United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

UNITED STATES OF AMERICA and THE STATE OF CALIFORNIA, *ex rel.* Judy Jones, an individual,

Plaintiffs,

v.

SUTTER HEALTH, et al.,

Defendants.

Case No. 18-CV-02067-LHK

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS WITH LEAVE TO AMEND

Re: Dkt. Nos. 72, 73

Pseudonymous *qui tam* plaintiff "Judy Jones" ("Relator") brings this action under the False Claims Act and California False Claims Act against three groups of Defendants: (1) Sutter Health, Sutter Bay Medical Foundation, and Palo Alto Medical Foundation (collectively, "Sutter Defendants"); (2) Palo Alto Foundation Medical Group and Dr. Roy Hong (collectively, "Doctor Defendants"); and (3) unknown Does 1–10. Before the Court are Sutter Defendants' motion to dismiss Relator's First Amended Complaint ("FAC"), ECF No. 73, and Doctor Defendants' motion to dismiss the FAC, ECF No. 72. Having considered the submissions of the parties, the relevant law, and the record in this case, the Court GRANTS Defendants' motions to dismiss with leave to amend.

DOCKET ALARM
Find authenticated court documents without watermarks at docketalarm.com.

I. BACKGROUND

A. Factual Background

Relator filed this *qui tam* action against Sutter Defendants, Doctor Defendants, and unknown Does 1–10 (collectively, "Defendants"). Relator alleges that Defendants' "fraudulent billing practices" violated the False Claims Act ("FCA"), 31 U.S.C. §§ 3729–33, and the California False Claims Act ("CFCA"), Cal. Gov't Code §§ 12650–56. FAC ¶ 2, ECF No. 13. Specifically, Relator alleges that "through her expert analysis of thousands of adjudicated Medicare claims," she has "showed that Sutter [Health] and its surgeons freely took advantage of a flawed medical payment system by regularly upcoding and unbundling major surgical codes for breast cancer surgery, and coding 'first-time' immediate mastectomy reconstruction codes multiple times in the same patient." *Id.*; *see* FAC ¶¶ 4 (similar allegation against all Defendants), 22 (defining Defendant Sutter Health as "Sutter").

To obtain the Medicare claims she analyzed, Relator made two Freedom of Information Act ("FOIA") requests to the Centers for Medicare & Medicaid Services ("CMS"). The first FOIA request was made "in or about November 2016" and sought "billing and coding records for [Dr.] Hong and Sutter [Health]." FAC ¶ 94. The second FOIA request was made sometime before March 2017 and sought "Medicare billing and payment data for other Sutter [Health] plastic and reconstructive surgeons from 2010 through 2016." FAC ¶ 98. Relator's analysis of the FOIA data allegedly showed that "Sutter [Health] had pattern billed and received federal and State funds for breast surgery claims which did not appear to conform to NCCI [CMS' National Correct Coding Initiative], were incompatible code combinations, and failed to adhere to CMS mandates." FAC ¶ 100. Altogether, Defendants allegedly miscoded and overbilled surgical services. *See* FAC ¶¶ 115–131 (alleging that Defendants "routinely upcoded and unbundled mastectomy reconstruction claims").

B. Procedural History

The instant case is one of two that Relator has pseudonymously brought against Doctor Defendants. In December 2012, Relator underwent a bilateral preventative mastectomy at

DOCKET ALARM
Find authenticated court documents without watermarks at docketalarm.com.

Defendant Palo Alto Medical Foundation. FAC ¶ 41. In November 2016, Relator allegedly reviewed the medical bills from her December 2012 mastectomy and noticed billing irregularities. FAC ¶ 94. On March 5, 2014, Relator brought a malpractice case against Defendants Dr. Hong, Palo Alto Foundation Medical Group, and other parties in Santa Clara County Superior Court. *See* Compl. for Damages, *Doe vs. Hong*, No. 1-14-CV-261702 (Cal. Super. Ct. Mar. 05, 2014). Relator brought her malpractice case under the pseudonym "Jane Doe." *Compare* FAC ¶ 41 (alleging a December 2012 bilateral mastectomy performed by Dr. Hong), *with, e.g.*, Compl. for Damages ¶¶ 17–19 (same). On November 29, 2017, the Superior Court dismissed Relator's malpractice case after she failed to appear for trial. *See* Doctor Defendants' Request for Judicial Notice in Support of Motion to Dismiss ("Doctor RJN") at Ex. B, ECF No. 72-2 (Order re: Defendants' Motion to Dismiss dismissing case pursuant to Cal. Code Civ. Proc. § 581(b)(5)).

On April 4, 2018, Relator brought the instant *qui tam* action. ECF No. 1 (original complaint). On October 19, 2018, Relator filed the FAC, which is the operative complaint. ECF No. 13. The FAC cites discovery obtained in Relator's dismissed Superior Court malpractice case. *See, e.g.*, FAC ¶¶ 96, 118, 119 (deposition testimony).

On June 11, 2019, the United States declined to intervene in the instant *qui tam* action. ECF No. 23. On June 19, 2019, California followed suit. ECF No. 29.

At first, the FAC alleged violations of not only the FCA and CFCA, but also the California Insurance Fraud Prevention Act. However, on December 4, 2019, Relator voluntarily dismissed without prejudice her California Insurance Fraud Prevention Act claim. ECF No. 39. Thus, only the FCA and CFCA claims remain.

On June 15, 2020, Sutter Defendants and Doctor Defendants each filed a motion to dismiss (ECF Nos. 72, 73),[1] and Doctor Defendants filed a request for judicial notice in support of their

[1] Sutter Defendants' motion to dismiss contains a notice of motion paginated separately from the memorandum of points and authorities in support of the motion. ECF No. 73 at 2. Civil Local Rule 7-2(b) provides that the notice of motion and points and authorities should be contained in one document with the same pagination.

DOCKET ALARM Find authenticated court documents without watermarks at docketalarm.com.

motion to dismiss. ECF No. 72-2 ("Doctor RJN"); ECF No. 81 (errata to same). On August 14, 2020, Relator filed identical oppositions to the motions to dismiss and a request for judicial notice.[2] ECF Nos. 79 ("Opposition" or "Opp'n"), 80. On September 11, 2020, Sutter Defendants and Doctor Defendants each filed a reply supporting their motion to dismiss (ECF Nos. 84, 87), Doctor Defendants filed a request for judicial notice in support of their reply (ECF No. 85), and Defendants jointly filed an opposition to Relator's request for judicial notice (ECF Nos. 86, 88).

The Court may take judicial notice of matters that are either "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Moreover, courts may consider materials referenced in the complaint under the incorporation by reference doctrine, even if a plaintiff failed to attach those materials to the complaint. *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005). Public records, including judgments and other publicly filed documents, are proper subjects of judicial notice. *See, e.g.*, *United States v. Black*, 482 F.3d 1035, 1041 (9th Cir. 2007). However, to the extent any facts in documents subject to judicial notice are subject to reasonable dispute, the Court will not take judicial notice of those facts. *See Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001), *overruled on other grounds by Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002). Here, Doctor Defendants request judicial notice of court filings and a CMS fee schedule available on CMS's website. ECF No. 72-2; ECF No. 85. These documents are public records. Accordingly, the Court GRANTS Doctor Defendants' requests for judicial notice, ECF No. 72-2 and ECF No. 85.

Relator requests judicial notice of 504 pages of documents plus other "redacted" documents that in fact have not been filed on the Court's docket. ECF No. 79-1. Defendants

---

[2] The Opposition violates Local Rules 3-4(c)(2) and 7-4(b), which require that opposition papers "may not exceed 25 pages," and each page "must be double-spaced with no more than 28 lines per page." The Opposition instead contains 25 pages of at least 32 lines each—and hardly any paragraph breaks. Thus, the Opposition is overlong by 100 lines or 3.5 pages of properly spaced text.

DOCKET ALARM
Find authenticated court documents without watermarks at docketalarm.com.

correctly note several defects with Relator's request for judicial notice. *See* ECF No. 86 at 4–6. However, given that Relator seeks judicial notice of public records (such as court filings and government announcements), the Court also GRANTS Relator's request for judicial notice. The Court notes again that to the extent any facts in documents subject to judicial notice are subject to reasonable dispute, the Court does not take judicial notice of those facts. *See Lee*, 250 F.3d at 689.

II. LEGAL STANDARD

A. Motion to Dismiss Under Federal Rule of Civil Procedure 12(b)(6)

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires a complaint to include "a short and plain statement of the claim showing that the pleader is entitled to relief." A complaint that fails to meet this standard may be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6). The U.S. Supreme Court has held that Rule 8(a) requires a plaintiff to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (internal quotation marks omitted). For purposes of ruling on a Rule 12(b)(6) motion, the Court "accept[s] factual allegations in the complaint as true and construe[s] the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

The Court, however, need not accept as true allegations contradicted by judicially noticeable facts, *see Schwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000), and it "may look beyond the plaintiff's complaint to matters of public record" without converting the Rule 12(b)(6) motion into a motion for summary judgment, *Shaw v. Hahn*, 56 F.3d 1128, 1129 n.1 (9th Cir. 1995). Nor must the Court "assume the truth of legal conclusions merely because they are cast in the form of factual allegations." *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011) (per curiam) (internal quotation marks omitted). Mere "conclusory allegations of law and unwarranted

DOCKET ALARM
Find authenticated court documents without watermarks at docketalarm.com.

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.