*Id.* at ¶ 54.)

In late 2015, relator was tasked with comparing the functionalities offered by two claims analytics vendors, McKesson and Verisk, with which defendants routinely contracted. (*Id.* at ¶¶ 60, 61.) McKesson offers auditing software called ClaimsXten that detects fraudulent billing practices using "a robust set of rules." (*Id.* at ¶ 62.) However, defendants chose to deactivate 25

of the 54 rules used by ClaimsXten—"the principal software program that they were supposedly relying on [to] detect such billing fraud." (*Id.*) When a group of employees including relator used a Verisk program to double-check data from "the Georgia region" produced by ClaimsXten, the group found $5.3 million in overpayments stemming from defendants' decision to deactivate nearly half the rules in ClaimsXten. (*Id.* at ¶ 64.) Defendants neither reactivated the disabled rules nor rectified the $5.3 million in overpayments. (*Id.* at ¶¶ 65, 66.) Relator presented the group's findings on the Georgia region to several Kaiser executives named in the FAC, but none of those executives took any action. (*Id.* at ¶¶ 66, 67.)

In February 2016, relator detected significant overpayments due to erroneous diagnosis codes in "all other regions."[2] (*Id.* at ¶ 68.) Relator prepared another presentation on the overpayments for his superiors and pointed out that defendants were required by the applicable regulations to review and investigate all identified overpayments within 60 days. (*Id.* at ¶¶ 68, 69.) His superiors did not request a root cause analysis, did not investigate further, and "even took overt steps to prevent Relator from investigating any further himself." (*Id.* at ¶ 71.)

On June 30, 2016, relator participated in a call with Marita Janiga, "Executive Director of Investigations in Kaiser's National Compliance, Ethics & Integrity Office," and the U.S. Department of Health and Human Services' Office of the Inspector General ("OIG"). (*Id.* at ¶¶ 59, 80, 81.) The purpose of the call was to discuss issues surrounding claims accuracy and claims recovered through fraud reduction efforts. (*Id.* at ¶ 81.) Janiga made several false statements during the call related to compliance issues, such as claiming that "Kaiser and its regional offices were 'fully integrated,' so there was no need for the OIG to inquire into its claims processes." (*Id.* at ¶ 84.) Worried that relator would speak up to correct her or to discuss his overpayment findings, Janiga messaged him "[not] to say a word." (*Id.* at ¶¶ 85–86.) Relator obeyed this command and remained silent during the call. (*Id.* at ¶ 87.)

Defendants "failed to activate (or disabled) the Verisk system" in states including Colorado, Georgia, Hawai'i, Virginia, and Washington. (*Id.* at ¶¶ 93–98.)

[2] Relator's allegations in the SAC are ambiguous as to whether or not these overpayments were also due to defendants tampering with compliance software.

In September 2016, relator "witnessed" an audit of claims data from all regional offices dating from August 3, 2010 through July 30, 2016. (*Id.* at ¶ 110.) The audit revealed that unsupported diagnosis codes had led to over $209 million in Medicare Advantage overpayments, $181 million in Medi-Cal overpayments, and $181 million in overpayments relating to "other Medicaid programs during that six-year period."[3] (*Id.*)

Despite all of relator's findings, defendants certified that their risk adjustment data was accurate and truthful and failed to correct the overpayments. (*Id.* at ¶¶ 90, 91.) All defendants profited from the overpayments and the inflated capitation rates. (*Id.* at ¶ 93.)

Eventually, defendants retaliated against relator for his activities. (*Id.* at ¶ 114.) The more that relator spoke up about unsupported diagnosis codes and overpayments, and the more that he "tried to steer Kaiser in the direction of full compliance," the more he was "sidelined and closed out from data and documents." (*Id.*) On October 12, 2016, relator approached Lauren Sutcliffe, "a Senior Manager in the Special Investigations Unit," regarding an analysis relator had performed uncovering approximately $380,000 in overpayments. (*Id.* at ¶¶ 59, 116.) Sutcliffe severely criticized relator for performing the analysis without her approval and placed him on a performance improvement plan. (*Id.* at ¶ 116.) Several times in October 2016, relator was denied access to "every data repository necessary to perform his compliance job." (*Id.* at ¶¶ 117, 118.) Because claims data review was relator's central focus on the compliance team, he was thereby stripped of his duties and responsibilities. (*Id.* at ¶ 119.) In an attempt to prevent whistleblowing, Sutcliffe also prohibited relator from meeting with anyone above Sutcliffe's level without her prior approval. (*Id.* at ¶ 120.) On November 3, 2016, Sutcliffe forbade relator from communicating with other employees by phone or instant messaging; he was instructed instead to use only email and to copy Sutcliffe on all outgoing emails. (*Id.* at ¶ 124.) On January 5, 2017, relator was fired. (*Id.* at ¶ 129.) Throughout his time working for defendants, relator's performance reviews were consistently "successful" or "excellent," and it was only after his

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[3] Again, relator does not specify whether or not the overpayments were allegedly due to defendants tampering with auditing software.

presentations on overpayments that he received his first "performance needs improvement" review. (*Id.* at ¶ 130.)

Based on the above allegations, relator asserts the following eleven claims in his SAC: (1) violation of the federal False Claims Act ("federal FCA"), 31 U.S.C § 3279(a)(1); (2) violation of the California FCA, California Government Code §§ 12650, *et seq.*; (3) violation of the Colorado Medicaid FCA, Colorado Revised Statutes §§ 25.5-4-303.5, *et seq.*; (4) violation of the Georgia False Medicaid Claims Act, Georgia Code §§ 49-4-168, *et seq.*; (5) violation of the Hawai'i FCA, Hawai'i Revised Statutes §§ 661-21, *et seq.*; (6) violation of the Virginia Fraud Against Taxpayers Act, Virginia Code §§ 8.01-216.1, *et seq.*; (7) violation of the Washington Medicaid Fraud FCA, Washington Revised Code §§ 74.66.005, *et seq.*; (8) unlawful retaliation in violation of the federal FCA, 31 U.S.C. § 3730(h); (9) unlawful retaliation in violation of the California FCA, California Government Code § 12653; (10) unlawful retaliation in violation of California Labor Code § 1102.5(b); and (11) retaliatory common law termination in violation of public policy. (Doc. No. 107 at ¶¶ 131–207.)

On July 13, 2022, defendants filed a motion to dismiss relator's first amended complaint ("FAC") on the grounds that his federal FCA claims were subject to the first-to-file bar given their similarity to claims being pursued in the Northern District of California. (Doc. No. 78.) The court granted that motion in part, concluding that "relator's FCA claim is barred by the first-to-file rule except to the extent relator alleges that defendants deliberately tampered with compliance software to ensure that it did not identify erroneous diagnosis codes." (Doc. No. 104 at 12.)

Thereafter, defendants filed their pending motion to transfer venue on April 8, 2024. In that motion, defendants argue among other things that the potential for consolidation of this

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action with other allegedly related matters currently before Judge Chen in the Northern District[4] strongly weighs in favor of transfer. (Doc. No. 109 at 13–16.) On April 22, 2024, the United States filed a statement of interest opposing transfer. (Doc. No. 111.) Relator filed his opposition to the pending motion on May 14, 2024. (Doc. No. 114.) Defendants filed their reply thereto on May 31, 2024. (Doc. No. 120.)

LEGAL STANDARD

Pursuant to 28 U.S.C. § 1404(a), "a district court may transfer any civil action to any other district or division where it might have been brought" for the convenience of parties and witnesses and in the interest of justice. "[T]he purpose of [§ 1404(a)] is to prevent the waste of time, energy and money and to protect litigants, witnesses and the public against unnecessary inconvenience and expense." *Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964) (internal quotation marks and citation omitted). "Section 1404(a) is intended to place discretion in the district court to adjudicate motions for transfer according to an 'individualized, case-by-case consideration of convenience and fairness.'" *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988) (quoting *Van Dusen*, 376 U.S. at 622).

District courts employ a two-step analysis when determining whether to transfer an action. *Robert Bosch Healthcare Sys., Inc. v. Cardiocom, LLC*, No. 3:14-cv-01575-EMC, 2014 WL 2702894, at *3 (N.D. Cal. June 13, 2014). "A court must first consider the threshold question of whether the case could have been brought in the forum to which the moving party seeks to transfer the case." *Park v. Dole Fresh Vegetables, Inc.*, 964 F. Supp. 2d 1088, 1093 (N.D. Cal. 2013); *see also Hatch v. Reliance Ins. Co.*, 758 F.2d 409, 414 (9th Cir. 1985) ("In determining whether an action 'might have been brought' in a district, the court looks to whether the action

[4] Six cases were consolidated before Judge Chen: (1) *United States ex rel. Osinek v. Kaiser Permanente*, No. 3:13-cv-03891-EMC (N.D. Cal.) ("*Osinek*"); (2) *United States ex rel. Taylor v. Kaiser Permanente*, No. 3:21-cv-03894-EMC (N.D. Cal.) ("*Taylor*"); (3) *United States ex rel. Arefi v. Kaiser Found. Health Plan, Inc.*, No. 3:16-cv-01558-EMC (N.D. Cal.) ("*Arefi*"); (4) *United States ex rel. Stein v. Kaiser Found. Health Plan, Inc.*, No. 3:16-cv-05337-EMC (N.D. Cal.) ("*Stein*"); (5) *United States ex rel. Bryant v. Kaiser Permanente*, No. 3:18-cv-01347-EMC (N.D. Cal.) ("*Bryant*"); (6) *United States ex rel. Bicocca v. Permanente Med. Grp., Inc.*, No. 3:21-cv-03124-EMC (N.D. Cal.) ("*Bicocca*"). The court will refer to these matters collectively as "the *Osinek* matters" in this order.

initially could have been commenced in that district.") "Once the party seeking transfer has made this showing, district courts have discretion to consider motions to change venue based on an 'individualized, case-by-case consideration of convenience and fairness.'" *Park*, 964 F. Supp. 2d at 1093 (quoting *Stewart Org.*, 487 U.S. at 29). In addition, "Section 1404(a) provides for transfer to a more convenient forum, not to a forum likely to prove equally convenient or inconvenient." *Mainstay Bus. Sols. v. Indus. Staffing Servs.*, No. 2:10-cv-03344-KJM-GGH, 2012 WL 44643, at *1 (E.D. Cal. Jan 9, 2012) (citing *Van Dusen*, 376 U.S. at 645–46). The burden is on the moving party to show that transfer is appropriate. *Commodity Futures Trading Comm'n v. Savage*, 611 F.2d 270, 279 (9th Cir. 1979.)

"A motion to transfer venue under § 1404(a) requires the court to weigh multiple factors in its determination whether transfer is appropriate in a particular case." *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498 (9th Cir. 2000). "The primary factors to be considered are convenience of witnesses and parties and concerns for judicial economy (including duplicative effort, waste of time and money)." *Cochran v. NYP Holdings, Inc.*, 58 F. Supp. 2d 1113, 1119 (C.D. Cal. 1998), *aff'd*, 210 F.3d 1036 (9th Cir. 2000). Other factors include plaintiff's choice of forum, administrative considerations, and the respective parties' contacts with the forum. *See Jones*, 211 F.3d at 498–99; *Rubio v. Monsanto Co.*, 181 F. Supp. 3d 746, 759 (C.D. Cal. 2016).

ANALYSIS

At step one of the transfer analysis, relator does not contest that his claims could have been brought in the Northern District of California. Consequently, the court moves to step two and conducts "an 'individualized, case-by-case consideration of convenience and fairness.'" *Park*, 964 F. Supp. 2d at 1093 (quoting *Stewart Org.*, 487 U.S. at 29.)

A. Choice of Forum

"[G]reat weight is generally accorded plaintiff's choice of forum . . . ." *Lou v. Belzberg*, 834 F.2d 730, 739. However, the "degree to which courts defer to the plaintiff's chosen venue is substantially reduced where the plaintiff's venue choice is not its residence." *United States v. Academy Mortg. Corp.*, No. 16-cv-02120-EMC, 2018 WL 4053484, at *5 (N.D. Cal. Aug. 24,

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2018) (citation omitted). It is undisputed that relator resides in the Northern District of California, not the Eastern District. (*See* Doc. No. 114 at 13.)

"[A] plaintiff's forum choice is [also] given substantially less weight when the central dispute in the action occurred primarily in another forum and lacks any significant contact with the forum." *A.F.P. v. United States*, No. 1:21-cv-00780-DAD-EPG, 2022 WL 2704570, at *5 (E.D. Cal. July 12, 2022). Defendants argue that relator has not explained why he chose to litigate his case in the Eastern District, and they contend that relator "does not point to any allegation in the SAC that specifically concerns conduct occurring in the Eastern District." (Doc. No. 109 at 7–8.)

Relator argues in opposition that, the government's decision not to intervene notwithstanding, plaintiff's counsel has conferred with the Assistant U.S. Attorney for the Eastern District, Catherine Swann, throughout the course of this litigation. (Doc. No. 114 at 13.) Relator further argues that Assistant U.S. Attorney Swann "is familiar with the claims and is actively monitoring this action" (*id.*), though as defendants point out in reply, relator has not filed any declarations or produced any evidence to support this argument (Doc. No. 120 at 7).

The court notes that relator alleges in his SAC that venue in the Eastern District is appropriate because "defendants can be found in, reside in, and/or transact business in the Eastern District of California, and because many of the violations of [the federal FCA] discussed herein occurred within this judicial district." (Doc. No. 107 at ¶ 10.) While defendants argue that relator has failed to make any allegations regarding conduct specifically occurring in the Eastern District, defendants nowhere argue that venue in the Eastern District is inappropriate. Indeed, while relator could be more detailed in sections of his SAC, he appears to allege a fraudulent scheme occurring throughout the state of California.[5] (*See, e.g.*, Doc. No. 107 at ¶ 110.) However, relator does not point to any allegations in his SAC purporting to show that defendants'

[5] The court notes that even if relator's SAC was construed as alleging a fraudulent scheme occurring only in the Northern District of California and not in the Eastern District, the court would still deny the pending motion for the reasons discussed below. Specifically, the court ultimately concludes that defendants' delay in seeking transfer of venue and concerns for judicial economy weigh significantly in favor of denying the pending motion.

interference with compliance software occurred in the Eastern District rather than at defendants' headquarters located in the Northern District, where relator was employed. The court therefore finds that the conduct and parties in this case have some contacts with the Eastern District, but that "the central dispute in the action occurred primarily in another forum." *A.F.P.*, 2022 WL 2704570, at *5.

Finally, the weight accorded a plaintiff's choice of forum "is diminished . . . when the plaintiff is a *qui tam* relator asserting the rights of the Government," because the government is the real party in interest in a *qui tam* action. *United States v. Janssen Biotech, Inc.*, No. 17-cv-07250-JST, 2019 WL 13175808, at *2 (N.D. Cal. Apr. 29, 2019) (collecting cases).[6]

Accordingly, the court affords relator's choice of forum some, but very little, weight in this case. *See Academy Mortg. Corp.*, 2018 WL 4053484, at *5 ("Relator is a *qui tam* plaintiff bringing suit on behalf of the U.S. government, and she does not work or reside in the district. Plaintiff resides in the Eastern District of California, adjacent to this district. Accordingly, her choice of forum is given some, but very limited, weight.").

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[6] Because the government is the real party in interest in a *qui tam* action, district courts considering a motion to transfer often give significant weight to the government's preferences once the government has intervened. *See, e.g.*, *United States ex rel. Westrick v. Second Chance Body Armor, Inc.*, 771 F. Supp. 2d 42, 47 (D.D.C. 2011) ("Because the United States is the real party in interest in a *qui tam* action filed by a relator, the United States' choice of forum is entitled to principal deference."). Here, the government has declined to intervene, but has nevertheless filed a statement of interest opposing the pending motion. (Doc. No. 111.) At least one district court has found in similar circumstances that "the United States' preferred forum has no bearing" on a motion to transfer when the government has filed a statement of interest but declined to intervene. *See United States ex rel. Thomas v. Duke Univ.*, No. 4:13-cv-00017-JLK, 2017 WL 1169734, at *2 (W.D. Va. Mar. 28, 2017). The court notes that the government nonetheless remains the real party in interest even after declining intervention. *See United States ex rel. Polansky v. Exec. Health Res.*, 599 U.S. 419, 425 (2009). In any event, as discussed below, the court will deny the pending motion even if relator's and the government's choice of forum is afforded only minimal deference. Consequently, and particularly in light of the lack of briefing from the parties on the appropriate level of deference to be accorded under these circumstances, the court need not—and therefore does not—consider whether a greater degree of deference to the government's expressed preference is appropriate here.

B. Convenience of Witnesses

While defendants "recognize that Sacramento, where this Court is located, and San Francisco . . . are not distant," they nevertheless argue that the convenience of the witnesses favors transfer. (Doc. No. 109 at 16.)

The convenience of the witnesses is often the paramount factor in ruling on a motion to transfer under § 1404(a). *A.F.P.*, 2022 WL 2704570, at *6. "Importantly, while the convenience of party witnesses is a factor to be considered, the convenience of non-party witnesses is the more important factor." *Ironworkers Local Union No. 68 & Participating Employers Health and Welfare Fund v. Amgen, Inc.*, No. 2:07-cv-05157-PSG-AGR, 2008 WL 312309, at *5 (C.D. Cal. Jan. 22, 2008). Likewise, the convenience of an employee of the party seeking transfer is "entitled to little weight" because that party "will be able to compel [the employee's] testimony at trial." *Jaco Env't Inc. v. Appliance Recycling Ctrs. of Am., Inc.*, No. 3:06-cv-06601-JSW, 2007 WL 951274, at *4 (N.D. Cal. Mar. 27, 2007). To show inconvenience for witnesses, "the moving party should state the witnesses' identities, locations, and content and relevance of their testimony." *Meyer Mfg. Co. Ltd. v. Telebrands Corp.*, No. 2:11-cv-03153-LKK-DAD, 2012 WL 1189765, at *6 (E.D. Cal. Apr. 9, 2012) (citing *Florens Container v. Cho Yang Shipping*, 245 F. Supp. 2d 1086, 1092–93 (N.D. Cal. 2002)); *see also E. & J. Gallo Winery v. F. & P. S.p.A.*, 899 F. Supp. 465, 466 (E.D. Cal. 1994) ("[a]ffidavits or declarations are required to identify key witnesses and a generalized statement of their anticipated testimony").

Defendants argue that "most of the key witnesses" will be located in the Northern District. (Doc. No. 109 at 16.) Defendants also contend that of the 25 current and former employees identified by the parties in their initial disclosures, "13 worked within the Northern District" and only one lived in the Eastern District.[7] (*Id.* at 17.) In particular, defendants argue that current and former employees such as relator's supervisors and colleagues all worked in the Northern District

[7] The court notes that defendants do not assert that these potential witnesses currently live in the Northern District. Indeed, according to the declaration of Charlotte Tang, a human resources consultant for defendants, these former employees largely do not live in the Northern District, as described below. (*See* Doc. No. 109-2.) In analyzing the convenience of the witnesses, the court attaches no weight to the location of their former employment, as opposed to their current residence.

and are "likely to have important testimony" in connection with both the fraud and retaliation claims. (*Id.*) (identifying Judy Sarles, Jay Loden, Daren Pursche, Marita Janiga, Sean Kelly, and Laurel Sutcliffe).

The court finds that the convenience of the witnesses weighs minimally, if at all, in favor of transfer. Defendants have provided evidence that two potential witnesses currently live in the Northern District and two live in the Eastern District, balancing the scales equally.[8] (Doc. No. 109-2 at 2–4.) These four potential witnesses are also defendants' current employees (*id.*), meaning their convenience is given little weight. *Jaco Env't Inc.*, 2007 WL 951274, at *4.

Defendants have also provided evidence that the last known addresses for three more potential witnesses are in the Northern District. (Doc. No. 109-2 at 2–4.) While these three potential witnesses are all former employees, and thus their presence cannot be compelled by defendants, their last known addresses are in Contra Costa and Alameda Counties, located in the East Bay region between the Sacramento and San Francisco courthouses. (*Id.*) The court notes that depending on their exact locations within those counties, these potential witnesses might find either courthouse more convenient. *See Pratt v. Rowland*, 769 F. Supp. 1128, 1132 (N.D. Cal. 1991) ("First, it is unclear whether transfer to the Eastern District would in fact be more convenient for the parties and witnesses. Many defendants reside in distant Kern County. For them, the difference in travel time between this Court and the Eastern District is negligible."). Moreover, these potential witnesses appear to live within 100 miles of either courthouse and are thus subject to either court's subpoena power. *See Galliani v. Citimortgage, Inc.*, No. 2:12-cv-00411-KJM-KJN, 2013 WL 101411, at *5 (E.D. Cal. Jan. 7, 2013) ("[T]ransfer may be denied when witnesses either live in the forum district or are within the 100-mile reach of the subpoena power.") (citation omitted); Fed. R. Civ. P. 45(c) ("A subpoena may command a person to attend a trial . . . within 100 miles of where the person resides . . . ."). These potential witnesses therefore provide minimal support for transfer.

[8] In fact, given that these four potential witnesses live in Alameda, Contra Costa, Solano, and Sacramento Counties, it is likely that Sacramento would be more convenient for them overall than San Francisco.

Lastly, defendants provide evidence that more than a dozen other witnesses live in various other parts of the country, such as Los Angeles, Oregon, Connecticut, Maryland, and Georgia. (Doc. No. 109-2 at 2–4.) The court does not find the convenience of these witnesses to weigh in favor of transfer. *Cf. Bristow v. Lycoming Engines*, No. 06-cv-01947-LKK-GGH, 2007 WL 1106098, at *4 n.2 (E.D. Cal. Apr. 10, 2007) ("The court does not consider the convenience of parties and witnesses who are located outside both the current and transferee fora.").

C. Location of Records and Evidence

Defendants briefly argue that the location of the evidence favors transfer. (Doc. No. 109 at 16.) However, the location of evidence is not a significant consideration "because documentary evidence related to this case can be reproduced and transmitted electronically to this court." *A.F.P.*, 2022 WL 2704570, at *7; *see also Williams v. Robert Half Int'l Inc.*, No. 4:20-cv-03989-KAW, 2020 WL 12655622, at *3 (N.D. Cal. Sept. 18, 2020) ("[I]n the digital age, the access to records is neutral given the portability of documents."). Defendants have not argued that, for example, any important evidence cannot be easily transmitted to the Eastern District. *See Martinez v. San Diego Cnty.*, No. 1:16-cv-01140-DAD-SKO, 2017 WL 1273822, at *4 (E.D. Cal. Apr. 4, 2017) ("Defendant San Diego County does not allege that discovery in this case [will] implicate any unique types of information that cannot be easily digitized or that any on-site inspections will be required in San Diego.").

D. Parties' Contacts with the Forum and Locus of the Action

Relator has no discernible contacts with the Eastern District. As noted above, he argues that an Assistant United States Attorney for the Eastern District is already familiar with this case, but he cites no authority—nor has the court found any—suggesting this supports denial of the pending motion to transfer. Instead, it is undisputed that relator worked and resides in the Northern District, albeit in locations between both courthouses. As also discussed above, relator alleges a fraudulent scheme with some relation to the Eastern District, though the locus of the alleged scheme was in the Northern District. Overall, these factors weigh only slightly in favor of transfer.

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E. Judicial Economy and the Interests of Justice

1. Risk of Inconsistent Judgments

Defendants next argue that denying the pending motion would raise the risk of inconsistent rulings on questions of law, specifically their anticipated defense that the diagnosis codes they submitted to CMS are not "claims for payment" within the meaning of 31 U.S.C. § 3729(b)(2). (Doc. No. 109 at 16.) Neither the undersigned nor Judge Chen has expressly considered this precise question. However, both courts have found that the materiality element of the respective relators' federal FCA claims—that is, whether conduct has "a natural tendency to influence . . . the payment or receipt of money," *United States ex rel. Rose v. Stephens Inst.*, 909 F.3d 1012, 1018 (9th Cir. 2018)—was "supported by allegations that CMS makes risk-adjustment payments based directly on the diagnosis codes submitted by health plans." (Doc. No. 104 at 16–17); *United States ex rel. Osinek v. Permanente Med. Grp., Inc.*, 640 F. Supp. 3d 885, 910 (N.D. Cal. 2022); *cf. United States ex rel. Silingo v. WellPoint, Inc.*, 904 F.3d 667, 673 (9th Cir. 2018) ("The importance of accurate data certifications and effective compliance is obvious: if enrollee diagnoses are overstated, then the capitation payments to Medicare Advantage organizations will be improperly inflated."). The court therefore finds that consideration of the risk of inconsistent judgments does not weigh in favor of transfer.

2. Efficiencies and Judicial Economy

"The feasibility of consolidation is a significant factor in a transfer decision, although even the pendency of an action in another district is important because of the positive effects it might have in possible consolidation of discovery and convenience to the witnesses and parties." *A.J. Indus., Inc. v. U.S. Dist. Ct. for Central Dist. of Cal.*, 503 F.2d 384, 389 (9th Cir. 1974) (internal citation omitted). However, when transfer would lead to delay, "the district court [does] not abuse its discretion in denying [a party's] motion notwithstanding possible inconvenience to the witnesses." *Allen v. Scribner*, 812 F.2d 426, 436 (9th Cir. 1987).

Defendants argue that the potential for consolidation of this action with the *Osinek* matters strongly weighs in favor of transfer. (Doc. No. 109 at 13–16.) Defendants argue, and relator does not contest, that the present action (hereinafter, "*Mazik*") and the *Osinek* matters both

concern an alleged effort by defendants to knowingly submit false diagnosis codes to CMS in an effort to defraud the Medicare Advantage program in violation of the federal FCA. (*Id.* at 14.) According to defendants, this similarity would permit Judge Chen to coordinate discovery and case management more efficiently in the Northern District. For instance, defendants argue, the *Mazik* and *Osinek* matters both involve Medicare Advantage, defendants' risk-adjustment business practices, and defendants' compliance programs, such that transfer would reduce the duplication of discovery. (*Id.* at 14–15.) Moreover, defendants argue that Judge Chen and Magistrate Judge Sallie Kim are already familiar with "the sort of discovery that is relevant in these types of cases and with this specific group of Defendants," having already handled several motions to dismiss and discovery motions. (*Id.* at 16.)

Relator argues in opposition that consolidation of *Mazik* with the *Osinek* matters would be infeasible. (Doc. No. 114 at 14–17.) As an initial matter, relator argues that the scopes of the actions are different because he asserts state FCA claims and retaliation claims entirely unrelated to the *Osinek* matters. (*Id.* at 14.) This court agrees with relator that the scope of *Mazik* is different from that of the *Osinek* matters. However, the court notes that this fact does not necessarily undercut potential efficiencies to be gained from consolidating the federal FCA claims, if the federal FCA claims are in fact similar. To that point, relator argues that the one commonality between the *Mazik* and *Osinek* matters, the presence of a federal FCA claim predicated on defendants' Medicare Advantage compliance program, itself conceals a distinction: The FCA claim in *Mazik* is predicated on defendants' alleged tampering with compliance software, while the FCA claims in the *Osinek* matters is almost entirely predicated on defendants' providers allegedly adding false diagnostic codes in addenda after patient encounters. (*Id.*)

The government similarly argues in its statement of interest that the different factual bases render any proposed benefits of consolidation "illusory" and that transfer would only delay the completion of discovery and other pre-trial matters in the *Osinek* matters. (Doc. No. 111 at 2.) It was these significant factual differences, the government argues, that led it to decline intervention in *Mazik* and not to seek transfer to the Northern District at the time it moved to consolidate the other six cases into the *Osinek* matters. (*Id.* at 3.) The government further argues that the parties

in the *Osinek* matters are more than two years into fact discovery and that "Judge Chen recently approved a five-page revised pre-trial schedule that required months of negotiations among the parties and motions practice focusing on the highly specific discovery issues presented by" the *Osinek* matters. (*Id.* at 10–11.) Both relator and the government highlight this court's prior order granting in part and denying in part defendants' motion to dismiss relator's FAC, which dismissed relator's federal FCA claim to the extent it was predicated on similar "material facts" as the claims presented in the *Osinek* matters. (*See* Doc. Nos. 111 at 7; 114 at 16; *see also* Doc. No. 104 at 10–14.)

The court concludes that the potential for gains in efficiency with consolidation weighs in favor of transfer, though only slightly. As defendants argue and relator does not contest, there are some high-level similarities between *Mazik* and the *Osinek* matters. Both involve defendants' alleged violations of the federal FCA via incorrect diagnoses and deficient compliance programs. But, because of defendants' prior motion to dismiss on first-to-file grounds, relator's federal FCA claim survives only to the extent that it does not share a material factual basis with the *Osinek* matters. As the court discussed in its prior order, nothing in the *Osinek* matters deals with defendants' intentional misuse of its own compliance software, which is the sole remaining basis of relator's federal FCA claim in this case. Perhaps as a result, as the government points out, defendants have not identified a single witness expected to be deposed both in this action and the *Osinek* matters (Doc. No. 111 at 9), likely because of the different underlying conduct in *Mazik* and the *Osinek* matters. The court finds that the lack of factual similarity between the actions undercuts defendants' claim that consolidation would promote efficiency in discovery and case management. *See, e.g.*, *Lexington Ins. Co. v. Scott Homes Multifamily, Inc.*, No. 12-cv-02119-JAT, 2013 WL 4026883, at *2 (D. Ariz. Aug. 7, 2013) (denying a motion to consolidate where "the cases share a common factual background in a general sense" but "the specific facts in both suits are completely different" because "there is unlikely to be a substantial duplication of effort that would be saved if both cases were being heard by one judge"); *cf. In re Acetaminophen – ASD/ADHD Prods. Liab. Litig.*, MDL No. 3043, 2023 WL 2843771, at *1 (U.S.J.P.M.L. Apr. 7,

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2023) (denying the plaintiffs' motion to transfer brought under 28 U.S.C § 1407 in part because of the likely small "extent of overlapping discovery").

3. Potential for Delay

Relator and the government argue that transfer would result in delay for both *Mazik* and the *Osinek* matters. The government points out that the parties in the *Osinek* matters recently spent nearly five months negotiating a case management order. (Doc. No. 111 at 11); *see also Osinek*, No. 3:13-cv-03891-EMC, Admin. Mot. to Amend the Case Mgmt. Ord., Doc. No. 327, at 4 (N.D. Cal. Mar. 1, 2024) ("Plaintiffs have worked diligently to conduct an enormous volume of written and document discovery to date in this complex and significant litigation. . . . And further conferral will not be fruitful, as the parties have conferred about amending the current case management order [ ] for the past four months."); *id.*, Ord. Granting Stipulation to Amend the Case Mgmt. Ord., Doc. No. 332 (N.D. Cal. Apr. 3, 2024). Defendants argue in reply that delay would be negligible because relator's proposed case schedule trails the schedule in the *Osinek* matters "by a mere three months, and only for certain deadlines." (Doc. No. 120 at 12.)

This court does not share defendants' optimism regarding the ease with which case management schedules could be aligned were transfer to be granted. Consolidating *Mazik* with the *Osinek* matters appears likely to disrupt the laboriously negotiated schedule currently in place in the cases pending before Judge Chen in the Northern District. Moreover, transfer runs the risk of injecting relator into discovery disputes with little relation to his action given the factual dissimilarity of his federal FCA claim. Accordingly, the court concludes that the potential for delay weighs strongly in favor of denying the pending motion. *See Allen*, 812 F.2d at 436 ("Because the transfer of this case undoubtedly would have led to delay, the district court did not abuse its discretion in denying Allen's motion notwithstanding possible inconvenience to the witnesses.")

4. Timeliness of the Pending Motion

A district court may consider the timing of a motion to transfer in relation to other developments in the case. *See Moore v. Telfon Commc'ns Corp.*, 589 F.2d 959, 968 (9th Cir. 1978) (finding that the district court "justifiably found" the convenience of the parties and

witnesses "outweighed by other, more compelling, considerations" including "the duration of the pendency of the litigation prior to the motion to transfer"); *Savage*, 611 F.2d at 279 (finding that the district court did not abuse its discretion in denying the defendant's motion to transfer where the "district court was familiar with the case"); *New Show Studios, LLC v. Howe*, 696 F. App'x 271, 272 (9th Cir. 2017) ("Denial of Howe's request to transfer venue was not an abuse of discretion because Howe unreasonably delayed in seeking transfer . . . .") (citing *Allen*, 812 F.2d at 436).[9]

Here, relator's original complaint was served upon defendants in February 2021 (Doc. No. 40), the government intervened and sought to consolidate the *Osinek* matters in July 2021, and yet defendants did not file the pending motion to transfer venue until April 2024 (Doc. No. 109). Moreover, this court has already resolved a motion to dismiss in *Mazik* (Doc. No. 104), and Judge Chen has resolved eight motions to dismiss in the *Osinek* matters (*see Osinek*, 3:13-cv-03891-EMC, Doc. Nos. 171, 223, 224, 225, 226, 275, 276, 277). *See Pratt*, 769 F. Supp. at 1132 (denying the defendant's motion to transfer because "[t]he fact that a preliminary injunction has already been issued in this action also militates against transfer" and because "this Court [is] knowledgeable about the facts of the case"); *Right to Life of Central Cal. v. Bonta*, 614 F. Supp. 3d 729, 733 (E.D. Cal. July 6, 2022) (denying the defendant's motion to transfer where "the undersigned issued the TRO in this case" and had already "engage[d] with the substantive issues presented"); *compare Lixenberg v. Coogi Partners, LLC*, No. 17-cv-02537-MWF-MRW, 2018 WL 4850402, at *5 (C.D. Cal. Feb. 27, 2018) (granting the defendant's motion to transfer where "this action ha[d] only been pending for a matter of months, not two years, before the Motion to Transfer was filed" and where "no substantive motions [had been] decided").

The court also notes that one of defendants' primary arguments in support of the pending motion to transfer is the alleged similarity between *Mazik* and the *Osinek* matters, but defendants only filed the pending motion after this court dismissed those of relator's allegations that resembled the allegations in the *Osinek* matters. Defendants do not satisfactorily explain why

[9] Citation to this unpublished Ninth Circuit opinion is appropriate pursuant to Ninth Circuit Rule 36-3(b).

they chose to wait three years to file their motion to transfer and only then filed it after the most similar allegations had been stripped out of relator's pleadings. "In light of these case-specific circumstances, the court concludes that a transfer of this action to the Northern District of California at this time is not appropriate." *Right to Life*, 614 F. Supp. 3d at 733.

CONCLUSION

For all of the reasons explained above, defendants' motion to transfer venue (Doc. No. 109) is denied.

IT IS SO ORDERED.

Dated: **June 13, 2024**

DALE A. DROZD
UNITED STATES DISTRICT JUDGE