IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

UNITED STATES OF AMERICA, ex rel. HOWARD BECK, M.D.,	)	
Plaintiff-Relator	)	
	)	Civil No. 5:17-cv-00052-C
v.	)	
ST. JOSEPH HEALTH SYSTEM, et al.	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

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PHYSICIANS ADVOCACY INSTITUTE, UPDATED PHYSICIAN PRACTICE ACQUISITION STUDY: NATIONAL AND REGIONAL CHANGES IN PHYSICIAN EMPLOYMENT 2012-2018 (February 2019). 3

Defendants St. Joseph Health System ("St. Joseph"), Covenant Health System ("CHS"), Covenant Medical Center ("CMC"), and Covenant Medical Group ("CMG") (collectively, "Defendants") hereby submit the following memorandum in support of their motion to dismiss Relator Howard Beck, M.D.'s ("Relator") First Amended Complaint ("FAC") pursuant to the False Claims Act's ("FCA") public disclosure bar, 31 U.S.C. § 3730(e)(4), and Federal Rules of Civil Procedure 12(b)(6) and 9(b).

I. INTRODUCTION

Throughout its history as the Government's principle enforcement tool to combat fraud, courts have attempted to balance the twin goals of the FCA, namely, discouraging parasitic lawsuits brought by opportunistic bounty-hunters without any inside information or independent knowledge of wrongful conduct, while encouraging legitimate whistleblowers to come forward.[1] The current action (in which the Government declined after a lengthy investigation)[2] provides a clear-cut example of the former scenario, as Relator has harnessed the FCA's *qui tam* provisions in an attempt to extract an unwarranted windfall from Defendants based on nothing more than publicly available data. Relator alleges that Defendants violated the Anti-Kickback Statute ("AKS"), the Stark Law, and – by extension – the FCA by paying various physicians employed by Defendant CMG compensation that exceeded fair market value ("FMV") and was commercially unreasonable to induce patient referrals to Defendant CMC.

[1] *See United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1519-20 (10th Cir. 1996) (noting that the twin goals of the FCA are to encourage whistleblowers to expose fraud and prevent opportunists from bringing suits based on information already in the public domain).

[2] The Fifth Circuit has shown a healthy level of skepticism when it comes to non-intervened FCA cases. *See e.g. Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 767 n.24 (5th Cir. 2001) ("cases in which the government declines to intervene are generally the meritless cases"); *United States ex rel. Jamison v. McKesson Corp.*, 649 F.3d 322, 331 (5th Cir. 2011) (the United States declined to intervene in a number of defendants' actions because they "presumably lacked merit").

Despite its simplicity, Relator's theory of liability is not supported by well-pled allegations, nor is it premised on independent knowledge, as required by the FCA. Relator has never been employed by CMG, CHS, CMC, or SJHS (which is headquartered in California). Relator merely holds privileges at CMC and three other hospitals in the region. Dkt. 77 ¶ 9. He has no insider knowledge regarding CMG's physician contracts and no insight into any Defendant's claims submission processes. In fact, his entire complaint is based on publicly-available information, including CMG's IRS Form 990s, salary surveys, and articles and data published by the Wall Street Journal. Relator's absolute reliance on these public disclosures serves as an independent basis for dismissal under the FCA's public disclosure bar.

Relator's underlying theory of liability is also flawed and completely unsupported by the facts necessary to satisfy Federal Rules of Civil Procedure 12(b)(6) and 9(b). Relator merely regurgitates a list of CMG's highest-paid physicians, compares their overall compensation to other physicians based on publically available salary survey data, and concludes without justification that *all* compensation at or above the 90th percentile based on national averages exceeds FMV and, by extension, violates the AKS and Stark Law. Relator has not provided factual allegations necessary to support this arbitrary benchmark, and the FAC does not sufficiently allege that this is the proper standard for assessing FMV.

To be sure, extending this theory of liability to its logical conclusion would result in a *de facto* finding that 10% of all hospital employed physicians nationwide receive compensation that exceeds FMV in violation of the Stark Law's *bona fide* employment exception. The absurdity of this proposition should be apparent on its face. As of 2016, there were approximately 953,695

actively licensed physicians in the United States[3] and according to an updated study from the nonprofit Physicians Advocacy Institute and Avalere, hospitals employed 44% of physicians as of January 2018.[4] Accepting Relator's proposition as true that the top 10% of physician salaries necessarily exceed FMV would mean that approximately 41,962 physicians and the hospital systems that employ them are violating Federal law. Breaking this down to a simple mathematical equation, as the FAC appears to do, would obviate the need for "whistleblowers" that do nothing more than highlight highly-paid physicians on publicly available IRS Form 990s.

Relator's mechanism for assessing FMV is also erroneous as a matter of law because the FAC fails to consider or even mention physician productivity (*i.e.* how much work the physician performs), which is the most critical element in determining the FMV and commercial reasonableness of physician compensation. Absent allegations regarding physician productivity, the FAC does not – and cannot – state a claim for relief based on a theory that Defendants paid employed physicians above FMV. Dkt. 46.

The Complaint suffers a number of additional maladies, including Relator's failure to identify a single referral from a CMG physician to Defendant CMC, let alone a corresponding false claim submitted to a Federal health care program. Relator also fails to sufficiently allege that the financial relationships between CMG and its employed physicians were not commercially reasonable in light of the Defendants' charitable mission and overarching

[3] Aaron Young et al., *A Census of Actively Licensed Physicians in the United States, 2016*, JOURNAL OF MED. REGULATION, June 2017, at 7-21, https://www.fsmb.org/siteassets/advocacy/publications/2016census.pdf.

[4] PHYSICIANS ADVOCACY INSTITUTE, UPDATED PHYSICIAN PRACTICE ACQUISITION STUDY: NATIONAL AND REGIONAL CHANGES IN PHYSICIAN EMPLOYMENT 2012-2018 (February 2019), p. 11/25, http://www.physiciansadvocacyinstitute.org/Portals/0/assets/docs/021919-Avalere-PAI-Physician-Employment-Trends-Study-2018-Update.pdf?ver=2019-02-19-162735-117.

objective to provide exceptional health care to the community. For all these reasons, and those discussed in greater detail below, the FAC should be dismissed with prejudice.

II. APPLICABLE LAW

A. THE FALSE CLAIMS ACT

The FCA authorizes actions by the United States or by a relator in a *qui tam* capacity on behalf of the Government. 31 U.S.C. § 3730 *et seq*. As relevant here, the FCA imposes civil penalties and damages on any person who (i) "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval" to the Government; (ii) "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim"; and (iii) "conspires to commit a violation of [the FCA]." *Id.* §§ 3729(a)(1)(A)–(C).

The Fifth Circuit has summarized the FCA inquiry as follows: "(1) whether there was a false statement or fraudulent course of conduct; (2) made or carried out with the requisite scienter; (3) that was material; and (4) that caused the government to pay out money or to forfeit moneys due (i.e., that involved a claim)." *United States ex rel. Harman v. Trinity Industries, Inc.*, 872 F.3d 645, 653–54 (5th Cir. 2017) (internal quotations omitted).

Defendants can incur liability under the FCA by submitting claims for services rendered in violation of the Anti-Kickback Statute (AKS) or the Stark Law. U*.S. ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 902 (5th Cir. 1997). Those statutes are explained in separate sections below.

B. PLEADING STANDARDS

A court may dismiss a complaint for a "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The plausibility standard demands more than "a formulaic recitation of the elements of a cause of action," or "naked assertions devoid of further factual enhancement." *Ashcroft v. Iqbal*, 556

U.S. 662, 678 (2009). Relators' factual allegations must demonstrate more than a sheer possibility that Defendants acted unlawfully, and must contain "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678.

An FCA complaint must also meet the heightened pleading standard of Rule 9(b). *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 185 n.8 (5th Cir. 2009). Rule 9(b) states that "a party must state with particularity the circumstances constituting fraud" and "requires, at a minimum, that a plaintiff set forth the 'who, what, when, where, and how' of the alleged fraud." *United States ex rel. Shupe v. Cisco Sys., Inc*., 759 F.3d 379, 382 (5th Cir. 2014).

III. ARGUMENT

A. THE PUBLIC DISCLOSURE BAR PRECLUDES RELATOR'S LAWSUIT

To eliminate "parasitic suits by opportunistic late-comers who add nothing to the exposure of fraud," Congress enacted a public disclosure bar requiring dismissal of *qui tam* suits whose allegations are based upon publicly disclosed information. *United States ex rel. Jamison v. McKesson Corp.,* 649 F.3d 322, 332 (5th Cir. 2011); 31 U.S.C. § 3730(e)(4). The Fifth Circuit employs an overarching, three-part test to guide the analysis of whether the public-disclosure bar applies: "(1) whether there has been a 'public disclosure' of allegations or transactions, (2) whether the *qui tam* action is 'based upon' such publicly disclosed allegations, and (3) if so, whether the relator is the 'original source' of the information." *United States ex rel. Jamison v. McKesson Corp.*, 649 F.3d 322, 327 (5th Cir. 2011) (quoting *Fed. Recovery Servs., Inc. v. United States*, 72 F.3d 447, 450 (5th Cir. 1995)).

The FAC should be dismissed with prejudice under the public disclosure bar because Relator's allegations were publically disclosed through three sources cited throughout the FAC,

including: (1) CMG's IRS Form 990's from 2012 through 2013[5]; (2) MGMA's Physician Compensation and Production Surveys (the "MGMA Reports") and the AMGA Medical Group Compensation and Financial Surveys (the"AMGA Reports")[6]; and (3) The Wall Street Journal's searchable database, "*Behind the Numbers: Medicare Unmasked*."[7]

1. Public disclosure of allegations or transactions

In analyzing whether there has been a public disclosure of allegations or transactions, courts looks for three required subparts suggested by the statute's plain language: "(1) public disclosure; (2) in a particular form specified in the statute; and (3) of allegations or transactions." *U.S. ex rel. Colquitt v. Abbott Labs.*, 864 F. Supp. 2d 499, 517 (N.D. Tex. 2012), *aff'd sub nom. United States ex rel. Colquitt v. Abbott Labs.*, 858 F.3d 365 (5th Cir. 2017). Defendants will discuss the first two elements here. Defendants will then discuss the last element in conjunction with the "based upon" inquiry below. *See Jamison*, 649 F.3d at 327 ("[C]ombining the first two steps can be useful, because it allows the scope of the relator's action in step two to define the 'allegations or transactions' that must be publicly disclosed in step one.")

The FCA provides three categories of sources for such disclosure: "(1) criminal, civil, or administrative hearings; (2) congressional, administrative, or Government [General] Accounting Office reports, hearing, audits, or investigations; and (3) the news media." *See* 31 U.S.C. § 3730(e)(4). To demonstrate that the disclosure is a public one, the statute "requires information to be public enough that it 'would have been equally available to strangers to the fraud

[5] Dkt. 77, fn. 3, 4, 5 ¶¶ 65-77.

[6] Dkt. 77, ¶¶ 65-70, 79.

[7] Dkt. 77, ¶ 93 (citing the Wall Street Journal's searchable database "*Behind the Numbers: Medicare Unmasked*," available at https://graphics.wsj.com/medicare-billing/). The searchable database was made available by the Wall Street Journal in connection with a series of articles about Medicare fraud. The fact that the tool was provided by the newspaper in connection with stories about Medicare fraud lends additional credence to Defendants' argument that Relator has relied on public disclosures to allege a theory of Medicare fraud.

transactions had they chosen to look for it as it was to the relator.'" *Id.* (quoting *United States ex rel. Stinson v. Lyons, Gerlin & Bustamante, P.A.*, 944 F.2d 1149, 1155–56 (3d Cir.1991)).

The three sources of publically-available information alleged in the FAC – including CMG's IRS Form 990's, Medicare claims data published by the Wall Street Journal, and physician compensation survey data – each qualify for the FCA's public disclosure bar and are equally available to strangers. While daily newspapers – like the Wall Street Journal – unquestionably constitute "news media" for purposes of the FCA's public disclosure bar, courts have not limited "news media" to articles in the popular press or television and radio. In fact, several courts have found that information contained on publically available websites can be public disclosures within the meaning of the FCA.[8] In *U.S. ex rel. Repko v. Guthrie Clinic, P.C.*,[9] the Middle District of Pennsylvania held that "[g]enerally accessible websites are available to anyone with an internet connection and a web browser, and access is not restricted" and they therefore "serve the same purpose as newspapers or radio broadcasts, to provide the general public with access to information." *Repko*, 2011 WL 3875987, at *7.

Applying this well-reasoned logic, it is clear that both the MGMA and AGMA Reports and CMG's IRS Form 990s – which are all publicly available via online websites – constitute

[8] *See, e.g., U.S. ex rel. Brown v. Walt Disney World Co.*, No. 6:06–cv–1943, 2008 WL 2561975, at *4 (M.D. Fla. June 24, 2008) ("the internet can qualify as 'news media' within the meaning of" the FCA and finding that Wikipedia qualifies as the news media); *United States ex rel. Nowak v. Medtronic, Inc.*, No. 1:08cv10368, 2011 WL 3208007, *45 (D. Mass., July 27, 2011) (publication on the FDA website was a "public disclosure."); *United States ex rel. Jones v. Collegiate Funding Servs.*, No. 07cv290, 2010 WL 5572825, *31 (E.D. Va. Sept. 21, 2010) (defendants "SEC filings, which the government required [defendant] to file and which the government disclosed to the public on its website, constituted 'administrative reports' within the meaning of" the FCA); *United States ex rel. Barber v. Paychex, Inc.*, No. 09-20990-CIV, 2010 WL 2836333, at *8 (S.D. Fla. July 25, 2010) ("newspaper and magazine articles, court decisions, cable news shows, securities filings, analyst reports and internet websites—constitute the kind of 'public disclosure' covered by" the FCA).

[9] *U.S. ex rel. Repko v. Guthrie Clinic, P.C.*, No. 3:04CV1556, 2011 WL 3875987 (M.D. Pa. Sept. 1, 2011), aff'd, 490 F. App'x 502 (3d Cir. 2012)

public disclosures.[10] Moreover, the *Repko* court specifically found that IRS Form 990s – which are publically available on the online website, GuideStar – constitute public disclosures for purposes of the FCA. *Id.* at *8. In reaching that conclusion, the court held as follows:

> The material contained on these websites is easily accessible by any stranger to the allegedly fraudulent transactions here at issue, and that material was regularly published. A person interested in the financial status and tax claims made by the defendants would be able to discover such information on these public sources, and would not need to be involved in the transactions to see them. In a general sense, then, the websites involved in this case publicly disclose the information contained on them.

Id.; see also, Id., at *7 ("Since the court has determined that documents on this website are public disclosures, the court finds that the information contained in this allegation was publicly disclosed."). Based on the holding in *Repko* and the commonsense logic employed by the court, it is evident that, like the Wall Street Journal information, CMG's publicly disclosed IRS Form 990s and the publicly available survey data all constitute public disclosures for purposes of the FCA and the first prong of the public disclosure bar is satisfied.

2. "Based upon"

The Court must next determine whether Relator's complaint is "based upon" (or substantially similar to) any of the public disclosures identified above. The essential question is "whether the scope of Relators' action is similar to the allegations or transactions that are publicly disclosed." *United States ex rel. Lockey v. City of Dallas,* Civ. A. No. 3:11-cv-354-O, 2013 WL 268371, at *14 (N.D. Tex. Jan. 23, 2013). A complaint is based upon public disclosures where "one could have produced the substance of the complaint merely by synthesizing the public disclosures' description of the ... scheme[.]" *Jamison*, 649 F.3d at 331. The public disclosures must "'provide[ ] specific details about the fraudulent scheme and the

[10] The MGMA Reports are available on the company's website, at https://www.mgma.com. The AMGA Reports are also available on its website, at http://www.amga.org.

types of actors involved in it' sufficient to 'set the government on the trail of the fraud' and ensure that the government will not 'need to comb through myriad transactions performed by various types of entities in search of potential fraud.'" *Id.* at 329 (citations omitted).

The Fifth Circuit has adopted the *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*[11] test "for determining whether public disclosures contain sufficient indicia of an FCA violation to bar a subsequently filed FCA complaint." *United States ex rel. Solomon v. Lockheed Martin Corp.*, 878 F.3d 139, 144 (5th Cir. 2017). To find a public disclosure under this test, the Court must find both the misrepresented state of facts ("X") and the true state of facts ("Y") that together give rise to an inference of fraud ("Z"), *Springfield*, 14 F.3d at 653-55. "The presence of [X] or [Y] in the public domain, but not both, cannot be expected to set government investigators on the trail of fraud." *Id.* at 655.

Relator's theory of liability is based on financial relationships between Defendants and CMG's employed physicians (who purportedly received compensation that exceeded FMV) and on illegal referrals. *See* Dkt. 77. These allegations are entirely reliant on publically disclosed information. The X (misrepresented state of facts, according to Relator) in this equation was that Defendants were in compliance with all federal laws when they sought reimbursement from Medicare. The Y (true state of facts, according to Relator) was that Defendants were actually in violation of the AKS and Stark Law by virtue of the alleged above-FMV compensation paid to the CMG physicians.[12] The publicly available data cited by Relator are the only facts set forth in the FAC. They clearly disclose the allegations or transactions alleged by Relator (namely, the full extent of compensation paid by CMG to certain physicians) and it is indisputable that Relator's complaint is based upon them.

[11] 14 F.3d 645 (D.C. Cir. 1994).

[12] This is exactly the holding reached by the court in *Repko*, WL 3875987, at *15.

3. Original source

Because there has been a public disclosure and the Amended Complaint is based upon that disclosure, the Court cannot maintain the action unless Relator is the original source of the information. A relator must "voluntarily disclose[ ] to the Government the information on which allegations or transactions in a claim are based" prior to a public disclosure or have "knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions" and "voluntarily provide[ ] the information." 31 U.S.C. § 3730(e)(4)(B). Here, Relator does not (and cannot) allege that he voluntarily disclosed the information on which his allegations are based *prior* to the publication in the IRS Forms 990 and the Wall Street Journal's dissemination of the "Medicare unmasked" tool, and he certainly does not have insider knowledge of what the physicians were paid (let alone their productivity or the terms of their agreements) that materially adds to the publically available information. Relator therefore is not an original source.

B. ST. JOSEPH HEALTH SYSTEM, COVENANT HEALTH SYSTEM AND COVENANT MEDICAL CENTER SHOULD BE DISMISSED

The FAC treats four distinct legal entities – St. Joseph, CHS, CMC, and CMG – interchangeably, obfuscating the distinct role (if any) the various entities played in the alleged kickback scheme. By structuring the FAC in this manner, Relator attempts to pin liability on SJHS, CHS, and CMC solely by virtue of their corporate affiliation with each other and with CMG.[13] The existing parent/subsidiary relationship between Defendants is irrelevant, however, for purposes of pleading a claim against St. Joseph, CHS, and CMC.

Absent an independent basis to impose liability, a parent corporation is generally not liable for the acts of its wholly owned subsidiary. *See United States v. Bestfoods*, 524 U.S. 51, 61 (1968) ("It is a general principle of corporate law deeply 'ingrained in our economic and legal

[13] Dkt. 77 ¶¶ 10–12.

systems' that a parent corporation . . . is not liable for the acts of its subsidiaries."). Relator attempts to blur the lines between CMG and its corporate parents by alleging, for example, that CMG has no independent board members because all board members are required to be active physicians with loyalties to Covenant Health System." But, the Supreme Court in *Bestfoods* found these types of allegations to be insufficient, holding that "it is entirely appropriate for directors of a parent corporation to serve as directors of its subsidiary, and that fact alone may not serve to expose the parent corporation to liability for its subsidiary's acts." *Bestfoods*, 524 U.S. at 69.

These types of allegations, along with Relator's efforts to taint Defendants' decision-making processes with respect to compensation[14] do not give rise to a plausible claim for alter ego liability. *See Id.* at 72 (a parent corporation may be directly involved in the activities of its subsidiaries if that involvement is "consistent with the parent's investor status.").

Relator's allegations regarding the "reserved rights" in CHS's and CMG's "tiered governance structure" also fail to poke holes in Defendants' corporate boundaries, as the Supreme Court has clearly held that business activities such as "monitoring of the subsidiary's performance, supervision of the subsidiary's finance and capital budget decisions … should not give rise to direct liability." *Id.*; Dkt. 77 ¶¶ 11, 14. For these reasons, Relator fails to establish an independent basis for liability as to CHS, CMC, or SJHS based on the Defendants' overarching corporate structure, and these Defendants should be dismissed with prejudice.

C. RELATOR'S FCA CLAIMS (COUNTS 1-4) SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM

[14] The FAC is riddled with allegations concerning compensation arrangements to create an inference of impropriety and fluid corporate structures. *See, e.g.*, Dkt. 77 ¶¶ 3 n.1, 12, 14 and 62. These allegations fall well short of overcoming the high bar to establish an alter ego relationship.

Each of Relator's FCA claims is premised on alleged violations of the AKS and Stark. Because the FAC fails to sufficiently: (1) plead a violation of the AKS; (2) plead a violation of Stark; (3) allege the submission of an actual false claim or provide reliable indicia that a false claim was actually submitted; or (4) allege facts in support of a FCA conspiracy claim, Counts 1 through 4 should be dismissed.

1. Relator Fails to Plead a Violation of the Anti-Kickback Statute

The Federal Anti-Kickback statute prohibits "knowingly and willfully offer[ing] or paying[ing] any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person … to refer an individual to a person for the furnishing … of any item or service for which payment may be made in whole or in part under a Federal health care program." 42 U.S.C. §1320a-7b(b)(2).

Relator alleges that Defendants violated the FCA by committing predicate act violations of the AKS, and then submitting claims for payment to the government that falsely certified compliance with the AKS. *See e.g.* Dkt. 77 ¶¶ 98-100. Specifically, the FAC claims the Defendants' payment of above-FMV compensation to employed CMG physicians was an unlawful inducement that ran afoul of the AKS. *Id.* at ¶ 98(d) (alleging that Defendants paid "remuneration to employee physicians in exchange for referrals in violation of the AKS…").

Relator's AKS claim fails as a matter of law even had he sufficiently pled the payment of physician salaries by CMG that were above FMV or were otherwise not commercially reasonable. This is because Relator cannot plead or prove a central element of his AKS theory: that CMG paid "remuneration" - as defined in the AKS - to the employed physicians to induce their referral of federal program beneficiaries. While Relator wastes time describing the personal services and management contracts safe harbor of the AKS, he simultaneously ignores that

payments made by an employer to a *bona fide* employee are specifically exempted as violations of the AKS. *See* Dkt. 77 ¶¶ 46-47; 42 U.S.C.A. § 1320a-7b(b)(3)(B).

The employment exception to the AKS contains no FMV or commercial reasonableness requirements of any kind, and all that is necessary is a *bona fide* employer-employee relationship. *See* 42 U.S.C.A. § 1320a-7b(b)(3)(B) ("*any amount* paid by an employer to an employee (who has a bona fide employment relationship with such employer) for employment in the provision of covered items or services) [emphasis added]; *Carrel v. AIDS Healthcare Found., Inc*., 898 F.3d 1267, 1273 (11th Cir. 2018) (holding that even payments specifically based on referrals were lawful where recipients of the payments were *bona fide* employees). Stated differently, an employer can pay an employee in any way, and in any amount it choses, without violating the AKS.

Against this backdrop, Relator pleads no facts demonstrating the physicians he slanders as the recipients of kickbacks, were anything other than *bona fide* employees of CMG that fall squarely within the AKS' employment exception, and the Court must dismiss Relator's AKS related counts with prejudice under Rule 12(b)(6).[15]

2. Relator Fails to Plead a Violation of the Stark Law

Relator also alleges that Defendants violated federal law by "[e]ntering into physician employment agreements that compensate physician in a commercially unreasonable manner and/or in excess of FMV in violation of the employment exception to the referral prohibition imposed by the Stark Law, 42. U.S.C. § 1395nn." Dkt. 77, ¶ 98(a). As with the AKS theory, Relator's Stark-based allegations are intended to state a claim under Subsection (a)(1)(A)

[15] Even if Relator could miraculously show that the W-2 employed physicians listed on CMG's IRS Form 990s were anything other than *bona fide* employee, his AKS allegations are still subject to dismissal for each of the reasons set forth in the Defendants' briefing about the Stark Law. *See infra* at Section III(C)(2).

(presenting or causing presentment of a false claim) and Subsection (a)(1)(B) (making or using a false record or statement material to a false claim). Dkt. 77, ¶¶ 98(a)-(c), 101, 108-111.

Under the Stark Law, a physician may not refer an individual for health services to an entity with which the physician has a financial relationship. 42 U.S.C. § 1395nn(a)(1)(A). Likewise, the entity may not present a claim to a federal health care program pursuant to a referral from a physician with whom it has a financial relationship. Id. § 1395nn(a)(1)(B). A "financial relationship" is "an ownership or investment interest in the entity" or "a compensation arrangement," subject to certain exceptions. Id. § 1395nn(a)(2).

The Stark Law does *not* prohibit arrangements between employers and physicians or their immediate family members who have a *bona fide* employment relationship with the employer for the provision of services if the employment is for identifiable services, the amount of payment is consistent with FMV, and is not determined in a manner that takes into account (directly or indirectly) the volume or value of any referrals by the referring physician. 42 U.S.C. § 1395nn(e)(2); 42 C.F.R. 411.357(c). The payment provided through the employment agreement must be commercially reasonable even if no referrals were made to the employer. *Id.*[16] To state a Stark violation against the Defendants, Relator must establish that: (1) a physician, (2) with a financial relationship with the Defendants, (3) made referral for designated health services ("DHS"), and (4) that the Defendants submitted a claim to Medicare for such services. 42 U.S.C. § 1395nn(a)(1). In an FCA action, Relator must plead these elements with requisite particularity to satisfy Rule 9(b) and provide reliable indicia that a claim tainted by an underlying violation of

[16] The requirement that payment made to employees not be determined based on the volume or value of referrals does *not* prohibit payments in the form of productivity bonuses based on services performed personally by the employee. *Id.*

Stark was actually submitted to Medicare. *Grubbs*, 565 F.3d at 190. Relator's Stark-based claims fail for the following reasons.

a) Relator fails to allege referrals of DHS.

Relator's Stark-based claims fail because the FAC does not allege with sufficient particularity which physicians received remuneration in exchange for specific referrals of DHS to Defendant CMC. Relator merely alleges, in conclusory fashion, that all Defendants – without differentiation – violated the Stark Law by "pay[ing] improper compensation to CMG physicians to induce them to refer patients, including Medicare and Medicaid patients, to CMC for inpatient and ancillary and other services." *See* Dkt. 77 ¶¶ 2-4, 62.

Relator's allegations that certain unidentified CMG physicians were required to refer *all* of their patients to CMC are completely devoid of factual development and the type of particularized allegations that are required under Rule 9(b)'s heightened pleading standard. There is not a single particularized allegation that one of the five "excessively compensated CMG physicians" or any other CMG physicians made referrals of DHS to CMC. Relator's naked assertions on this point fail to allege *who* referred DHS to CMC, *what* specific services were referred, *where* the referrals were sent, or *when* the referrals were made. *See United States ex rel. Shupe v. Cisco Sys., Inc.*, 759 F.3d 379, 382 (5th Cir. 2014). And, although Relator includes a data dump of publicly available information purporting to show specific services (identified only by CPT code) performed by five CMG physicians in 2012, the FAC alleges only that *CMG* – and not any other Defendant – submitted Medicare claims in connection with these services. *See* Dkt. 77 ¶ 93. The FAC is completely devoid of well-pled allegations establishing that CMG physicians made referrals of DHS to specifically to CMC and that CMC billed for those services.

b) Relator fails to negate Stark's *bona fide* employment exception.

Even if Relator had established each of the underlying Stark Law elements, his Stark-based claims fail because the FAC clearly establishes that the "referring physicians" are employees of CMG and, therefore, the purported financial relationships ware protected by the statute's *bona fide* employment exception. *See* 42 U.S.C. § 1395nn(e)(2); *see also* Dkt. 77 ¶ 13; *Id.* ¶ 93 (alleging that Juan Kurdi, M.D., Piyush Mittal, M.D., Catherine Ronaghan, M.D., Ike Umezurike, M.D., and Jason Bradley, M.D. were each employed by CMG).

The *bona fide* employment exception protects arrangements between employers and physicians if the employment is for identifiable services, the amount of payment is commercially reasonable and consistent with FMV, and is not determined in a manner that takes into account the volume or value of any referrals. 42 U.S.C. § 1395nn(e)(2); 42 C.F.R. 411.357(c). Although Relator alleges that "[t]he Stark Law's exceptions operate as affirmative defenses to alleged violates of the statute," he has raised the applicability of the *bona fide* employment exception by proactively alleging that Defendants "enter[ed] into employment that compensate physicians in a commercially unreasonable manner and/or in excess of FMV in violation of the employment exception to the referral prohibition imposed by the Stark Law." Dkt. 77 ¶ 98(a). Relator also alleges that Defendants fail to meet another element of the employment exception because they "compesat[ed] employee physicians based on the volume or value of services referred to CHS' flagship hospital, CMC, in violation of the Stark Law. *Id*. But Relator fails to satisfy Rule 12(b)(6) and 9(b)'s pleading standards as to his allegations that Defendants did not comply with Stark's *bona fide* employment exception.

(1) *Relator fails to allege non-FMV compensation.*

Relator alleges that Defendants violated the *bona fide* employment exception by paying CMG physicians "overall compensation above fair market value." *See* Dkt. 77 ¶ 3; *see also, id.* ¶ 3 ("compensation to these referring physicians came in many forms including annual salaries

well above fair market value."); *Id.* ¶ 64 ("Defendants have provided … what they know to be excessive compensation, perquisites, and benefits to the CMG physicians—which are not … in accord with fair market value."). But the FAC fails to establish the proper measure for FMV for physician compensation dooming Relator's claims.

Relator's methodology for assessing FMV is far from scientific and certainly not based on personal knowledge of CMG's compensation practices. Relator's allegations regarding the purported lack of FMV are instead based entirely upon his review of just two sources of information available to anyone with a computer or smartphone and an internet connection: (1) CMG's IRS Form 990's from 2012 through 2013[17]; and (2) the MGMA and AMGA Reports.[18]

Relator has simply identified the highest compensated physicians listed in the Form 990s and compared their overall compensation to cherry-picked survey data from the MGMA and AMGA Reports. Dkt. 77 ¶ 65. Based on that narrow review, Relator alleges that the vast majority of the physicians listed in CMG's Form 990s "exceeded the 90th percentile of compensation" reported in the 2013 and 2014 MGMA and AMGA Reports. *Id.*[19] Relator implies, but does not specifically allege, that compensation above the 90th percentile of data reported in the MGMA and AMGA Reports is unequivocally above FMV. *Id.* ¶ 65. However, Relator does not include a single fact to support the proposition that *all* compensation above the 90th percentile is *per se* evidence of a lack of FMV. Implementation of such a standard would mean that compensation paid to 10% of all physicians nationwide exceeds FMV and, thus,

[17] *See, e.g.* Dkt. 77 fn. 3, 4, 5 ¶¶ 65-77.

[18] *See, e.g.*, Dkt. 77 ¶¶ 65-70, 79.

[19] Relator also highlights "five excessively compensated CMG physicians" and similarly concludes that they each received compensation in 2012 that exceeded the 90th percentile for their specialties based on 2012 survey data presented in the 2013 MGMA Report. Dkt. 77 ¶ 93.

violates the Stark Law. This of course, is not the standard and Relator's naked assertions and legal conclusions do nothing to compel a different result.

Relator's allegations regarding FMV are inherently flawed because the FAC completely ignores the most important factor in determining whether a physician's compensation is FMV: *i.e.*, physician productivity. It is illogical to assess whether physician compensation is FMV without considering how busy or productive the physician is. Relator's principle source of authority supports this notion. In describing a series of graphs that illustrate the relationship between total compensation and productivity pay, the MGMA Report states the following:

> What these graphs demonstrate is that although overall compensation tends to increase for more productive physicians, per unit, compensation does not. By evaluating the compensation to work RVU ratio[20] within the appropriate level of production, group managers are better able to create appropriate compensation levels based on production.[21]

The MGMA Report therefore makes clear that evaluating physician compensation based on productivity provides the proper measure for assessing FMV. Removing this critical component from the analysis would be akin to calculating an attorney's compensation without taking into account her annual billable hours. It is fair to compensate a lawyer who works 500 hours, for example, less than another lawyer who works 2,000 hours during the same timeframe.

The Government has also presented expert witnesses in high profile FCA cases who agree that compensation per wRVU is an appropriate measure of FMV for physician compensation. In *U.S. ex rel. Michael K. Drakeford, M.D., v. Toumey Healthcare System, Inc.*, the Government's witness, Kathleen A. McNamara, stated in her report that "an employer is not

[20] Work Units (or wRVUs) measure the value of a doctor's personal services. Every medical service is worth a certain number of wRVUs. The longer and more complex the service, the more wRVUs it is worth. In essence, the number of wRVUs attributable to a physician in a given year is a clear indicator of that physician's productivity. *See United States ex rel. Bookwalter v. UPMC*, 938 F.3d 397, 403 (3d Cir. 2019).

[21] *See* MGMA Physician Compensation and Production Survey: 2012 Report Based on 2011 Data 12-13 (2012).

categorically prevented from paying above the 75th percentile in total compensation … and [a]pplying the 'supportable rate' to very high production (either collections or Work RVUs) will result in defendable and FMV compensation, sometimes even above the 90th percentile total cash compensation."[22] Absent allegations regarding physician productivity, Relator's incomplete and conclusory allegations regarding FMV fail to pass muster under Rules 12(b)(6) and 9(b).[23]

(2) *Relator fails to allege commercially unreasonable compensation.*

Relator alleges that "Defendants' compensation scheme is not commercially reasonable because, CMG incurs substantial financial losses as the direct result of the excessive compensation paid to the CMG physicians." Dkt. 77 ¶¶ 83, 93. Relator's allegations about commercial reasonableness are unavailing in light of the Defendant's charitable mission, which is not driven by profit. The FAC alleges "[a]s a nonprofit organization, SJHS and its nonprofit ministries have a legal and ethical obligation to comply with applicable laws, to engage in activities to further its charitable purpose, and to ensure that its resources are used to further [its] charitable mission rather than the private or personal interest of any private individual." *Id.* ¶ 90.

Based on its charitable mission and overarching objective to provide quality health care services to the community, it should come as no surprise that Defendants may have been willing to absorb practice losses in order to fairly compensate qualified physicians capable of providing care to the community. And, as the Centers for Medicare & Medicaid Services ("CMS") recently

[22] *See* United States' Opp'n to Def.'s Mot. for Summ. J., App. Part 3 at 11, *U.S. ex rel. Drakeford v. Tuomey,* Case No. 3:05-cv-02858-MBS, 2010 WL4000188 (D.S.C. 2010), ECF No. 358.

[23] A court may take judicial notice of matters of public record – like the record in *Tuomey* – without converting a motion to dismiss into a motion for summary judgment. *See Randall D. Wolcott, M.D., P.A. v. Sebelius*, 635 F.3d 757, 763 (5th Cir. 2011) ("Generally, a court ruling on a 12(b)(6) motion may rely on the complaint, its proper attachments, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.") (citation and quotation marks omitted).

noted in its notice of proposed rule-making regarding the Stark Law, an assessment of an arrangement's commercial reasonableness is *not dependent* on its profitability:

> As discussed previously, we believe that the key question to ask when determining whether an arrangement is commercially reasonable is simply whether the arrangement makes sense as a means to accomplish the parties' goals. We continue to believe that this determination should be made from the perspective of the particular parties involved in the arrangement. The determination of commercial reasonableness is not one of valuation. **Nor does the determination that an arrangement is commercially reasonable turn on whether the arrangement is profitable. It is apparent from our review of the CMS RFI comments that there is a widespread misconception about our position on the nexus between the commercial reasonableness of an arrangement and its profitability. We wish to clarify that compensation arrangements that do not result in profit for one or more of the parties may nonetheless be commercially reasonable.**

84 Fed. Reg. 55766, 55790 (October 17, 2019) (emphasis added). Given the Defendants' charitable mission, the FAC reveals that that the financial relationships between CMG and its physicians were commercially reasonable in spite of CMG's practice losses. *See Twombly,* 550 U.S. at 567 (when assessing whether a violation of the AKS has occurred, courts are permitted to consider "obvious alternative explanations" for the defendant's conduct); *see also United States ex rel. Patel v. Catholic Health Initiatives,* 312 F. Supp. 3d 584, 596 (S.D. Tex. 2018) (dismissing relator's complaint after consideration of whether "Relators' allegations are consistent with an alternate narrative of reasonable, lawful business decision-making").

Relator's attempt to weaponize CMG's losses also functions as an end-run around pleading a Stark Law violation, which required him to allege facts about individual physicians and their contracts. To show a lack of commercial reasonableness or FMV, Relator must explain whether CMG incurs losses on a *specific physician's contract* based on their compensation and CMG's professional fee collections for that physician's work. Instead, Relator makes arguments about CMG's financials and points at publically available CMS data. But even then, Relator runs into trouble, when for example, he claims that Dr. Piyush Mittal's salary exceeds FMV and

is not commercially reasonable, *even though his Medicare collections alone exceed his CMG salary*. *Compare* Dkt. 77 at p. 47 at (a) with p. 48 at (b).

(3) *Relator fails to establish that Defendants considered the volume or value of referrals.*

Relator also alleges that Defendants violated the Stark Law's *bona fide* employment exception by "[c]ompensating employee physicians based on the volume or value of services referred to CHS's flagship hospital, CMC." Dkt. 77, ¶ 98(b). Relator vaguely alleges that the "CMG physicians refer large volumes of patients, including Medicare and Medicaid patients, to CMC" (*See Id.*, ¶ 4), but when these conclusory statements are stripped out, there are no well-pled facts supporting Relator's speculation. Relator does not allege, for example, that Defendants tracked referrals from CMG physicians to CMC, analyzed the business generated by those referrals, or discussed the potential impact physician compensation might have on referrals. The omission of these facts undercuts any assertion that Defendants compensated CMG physicians based on the volume or value of services referred to CMC. *See Gonzalez v. Fresenius Med. Care N. Am.*, 689 F.3d 470, 476 (5th Cir. 2012) (upholding dismissal of FCA suit where there was no change to or increase in the referrals provided by the purported recipients of remuneration).

3. Relator Fails to Sufficiently Identify an Actual False Claim

In the Fifth Circuit, "the linchpin of an FCA claim is a false claim." *United States ex rel. Rafizadeh v. Cont'l Common, Inc*., 553 F.3d 869, 873 (5th Cir. 2008). Thus, a complaint must state "the time, place and contents of the false representations, as well as the identity of the person making the misrepresentation and what that person obtained thereby." *Id.* The FAC's central thesis is that Defendants engaged in a scheme "to induce individual physicians to refer admissions, lab work, radiology services, and all ancillary services exclusively to CMC, rather than any number of other hospitals in the geographic region" and that "[t]he services provided at

CMC through these exclusive referrals include services … for which CMC has made claims through Medicare and Medicaid." Dkt. 77, ¶ 61. Despite these allegations, Relator fails to actually identify a single false claim that the Defendants submitted to a state or federal health care program, let alone a claim tainted by a violation of the AKS or Stark.

Although he alleges that CMC submitted claims to Medicare, he does not allege the date on which even one of these claims was submitted, the identities of individuals who submitted claims or falsely certified compliance with the AKS or Stark, where claims were submitted, what the claims were submitted for, the amounts of such claims, or the resulting payments. *United States ex rel. Steury v. Cardinal Health, Inc.*, 735 F.3d 202, 204 (5th Cir. 2013).

Although the Fifth Circuit has held that a complaint may survive where the relator cannot "allege the details of an actually submitted false claim," the complaint must allege "particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted." *Grubbs*, 565 F.3d at 190. This exception does not absolve a relator of "the heightened pleading requirements under Rule 9(b)" or the burden of "sufficiently pleading the time, place, or identity details of the traditional standard, in order to effectuate Rule 9(b)'s function of fair notice and protection from frivolous suits." *United States ex rel. Nunnally v. W. Calcasieu Cameron Hosp*., 519 F. App'x 890, 895 (5th Cir. 2013).

Relator fails to establish the first prong of *Grubbs* because the FAC does not plead the particulars of an underlying fraud scheme, let alone reliable indicia that lead to a strong inference that false claims were actually submitted to the government. Without well-pled allegations, Relator's sweeping accusations are based on mere conjecture that false claims tainted by alleged kickbacks *must* have been submitted to the government, which is simply not sufficient. *See United States ex rel. Davis v. Lockheed Martin Corp.*, No. 4:09-cv-645, 2010 WL 3239228, at *6

(N.D. Tex. 2010). Accordingly, Relator's claims fail to satisfy the pleading requirements under Rule 9(b) and should be dismissed on that basis, as well.

4. Relator Fails to Establish a Viable Conspiracy Claim

To state a claim for conspiracy, Relator must allege that Defendants had an agreement, combination, or conspiracy to defraud the government by getting a false claim allowed or paid, and that they did so for the purpose of obtaining payment from the government. *Grubbs*, 565 F.3d at 193. The FAC does not include the allegations necessary to state a claim for conspiracy and instead provides a formulaic recitation of the elements of Section 3729(a)(1)(C). Without more, Relator fails to state a viable conspiracy claim under Rule 12(b)(6). *United States ex rel. Dekort v. Integrated Coast Guard Sys.*, 705 F. Supp. 2d 519, 548 (N.D. Tex. 2010).

To allege a viable conspiracy claim with requisite particularity under Rule 9(b), the relator must plead "who agreed with whom, how they agreed, how they decided to file a false claim, who made the alleged misrepresentation, who filed the allegedly false claim, the method by which it was filed, and how much the payment was for." *United States ex rel. Walner v. NorthShore Univ. Healthsystem*, 660 F. Supp. 2d 891, 895–96 (N.D. Ill. 2009). Relator does not attempt to answer these key questions or provide the type of detail required under Rule 9(b). At most, Relator alleges in conclusory fashion that the Defendants conspired "among themselves," but the Fifth Circuit has held that a parent corporation – like SJHS and CHS – cannot conspire with its own subsidiary. *Deauville Corp. v. Federated Dept. Stores, Inc.*, 756 F.2d 1183, 1192 (5th Cir.1985) (citing *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 777 (1984)); *accord Elliott v. Tilton*, 89 F.3d 260, 265 (5th Cir.1996) ("a corporation or other company cannot conspire with itself, no matter how many of its agents participate in the complained of action"). For these reasons, Count 4 should be dismissed.

D. RELATOR'S STATE LAW CLAIMS SHOULD BE DISMISSED

1. Relator's California Unfair Compensation Act Claim Must be Dismissed

The FAC includes exactly one factual allegation regarding Defendants' contacts with California – a single sentence about the California location of St. Joseph's corporate office and principal place of business. *See* Dkt. 77 ¶ 10. The crux of Relator's claims concerns payments made by a Texas medical group to Texas physicians, and the referrals made by doctors in Texas to a Texas hospital that serves the Lubbock community. Judge Snyder in the Central District of California tacitly acknowledged the lack of California contacts by transferring this matter to the current venue. *See* Dkt. 152. Yet Count 5 of the FAC (alleged violations of the California Unfair Competition Act, Cal. Bus. & Prof. Code §§ 17200 et seq.) hinges on the alleged activity having at least some relation to the state of California. A foundational principle of jurisdiction, after all, is that a defendant had such "'minimum contacts'" through which it "'purposefully availed itself of the privilege of conducting activities'" within a state, "'thus invoking the benefits and protections'" of that state's laws. *See, e.g., Saxton v. Faust, No. 3:09-CV-2458-K, 2010 WL 3446921*, at *3 (N.D. Tex. Aug. 31, 2010); *Eurotec Vertical Flight Solutions, LLC v. Safran Helicopter Engines USA, Inc.*, No. 3:15-CV-3454-S, 2019 WL 3503240, at *14 (N.D. Tex. Aug. 1, 2019) (declining to exercise jurisdiction over defendant as to certain state law claims because plaintiff failed to allege that defendant "took any tortious action" in that state). Relator did not – because he cannot – connect Defendants' alleged activities in the FAC (which exclusively concern Texas) with violations of a California state law. As Count 5 is nothing more than a vestige of the Original Complaint filed in California, it should be dismissed with prejudice.

2. Relator Fails to State a Claim Under the TMFPA

Relator also alleges that Defendants violated Texas's state false claims act, the Texas Medicaid Fraud Prevention Act ("TMFPA"). The TMFPA is modeled after and interpreted in similar fashion to the FCA and, as such, Relator's failure to state a claim under the FCA also constitutes a failure to state a claim under the TMFPA. Relator's FCA and TMFPA claims are both premised on alleged violations of the AKS and Stark and, thus, Relator's failure to sufficiently allege his AKS and Stark-based claims are equally fatal to his TMFPA allegations for many of the same reasons discussed above. *See, e.g., United States ex rel. Colquitt v. Abbott Labs.*, 864 F. Supp. 2d 499, 537 (N.D. Tex. 2012) (because relator failed to state a claim under the FCA based on violations of the AKS, he also failed to state claims under state false claims laws). And, as with his FCA claims, Relator has not pled his TMFPA claim with particularity.

Should the Court dismiss Relator's FCA claims for any reason, it should also decline to exercise supplemental jurisdiction over Relator's state law claims. *See U.S. ex rel. Foster v. Bristol-Myers Squibb Co.*, 587 F. Supp. 2d 805, 828 (E.D. Tex. 2008) ("[T]he 'general rule' in the Fifth Circuit is to decline to exercise jurisdiction over pendent state law claims when all federal claims are eliminated from a case before trial.").

IV. CONCLUSION

Based on the foregoing reasons, the Defendants respectfully request that this Honorable Court dismiss Relator's FAC with prejudice, in its entirety, as Relator's claims are barred by the FCA's public disclosure bar and Relator has not (and cannot) satisfy Federal Rules of Civil Procedure 9(b) and 12(b)(6). These pleading deficiencies are present notwithstanding the fact that Relator has already been afforded an opportunity to amend his complaint. For this reason, and because Relator cannot overcome the public disclosure bar, any further amendment would be futile.

Dated: December 13, 2019

Respectfully submitted,

POLSINELLI PC

By: */s/ Daniel S. Reinberg*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 13, 2019, I filed the foregoing **Motion to Dismiss the First Amended Complaint** with the Clerk of Court through the CM/ECF system.

By: */s/ Daniel S. Reinberg*
Daniel S. Reinberg