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# [***United States ex rel. Martinez v. Orange Cty. Global Med. Ctr., Inc.***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5SFM-PKJ1-F27X-63J6-00000-00&context=)

United States District Court for the Central District of California

September 14, 2017, Decided; September 14, 2017, Filed

Case No. 8:15-cv-01521-JLS-DFM

**Reporter**

2017 U.S. Dist. LEXIS 221085 \*

United States of America ex rel. Liza Martinez v. Orange County Global Medical Center, Inc.

**Core Terms**

benchmark, services, alleges, billing, leave to amend, pleaded, materiality, rehabilitation, enrollees, plausibly, cardiac

**Counsel:** **[\*1]**ATTORNEYS FOR PLAINTIFF: Not Present.

ATTORNEYS FOR DEFENDANT: Not Present.

**Judges:** Present: Honorable JOSEPHINE L. STATON, UNITED STATES DISTRICT JUDGE.

**Opinion by:** JOSEPHINE L. STATON

**Opinion**

**CIVIL MINUTES — GENERAL**

**PROCEEDINGS: (IN CHAMBERS) ORDER GRANTING DEFENDANT'S MOTION TO DISMISS WITH LEAVE TO AMEND (Doc. 51)**

Before the Court is a Motion to Dismiss filed by Defendant Orange County Global Medical Center, Inc. (Mot., Doc. 51; Mem., Doc. 51-1.) Relator Liza Martinez has submitted an Opposition (Opp'n, Doc. 53), and Defendant has replied (Reply, Doc. 54). The Government has also filed a Statement of Interest to which OCGMC objects.[[1]](#footnote-0)1 (Statement of Interest, Doc. 55; Objection, Doc. 56.) The Court finds the matter appropriate for disposition without oral argument. *See* [*Fed. R. Civ. P. 78(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-25Y1-FG36-105D-00000-00&context=); [*C.D. Cal. R. 7-15.*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5HM5-GY90-004H-425B-00000-00&context=) Accordingly, the hearing on Defendant's Motion set for September 15, 2017 at 2:30 p.m. is VACATED. For the following reasons, the Court GRANTS the Motion to Dismiss WITH LEAVE TO AMEND.

**I. BACKGROUND**

Because the parties and the Court are familiar with this [*False Claims Act*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GW41-NRF4-42TV-00000-00&context=) suit, the Court will recount only the developments since the first Motion to Dismiss. On June 8, 2017, the Court granted in part and denied in part a Motion to Dismiss**[\*2]** filed by the Orange County Global Medical Center, Inc.; KPC Healthcare, Inc.; and KPC Healthcare Holdings, Inc. (MTD Order, Doc. 43.) The Court held that Relator had plausibly and particularly pleaded her claims against Orange County Global Medical Center for Medicare fee-for-service patients. (*Id.* at 6-7, 9-11.) The Court, however, granted the Motion as to Relator's conspiracy cause of action and claims against KPC Healthcare, Inc. and KPC Healthcare Holdings, Inc. due to Relator's failure to plead with particularity these parent entities' role in the alleged fraud. (*Id.* at 11-13.) Further, and of particular relevance to this Motion, the Court dismissed Relator's claims involving Kaiser Medicare Advantage patients because Relator had not "allege[d] how the hospital's allegedly false billing would affect the Government's Medicare Part C disbursements to Kaiser." (*Id.* at 8-9.)

In her Second Amended Complaint, Relator abandoned her civil conspiracy count and her claims against KPC Healthcare and KPC Healthcare Holdings. (*See generally* SAC, Doc. 48.) To support her claims involving Kaiser Medicare Advantage enrollees, Relator alleges that OCGMC's allegedly false billing was material to the Government's expenditure of federal**[\*3]** funds in two respects. (*Id.* ¶¶ 71-86.) First, Relator alleges that, "[h]ad Kaiser disclosed that it or its providers would not (or, on an ongoing basis, did not) comply with Medicare ***regulations***, the United States would not have contracted with Kaiser or would have terminated its contract." (*Id.* ¶ 76.) In support of this proposition, Relator alleges that Kaiser terminated its cardiac rehabilitation services contract with OCGMC and instead directed its Medicare Advantage enrollees to a local competitor, St. Joseph Hospital, after the alleged fraud surfaced. (*Id.*) Second, Relator pleads that OCGMC's allegedly false billing to Kaiser artificially increased the benchmark capitated rate that the Government paid Kaiser for Medicare Advantage enrollees. (*Id.* ¶ 78.)

**II. LEGAL STANDARD**

In deciding a motion to dismiss under [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=), courts must accept as true all "well-pleaded factual allegations" in a complaint. [*Ashcroft v. Iqbal, 556 U.S. 662, 679, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4W9Y-4KS0-TXFX-1325-00000-00&context=). A court must draw all reasonable inferences in the light most favorable to the non-moving party. *See* [*Daniels-Hall v. Nat'l Educ. Ass'n, 629 F.3d 992, 998 (9th Cir. 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:51RV-7241-652R-8000-00000-00&context=). Yet "courts 'are not bound to accept as true a legal conclusion couched as a factual allegation.'" [*Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=) (quoting [*Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6840-0039-N31S-00000-00&context=). "To survive a motion to dismiss, a complaint must contain sufficient factual**[\*4]** matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" [*Iqbal, 556 U.S. at 678*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4W9Y-4KS0-TXFX-1325-00000-00&context=) (quoting [*Twombly, 550 U.S. at 570*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing [*Twombly, 550 U.S. at 556*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=)).

"[W]here a complaint includes allegations of fraud, [*Federal Rule of Civil Procedure 9(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YN-00000-00&context=) requires more specificity including an account of the 'time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations.'" [*Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4N1X-8B60-0038-X53X-00000-00&context=) (quoting [*Edwards v. Marin Park, Inc., 356 F.3d 1058, 1066 (9th Cir. 2004))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4BJG-DH50-0038-X233-00000-00&context=). "A pleading is sufficient under [*[R]ule 9(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YN-00000-00&context=) if it identifies the circumstances constituting fraud so that a defendant can prepare an adequate answer from the allegations." [*Moore v. Kayport Package Express, Inc., 885 F.2d 531, 540 (9th Cir. 1989)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9H00-003B-51K1-00000-00&context=).

**III. DISCUSSION**

In its Motion to Dismiss, OCGMC renews its challenge to Relator's pleading of materiality for the Medicare Advantage claims, asserting that Relator still has not shown how OCGMC's alleged false billing could have affected the Government's outlays to Kaiser. (Mem. at 8-17.) Relator resists OCGMC's characterization of the materiality inquiry and asserts that the SAC plausibly alleges that the false billing to Kaiser affected the Government's conduct. (Opp'n**[\*5]** at 9-20.)

Although a false claim need not be submitted directly to the United States to trigger liability under the False Claims Act, *see* [*31 U.S.C. § 3729(b)(2)(A)(ii)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GW41-NRF4-42TV-00000-00&context=), it must be material to the Government's payment decision, [*United States ex rel. Petratos v. Genentech Inc., 855 F.3d 481, 491-92 (3d Cir. 2017)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5NFD-7CK1-F04K-K014-00000-00&context=) (collecting cases). In this case, the hospital's allegedly false certification of compliance with the requirements for a cardiac rehabilitation program must have affected or had a likelihood of affecting the Government's expenditure of funds to Kaiser. *See* [*Universal Health Servs., Inc. v. United States ex rel. Escobar, 136 S. Ct. 1989, 2002, 195 L. Ed. 2d 348 (2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5K1C-4R91-F04K-F19G-00000-00&context=). Simply showing that "the Government would be entitled to refuse payment were it aware of the violation" is not enough. [*Id. at 2004*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5K1C-4R91-F04K-F19G-00000-00&context=).

As pleaded, neither of Relator's theories of how the hospital's alleged false certifications to Kaiser could have been material are plausible. While Kaiser's alleged decision to cease referring patients to OCGMC for cardiac rehabilitation services is probative of the gravity of the violations, it does not plausibly suggest that the Government would have terminated Kaiser as a Medicare Advantage Organization had it known that a Kaiser subcontractor would improperly bill cardiac rehabilitation services. In fact, Relator notes in the next paragraph of her SAC that, as a Medicate Advantage Organization, Kaiser had to implement**[\*6]** compliance programs designed to ferret out non-compliant billing by downstream entities, such as OCGMC. (SAC ¶ 77.) Nothing in Relator's SAC suggests that Kaiser's compliance programs failed or that it was somehow complicit in the allegedly false certifications.

Relator's second theory—that the alleged fraud increased the benchmark capitated rate (SAC ¶ 78)—is based on a misconstruction of the governing statutory framework. The Centers for Medicare and Medicaid Services (CMS) determines the benchmark capitated rate based on the average cost of a Medicare fee-for-service beneficiary in the same region. [*42 U.S.C. § 1395w-23(c)(1)(D)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GV31-NRF4-434S-00000-00&context=); [*42 C.F.R. §§ 422.306(b)*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:5HC7-R9G0-008H-053R-00000-00&context=), [*422.258(d)*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:5S4T-MYB0-008H-04KF-00000-00&context=). Starting in 2012, CMS began using a "blended benchmark," a cost-saving metric that considers the national and regional average expenditures for Medicare fee-for-service beneficiaries as well as a quality metric. *See* [*42 U.S.C. § 1395w-23(n)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GV31-NRF4-434S-00000-00&context=); [*42 C.F.R. § 422.258(d)*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:5S4T-MYB0-008H-04KF-00000-00&context=). The blended benchmark can never exceed the standard benchmark. [*42 C.F.R. § 422.258(d)(2)(iii)*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:5S4T-MYB0-008H-04KF-00000-00&context=). Because neither the standard benchmark nor the blended benchmark considers the historical volume, value, or cost of services a Medicare Advantage Organization provides, the hospital's alleged false certification to Kaiser could not have inflated these CMS benchmarks.

To the extent that Relator contends**[\*7]** in her Opposition that materiality does not depend on whether the Government receives services worth the amount paid (*see* Opp'n at 16-18), the Court agrees. Although it would be reasonable to infer that operating a cardiac rehabilitation program without extensive doctor participation or individualized treatment plans would be cheaper, Relator need not plead this to establish materiality. Yet Relator has not plausibly pleaded that the Government's disbursements to Kaiser were affected by OCGMC's allegedly false billing.

As neither theory of materiality is plausible, Relator's claims related to Kaiser enrollees must be dismissed. In determining whether to grant leave to amend, a court should consider: "(1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of amendment; and (5) whether plaintiff has previously amended his complaint." [*In re W. States Wholesale Nat. Gas* ***Antitrust*** *Litig., 715 F.3d 716, 738 (9th Cir. 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:585C-H4N1-F04K-V321-00000-00&context=). While futility alone is a sufficient reason to deny leave to amend, "a proposed amendment is futile only if no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense." [*Miller v. Rykoff-Sexton, Inc., 845 F.2d 209, 214 (9th Cir. 1988)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-1CC0-001B-K0CN-00000-00&context=). In its Statement of Interest, the Government asserts that "the volume or value of services**[\*8]** provided to Part C beneficiaries and the costs incurred by a particular MAO could certainly affect" whether a MAO chooses to submit a bid (*42 C.F.R. § 422.254*), the MAO's bid amount, and the Government's share of the savings for a below-benchmark bid ([*42 C.F.R. § 422.304(a)(1)*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:5HC7-R9G0-008H-053P-00000-00&context=)). (Statement of Interest at 5.) As such, Relator's claims are not futile. The other factors likewise militate in favor of granting leave to amend: there is no bad faith, undue delay, or substantial prejudice to OCGMC, and the Court has granted leave to amend only once before this Motion.

Accordingly, the Court DISMISSES Relator's claims related to Kaiser enrollees with LEAVE TO AMEND. To be clear, though, any Third Amended Complaint must sufficiently articulate how OCGMC's alleged false billing affected the *Government's* outlays to Kaiser and do so in a manner consistent with the applicable Medicare legal framework. Alleging that Kaiser would not have paid for the services is not sufficient, nor are Relator's two theories of materiality as currently pleaded.

**IV. CONCLUSION**

For the foregoing reasons, Defendant's Motion to Dismiss is GRANTED WITH LEAVE TO AMEND. Relator is given leave to file a Third Amended Complaint within **twenty-one (21) days** of this Order**[\*9]** to remedy the identified deficiencies. Failure to file a Third Amended Complaint by that date shall be deemed consent to dismiss the deficient claims with prejudice as to Relator and without prejudice as to the United States.

**End of Document**

1. 1In the future, the United States must file any statement of interest no later than the deadline for the non-moving party to file an opposition brief so that the moving party has an opportunity to respond. [↑](#footnote-ref-0)