

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case Number: 10-23382-CIV-MORENO

UNITED STATES OF AMERICA *ex rel.*
OLIVIA GRAVES,

Plaintiff,

vs.

PLAZA MEDICAL CENTERS CORP.,
HUMANA, INC., and MICHAEL
CAVANAUGH,

Defendants.

**ORDER ADOPTING MAGISTRATE'S REPORT AND RECOMMENDATION
AND DENYING DEFENDANTS' MOTIONS TO DISMISS**

THE MATTER was referred to the Honorable John J. O'Sullivan, United States Magistrate Judge for all pretrial matters (**D.E. No. 134**), filed on **January 28, 2015**. The Magistrate Judge filed a Report and Recommendation (**D.E. No. 153**) on **April 1, 2015**, on Defendants' motions to dismiss the second amended complaint (**D.E. Nos. 111 and 113**) both filed on **November 24, 2014**. The Court has reviewed the entire file and record. The Court has made a *de novo* review of the issues that the objections to the Magistrate Judge's Report and Recommendation present, and being otherwise fully advised in the premises, it is

ADJUDGED that United States Magistrate Judge John J. O'Sullivan's Report and Recommendation (**D.E. No. 153**) on **April 1, 2015** (the "R&R") is **AFFIRMED** and **ADOPTED** in accordance with the reasons below. Accordingly, it is

ADJUDGED that:

(1) Defendant Humana Inc.'s Motion and Incorporated Memorandum of Law to Dismiss Second Amended Complaint (**D.E. No. 111**) filed on **November 24, 2014**, is DENIED.

(2) Defendants Plaza Medical Centers Corp.'s and Dr. Michael Cavanaugh's Motion to Dismiss Plaintiff's Second Amended Complaint (**D.E. No. 113**) filed on **November 24, 2015**, is DENIED.

(3) Defendants Plaza Medical Centers Corp.'s and Dr. Michael Cavanaugh's Motion to File Amended Appeal [...] (**D.E. No. 184**) filed on **April 27, 2015**, is DENIED AS MOOT.

I. Summary of the alleged scheme and the objections.

Paraphrasing the complaint, the crux of the case is the alleged "upcoding" or making of fraudulent diagnoses in order to obtain a higher payout from Medicare. Dr. Michael Cavanaugh, through his practice Plaza Medical Centers Corp., made allegedly false diagnoses. According to the complaint, those defendants then prepared medical claims resulting from the fraudulent diagnoses and submitted them to Defendant Humana, who, in turn, had the responsibility of verifying and submitting those claims for payment to Medicare. Medicare then "reimburses" Humana and Humana splits the profits with Plaza Medical Centers. More specific to the fraud being alleged, Humana is paid a monthly "capitation" amount for each patient by Medicare. The capitation amount is based, in part, on the patients' "risk adjustment factor." The allegedly false diagnoses increase patients' risk factor because the patients are presumed to have more or more serious ailments that require additional treatment. The increased risk factors, in turn, increase the capitation amount and Medicare's payment.

The objections to the Report and Recommendation argue that Relator, Dr. Olivia Graves, does not meet the heightened pleading standard set out by Federal Rule of Civil Procedure 9(b)

because she fails to: 1) include sufficient indicia of reliability, with particular emphasis on whether Dr. Graves is an “insider” and whether the allegations support that an actual claim was presented to the United States; 2) sufficiently allege that Defendant Plaza Medical Centers can be vicariously liable for Dr. Cavanaugh’s acts; and 3) sufficiently allege that Humana had the requisite knowledge. Each of the objections are unavailing and are dealt with in turn.

II. The complaint contains sufficient indicia of reliability and meets Rule 9's heightened pleading standard.

Defendants all argue that the complaint should be dismissed because Dr. Graves fails to include sufficient indicia of reliability. In one specific section, Magistrate Judge O’Sullivan summarizes and lists the following indicia: 1) Dr. Graves used to run the medical practice that was sold to Defendant Dr. Cavanaugh; 2) that same medical practice is now operated by Defendant Plaza Medical Centers; 3) Dr. Graves continued to be employed by Plaza Medical Centers after the sale until around the time she first alleged that Defendants prepared fraudulent claims; 4) the billing practices, for which Dr. Graves was wholly responsible for when she ran the practice remained the same after the sale; and 5) the agreement with Humana and Humana’s billing practices remained the same both before and after the sale as Plaza Medical Centers assumed the original agreement. *See* R&R, D.E. 153, pg. 8. Although not listed in that particular section, the complaint contains additional indicia of reliability: 1) Dr. Graves treated at least one patient both before and after Dr. Cavanaugh allegedly falsely diagnosed that patient; 2) when confronted, Dr. Cavanaugh allegedly responded that he “did not give a sh*t;” 3) Dr. Graves then copied and maintains in her possession a small subset of patient files, 28, which lend support to the allegations that there was a consistent scheme to mis-diagnose patients with

diabetes, chronic kidney disease, or complications from those diseases; 4) the laboratory data included in those patient files do not support the diagnoses; and 5) few if any of the patients were referred to specialists that would be necessary to treat the allegedly false ailments. *See* 2d Am. Compl., D.E. 102, ¶¶ 30, 35, 40.

A. There are sufficient allegations regarding the submission and payment of the false claims.

Defendants object and state that Dr. Graves has not sufficiently alleged that the Defendants actually submitted false claims to the Government or that they received payment. *See, e.g.*, D.E. No. 183, pg. 8-9. *See also, Clausen v. Laboratory Corp. of Am., Inc.*, 290 F.3d 1301, 1311 (11th Cir. 2002) (Holding that there must be specific factual allegations regarding the submission of a false claim and stating that “[t]he submission of a claim is ... the *sine qua non* of a False Claims Act violation.”). In contrast to *Clausen* where the relator merely alleged that defendant submitted a false claim “on the date of service or within a few days after,” the complaint provides sufficient detail regarding the submission of, and actual payment on, allegedly false claims. *See Clausen*, 290 F.3d at 1313. The complaint provides specific examples of patients, which the Court has held constitutes a representative sample,¹ along with the exact change in their “risk adjustment factor” from 2007 to 2009 and the exact payment for each of those patients, per year, based on the risk adjustment factors. *See* 2d Am. Compl. ¶¶ 45-66. The complaint also shows how Defendants received markedly higher payments from

¹*See* Order Denying United States’ Motion for Clarification, D.E. 133, pg. 2 (“That Order [dismissing the original complaint] generally provides that Relator has set forth sufficient facts under Rule 9(b) on a motion to dismiss to suggest that the identified false claims are representative of a larger pool of false claims. Relator is not required at this point in the litigation to identify and prove each instance of fraud.”).

Medicare year over year for a sample of patients along with detail as to the allegedly false diagnoses that ultimately led to this increase.² *See id.* at ¶¶ 67-74. The complaint states “with particularity the circumstances constituting fraud” and contains sufficient indicia of reliability to satisfy that standard, both generally and in relation to actual submission of a false claim. Fed. R. Civ. P. 9(b).

B. For the complaint to survive, it is not necessary that Dr. Graves be considered an insider.

The Defendants all object to the Report and Recommendation’s reliance on its supposed finding that Dr. Graves is an insider and therefore entitled to a more relaxed pleading standard. *See, e.g.*, D.E. 183, pg. 8 (Humana objects to the Report and Recommendation as “based on the flawed conclusion[] ... that Graves was an ‘insider’ who deserves the benefit of a relaxed pleading standard.”). The Court and the Report and Recommendation both make clear that Dr. Graves is not an insider nor entitled to a more relaxed pleading standard. *See R&R*, D.E. 153, pg. 4.

Defendants confusion may stem from the fact that both the Report and Recommendation and this order cite indicia of reliability potentially premised on insider-like knowledge, such as Dr. Graves’ general understanding of the Defendants’ previously described billing practices. The material allegations, however, are not based solely personal knowledge or her employment status with Plaza Medical Centers at the time the alleged fraud occurred. Specific to the billing

² While there may be valid, non-fraudulent reasons for this increase, the Court must construe the complaint in the light most favorable to Dr. Graves and accept the allegations as true for purposes of a motion to dismiss. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

practices allegations, they are instead premised on the fact that Dr. Graves engaged in the same billing practices (minus the alleged upcoding) for years before selling her practice, that her billing contract with Humana, of which she was knowledgeable, was assumed by Plaza Medical Centers, and that she has reviewed Medicare's records. Whether the factual allegations are indeed true is not currently before the Court, but Dr. Graves has alleged sufficient factual matter to indicate the allegations' reliability. Similarly, Dr. Graves' allegations regarding the falseness of the diagnoses is not based on that fact that she was employed by Plaza Medical Centers to treat those patients, although it may have afforded her the opportunity to diagnose patients and gather their medical records, but likely relies on her understanding and training as a medical doctor. Oftentimes, even if an allegation has some relation to Dr. Graves' employ with Plaza Medical Centers, such as when she learned of the alleged mis-diagnoses, it is supported by other factual allegations that demonstrate their reliability, such as that the lab work does not support the diagnoses and that patients were never referred to specialists. Defendants are free to disprove those allegations at the appropriate time, but Dr. Graves has alleged enough to survive a motion to dismiss.

This case is unlike *Mastej*, where the relator did not "[a]t bottom ... specify a single claim for a single referred patient by a single one of ten doctors and thus does not significantly allege any actual false claim." *Mastej v. Health Mgmt. Assocs., Inc.*, 591 Fed. App'x 693, 707 (11th Cir. 2014). While in *Mastej* some claims were allowed to survive under an arguably relaxed pleading standard because the relator "was in a position to know that actual false claims were submitted to the government and [he] had a factual basis for his alleged personal knowledge," Dr. Graves does not rely on her position with the Defendant. *Id.* Instead, she provides specific

examples of allegedly fraudulent diagnoses for specific patients and provided allegations not only supporting the fraudulent characterization of those diagnoses and concomitant change in the risk adjustment factors, but also provides the payment amount and time-specific information regarding the claims made to the United States. Few if any of the material allegations are premised solely on Dr. Graves' bald assertion of personal knowledge. In any event, it is clear that the Report and Recommendation does not relax the pleading standard for Dr. Graves and instead finds that she met the traditional Rule 9(b) standard for fraud. The Court so holds.

III. Defendants' objections regarding failure to allege knowledge and intent are meritless.

Defendant Plaza Medical Centers argues that Relator has failed to sufficiently allege that it can be vicariously liable for the actions of Dr. Cavanaugh because Relator "fail[ed] to allege that Dr. Cavanaugh acted with the intent to benefit [Plaza Medical Centers]." D.E. 184-1, pg. 11. Relatedly, Humana argues that Relator did not adequately allege that Humana had knowledge of the fraud. *See* D.E. 183, pg. 15-17. The Court, however, previously held that Rule 9(b) allows parties to allege "malice, intent, knowledge, and other conditions of mind of a person" generally. *See* Order Granting ... Motion[s] to Dismiss, D.E. No. 97, pg. 7; Fed. R. Civ. P. 9(b). These objections are meritless.

A. The allegations plausibly state that Plaza Medical Centers is vicariously liable for Dr. Cavanaugh's conduct.

In support of its objection regarding vicarious liability, Plaza Medical Centers cites *U.S. v. Hill*, which states, "Binding precedent in this circuit clearly holds that, in cases brought under the False Claims Act, an entity will not be held responsible for the acts of one of its employees **unless** the employee was acting within the scope of his authority and with the purpose of

benefitting the entity.” 676 F. Supp. 1158, 1178 (M.D. Fla. 1988) (citing *Grand Union Co. v. U.S.*, 696 F.2d 888 (11th Cir. 1983)) (emphasis added). The complaint is rife with allegations about how Dr. Cavanaugh fits into the exception stated in *Grand Union Co.* Relator alleges that she sold her medical practice to Dr. Cavanaugh who then engaged Plaza Medical Centers to operate the practice. *See* 2d Am. Compl., D.E. No. 102, ¶ 25. Dr. Cavanaugh is also an owner, officer, and director of Plaza Medical Centers and “at all times material was acting as its agent and/or apparent agent.” *Id.* at ¶ 8. *See also, id.* at ¶ 76. Dr. Cavanaugh “was acting within the course and scope of his employment and corporate office.” *Id.* at ¶ 77. It was Plaza Medical Centers that ultimately received Medicare reimbursements.

In spite of these allegations, Plaza Medical Centers argues that Relator did not allege the requisite “guilty intent” of Dr. Cavanaugh required to state a claim. The whole complaint speaks to the “guilty intent” of Dr. Cavanaugh to defraud the Federal Government, and to require a specific allegation containing the words “guilty intent,” particularly given the specific allegations recounting Dr. Graves’ conversation with Dr. Cavanaugh, would be to elevate form over substance. Even without those specific words, the Court holds that the complaint satisfies the standard set by Federal Rule of Civil Procedure 9(b), which states that “[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally.”

B. The allegations plausibly state that Humana had knowledge of the fraudulent conduct.

The complaint contains numerous allegations regarding Humana’s knowledge. *See, e.g., id.* at ¶¶ 14-21, 23-27, 35-37, 95, 98, 99. This Court previously found that Dr. Graves had sufficiently alleged Humana’s knowledge under both the less robust original complaint and a

version of the current complaint. *See* Order Granting ... Motion[s] to Dismiss, D.E. No. 97, pgs. 7, 10. Undeterred, Humana objects and argues that the complaint does not plausibly allege knowledge and there are obvious alternative explanations to Dr. Graves' allegations concerning Humana. *See* D.E. 183, pgs. 14-15. As Humana offers no alternative explanation rendering its conduct lawful, apart from perhaps that it simply did not know or there was no fraud, that argument will not be addressed. *See generally, id.* at 14-16. In line with its previous rulings and the Report and Recommendation, the Court holds that Dr. Graves has sufficiently alleged Humana's knowledge. Humana's knowledge, which can be averred generally, is plausible given the allegations and Humana's admission that it was obligated to "have in place measures to 'detect, correct, and prevent fraud'" and that it "affirmatively reviewed and audited selected patient files." *Id.* at 15-16.

DONE AND ORDERED in Chambers at Miami, Florida, this 6th day of ~~June~~ ^{July}, 2015.


FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

Copies provided to:

United States Magistrate Judge John J. O'Sullivan

Counsel of Record