UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA AND STATE OF CALIFORNIA ex rel. SCOTT H.M. DRISCOLL, M.D., AND SCOTT H.M. DRISCOLL, M.D., individually and personally, Plaintiffs, v. TODD SPENCER M.D. MEDICAL GROUP, et al., Defendants.

1:11-cv-1776-LJO-SMS MEMORANDUM DECISION AND ORDER TO DISMISS (Docs. 78, 79)

I. PRELIMINARY STATEMENT TO PARTIES AND COUNSEL Judges in the Eastern District of California carry the heaviest caseloads in the nation, and this Court is unable to devote inordinate time and resources to individual cases and matters. Given the shortage of district judges and staff, this Court addresses only the arguments, evidence, and matters necessary to reach the decision in this order. The parties and counsel are encouraged to contact the offices of the parties and this action. The parties are required to reconsider consent to conduct all further proceedings before a Magistrate Judge, whose schedules are far more realistic and accommodating to parties than that of U.S. Neill, who must prioritize criminal and older civil cases.

Civil trials set before Chief Judge ONeill trail until he becomes available and are subject to suspension mid-trial to accommodate criminal matters. Civil trials are no longer reset to a later date if Neill is unavailable on the original date set s Fresno Division randomly and without advance notice reassigns civil actions to U.S. District Judges throughout the nation to serve as visiting judges. In the absence of Magistrate Judge consent, this action is subject to reassignment to a U.S. District Judge from inside or outside the Eastern District of California.

II. INTRODUCTION Plaintiff brings this qui tam action on behalf of the United States against Defendants for their alleged false or fraudulent claims to the federal government in violation of the False Claims Act , 31 U.S.C. §§ 3729 et seq., and its California corollary, the . See U.S. ex rel. Anderson v. Northern Telecom, 52 F.3d 810, 812-13 (9th Cir. 1995). Relator claims Defendants Todd Spencer, M.D., Todd Spencer M.D. Medical Group, and Madera Community Hospital submitted approximately 63,500 false and fraudulent claims for Medicare and Medi-Cal payments for,

among other things, unnecessary or unperformed radiology scans and procedures.

12(b)(6). 1

The Court took the matter under submission on the papers pursuant to Local Rule 230(g). See Doc. 83. For the following reasons, the Co amend.

III. FACTUAL AND PROCEDURAL BACKGROUND 2 The See Docs. 46, 64. In the second See Doc. 64. Relator appealed the order, and

the Ninth Circuit reversed and remanded the case. Doc. 71 at 4. The Ninth Circuit held in relevant part:

1 re to the Federal Rules of Civil Procedure. 2 See Lazy Y. Ranch LTD. v. Behrens, 546 F.3d 580, 588 (9th Cir. 2008). By holding that the district court erred in dismissing the entire operative complaint, we do not mean to suggest that the entire complaint is sufficiently specific. Id. For example, the present complaint alleges generally that tests numbering in the thousands were fraudulent, covering a period much longer than the three years during which Relator worked with Dr. Spencer. Id. The court therefore remanded the case with instructions to allow Relator another opportunity to amend the complaint to address these deficiencies and to narrow the scope of the complaint so that the litigation will be manageable. Id. The

Relator worked as a diagnostic radiologist for the Spencer Group from December 1, 2007, to April 9, 2010. Id. at ¶ 1. - that Defendants had used for approximately a decade. Id. The protocol dictate how and when to perform certain radiological scans. Id. at ¶ 18. each time they performed a radiological scan and, in doing so, performed unnecessary or useless nt of defrauding the Government and inflated medical bills. Id.

fraudulent claims at Madera Community Hospita Id. a

government (or both). See id. at ¶¶ 44, 52.

-Cal Provider Agreements also made clear their duty . . . to charge their lowest fees . . . and refrain from conduct that would harm the Medi-Cal program or its be Id. at ¶ 20. As part of those agreements, Defendants agreed to do the following:

Compliance with Laws and Regulations. Provider agrees to comply with all applicable provisions of Chapters 7 and 8 of the Welfare and Institutions Code (commencing with Sections 14000 and 14200), and any applicable rules or regulations promulgated by DHS pursuant to these chapters. Forbidden Conduct. Provider agrees that it shall not engage in

conduct inimical to the public health, morals, welfare and safety of any Medi-Cal beneficiary, or the fiscal integrity of the Medi-Cal program. Provider Fraud and Abuse. Provider agrees that it shall not engage in fraud or abuse. Prohibition of Rebate. Refund or Discount. Provider agrees that it shall not offer, give, furnish, or deliver any rebate, refund, commission, preference, patronage dividend,

discount, or any other gratuitous consideration, in connection with the rendering of health care services to any Medi-Cal beneficiary. Provider further agrees that it shall not solicit, request, accept, or receive, any rebate, refund, commission, preference, patronage dividend, discount, or any other gratuitous consideration, in connection with the rendering of health care services to any Medi-Cal beneficiary. Provider further agrees that it shall not take any other action or receive any other benefit prohibited by state or federal law. Id. at ¶ 20 (emphasis in original). According to Relator, however, certified compliance with [the Mammography Quality Standards Act] and other applicable laws and

Id. at ¶ 37. Relator brings seven claims for relief. In claims one through three, he alleges violations of 31 U.S.C. § 3729(a)(1)(A), (B), and (C) against all defendants. These sections of the FCA attach liability to any person who:

(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval; (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim; [or] (C) conspires to commit a violation of subparagraph (A), (B).

31 U.S.C. §§ 3729(a)(1)(A)-(C). In claims four through seven, relator alleges violations of California Government Code §§ 12651(a)(1), (2), (3) and (8) against all defendants. These sections of the CFCA attach liability to any person who:

(1) Knowingly presents or causes to be presented a false or fraudulent claim for payment or approval. (2) Knowingly makes, uses, or causes to be made or used a false record or statement material to a false or fraudulent claim. (3) Conspires to commit a violation of this subdivision . . . . (8) Is a beneficiary of an inadvertent submission of a false claim, subsequently discovers the falsity of the claim, and fails to disclose the false claim to the state or the political subdivision within a reasonable time after discovery of the false claim. Cal. Gov. Code §§ 12651(a)(1)-(3), (8). Defendants move to dismiss all seven claims under Rule 12(b)(6) for failure to state a claim and under See Docs. 78, 79.

IV. STANDARD OF DECISION 1. Rule 12(b)(6) A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) is a challenge to the sufficiency of the allegations set forth in the complaint. A 12(b)(6) dismissal is proper where there is

Balisteri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990). In considering a motion to dismiss for failure to state a claim, the court generally accepts as true the allegations in the complaint, construes the pleading in the light most favorable to the party opposing the motion, and r Lazy Y. Ranch LTD v. Behrens, 546 F.3d 580, 588 (9th Cir. 2008).

To survive a 12(b)(6) motion to dismiss, the plaintiff must, in accordance with Rule 8, allege Bell Atl. Corp. v. Twombly, 550 U.S.

court to draw the reasonable inference that the defendant is liable for the misconduct alle Ashcroft v. Iqbal Id. (quoting Twombly complaint attacked by a Rule 12(b)(6) motion to dismiss does not

Twombly, 550 U.S. at 555 (internal citations omitted). Iqbal allegations in a complaint . . . must contain sufficient allegations of underlying facts to give fair notice

Starr v. Baca, 652 F.3d 1202, 1216 (9th either direct or inferential allegations respecting Twombly, 550 U.S. at 562.

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United States v. United Healthcare Insurance Company, 832 F.3d 1084, 1101 (9th Cir. 2016) (i give notice to defendants of the specific fraudulent conduct against which they must defend, but also rohibit plaintiffs from unilaterally imposing upon the court, the parties and society enormous social and Bly-Magee v. California, 236 F.3d 1014, 1018 (9th Cir. 2001). To the extent that the pleadings can be cured by the allegation of additional facts, a plaintiff should be afforded leave to amend. Cook, Perkiss and Liehe, Inc. v. Northern California Collection Serv., Inc., 911 F.2d 242, 247 (9th Cir. 1990) (citations omitted).

2. Rule 9(b) Cafasso, U.S. ex rel. United States v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1054 (9th Cir.2011), and CFCA claims. Vess v. Ciba Geigy Corp. USA, 317 F.3d 1097, 1103 (9th Cir.2003) (it is well established that 9(b)'s particularity requirement applies to state- . Rule 9(b)

Ebeid ex rel. United States v. Lungwitz, 616 F.3d 993, 998 (9th Cir.2010) (internal quotation marks and citations omitted).

V. ANALYSIS

record § 3729(a)(1)(B). l elements of False Claims Act liability [are]: (1) a false statement or

fraudulent course of conduct, (2) made with scienter, (3) that was material, causing (4) the government to pay out money or forfeit moneys due. U.S. ex rel. Hendow v. Univ. of Phoenix, 461 F.3d 1166, 1174 (9th Cir. 2006). only false certification (either e See id. at 1171 (citation

omitted).

Relator proceeds under a false certification theory. It applies when a party compliance with a statute or regulation as a condition to government payment. Id. at 1171.

False certification can be explicit or implicit. Id. The parties dispute whether Relator brings his claims under a theory of express or implied false certification simple run-of-the-mill case of

Medicare fraud, involving express Doc. 80 at 8 (emphasis in original). Because he has made that representation, the Court only analyzes his claims under the express certification doctrine. 3

See United States ex rel. McGrath v. Microsemi Corp.,

3 The Cou an implied certification theory. For one thing, there is not only no mention of any express certification in his causes of action, but he allege - Cal, with an implied certification Nonetheless, because Relator contends his claims are premised on an express certification theory, the Court need not address whether they are viable under an implied certification theory. theory), appeal docketed, No. 15-17206 (9th Cir. Oct. 29, 2015).

U.S. ex rel.

Ebeid v. Lungwitz, 616 F.3d 993, 998 (9th Cir. 2010). The express certification of compliance therefore is a prerequisite to payment. See New York v. Amgen, Inc., 652 F.3d 103, 109 (1st Cir. 2011); Mikes v. Straus, 274 F.3d 687, 698 (2d Cir. 2001). So long as the statement in question is knowingly false when made, it matters not whether it is a certification, assertion, statement, or secret handshake; False Claims liability can attach Hendow, 461 F.3d at 1172.

The SAC fails to allege sufficient facts to state a claim under the FCA or CFCA and also fails to . Specifically, Relator fails to allege sufficient facts showing that Defendants expressly certified their compliance with laws or that any such certification was a necessary prerequisite to receive government funds for the tens of thousands of claims allegedly at issue in this case. receiving funds government funds was conditioned on their certification of compliance with any statute or regulation. Although Relator alleges Defendants had Medi- they would comply with various state laws, Relator does not allege any further facts about the Provider Agreements. There is no indication, for instance, that the Provider Agreements applied to all of the allegedly fraudulent claims at issue in this case. There are insufficient facts concerning who was responsible for the Provider Agreements and whether and to what extent they governed the claims at issue in this case.

Simply put, Relator fails to allege sufficient facts showing who falsely and expressly certified compliance with a statute or regulation, how it was done, whether it was a prerequisite to obtain government funds, how it allegedly occurred over 60,000 times during the course of a decade, and whether and to what extent the express certification of compliance was part of claims actually submitted that resulted in payments to Defendants that would not have occurred without the certification. Case 1:11-cv-01776-LJO-BAM Document 84 Filed 12/14/16 Page 8 of 9 claim under an express certification theory. Neither Relator nor Defendants make any attempt to distinguish the claims from one another. s contains approximately one page of argument.) It thus appears t s claims fail. See U.S. ex rel. Hopper v. Anton certification of compliance which creates [FCA] liability when certification is a prerequisite to obtaining ; United States v. Johnson Controls, Inc., 457 F.3d 1009, 1020 (9th Cir. 2006) California courts look to interpretations of the federal statute for guidance in

interpreting the state statute s to dismiss with leave to amend.

VI. CONCLUSION AND ORDER with leave to amend. Any amended complaint shall be filed on or before January 13, 2016. This Court

has spent great time and effort to detail the deficits of the current pleading. The amended complaint, assuming that one is filed in a timely fashion, will be assumed by the Court to be the best possible pleading that the Plaintiff can produce, and should be considered to be the last attempt that will be permitted. IT IS SO ORDERED. Dated: December 14, 2016 /s/ _____ UNITED STATES CHIEF DISTRICT JUDGE