UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES -- GENERAL

Case No. **CV 09-5013-JFW (JEMx)** Date: June 1, 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 DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT [filed 1/30/15; Docket No. 146]**

On January 30, 2015, Plaintiff and *Qui Tam* Relator James M. Swoben ("Swoben") filed a Motion for Partial Summary Judgment ("Motion"). On March 6, 2015, the United States of America (the "United States") and the State of California (the "State") (collectively, the "Governments") filed their Oppositions. On March 16, 2015, Swoben filed a Reply. Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court found the matter appropriate for submission on the papers without oral argument. The matter was, therefore, removed from the Court's March 30, 2015 hearing calendar and the parties were given advance notice. After considering the moving, opposing, and reply papers, and the arguments therein, the Court rules as follows:

I. Factual and Procedural History[1]

A. Introduction

On July 13, 2009, Swoben filed his original *qui tam* Complaint ("Complaint"), alleging claims for violation of the Federal False Claims Act, 31 U.S.C. §§ 3729, *et seq.* ("FCA"), and for violation of the California False Claims Act, California Government Code §§ 12650, *et seq.* ("CFCA") In the

[1] The Court has considered the facts in the light most favorable to the nonmoving party, and to the extent any of these facts are disputed, they are not material to the disposition of this motion. In addition, to the extent that the Court has relied on evidence to which the parties have objected, the Court has considered and overruled those objections. As to the remaining objections, the Court finds that it is unnecessary to rule on those objections because the disputed evidence was not relied on by the Court.

Complaint, 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 Swoben 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 receiving duplicative or overlapping payments.

In his Motion, Swoben seeks a determination that the SCO Report did not trigger the public disclosure bar of the FCA and the CFCA with respect to his Complaint.

B. Swoben's Employment with SCAN

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

In discussions that took place in October 2006 and April 2007, after he had left SCAN, Swoben learned from SCAN's former Director of Financial Planning and Analysis, Rolando Chavez ("Chavez"): (1) the amount of the payments SCAN had received from Medi-Cal; (2) that SCAN had made a 60 or 65 percent profit on its Medi-Cal contract; (3) that SCAN's 2005 annual report showed $1 billion in revenue with a $100 million profit, resulting in an overall 10 percent profit margin; (4) that Chavez had put SCAN's Medi-Cal profits into a special reserve account, because he was afraid that someday the State would ask for its money back; (5) that SCAN had not yet repaid the State for the purported "excess payments" and "overpayments"; (6) that the State was unaware of SCAN's Medi-Cal profit; and (7) 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 discussion with Chavez, Swoben met with California State Senator Lowenthal and his staff, and provided them with the information 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. In response to the referral, the SCO opened an investigation.

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[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.

[3] Encounter data consists of electronic records, one for each encounter or visit a patient has 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.

C. The SCO Investigation and Report

On April 9, 2008, the SCO Division of Audits interviewed Swoben. In his interview, Swoben confirmed the accuracy of the information contained in the two pages of "talking points" he had previously provided 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 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.

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. Before 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

On July 13, 2009, Swoben filed his Complaint under seal, naming SCAN. On September 30, 2009, Swoben filed his First Amended Complaint, which added SCAN Group, United Healthcare Insurance Company, UnitedHealthCare Services Inc., UHIC, UnitedHealth Group, UnitedHealthCare, United Health, PacifiCare Health Plan Administrators, UHC of California (f/k/a PacifiCare of California), PacifiCare Life and Health Insurance Company, PacifiCare Health Systems. On October 19, 2010, Swoben filed his Second Amended Complaint. On November 23, 2011, Swoben filed his Third Amended Complaint, which added WellPoint, Inc., Aetna, HealthNet, Healthcare Partners, LLC, Healthcare Partners Medical Group, Inc., and Healthcare Partners Independent Physician Association.

On August 17, 2012, Scan Health Plan, Senior Care Action Network, and SCAN Group, the United States, the State of California, and Swoben reached a settlement, and this case was dismissed as to those defendants.[4] On or about January 8, 2013, the United States and the State

[4] In the August 20, 2012 Order approving the SCAN settlement, the Court retained jurisdiction over Swoben's 31 U.S.C. § 3730(d)(1) claim and California Government Code § 12652(g)(2) claim with respect to Swoben's relator share of the recovery by the United States and the State of California as a result of the SCAN settlement.

of California declined to intervene in the action against the remaining defendants. On January 8, 2013, the Court issued an order unsealing this action and directed Swoben to serve the Third Amended Complaint on the remaining defendants. On July 30, 2013, the Court granted the motions to dismiss as to the remaining defendants, and dismissed Swoben's Third Amended Complaint with prejudice.

II. Legal Standard

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 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

In his Motion, Swoben seeks a determination that the SCO Report does not trigger the public disclosure bar of the FCA and the CFCA with respect to his Complaint. If the public disclosure bar under 31 U.S.C. § 3730(e)(4)(A) and California Government Code § 12652(d)(3)(A) is triggered, then Swoben, as the relator, must prove that he is an "original source" as defined by 31 U.S.C. § 3730(e)(4)(B) and California Government Code § 12652(d)(3)(B). If the relator fails to prove he is the original source, the court lacks subject matter jurisdiction over the relator's action. *See, e.g., U.S. ex rel. Meyer v. Horizon Health Corp*., 565 F.3d 1195, 1199 (9th Cir. 2009). Swoben's Motion concerns only the first issue – whether the SCO Report triggered the public disclosure bar with

respect to his Complaint – and does not address whether, if the SCO Report was publicly disclosed, Swoben was the original source.

A. The Public Disclosure Bar

The Court agrees with the parties that the federal public disclosure statute, 31 U.S.C. 3730(e)(4), in effect from 1986 through March 22, 2010, and the California public disclosure statute, California Government Code § 12652(d)(3), in effect from 1987 through 2012 (collectively referred to "the public disclosure statutes"), apply to Swoben's Complaint. *See, e.g., Schindler Elevator Corp. v. U.S. ex rel. Kirk*, ___ U.S.___ , 131 S.Ct. 1885, 1889, fn. 1 (2011); *U.S. ex rel. May v. Purdue Pharma L.P.*, 737 F.3d 908, 914-918 (4th Cir. 2013); *U.S. ex rel. Estate of Cunningham v. Millennium Laboratories of California, Inc.,* 713 F.3d 662 (1st Cir. 2013); *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939 (1997); *Graham County Soil and Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 283, fn.1 (2010).

Under the public disclosure statutes, the public disclosure bar is triggered by the following events: (1) the disclosure at issue occurred through one of the channels specified in the applicable statute; (2) the disclosure was "public"; and (3) the relator's action is "based upon" the allegations or transactions publicly disclosed. § 3730(e)(4)(A). *U.S. ex rel. Malhotra v. Steinberg*, 770 F.3d 853, 858 (9th Cir. 2014); *State v. Altus Finance, S.A.*, 36 Cal.4th 1284, 1299 (2005) (holding that "the CFCA is patterned on similar federal legislation and it is appropriate to look to precedent construing the equivalent federal act").

B. The SCO Report Triggers The Public Disclosure Bar With Respect to Swoben's Complaint.

1. The SCO Report Was the Result of the SCO's Investigation, and, Thus, Was Produced by at Least One of the Channels Specified in the Public Disclosure Statutes.

The SCO Report was "a[n] . . . administrative . . . report" prepared and issued pursuant to 31 U.S.C. § 3730(4)(e)(A). *See A-1 Ambulance Service, Inc. v. California*, 202 F.3d 1238 at 1243 (9th Cir. 2000) ("it is axiomatic that agency actions are inherently 'administrative.'"); *Schindler Elevator Corp. v. U.S. ex rel. Kirk*, ___ U.S.___ , 131 S.Ct. 1885 (2011) (holding that "something that gives information" is a "report" within the meaning of Section 3730(4)(e)(A)); *Graham County Soil and Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280 (2010) (holding that State and local agency reports qualify as "administrative reports" under Section 3730(4)(e)(A)); *U.S. ex rel. Bly-Magee v. Premo*, 470 F.3d 914, 919 (9th Cir. 2006) (holding that a report by a California State auditor was a public disclosure under federal law). The SCO Report was also disclosed as the result of the investigation conducted by the SCO's Division of Audits, and, thus, was a "disclosure . . . in a[n] . . . administrative . . . investigation" under 31 U.S.C. § 3730(4)(e)(A). *See Seal 1 v. Seal A*, 255 F.3d 1154, 1161 (9th Cir. 2001) (holding that "the term 'investigation,' as used in § 3730(e)(4)(A), must encompass any kind of government investigation – civil, criminal, administrative, or any other kind").

In addition, the SCO Report was a "report . . . by" a State "auditor" and a "report . . . at the request of the Senate" pursuant to California Government Code § 12652(d)(3)(A). It is undisputed that Senator Lowenthal referred the information he received from Swoben relating to SCAN to the SCO's Division of Audits and requested that it conduct an investigation. As a result of that referral, in March 2008, the SCO Division of Audits initiated an investigation of SCAN, and the results of the investigation were detailed in the SCO Report.[5]

2. Swoben's Complaint is Based Upon the SCO Report.

Because the SCO Report was produced through at least one of the channels specified in the federal and state public disclosure statutes, the Court must determine whether Swoben's Complaint is based on the SCO Report. A complaint is "based on" an alleged public disclosure if some of the complaint's allegations are the same as, repeat, or are supported by some of the information in the public disclosure. *A-1 Ambulance Service, Inc. v. California*, 202 F.3d 1238, 1245 (9th Cir. 2000) (holding that a *qui tam* complaint that repeats what the public already knows, but adds more allegations, is still "based upon" the public disclosure); *U.S. ex rel. Biddle v. Board of Trustees of Leland Stanford, Jr. University*, 161 F.3d 533, 537 (9th Cir. 1998) ("holding that a claim in a FCA *qui tam* complaint is "based upon" a public disclosure "when the claim repeats allegations that have already been disclosed to the public"); *Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1473 (9th Cir. 1996) ("The *Wang* court found there was public disclosure where the *qui tam* suit was 'supported by a few factual assertions never before publicly disclosed; but "fairly characterized" the allegation repeats what the public already knows'"); *U.S. ex rel. Mateski v. Raytheon Co.*, 2013 WL 692798 (Feb. 26, 2013) (holding that "based upon" does not mean "solely based upon").

The Court concludes that Swoben's Complaint is "based upon" the SCO Report.[6] Both the SCO Report and Swoben's Complaint allege the same duplicative Medicare and Medi-Cal payments made to SCAN, and the Complaint's key allegations repeat and are supported by various conclusions contained in the SCO Report. Swoben argues that his Complaint is not "based on" the SCO Report because it added an allegation of fraud, which claimed that SCAN was responsible for what the SCO Report found was DHCS's failure to consider certain cost and Medicare revenue data, in setting SCAN's capitated Medi-Cal rates. However, because Swoben's Complaint merely restates various conclusions of the SCO Report and is, thus, at least partially based upon the SCO Report, the additional fraud allegation does not support the conclusion that Swoben's Complaint is not "based upon" the SCO Report.

Although the SCO Report did not contain any allegations of fraud, it still adequately

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[5] When a legislator requests an investigation by the SCO Division of Audits, it is the Division of Audits' usual and customary procedure to communicate the results of that investigation to the legislator that made the request in a written document, such as the SCO Report.

[6] Swoben did not discover the key information alleged in his Complaint from his work at SCAN. In fact, even after this action had settled as to SCAN, Swoben still did not fully understand key aspects of how DHCS set SCAN's Medi-Cal capitated rates, and he still had never seen SCAN's Medicare and Medi-Cal contracts.

disclosed, for purposes of the public disclosure statutes, the "allegations or transactions" upon which Swoben's Complaint was based. The public disclosure statutes do not require that the public disclosure specifically allege fraud, or even directly point to any wrongdoing. *U.S. ex rel. Harshman v. Alcan Elec. and Engineering, Inc*., 197 F.3d 1014, 1019-1020 (9th Cir. 1999) (holding that "fraud need not be explicitly alleged to constitute public disclosure"); *A-1 Ambulance Service, Inc. v. California*, 202 F.3d 1238, 1244-45 (9th Cir. 2000); *see also Seal 1 v. Seal A*, 255 F.3d 1154, 1157 (9th Cir. 2001). Instead, it is sufficient if "the information publicly disclosed . . . contained the material facts underlying . . . [the relator's] allegation of fraud" (*A-1 Ambulance Service*, 202 F.3d at 1245) or "contained enough information to enable the government to pursue an investigation" of the defendant. *Alcan Elec*., 197 F.3d at 1019. Thus, even if a complaint included new allegations that charged the defendant with fraud or a FCA violation where the public disclosure did not, the disclosure will satisfy Section 7370(e)(4)(A)'s "allegations or transactions" requirement, so long as the information publicly disclosed contained the material facts underlying the relator's allegation of fraud." *A-1 Ambulance Service*, 202 F.3d at 1245 (finding that the relator was not an "original source" and holding that "all the material transactions giving rise to the Counties' allegedly unlawful cost-shifting schemes were publicly disclosed. That the disclosed transaction themselves may not have pointed directly to any wrongdoing is simply of no moment").

In this case, the SCO Report contained the material facts underlying Swoben's fraud allegations and Swoben himself believed that the SCO Report contained sufficient information to warrant a fraud investigation of SCAN by the United States. For example, the SCO Report included facts demonstrating that SCAN received payments from both Medicare and Medi-Cal for some of the same health care services, and that, in developing SCAN's rates, DHCS did not take into account any Medicare payments to SCAN or SCAN's costs. These are substantially the identical facts that Swoben alleged in his first and second claims for relief. As in *A-1*, Swoben's claims simply restate various conclusions in the public disclosure – in this case, the SCO Report – and then add allegations that the defendant – in this case, SCAN – committed fraud and FCA violations. Therefore, the SCO Report discusses the material transactions underlying the purported fraud alleged by Swoben in his Complaint. The absence of any allegations in the SCO Report that SCAN actually defrauded Medi-Cal does not change the fact that the SCO Report satisfies Section 3730(e)(4)(A)'s "allegations or transactions" and "based upon" requirements.

3. The SCO Report was Publicly Disclosed.

If a government conducting an investigation makes a disclosure during its investigation to an individual who then files a *qui tam* action "based upon" the disclosure, and the individual is an "outsider" to the investigation, then the disclosure will be held to be a "public" disclosure as to that individual and his *qui tam* lawsuit. *U.S. ex rel. Malhotra v. Steinberg*, 770 F.3d 853, 859 (9th Cir. 2014); *Seal 1 v. Seal A*, 255 F.3d 1154 (9th Cir. 2001); *see also, U.S. ex rel. Putnam v. Eastern Idaho Reg. Med. Ctr*., 2009 WL 2901233, *6 (D.Idaho Sept. 8, 2009); *U.S. ex rel. Friedland v. Environ-Mental Chemical Corporation*, 2003 WL 23315783, *12 (N.D. Cal. Dec. 30, 2003). The individual will be considered an outsider to the investigation even if the individual is the person who triggered the government investigation – so long as: (1) the individual (a) was not the most important source of the government's information that led to the public disclosure, (b) played no active role in the government's investigation, and (c) obtained critical information from the disclosure

about the purported fraud he later alleged; and (2) the government played a significant role in uncovering the allegations of the disclosure. *Seal 1*, 255 F.3d at 1163. Under *Malhotra*, the Ninth Circuit held that, for an individual to be an "outsider" to the investigation, all that is required is that the individual, at the time of the disclosure to him, was neither a current employee of the investigation's target nor an employee of the government that conducted the investigation. *Malhotra*, 770 F.3d at 858-59; *see also U.S. ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1518–19 (9th Cir.1995), *vacated on other grounds*, 520 U.S. 939 (1997); *U.S. ex rel. Hagood v. Sonoma Cnty. Water Agency*, 929 F.2d 1416, 1419–20 (9th Cir.1991).

In this case, Swoben was not employed by the State of California (or the federal government) or by SCAN during the SCO's investigation or at the time when the SCO Report was disclosed to him. Accordingly, under *Malhotra*, he was an outsider to the investigation, and the SCO Report was a "public" disclosure as to his Complaint. In addition, Swoben "now seeks to profit from . . . [the SCO's investigation and resulting report] as an FCA relator."[7] *Id*., at 860. He knew that the SCO had conducted an investigation, and he filed a *qui tam* action based on the SCO Report. *See* 31 U.S.C. § 3730(d); Cal. Gov't Code § 12652(g)(2). In addition, based on the SCO Report, Swoben discovered critical information that was unknown to him and which he used to frame his FCA allegations, including information that DHCS relied on when it set SCAN's Medi-Cal capitated rates. Accordingly, Swoben was an outsider to the SCO's investigation, and Senator Lowenthal's office's disclosure to Swoben of the SCO Report was a public disclosure with respect to his Complaint.

IV. Conclusion

For all the foregoing reasons, the Court concludes that the SCO Report constitutes a public disclosure under the applicable public disclosure statutes which triggered the public disclosure bar as to Swoben's Complaint, and, therefore, Plaintiff's Motion is **DENIED**. Because the Court concludes that the SCO Report was a "public disclosure" and triggers the public disclosure bar as to Swoben's Complaint, the Court has no jurisdiction to hear the claims alleged in the first and second claims for relief of Swoben's Complaint unless Swoben can demonstrate that he is an "original source" of the information. Accordingly, the Court orders the parties to file cross-motions with respect to the original source issue by June 15, 2015.

IT IS SO ORDERED.

[7] Although not a requirement under *Malhotra*, the Ninth Circuit in *Seal 1*, 255 F.3d 1134, has a second requirement for a disclosure to be "public" as to its recipient, which is that the individual who is an outsider to the investigation must also be seeking to profit from it as a FCA relator. In this case, because Swoben is seeking to profit as a FCA relator, the SCO Report was "public" as to Swoben under either standard.