UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES -- GENERAL

Case No. **CV 09-5013-JFW (JEMx)** Date: August 28, 2015

Title: United States of America, et al. *-v-* Scan Health Plan, et al.

PRESENT:

HONORABLE JOHN F. WALTER, UNITED STATES DISTRICT JUDGE

Shannon Reilly	**None Present**
Courtroom Deputy	**Court Reporter**

ATTORNEYS PRESENT FOR PLAINTIFFS:	**ATTORNEYS PRESENT FOR DEFENDANTS:**
None	None

PROCEEDINGS (IN CHAMBERS): **ORDER GRANTING UNITED STATES OF AMERICA AND STATE OF CALIFORNIA'S MOTION TO DISMISS THE RELATOR'S FIRST AND SECOND CLAIMS FOR RELIEF, DUE TO LACK OF SUBJECT MATTER JURISDICTION [filed 7/14/15; Docket No. 177]; and**

ORDER DENYING PLAINTIFF JAMES M. SWOBEN'S MOTION FOR DETERMINATION THAT RELATOR IS AN ORIGINAL SOURCE UNDER THE FEDERAL AND CALIFORNIA FALSE CLAIMS ACT [filed 7/14/15; Docket No. 182]

On July 14, 2015, the United States of America ("United States") and the State of California (collectively, the "Governments") jointly filed a Motion to Dismiss The Relator's First and Second Claims for Relief, Due to Lack Of Subject Matter Jurisdiction ("Motion to Dismiss").[1] Docket No. 177. On July 14, 2015, Plaintiff and *Qui Tam* Relator James M. Swoben ("Swoben") filed a Motion for Determination That Relator Is an Original Source under the Federal and California False Claims Acts ("Motion for Determination"). Docket No. 182. On August 14, 2015, Swoben, the United States, and the State of California filed their respective Oppositions. Docket Nos. 196, 191 and 194. On August 21, 2015, Swoben, the United States, and the State of California filed their respective Replies. Docket Nos. 208, 204, and 207. Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15 and due to the unavailability of counsel, the Court vacated the hearing date of August 24, 2015 (Docket No. 185), and advised counsel that the Court would decide these motions without oral argument and based on the papers. After considering the

[1] Although the Governments filed a joint Motion to Dismiss, they filed separate Memoranda in Support of the Motion to Dismiss. *See* Docket Nos. 178 and 181.

moving, opposing, and reply papers, and the arguments therein, the Court rules as follows:

I. Factual and Procedural Background

A. Introduction

On July 13, 2009, Swoben filed his original *qui tam* Complaint ("Complaint"). In the first claim for relief, Swoben alleges a violation of the Federal False Claims Act, 31 U.S.C. §§ 3729, *et seq.* ("FCA"), and in the second claim for relief he alleges a violation of the California False Claims Act, California Government Code §§ 12650, *et seq.* ("CFCA"). Swoben alleges that Defendants Scan Health Plan and Senior Care Action Network (collectively, "SCAN") received duplicative or overlapping payments from Medicare and Medi-Cal for certain of the same health care services that SCAN provided to its patient members, and then concealed its Medicare revenue and its true Medi-Cal costs from the State of California.[2] Prior to filing his Complaint, on June 30, 2008, the State of California Controller's Office ("SCO") issued a report (the "SCO Report") concluding that SCAN appeared to be generating unusually high profits because its contract reimbursement rates for its contract with the California Department of Health Care Services ("DHCS") were too high. The SCO Report recommended that DHCS conduct a thorough evaluation of its contract with SCAN, and determine whether DHCS should continue with that contract.

On January 30, 2015, Swoben filed a Motion for Partial Summary Judgment, seeking a determination that the SCO Report did not trigger the public disclosure bar of the FCA and the CFCA with respect to his Complaint. In its June 1, 2015 Minute Order ruling on Swoben's Motion for Partial Summary Judgment (Docket No. 174), the Court held that the SCO Report constituted a public disclosure under 31 U.S.C. §§ 3729 and 3730(e)(4)(A), *et seq*. and California Government Code §§ 12650 and 12652(d)(3)(A), *et seq*. as to Swoben's first and second claims for relief alleged in his Complaint.

In making its determination, the Court followed the well established three step analysis to determine whether Swoben's lawsuit is precluded by the public disclosure bar. The Court evaluated: (1) whether there had been a prior, public disclosure that SCAN was allegedly committing fraud; (2) whether that prior disclosure of fraud emanated from a source specified in the statute's public disclosure provision; and (3) whether Swoben's *qui tam* action was "based upon" that prior disclosure of fraud. In answering all three questions in the affirmative, the Court held that the public disclosure bar applied, and concluded the Court has no jurisdiction to hear Swoben's claims unless Swoben qualified under the "original source" exception.

Although the Court concluded that the public disclosure bar applied, the Court was unable to determine if the original source exception applied because the parties failed to raise this issue in their briefs. Accordingly, the Court ordered the parties to file cross-motions so the Court could promptly resolve the original source issue.

---

[2] The Medicare Part C and Medi-Cal managed care programs pay private health maintenance organizations ("HMOs"), such as SCAN, capitated monthly payments for their patient members in exchange for the HMO's contractual promise to provide its members a menu of health care services during the relevant period. As a result, the risk of incurring a loss on costs beyond the capitated monthly payments for providing those services is shifted to the HMO.

B. Swoben's Employment with SCAN and His Discussions with Rolando Chavez

Swoben worked for SCAN from March 1, 2004 through September 30, 2006 as its Encounter Data Manager, and Swoben's duties included overseeing the transmission of SCAN's Medicare and Medi-Cal encounter data to the Centers for Medicare and Medicaid Services ("CMS") and DHCS.[3]

After leaving his employment at SCAN, Swoben had a telephone conversation with Rolando Chavez ("Chavez"), SCAN's former Director of Financial Planning and Analysis, in October 2006. In that telephone conversation, Swoben and Chavez discussed SCAN's profit margin on its Medicare and Medi-Cal contracts, and Chavez informed Swoben that SCAN had realized a 60 percent profit margin on its Medi-Cal contract. Chavez also informed Swoben that SCAN's 2005 annual report showed a $100 million profit on $1 billion in revenue, resulting in an overall 10 percent profit margin, which Swoben found to be high when compared to the three percent he believed to be the industry norm.

After his October 2006 telephone call with Chavez, Swoben sent a letter to Senator Diane Feinstein, complaining of governmental waste resulting from Medicare and Medi-Cal's overlapping payment of benefits. Although he complained about the overlap in payments, Swoben never suggested to Senator Feinstein that there was anything fraudulent about the payments.

In April 2007, Swoben and Chavez had a meeting, at which Chavez provided additional information to Swoben about SCAN's profits, including: (1) the amount of the payments SCAN had received from Medi-Cal; (2) that Chavez had put SCAN's Medi-Cal profits into a special reserve account, because he was afraid that someday the State of California would ask SCAN to return the money; (3) that SCAN had not yet repaid the State of California for the purported "excess payments" and "overpayments"; (4) that the State of California was unaware of SCAN's Medi-Cal profit; and (5) that SCAN's actuary, who was not willing to certify the actuarial statement that SCAN gave to the Medi-Cal program, was replaced by a new actuary who did certify it.

After his April 2007 meeting with Chavez, Swoben met with California State Senator Lowenthal and his staff, and provided them with the information that he had received from Chavez and that he had learned during his employment at SCAN. Senator Lowenthal referred the information he received from Swoben relating to SCAN to the SCO, and requested the SCO to conduct an appropriate investigation. Swoben never advised Senator Lowenthal that he had knowledge of any fraud committed by SCAN. In response to the referral, the SCO opened an investigation.

C. The SCO Investigation, Report, and Findings

On April 9, 2008, the SCO Division of Audits interviewed Swoben. In his interview, Swoben confirmed the accuracy of the information contained in the talking points memorandum that he prepared for his interview with the SCO, and suggested that the SCO interview Chavez. Swoben did not provide any new evidence or documents during his interview. During his interview, Swoben

---

[3] Encounter data consists of electronic records, one for each encounter or patient visit with a healthcare provider, which contains, among other things, a description of the services provided to the patient/beneficiary, the amount billed by the provider, and SCAN's costs to provide the service.

Initials of Deputy Clerk sr

advised that he was not certain that SCAN was, in fact, being paid for overlapping Medicare and Medi-Cal services. In addition, Swoben admitted that he did not know whether DHCS had actually considered SCAN's Medicare revenues in setting SCAN's Medi-Cal capitation rates, and he suggested that this was an area that should be investigated by the SCO. From the date of his initial interview by the SCO until he received the SCO Report, Swoben did not obtain any new, reliable information about whether DHCS had actually considered SCAN's Medicare revenues in setting SCAN's Medi-Cal capitation rates. Although the SCO interviewed Chavez, the SCO realized that neither Swoben nor Chavez knew or could determine what information DHCS relied on in setting SCAN's capitated Medi-Cal rates, which was central to any claim of fraud.

On June 30, 2008, Jeffrey Brownfield of the SCO Division of Audits prepared the SCO Report and submitted it to California State Controller John Chiang. The SCO concluded that the DHCS did not take into account either SCAN's costs of providing services or SCAN's Medicare revenues in setting SCAN's Medi-Cal capitated rates. The SCO also concluded that SCAN appeared to be generating unusually high profits because its contract reimbursement rates for its contract with DHCS were too high. Based on these conclusions, the SCO recommended that DHCS conduct a thorough evaluation of its contract with SCAN and determined whether DHCS should continue with that contract.

Before Swoben filed his Complaint on July 13, 2009, the SCO sent a copy of the SCO Report to DHCS and Senator Lowenthal, and his office sent a copy of the SCO Report to Swoben. After receiving the SCO Report, and prior to July 13, 2009, Swoben sent a copy of the SCO Report to the Office of Inspector General of the United States Department of Health and Human Services and United States Congressman Henry Waxman in an effort to persuade the United States to conduct a fraud investigation of SCAN.

D. Procedural History

The Court's June 1, 2015 Order describes the procedural history of this case, and it will not be repeated here. However, as noted in footnote 4 of the Court's June 1, 2015 Order, the Court retained jurisdiction over Swoben's relator share of the recovery received by the United States and the State of California as a result of their settlement with SCAN. *See* August 20, 2012 Order (Docket No. 45).

II. Legal Standard[4]

[4] The Governments have moved under Federal Rule of Civil Procedure 12(b)(1), seeking to dismiss the first and second claims for relief of Swoben's Complaint because this Court lacks subject matter jurisdiction over those claims. Because the jurisdictional issue and the merits of this case are not intertwined, the Court can decide the Governments' motions to dismiss and consider the evidence submitted by all parties without converting the motions to dismiss into a motion for summary judgment. Swoben has moved for a determination that he is the original source within the meaning of the pre-2010 version of 31 U.S.C. § 3739(e)(4)(B) and/or the pre-2010 version of California Government Code § 12652(d)(3)(B), citing Rule 43(c). In his Notice of Motion, Swoben states that he is seeking partial summary judgment on this issue; however, he never cites to Rule 56. In any event, the parties agree that the Court can determine whether Swoben is the original source based on the evidence submitted in their respective motions, and cite to Rule 43(c) and

A. Motion to Dismiss for Lack of Subject Matter Jurisdiction

The party mounting a Rule 12(b)(1) challenge to the Court's jurisdiction may do so either on the face of the pleadings or by presenting extrinsic evidence for the Court's consideration. *See White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000) ("Rule 12(b)(1) jurisdictional attacks can be either facial or factual"). "In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In ruling on a Rule 12(b)(1) motion attacking the complaint on its face, the Court accepts the allegations of the complaint as true. *See, e.g., Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). "By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Safe Air*, 373 F.3d at 1039. "With a factual Rule 12(b)(1) attack . . . a court may look beyond the complaint to matters of public record without having to convert the motion into one for summary judgment. It also need not presume the truthfulness of the plaintiff['s] allegations." *White*, 227 F.3d at 1242 (internal citation omitted); *see also Thornhill Pub. Co., Inc. v. General Tel & Electronics Corp.*, 594 F.2d 730, 733 (9th Cir. 1979) ("Where the jurisdictional issue is separable from the merits of the case, the judge may consider the evidence presented with respect to the jurisdictional issue and rule on that issue, resolving factual disputes if necessary. . . '[N]o presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.'") (quoting *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (9th Cir. 1977)). "However, where the jurisdictional issue and substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits, the jurisdictional determination should await a determination of the relevant facts on either a motion going to the merits or at trial." *Augustine v. U.S.*, 704 F.2d 1074, 1077 (9th Cir. 1983). It is the plaintiff who bears the burden of demonstrating that the Court has subject matter jurisdiction to hear the action. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994); *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989).

B. Motion for Summary Judgment

Summary judgment is proper where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). Once the moving party meets its burden, a party opposing a properly made and supported motion for summary judgment may not rest upon mere denials but must set out specific facts showing a genuine issue for trial. *Id.* at 250; Fed. R. Civ. P. 56(c), (e). In particular, when the non-moving party bears the burden of proving an element essential to its case, that party must make a showing sufficient to establish a genuine issue of material fact with respect to the existence of that element or be subject to summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

An issue is genuine if evidence is produced that would allow a rational trier of fact to reach a verdict in favor of the non-moving party. *Anderson*, 477 U.S. at 248. The Court must assume the

---

Local Rule 7-6.

truth of direct evidence set forth by the opposing party. *See Hanon v. Dataproducts Corp.* 976 F.2d 497, 507 (9th Cir. 1992). However, where circumstantial evidence is presented, the Court may consider the plausibility and reasonableness of inferences arising therefrom. *See Anderson*, 477 U.S. at 249-50; *TW Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 631-32 (9th Cir. 1987). In that regard, "a mere 'scintilla' of evidence will not be sufficient to defeat a properly supported motion for summary judgment; rather, the nonmoving party must introduce some 'significant probative evidence tending to support the complaint.'" *Summers v. Teichert & Son, Inc.*, 127 F.3d 1150, 1152 (9th Cir. 1997).

In ruling on a summary judgment motion, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions . . .." *Id.* at 255.

III. Discussion

A. The False Claims Act's Jurisdiction Bar[5]

In general, federal courts have no power to consider claims for which they lack subject matter jurisdiction. *Bender v. Williamsport Area Sch. Dist*., 475 U.S. 534, 541 (1986). Under the False Claims Act, a district court is deprived of jurisdiction over any *qui tam* action that is based

---

[5] In light of the parties agreement that the pre-2010 versions of the statutes apply in this case, the Court will continue to apply the federal public disclosure statute in effect from 1986 through March 22, 2010 (Section 3730(e)(4)) and the California public disclosure statute in effect from 1987 through 2012 (Section 12652(d)(3)). *See* June 1, 2015 Order Denying Plaintiff's Motion for Partial Summary Judgment, Section 3(A).

In ruling on the current motions, the Court has considered Swoben's objections to what he characterizes as factual findings in the June 1, 2015 Order and the purported collateral estoppel effect on his current motion. Swoben argues that "because of the narrow scope and time frame" of his Motion for Partial Summary Judgment, he did not have adequate time to specifically rebut the approximately 125 additional material facts submitted by the Governments. *See* Combined Statement of Facts (Docket No. 169). The Court disagrees. Based on the Court's review of the Combined Statement of Facts, Swoben disputed approximately 49 of the additional material facts, and cited to the evidence and made arguments in support of his disputes. In addition, Swoben had ample opportunity to object to the Governments' additional material facts and the only objection that he raised was a relevancy objection in his Reply. *See* March 16, 2015 Reply in Support of Motion for Partial Summary Judgment (Docket No. 170). However, the Court has considered Swoben's objections, and concludes that there is no basis to change any of its alleged findings of fact to which Swoben now objects. *See* Swoben's August 14, 2015 Opposition, pp.25-26. Of course, the burden of revisiting these alleged disputed facts could have been eliminated if the parties had raised both issues in Swoben's original Motion for Partial Summary Judgment, but, apparently, Swoben declined the Governments' suggestion to file one motion addressing all issues related to his relator's share. *See* August 14, 2015 Declaration of Susan R. Hershman (Docket No. 193-4).

upon allegations or transactions already disclosed in certain public fora, unless the relator is the original source of the information underlying the action. Specifically, 31 U.S.C. § 3730(e)(4)(A) states:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

In analyzing whether a claim is barred under this provision, a court must conduct a two-tiered inquiry. First, the court must determine whether there has been a prior "public disclosure" of the "allegations or transactions" upon which the *qui tam* suit is based. *A–1 Ambulance Serv., Inc. v. California*, 202 F.3d 1238, 1243 (9th Cir.2000). Second, if there has been a qualifying public disclosure, the court must inquire whether the relator is the "original source of the information" contained in the disclosure. *Id*. The *qui tam* relator bears the burden of establishing subject matter jurisdiction by a preponderance of the evidence. *See United States v. Alcan Elec. & Eng'g, Inc*., 197 F.3d 1014, 1018 (9th Cir.1999).

Because the Court has already concluded that the allegations underlying the fraud have been publicly disclosed, it only has subject matter jurisdiction over Swoben's first and second claims for relief if Swoben is the original source of the information under 31 U.S.C. §3730(e)(4)(A). As recently clarified by the Ninth Circuit in *U.S. ex rel Hartpence v. Kinetic Concepts, Inc*., 792 F.3d 1121 (9th Cir. 2015):

> [T]he original source exception has two, and only two, requirements. An original source is "an individual who [1] has direct and independent knowledge of the information on which the allegations are based and [2] has voluntarily provided the information to the Government before filing an action . . . based on the information." 31 U.S.C. §3730(e)(4)(B).

The Supreme Court has held that the "information" of which a relator must have direct and independent knowledge is the information on which the allegations in the complaint are based, not the information on which the publicly disclosed allegations are based. *Rockwell Int'l Corp. v. U.S.*, 549 U.S. 457 (2007). A relator has "direct and independent knowledge" for purposes of Section 3730(e)(4) where he "discovered the information underlying his allegations of wrongdoing through his own labor." *United States ex rel. Devlin v. State of Cal*., 84 F.3d 358, 360 (9th Cir.1996). Thus, in order for the information to be "direct," the relator must have "firsthand" knowledge of the alleged fraud, and, in order for the information to be "independent," the information known by relator cannot depend or rely on the public disclosure. *Id.* In other words, the information must be derived from the source without interruption, or gained by the relator's own efforts, rather than learned secondhand through the efforts of others.

A review of the case law in this and other jurisdictions provides background on what "direct and independent knowledge" means in the original source definition. "Direct" and "independent" have distinct meanings. "Direct" knowledge is obtained firsthand, by the relator's own efforts rather

than by the labor of others and not derivative of the information of others. *Alcan Elec.*, 197 F.3d at 1020. "Independent" knowledge cannot rely on or depend on any public disclosure. *U.S. ex rel. Malhotra v. Steinberg*, 770 F.3d 853, 860 (9th Cir. 2014). Congress's clear intent was to encourage *qui tam* suits brought by insiders, typically employees who discovered information of fraud in the course of their employment. *See U.S. ex rel. Aflatooni v. Kitsap Physicians Services*, 163 F.3d 516, 526 (9th Cir. 1999). In making its determination, the Court must look to the factual subtleties and attempt to strike a balance between those individuals actually involved in the process of ferreting out important information about a false or fraudulent claim and those who have no details regarding the alleged fraud. Relators who are found to have direct and independent knowledge are those individuals who actually viewed source documents or viewed firsthand the fraudulent activity that is the basis of their *qui tam* action. In contrast, when a relator's claim is based on knowledge received from other people, it is not direct and independent. In *U.S. v. Alcan*, 197 F.3d 1014, the Ninth Circuit held that a member of an electrical workers' union did not meet the direct knowledge element since "he never participated in the negotiating, drafting, or implementation of the relevant agreements," "does not allege that he played any role in submitting false claims to the government," and simply heard secondhand (as a union member) that electrical contractors were submitting false claims to the government.

Although a relator need not be the original source of every element of his claim, a relator must do more than apply his expertise to publicly disclosed information. Thus, secondhand information may not be converted into direct and independent knowledge because the plaintiff discovered through investigation or experience what the public already knew. Instead, the investigation or experience of the relator either must translate into some additional important fact, or must demonstrate a new undisclosed relationship between disclosed facts that alerts a government agency to the fraud, where that fraud might otherwise go unnoticed. *U.S. ex rel. Bly-Magee v. Premo*, 470 F.3d 914, 917 (9th Cir. 2006).

The CFCA employs a substantially identical definition of original source. The pre-2010 version of California Government Code §12652(d)(3)(B) defines original source as:

> an individual who has direct and independent knowledge of the information on which the allegations are based, who voluntarily provided the information to the state or political subdivision before filing an action based on that information, and whose information provided the basis or catalyst for the investigation, hearing, audit, or report that led to the public disclosure . . . .

In addition to the direct and independent knowledge requirement, Section 12652(d)(3)(B)'s definition of original source also requires that Swoben must demonstrate that his information provided the basis for the investigation or report that led to the public disclosures of the information. This additional element is substantially similar to the now overruled *Wang* requirement in the Ninth Circuit that an original source had to have a hand in the public disclosure of the fraud.

B. Swoben Does Not Qualify as an Original Source.

Because the Court has concluded that Swoben's FCA and CFCA claims were based on

public disclosures, Swoben must now prove that he is the original source of the information. A review of the conclusory allegations of his Complaint demonstrates that Swoben lacked direct and independent knowledge of the fraud allegedly committed by SCAN.[6] For example, in his first claim for relief for violation of the FCA, Swoben alleges, without any facts to support his allegation, that SCAN violated the FCA. *See, e.g.,* Complaint, ¶¶ 17-20. In addition, the only fact that Swoben does allege with any specificity – that SCAN's alleged concealment and use of false records and statements caused Medi-Cal to pay in excess of $200 million more than it would have if SCAN had properly and truthfully billed and reported the excessive payments it received for dual eligible beneficiaries – is merely alleged on information and belief. *Id.*, ¶ 21. The same is true for Swoben's second claim for relief alleging a violation of the CFCA. *See id.*, ¶¶ 26-30. Thus, apart from conclusory statements or allegations alleged on information and belief, Swoben failed to plead any specific facts concerning the nature of the alleged fraud by SCAN, and those facts that he did plead are based on information contained in the SCO Report.[7] *Devlin,* 84 F.3d at 361 (finding no direct knowledge where the relators "did not see the fraud with their own eyes or obtain their knowledge of it through their own labor unmediated by anything else, but derived it secondhand"). In addition, Swoben failed to plead anywhere in his Complaint that he had direct and independent knowledge of the fraud. *See U.S. ex rel. Casady v. American International Group, Inc.*, 2013 WL 1702777 (S.D. Cal. April 19, 2013) (finding that where relators failed to plead direct and independent knowledge of the alleged fraud and, instead, only pled "conclusory statements or allegations that they relied on third parties," the relators were not the original

---

[6] Although it is undisputed that Swoben had contact with the Governments prior to filing his Complaint – such as sending a letter to United States Senator Feinstein, meeting with California State Senator Lowenthal, being interviewed by the SCO, and sending a copy of the SCO Report to the Office of the Inspector General of the United States Department of Health and Human Services and United States Congressman Waxman – those contacts are not relevant to the Court's ruling because the Court has concluded that Swoben cannot demonstrate that he had "direct and independent knowledge" of the information on which the allegations in his Complaint are based.

[7] Swoben's lack of direct and independent knowledge is also demonstrated by his August 9, 2009 letter to the federal government, which was a requirement of his filing a *qui tam* action. Pursuant to 31 U.S.C. § 3730(b)(2), a *qui tam* relator must not only serve his complaint on the federal government, but must also "disclose all material evidence and information known to the relator in order to allow the government to decide whether or not to intervene." *See also U.S. ex rel. Bagley v. TRW, Inc*., 212 F.R.D. 554 (C.D. Cal. 2003) ("The purpose of the written disclosure requirement 'is to provide the United States with enough information on alleged fraud to be able to make a well reasoned decision on whether it should participate in the filed lawsuit or allow the relator to proceed alone'") (citations omitted). A review of Swoben's August 9, 2009 letter, dated less than one month after Swoben filed his Complaint, reveals that he lacked any direct and independent knowledge of any of the information on which his first and second claims for relief are based. In fact, this letter simply repeats the conclusory and otherwise unsupported allegations contained in his Complaint. In addition, Swoben admits in this letter that he learned certain information, such as the percentage of SCAN's patients who were nursing home certifiable Medicare beneficiaries secondhand from his discussions and meetings with Chavez. The Court has not, as Swoben suggests, used his August 9, 2009 letter to restrict his presentation of evidence on the original source issue. Instead, the letter simply demonstrates the state of his knowledge at the time he filed his Complaint and how he acquired that knowledge.

sources of the information because they were unable to point to evidence in the record that would allow a reasonable fact finder to conclude that they learned of the fraud independently of the public disclosures).

Swoben argues that even if the allegations of his Complaint are unclear or insufficient, the evidence that he has presented in his motion demonstrates that he possesses the required direct and independent knowledge to qualify him as the original source of the information. In support of that argument, Swoben identifies various facts of which he claims to have had direct and independent knowledge. However, having reviewed the evidence Swoben cites in support of his claim, the Court concludes that Swoben did not have direct and independent knowledge of the great majority of the material facts. Instead, as Swoben himself admits, he learned most of these facts secondhand, from other sources.

For example, the information Swoben claims that he learned during his employment at SCAN, he actually learned secondhand from Sam King, SCAN's Director of Infomatics, during his March 2004 orientation meeting. Specifically, he learned: (1) that the United States awarded a contract to SCAN to operate as a Social HMO Demonstration Project that provided in-home services for its nursing home certifiable Medicare Advantage beneficiaries; (2) that the State of California had awarded a Medi-Cal managed care contract to SCAN that provided overlapping benefits with the Social HMO contract; and (3) that SCAN had not submitted its encounter data to DHCS for five years. *See* July 14, 2015 Declaration of James M. Swoben in Support of Motion re Original Source [Docket No. 182-4], ¶¶ 11, 12, and 15. In addition, Swoben states that he had direct and independent knowledge of the fact that SCAN's Medi-Cal managed care contract was secondary to the Social HMO coverage. *Id.*, ¶ 6. However, again, Swoben learned this secondhand, from a Health Law course he took while attending George Washington University.[8]

Based on Swoben's own admissions, Swoben learned this information indirectly, and not through his own labor. *See, e.g., Wang v. FMC Corp.*, 975 F.2d 1412, 1417 (9th Cir. 1992), *overruled on other grounds by U.S. ex rel. Hartpence v. Kinetic Concepts, Inc.*, 792 F.3d 1121 (9th Cir. 2015) (holding that the relator had personal knowledge of the alleged fraud because he had seen it "with his own eyes," and his knowledge was "'direct and independent' because it was unmediated by anything but [his] own labor"). Despite Swoben's argument to the contrary, because Swoben learned most of this secondhand information while employed by SCAN, he cannot transform his knowledge into direct and independent knowledge.[9] *See, e.g., Bly-Magee*,

---

[8] With respect to SCAN's Medicare and Medi-Cal contracts, Swoben never alleges, nor could he, that he had any responsibility for negotiating, drafting, or interpreting those contracts, or that he even read them.

[9] Swoben argues that anything he learned during the course of his employment with SCAN constitutes "direct knowledge." However, Ninth Circuit authority is to the contrary. For example, in *Wang.*, 975 F.2d at 1417, *overruled on other grounds by U.S. ex rel. Hartpence v. Kinetic Concepts, Inc.*, 792 F.3d 1121 (9th Cir. 2015), Wang, the relator, was a mechanical engineer, trained in gear technology, who worked for the defendant, FMC Corporation. The fraud that Wang alleged in his *qui tam* complaint concerned the failure of gear teeth in the transmissions of the Bradley family of vehicles, on which FMC Corporation had worked for the federal government. Wang learned of the problem first-hand because, on account of his special training, he had been

470 F.3d at 917 ("Bly-Magee has not demonstrated by a preponderance of the evidence that she was the original source of the information upon which these allegations were based. [Citation omitted.] Her employment at Southern California Rehabilitation Services and her claim that she conducted her own investigation are insufficient to show that she had direct knowledge of a scheme to submit false claims").

In addition, although Swoben argues that he has direct and independent knowledge of the fact that SCAN submitted undifferentiated cost information to Medi-Cal that resulted in Medi-Cal overpaying SCAN, the evidence presented by Swoben demonstrates that the only fact he had direct and independent knowledge of was the fact that SCAN submitted undifferentiated ***encounter*** data to Medi-Cal. Swoben Decl., ¶¶ 19 and 20. In fact, Swoben admits in his declaration that SCAN was not submitting undifferentiated cost data to Medi-Cal, but, to the contrary, was submitting differentiated cost information to Medi-Cal. *See, e.g., Id.*, ¶ 39 ("SCAN wanted MDX to electronically transmit SCAN's Medicare Advantage/Medi-Cal fee-for-service crossover billings to Medi-Cal because Medi-Cal had advised SCAN that it was out of compliance because SCAN was submitting such cross-over billings on paper"). In addition, during his deposition, when he was asked if he knew whether SCAN was hiding any financial data from the State of California at the time he was employed there, he admitted that he did not. Deposition of James Swoben ("Swoben Depo"), 39:5-10. Moreover, Swoben offers no factual basis, and certainly none that he had direct and independent knowledge of, for his claim that Medi-Cal was improperly overpaying SCAN. It is undisputed that the encounter data did not contain any

---

part of the team of FMC Corporation engineers called in to study the problem, and he had prepared a report on it. *Id.* In concluding that Wang was the original source of the fraud alleged in his *qui tam* complaint, the Ninth Circuit held that:

> Wang had personal knowledge of the Bradley's transmission problems because he worked (however briefly) on trying to fix them . . . [He] saw [them] with his own eyes. Wang's knowledge of the transmission problems was "direct and independent" because it was unmediated by anything by Wang's own labor.

Id. Similarly, in *U.S. ex rel. Barajas v. Northrop Corp.*, 5 F.3d 905 (9th Cir. 1998), Barajas, the relator, learned of the false testing that was the subject of his *qui tam* complaint because he himself planned and initiated that fraud during his employment. As the Ninth Circuit found:

> Barajas . . . was responsible for the fraudulent certifications that the flight data transmitters had been tested, upon which his *qui tam* action was based . . . Barajas . . . testified that he falsified many final acceptance tests "on his own initiative"

Id. Thus, the Ninth Circuit in *Barajas* did not hold that a relator's knowledge learned during his employment is always "direct knowledge," even if that knowledge is learned secondhand. *Id.* Instead, the Ninth Circuit in *Barajas* held that a relator who planned and initiated the fraud – and, thus, had firsthand knowledge of it – had "direct knowledge" of that fraud. *Id.* Therefore, it is clear that in the Ninth Circuit, a relator "must show that he had firsthand knowledge of the alleged fraud, and that he obtained this knowledge through his "own labor unmediated by anything else." *Alcan Elec.*, 197 F.3d at 1029.

information regarding the amounts Medi-Cal (or Medicare) was paying SCAN or even any requests by SCAN to Medi-Cal (or Medicare) for payment. Instead, Swoben's allegation that Medi-Cal was improperly overpaying SCAN appears to be nothing more than mere speculation and conjecture.

In carefully considering all the evidence submitted, there is only one piece of information – that SCAN failed to submit encounter data for five years and then submitted undifferentiated encounter data – that relates to anything that could even remotely be construed as evidence of wrongdoing on the part of SCAN. However, this information alone does not, and could not, support the fraud that Swoben alleged in the first and second claims for relief of his Complaint. In order to have direct and independent knowledge of the alleged fraud, Swoben would, at a minimum, have to had access to SCAN's relevant financial data, and Swoben, as Encounter Data Manager, simply did not have access to the financial data that would be necessary to discover the fraud alleged in his Complaint. For example, Swoben alleges that "SCAN's fraudulent billing practices included submitting cost reports and other financial reports to Medi-Cal." Complaint, ¶ 14. However, there is no evidence that Swoben knew either before or during his employment at SCAN what information, outside of encounter data, that SCAN did or did not submit to the State of California that would have informed the State of California about SCAN's revenues, costs, and other relevant financial information. Swoben lacked any such knowledge because during his employment at SCAN, it was SCAN's policy and practice to restrict employees' access to only documents and information that were directly relevant to the scope of their employment. Declaration of Moon Leung, Ph.D., ¶6. Thus, Swoben, who worked in the Encounter Data group, was walled off from SCAN's finance department, and did not have access to SCAN's financial data, including data concerning its billings to government entities, its revenue, its expenses, its profits, and its financial reports, such as cost reports. *Id.*, ¶ 7. In fact, it is undisputed that Swoben never had access to SCAN's financial accounting systems, which included revenue and expense data that would have been necessary to detect the fraud. While Swoben did have access to patient encounter data, the CMS and DHCS requirements for submitting that data, and data regarding claims for payment received from SCAN health care providers, his job duties did not require him to know how much Medi-Cal and Medicaid were paying SCAN, how Medi-Cal set SCAN's capitated rates, or whether the services that SCAN was obligated to provide to its members under its Medicare and Medi-Cal contracts overlapped in any way. *Id.*, ¶¶ 8 and 9. Swoben also did not have access to any of SCAN's Medicare or Medi-Cal contracts, SCAN's billings to Medicare and Medi-Cal, the amounts that SCAN received from Medicare and Medi-Cal, SCAN's Medicare profits, SCAN's Medi-Cal profits, or any list of the services SCAN was obligated to provide to its members under SCAN's contracts with Medicare and Medi-Cal. *Id.*, ¶10. In light of his lack of access to this crucial information, Swoben had absolutely no knowledge as to the nature of the financial information SCAN was submitting to the State of California, and, thus, could not have direct and independent knowledge of the facts of the fraud alleged in his Complaint.

In addition, any argument by Swoben that the fraud could be detected by the patient encounter data to which he did have access is directly contradicted by Swoben's own admissions. For example, Swoben stated that he realized after he left SCAN's employment and talked to Chavez in April of 2007 that by not distinguishing between Medicare and Medi-Cal services and costs in the encounter data, SCAN was not hiding data from the State of California, but, rather, had given the State of California "too much data . . . instead of not enough." Moreover, Swoben admits that SCAN's practice was not because of any nefarious motive, but because the format of SCAN's encounter data was State-dictated and State-approved. Swoben Decl., ¶ 9. Furthermore, after

reviewing Medi-Cal's Encounter Data Manual, Swoben came to the conclusion that Medi-Cal did not require SCAN to submit encounter data that had been differentiated to reflect the costs of services provided under the Medi-Cal managed care contract. *Id.*, ¶ 20. Therefore, the Court concludes that Swoben never could have reasonably concluded while he was working at SCAN that submitting undifferentiated encounter data to DHCS was illegal or constituted fraud.

Despite overwhelming evidence to the contrary, Swoben attempts to demonstrate that he did in fact learn about the fraud while employed at SCAN by relying on his December 2006 letter to Senator Diane Feinstein, and pointing out that he told Senator Feinstein about the overpayments received by SCAN.[10] However, Swoben has admitted that he had a telephone conversation with Chavez in October 2006 in which they discussed many of the same topics that he included in his letter to Senator Feinstein, including the enormous profit margin realized by SCAN on SCAN's Medicare and Medi-Cal contracts. Declaration of Keith Kuntz, Exh. 1 (Special Agent Kuntz's Report on his September 25, 2009 interview of Swoben). Moreover, even after his discussion with Chavez, Swoben still did not believe that SCAN was defrauding the State of California. Indeed, in his letter to Senator Feinstein, instead of claiming SCAN was committing fraud, he simply blamed governmental misconduct and waste, and stated:

> [O]verlapping programs pay for the same service more then [sic] one time and federal and state programs do not understand the details of the benefit design . . . The state officials who administer the MediCal program for managed care treat SCAN the same way as other health plans in California who are the MediCal beneficiaries even though the federal government is paying for the Social HMO [Medicare] benefits which include in-home services, which the other plans do not receive revenue for.

Swoben Decl., Exh. 1.

In fact, even after obtaining additional information from Chavez regarding the enormous profits SCAN realized on its Medi-Cal and Medicare contracts, and that Chavez was concerned that SCAN would have to repay the alleged Medi-Cal overpayments, Swoben merely became suspicious about the propriety of the payments to SCAN for overlapping Medi-Cal and Medicare services. In fact, Swoben never claimed that he knew SCAN was engaged in a fraud. Instead, he testified that he was going to rely on the SCO to confirm his suspicions:

> I wanted them [the SCO] to see if there was one of -- see if one of the reasons why this program was so profitable was that they [DHCS] were paying for services with overlapping benefits being paid twice.

---

[10] It is important to note that Swoben's lack of knowledge of any fraud by SCAN with respect to its Medi-Cal contract is also evidenced by the fact that while employed at SCAN, Swoben never advised anyone about the SCAN Medi-Cal fraud he alleged in the first and second claims for relief of his Complaint. However, Swoben did not hesitate to complain to individuals at SCAN about the conduct that he alleged in his third claim for relief, for which he received a relator's share of $687,548.84.

Swoben Depo., 132:19-22. In addition, the talking points memorandum that he prepared for his April 2008 interview with the SCO confirms that he did not know if SCAN was being improperly overpaid or whether those overpayments might be fraudulent because he wanted the SCO to investigate the matter and make the determination if there was fraud:

> The issue at the top level of rate calculation by the California State Department of Health services was from an actuarial point of view, how the Capitation rate was for SCAN determined. Were the differences in the eligibility criterion and Medicare additional in home services taken into account during rate setting?

Swoben Decl., Exh. 3. Again, as he admitted in his deposition, although he assumed SCAN was somehow being overpaid, based on his discussions with Chavez, Swoben was relying on the SCO auditors to make the determination about the propriety of the payments:

> Q: Now, in your statement [to the SCO], you -- you asked the question … at the end of the fifth paragraph, quote, "Was the benefit already paid by Medicare used in the medical cost ratio for the Medi-Cal -- for the Medicare rate." Were you asking the SCO that question?
>
> A: I was wanting them -- that is what I wanted them to confirm which -- which was my deduction. . . . We wanted to know if these benefits were already paid -- the benefits paid by Medicare were in the cost ratio for the Medi-Cal rate.
>
> . . . [W]hat I wanted them to determine -- what I asked the auditors to determine [was] whether what was already paid for in Medicare, the services that were provided by Medicare, were included in the medical cost ratio for Medi-Cal which is the rate that was -- the losses were understated and the profit was too high . . .

Id., 132:23-133:5, 134:5-7, and 134:12-17.

The SCO Report confirms that although Swoben suspected that SCAN was overpaid, he lacked any documentary or other hard evidence that SCAN was committing fraud until after the SCO Report was published. It is undisputed that the SCO investigator, Ted Constantine, concluded that Swoben did not know whether SCAN's Medicare revenue was already offset from SCAN's Medi-Cal capitated rates. Moreover, Swoben did not know the terms of DHCS's contract with SCAN. As a result, Swoben was unable to provide any specifics to the SCO, which required the SCO to obtain or uncover this crucial information by interviewing DHCS. As the SCO noted:

> We met with the former SCAN employee [Swoben] who made the original complaint with Senator Lowenthal's office. The issue raised by the former employee is ***whether*** the DHCS considered the amounts that Medicare was paying SCAN when determining its contract rates with SCAN.

Swoben Decl., Exh. 6 (emphasis added). In addition, even after the SCO Report was issued, Swoben still did not understand the nature of the alleged fraud. Swoben insisted that SCAN was defrauding Medi-Cal and Medicare by receiving duplicative payments for overlapping services. However, since at least 1982, a California regulation has allowed SCAN, in the managed care

context, to receive such duplicative payments from Medicare and Medi-Cal for overlapping Medicare and Medi-Cal services. *See* 22 California Code of Regulations § 53222.

After reviewing all of the evidence presented by Swoben, the Court also concludes that Swoben's showing is very similar to the showing held to be inadequate in *Devlin*.[11] *See Devlin*, 84 F.3d 358. In that case, the *qui tam* action was brought by individuals who were advised by a County of Mariposa Department of Social Services employee that the department had defrauded the United States government by inflating client statistics to qualify for increased federal funding. *Id.* The Ninth Circuit held that the relators' knowledge was not direct and independent because they did not discover firsthand information underlying the allegations of fraud. The Court explained that the relators "did not see the fraud with their own eyes or obtain their knowledge of it through their own labor unmediated by anything else, but derived it secondhand from [an employee of the alleged department perpetrating the fraud], who had firsthand knowledge of the alleged fraud." *Id.* Even though the relators in *Devlin* supplemented the information they obtained from the insider by confirming with the parties for whom the perpetrator had allegedly done work that was never done, the Court explained that the relators did not make a genuinely valuable contribution to the exposure of the alleged fraud. *Id.* Although Swoben may have suspected fraud based on information from Chavez that SCAN had been overpaid, it was not until his suspicions were confirmed by the SCO Report that he was able to file his Complaint. Because Swoben has failed to demonstrate that he is the original source of the information, the Court concludes that it lacks subject matter jurisdiction, and this action must be dismissed.[12]

IV. Conclusion

For all the foregoing reasons, the Governments' Motion to Dismiss is **GRANTED**, and Swoben's Motion for Determination is **DENIED**. Swoben's first and second claims for relief are **DISMISSED without leave to amend** for lack of subject matter jurisdiction.[13]

---

[11] On December 17, 2013, Swoben submitted Responses to Interrogatories propounded by the United States. In response to Interrogatory No. 2, which asked Swoben to state all facts supporting Swoben's contention that he had "direct knowledge" of the information on which the allegations contained in the first and second claims for relief of his Complaint were based, Swoben provided a 177 page response. Although Swoben's response was certainly voluminous, the Governments' analysis of Swoben's response further demonstrates Swoben's lack of the required knowledge necessary to qualify as the original source.

[12] The CFCA contains a similar jurisdictional provision as the FCA. *See* Cal. Gov. Code § 12652(d)(3) (A)-(B). The parties do not dispute that the original source requirements in the CFCA are materially identical to those in the FCA. *United States v. Johnson Controls, Inc*., 457 F.3d 1009, 1020–21 (9th Cir. 2006). Therefore, because the Court concludes that Swoben has failed to meet the FCA's jurisdictional requirements, his claims under California False Claims Act must also be dismissed for lack of subject matter jurisdiction.

[13] Swoben requests leave to amend to file a Fourth Amended Complaint that he claims would be consistent with his declarations and supporting evidence. However, as explained in detail in this Order, even if such leave was granted, Swoben would still not be able to demonstrate that he was the original source of the information on which the fraud alleged in his first and second

IT IS SO ORDERED.

claims for relief is based. Therefore, any further amendment would be futile, and his request is denied.