UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES -- GENERAL

Case No. **CV 14-08850-JFW (Ex)** Date: December 29, 2017

Title: United States of America ex rel. Jane Winter *-v-* Gardens Regional Hospital and Medical Center, Inc. et al.

PRESENT:

HONORABLE JOHN F. WALTER, UNITED STATES DISTRICT JUDGE

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

ATTORNEYS PRESENT FOR PLAINTIFF:	**ATTORNEYS PRESENT FOR DEFENDANTS:**
None	None

PROCEEDINGS (IN CHAMBERS):

ORDER GRANTING DEFENDANTS VICKI ROLLINS, WILLIAM NELSON, AND ROLLINSNELSON LTC CORPORATION'S MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT [Docket No. 120; filed 11/6/17]

ORDER GRANTING DEFENDANTS S&W HEALTH MANAGEMENT SERVICES, INC. AND BERYL WEINER'S MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT [Docket No. 122; filed 11/6/17]

ORDER GRANTING DEFENDANT PRODE PASCUAL, M.D.'S MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT [Docket No. 123; filed 11/6/17]

On November 6, 2017, Defendants S&W Health Management Services, Inc. ("S&W") and Beryl Weiner ("Mr. Weiner") (collectively, the "S&W Defendants"), Vicky Rollins, William Nelson, and RollinsNelson LTC Corporation (collectively, the "RollinsNelson Defendants") and Prode Pascual, M.D. ("Dr. Pascual") filed Motions to Dismiss Plaintiff *Qui Tam* Relator Jane Winter's ("Ms. Winter") Second Amended Complaint ("SAC") (Docket Nos. 120, 122, 123). Plaintiff filed Oppositions to the Motions on November 15, 2017. On November 22, 2017, Defendants filed their Replies. Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court found the matters appropriate for submission on the papers without oral argument. The

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matters were, therefore, removed from the Court's December 11, 2017 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. Background

A. The Parties

The RollinsNelson Defendants own and operate several skilled nursing facilities in the greater Los Angeles area. In addition, RollinsNelson and Mr. Beryl own S&W. At all times relevant to this action, S&W owned an entity known as Sycamore Healthcare ("Sycamore"), which had a contract to manage operations at Gardens Regional Hospital and Medical Center, Inc., doing business as Tri-City Regional Medical Center ("Tri-City"). Tri-City is a non-profit, acute care hospital with inpatient and outpatient services, which filed for Chapter 11 bankruptcy protection on June 6, 2016 (Docket No. 45).

Dr. Pascual and non-moving defendants Rafaelito Victoria, Arnold Ling, Cynthia Miller-Dobalian, Edgardo Binoya, and Namiko Nerio were attending physicians with admitting privileges at Tri-City. Non-moving defendant Manuel Sacapano was an emergency room physician. Although Dr. Sacapano made primary and secondary medical diagnoses incident to attending physicians' admissions of patients to Tri-City, he did not have admitting privileges at Tri-City.

Ms. Winter is a registered nurse who worked briefly as the Director of Care Management and Emergency Room at Tri-City from August 11, 2014 until she was terminated on November 6, 2014.

B. Alleged False Claims

During her employment with Tri-City, Ms. Winter was responsible for the operation of the emergency room and for case management, social services, and utilization review. During the first week of her employment at Tri-City, Ms. Winter alleges that she noticed that a disproportionate number of patients were being transported to the hospital via ambulance from nursing homes owned and operated by RollinsNelson. As a result, Ms. Winter began investigating inpatient hospital admissions of patients from facilities owned and operated by RollinsNelson ("RollinsNelson Patients").

Ms. Winter identified approximately 65 claims, totaling approximately $1,287,701.62, related to inpatient hospital admissions of RollinsNelson Patients between July 14, 2014 and September 9, 2014 that she believed were medically unnecessary and, therefore, false. According to Ms. Winter, part of her job was to review and evaluate the appropriateness of medical admissions using a hospital industry standard set of criteria called InterQual Level of Care Criteria 2014 ("InterQual"). Ms. Winter alleges that she determined that none of the RollinsNelson Patients met the inpatient criteria for admission to the hospital under InterQual and, therefore, could not be properly billed to Medicare.

InterQual is a nationally recognized evidence-based clinical content and decision support criteria system developed by McKesson Health Solutions LLC that provides health facilities with assistance in determining the medical appropriateness of hospital admission, continued stay, and discharge. The InterQual criteria are reviewed and validated by a national panel of clinicians and medical experts, including those in community and academic practice settings, as well as those within the managed care industry throughout the United States. According to Ms. Winter, when a Medicare patient presents to the hospital for inpatient admission or observation, InterQual criteria are used to assess the severity of their illness and the intensity of the required service. Ms. Winter alleges that the hospital can only bill Medicare for inpatient services if the InterQual criteria for severity of illness and intensity of service are both satisfied.

During the course of her investigation, Ms. Winter advised Tri-City's Chief Operating Officer ("COO") that she had determined that the hospital was admitting patients from RollinsNelson facilities that did not meet the InterQual criteria for inpatient admission to the hospital and that Tri-City was therefore improperly billing these charges to Medicare. Ms. Winter also notified Tri-City's Chief Executive Officer of her findings. Ms. Winter alleges that the doctors named as defendants in this action (the "Defendant Doctors") admitted the RollinsNelson Patients even though they knew the RollinsNelson Patients did not require inpatient care. Despite Ms. Winter's findings, Ms. Winter alleges that the S&W Defendants and the RollinsNelson Defendants pressured the Defendant Doctors to continue to admit patients and to continue to submit claims based on false certifications of medical necessity. In addition, Ms. Winter alleges that Ms. Rollins and Mr. Nelson specifically instructed case management personnel not to question the decision to admit these patients, despite Ms. Winter's objections. According to Ms. Winter, the message from Ms. Rollins and Mr. Nelson was clear: "anyone who questioned admissions to Tri-City would be fired."

Ms. Winter alleges that in September of 2014, Ms. Rollins, in an email to case manager Elida Agatep, explained how to coach physicians at Tri-City to prepare the required documentation in order to increase qualifying patient admissions to Tri-City. Ms. Winter also alleges that the clear implication of the email was that the RollinsNelson Defendants and the S&W Defendants were attempting to override physicians' medical judgment in order to increase admissions to Tri-City and to increase its billings to Medicare.

On November 6, 2014, Ms. Winter was terminated from her position at Tri-City. She alleges that her employment was terminated because of her numerous attempts to stop the "rampant and blatant violations" of the False Claims Act ("FCA"). After Ms. Winter was terminated, Ms. Agatep was named the new Director of Care Management and Emergency Room at Tri-City.

C. Medicare System and Payments for Inpatient Services

Medicare is a health insurance program administered by the Centers for Medicare and Medicaid Services ("CMS"), designed to provide access to health insurance for Americans aged 65 or older, people under age 65 with certain disabilities, and people of all ages with End-Stage Rental Disease (permanent kidney failure requiring dialysis or a kidney transplant). *See* 42 U.S.C. § 1395c. Eligible Medicare beneficiaries are provided a choice of either signing up for traditional fee-for-service (""FFS") coverage under Medicare Part A (Hospital Insurance) and Part B (Medical Insurance), or selecting a private plan option under Part C, which is also known as "Medicare

Advantage." 42 U.S.C. § 1395w–21(a). Under the traditional FFS model, physicians and hospitals (known as "providers") who care for beneficiaries are reimbursed directly by the federal government.

To receive payment from Medicare for inpatient hospital services provided to beneficiaries, a physician must certify that the services are medically necessary. 42 U.S.C. § 1395f(a)(3). Medicare also provides: "to the extent provided by regulations, the certification and re-certification requirements" described in the statute "shall be deemed satisfied where, at a later date, a physician, nurse practitioner, clinical nurse specialist, or physician assistant" provides "certification of the kind" described in relevant provisions of the statute, but only if the "certification is accompanied by such medical and other evidence as may be required by such regulations." 42 U.S.C. § 1395f(a)(8).

For purposes of payment under Medicare Part A, an individual qualifies as an inpatient of a hospital if he is formally admitted pursuant to an order for inpatient admission by a physician or qualified practitioner eligible to admit patients. 42 C.F.R. § 412.3(a). In order for a hospital to receive payment for inpatient services provided to a beneficiary under Medicare Part A, the physician's order must be included in the medical record and supported by the admitting physician's admission and progress notes. 42 C.F.R. § 412.3(a). The physician must also certify that the services are required and include: a documented reason for the hospitalization for either inpatient medical treatment or diagnostic study, or special or unusual services for cost outlier cases; and a statement that the inpatient services were provided in accordance with the physician's order. 42 C.F.R. § 412.3(a).

Inpatient admission will generally qualify for payment under Medicare Part A when the admitting physician concludes or is of the opinion that the patient will "require hospital care that crosses two midnights." 42 C.F.R. § 412.3(d)(1). The physician's decision to admit a patient typically is based on complex medical factors such as patient history and comorbidities, the severity of signs and symptoms, current medical needs, and the risk of an adverse event. 42 C.F.R. § 412.3(d)(1)(i). The factors that are relied on for a particular clinical explanation must be documented in the medical record in order to qualify for payment. 42 C.F.R. § 412.3(d)(1)(i). If unforeseen circumstances arise that result in a shorter stay than the physician expected at the time of admission (i.e., a stay that spans less than 24 hours), the patient may still be treated on an inpatient basis and payment for an inpatient hospital stay may be made under Medicare Part A. 42 C.F.R. § 412.3(d)(1)(ii). In addition, where the admitting physician concludes that a patient should be admitted to the hospital but will not be required to stay for 2 days, payment for the stay may be made under Medicare Part A, provided the physician's decision is based on complex medical factors and the medical record supports the physician's determination. 42 C.F.R. § 412.3(d)(3).

Medicare will not make payments under Medicare Part A or B for any expenses incurred for items or services that are not reasonable and necessary for the diagnosis or treatment of a beneficiary's illness or injury. 42 U.S.C. § 1395y(a)(1)(A).

D. Procedural History

Ms. Winter filed this *qui tam* action against Defendants on November 14, 2014. On October 16, 2017, she filed a Second Amended Complaint ("SAC") asserting four claims for violations of the FCA. Specifically, Ms. Winter alleges four causes of action: (1) Violation of 31 U.S.C. Section 3729(a)(1)(A) against Tri-City, RollinsNelson, S&W, Ms. Rollins, Mr. Nelson, Mr. Weiner, Dr. Pascual, and six other doctors for knowingly presenting or causing to be presented a false or fraudulent claim for payment or approval; (2) Violation of 31 U.S.C. Section 3729(a)(1)(B) against Tri-City, RollinsNelson, S&W, Ms. Rollins, Mr. Nelson, Mr. Weiner, Dr. Pascual, and six other doctors for knowingly making, using, or causing to be made or used a false record or statement material to a false or fraudulent claim; (3) Violation of 31 U.S.C. Section 3729(a)(1)(C) against Tri-City, RollinsNelson, S&W, Ms. Rollins, Mr. Nelson, Mr. Weiner, Dr. Pascual, and six other doctors for conspiracy to violate the FCA; and (4) Violation of 31 U.S.C. Section 3730(h) against Tri-City, Ms. Rollins, Mr. Nelson, RollinsNelson, Mr. Weiner, and S&W for retaliation. Although the United States conducted a thorough investigation of Ms. Winter's allegations, on March 16, 2017, it declined to intervene in this action.

II. Legal Standard

A motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims asserted in the complaint. "A Rule 12(b)(6) dismissal is proper only where there is either a 'lack of a cognizable legal theory' or 'the absence of sufficient facts alleged under a cognizable legal theory.'" *Summit Tech., Inc. v. High-Line Med. Instruments Co., Inc.*, 922 F. Supp. 299, 304 (C.D. Cal. 1996) (quoting *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988)). However, "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citations and alterations omitted). "[F]actual allegations must be enough to raise a right to relief above the speculative level." *Id.*

In deciding a motion to dismiss, a court must accept as true the allegations of the complaint and must construe those allegations in the light most favorable to the nonmoving party. *See, e.g., Wyler Summit P'ship v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). "However, a court need not accept as true unreasonable inferences, unwarranted deductions of fact, or conclusory legal allegations cast in the form of factual allegations." *Summit Tech.*, 922 F. Supp. at 304 (citing *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981) *cert. denied*, 454 U.S. 1031 (1981)).

"Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion." *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n. 19 (9th Cir. 1990) (citations omitted). However, a court may consider material which is properly submitted as part of the complaint and matters which may be judicially noticed pursuant to Federal Rule of Evidence 201 without converting the motion to dismiss into a motion for summary judgment. *See, e.g., id.*; *Branch v. Tunnel*, 14 F.3d 449, 454 (9th Cir. 1994).

III. Discussion

The FCA imposes penalties against any person who (1) "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval"; (2) "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim"; (3) "knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government"; or (4) conspires to commit any of these violations. 31 U.S.C. § 3729(a)(1)(A)–(C), (G). A "claim includes direct requests for government payment as well as reimbursement requests made to the recipients of federal funds under a federal benefits program." *United States ex. rel. Campie v. Gilead Scis., Inc.*, 862 F.3d 890, 899 (9th Cir. 2017). The FCA permits individuals to sue on behalf of the Government to enforce the statute. 31 U.S.C. § 3730(b).

To prevail on a claim under the FCA, a plaintiff must demonstrate: "(1) a false statement or fraudulent course of conduct; (2) made with scienter; (3) that was material, causing (4) the [G]overnment to pay out or forfeit moneys due." *Campie*, 862 F.3d at 899 (internal citation and quotation marks omitted). "It is not enough to allege regulatory violations . . . rather, the false claim or statement must be the *sine qua non* of receipt of . . . funding." *Id.* (internal citation and quotation marks omitted). Courts broadly construe the FCA and have recognized a number of schemes "that attach potential [FCA] liability to claims for payment that are not explicitly and/or independently false." *Id.* (internal citation and quotation marks omitted).

The FCA recognizes two types of actionable false claims—factually false claims and legally false claims. A plaintiff who relies on a legally false claim theory must prove the defendant's claim is false because the defendant certified to a government agency that it complied with laws, rules, or regulations governing the reimbursement of claims or other provision of benefits when it did not. *United States ex rel. Hopper v. Anton*, 91 F.3d 11261, 1266 (9th Cir. 1996). A legally false claim can rest on a theory of express false certification or implied false certification. Ms. Winter does not allege that Defendants billed the Government for services that were never provided—i.e., a "factually false" claim—or that Defendants expressly certified that the claims submitted complied with a law, rule, or regulation as part of the claims process. Rather, Ms. Winter's FCA claims are based on an implied false certification theory. Opp'n at 19.

"Implied false certification occurs when a defendant has previously undertaken to expressly comply with a law, rule, or regulation, and that obligation is implicated by submitting a claim for payment even though a certification of compliance is not required in the process of submitting the claim." *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010). "[I]t is the false certification of compliance which creates liability when certification is a prerequisite to obtaining a government benefit." *Id.* (internal citation and quotation marks omitted). The Supreme Court recently held that two conditions must be satisfied to prevail on an implied false certification theory: (1) the claim must not merely request payment, but also must make specific representations about the goods or services provided; and (2) the defendant's failure to disclose non-compliance with a material statutory, regulatory, or contractual requirement must "make[ ] those representations misleading half-truths." *Universal Health Servs., Inc. v. United States ex. rel. Escobar*, 136 S. Ct. 1989, 2000–2002 (2017); *see also Campie*, 862 F.3d at 901. "The violation need not be of a

contractual, statutory, or regulatory provision that the Government expressly designated as a condition of payment." *Campie*, 862 F.3d at 901. "However, the misrepresentation must be material to the Government's payment decision." *Id.* (internal citation and quotation marks omitted). Although the Supreme Court clarified "the conditions upon which an implied false certification claim can be made [the elements of an FCA claim] remain the same." *Id.*

Defendants move to dismiss Ms. Winter's FCA claims on the grounds that: (1) Ms. Winter cannot demonstrate that they submitted claims based on objectively false statements; and (2) Ms. Winter cannot show that the alleged false statements were material to the Government's decision to pay the claims.

A. FCA Claims as Alleged in the First and Second Causes of Action

1. Ms. Winter Cannot Establish Defendants Submitted Objectively False Claims

Defendants argue that Ms. Winter's FCA claims must be dismissed because her theory of liability fails as a matter of law given that she has not alleged an objectively false claim. The Court agrees. The FCA only imposes liability on those who make a false or fraudulent statement. Although the statute does not define these terms, the Ninth Circuit has cautioned that falsity under the FCA "does not mean scientifically untrue", rather, it means "a lie". *Wang v. FMC Corp.*, 975 F.3d 1412, 1421 (9th Cir. 1992). Thus, at minimum, to prevail on an FCA claim, a plaintiff must show that a defendant knowingly made an objectively false representation to the Government that caused the Government to remit payment. *United States v. St. Mark's Hosp.*, 2017 WL 237615, at *9 (D. Utah Jan. 19, 2017); *see also Hagood v. Sonoma Cty. Water Agency*, 81 F.3d 1465, 1477–78 (9th Cir. 1996).

In the SAC, Ms. Winter cites the Medicare statutes and regulations that set forth the criteria that a physician must consider when determining whether to admit a patient for inpatient hospital services. Specifically, Ms. Winter relies on the provisions of the statutes and regulations that require a healthcare provider to submit a certification with a request for payment for services stating that the services were medically necessary. Ms. Winter also relies on the Medicare statutes and regulations that provide that Medicare will not pay for expenses incurred for items or services that are not medically necessary for the diagnosis or treatment of a beneficiary's illness or injury. Accordingly, Ms. Winter's FCA claims are based on her contention that Defendants represented that the services provided to RollinsNelson Patients were medically necessary and that these representations were false.

Ms. Winter's contention that the medical provider's certifications were false is based on her own after-the-fact review of Tri-City's admission records. However, the fact that Ms. Winter reached a different conclusion on the issue of medical necessity does not render the provider's certification false. "[W]hen two or more medical experts look at the same medical records and reach different conclusions about whether those medical records" support a physician's decision to certify a patient for admission, "all that exists is a difference of opinion." *United States v. AseraCare Inc.*, 176 F. Supp. 3d 1282, 1285 (N.D. Ala. 2016); *see also St. Mark's Hosp.*, 2017 WL 237615, at *9. "This difference of opinion" among medical professionals regarding patients' eligibility for admission alone is not sufficient to demonstrate falsity. *AseraCare*, 176 F. Supp. 3d at 1285. Indeed, "expressions of opinions, scientific judgments, or statements as to conclusions

about which reasonable minds may differ cannot be false" for purposes of an FCA claim. *United States ex rel. Roby v. The Boeing Co.*, 100 F. Supp. 2d 619, 625 (S.D. Ohio 2000).

Moreover, as several courts have held, liability for an FCA violation may not be premised on subjective interpretations of imprecise statutory language such as "medically reasonable and necessary." *St. Mark's Hosp.*, 2017 WL 237615, at *9 (collecting cases). Ms. Winter alleges she believes that many of the admissions were medically unreasonable and unnecessary, for example, because the patients' conditions were not severe enough to support inpatient admission. However these allegations are based on subjective medical opinions that cannot be proven to be objectively false.

In addition, Ms. Winter relies heavily on the InterQual criteria and erroneously suggests that they are dispositive in determining when it is medically necessary to admit a patient for inpatient hospital services. In doing so, Ms. Winter improperly equates the InterQual criteria with the medical necessity standard imposed by Medicare. Medicare does not require compliance with the InterQual criteria before a physician can certify an inpatient admission and related services as medically necessary. Thus, requesting payment for services rendered that do not satisfy the InterQual criteria cannot amount to a fraudulent scheme under the FCA. *See e.g., Universal Health Srvs.*, 136 S. Ct. at 1999–2001 ("[t]he term medical necessity does not impart a qualitative element mandating a particular standard of medical care and [the relator] does not point to any legal authority requiring [the court] to read such a mandate into the form."). Moreover, Ms. Winter admits that the InterQual criteria are merely a collection of data and represent a consensus of medical professionals' opinions. Thus, even assuming there is factual support for Ms. Winter's allegation that Defendants did not satisfy the relevant InterQual criteria when admitting the patients, this does not demonstrate that the providers' certifications that the admissions and relevant services were medically necessary were objectively false. Accordingly, the Court concludes that Ms. Winter's first two FCA claims fail as a matter of law and must be dismissed.

2. Ms. Winter Cannot Establish the Failure to Follow InterQual Criteria Is Material to the Government's Payment

Defendants also argue that Ms. Winter cannot demonstrate that the alleged false statements were material. Under the FCA, a false statement is material if it has "a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." *Campie*, 862 F.3d at 904–05. As the Supreme Court recently confirmed, the "materiality standard is demanding." *Universal Health Servs.*, 136 S. Ct. at 2003. The key question is whether the government is likely to attach significance to the requirement in deciding whether to tender payment. *Id.*

In an effort to establish materiality, Ms. Winter alleges that the InterQual criteria can be relied on to perform a secondary review of the appropriateness of the current or proposed level of care, including whether inpatient admission is medically necessary. In addition, Ms. Winter alleges that CMS uses the InterQual criteria when auditing and inspecting hospitals. Based on these allegations, Ms. Winter argues the failure to meet the InterQual criteria must have an impact on the Government's actual or likely behavior—i.e., because CMS uses InterQual criteria when auditing or inspecting hospitals. Mot. 18. The Court disagrees. The plain language of the Medicare statutes and regulations relied on by Ms. Winter do not support her argument that failure to meet InterQual

criteria is material to the Government's decision to pay the claims. There is no mention of the InterQual criteria in any of the relevant statutes or regulations, and Ms. Winter has not cited to any other law, statute, or regulation that suggests that admission is not medically necessary simply because it does not meet the InterQual criteria. Moreover, the fact that CMS uses InterQual criteria when auditing or inspecting hospitals does not assist Ms. Winter's position because as the Medicare Program Integrity Manual Guidance states:

> CMS contractors are not required to automatically deny a claim that does not meet the admission guidelines of a screening tool. In all cases, in addition to screening instruments, the reviewer shall apply his/her own clinical judgment to make a medical review determination based on the documentation in the medical record.

CMS, News Flash: Guidance on Hospital Inpatient Admission Decisions, MLN No. SE 1037 Revised (July 31, 2012). Therefore, the Court concludes that Ms. Winter cannot establish that the failure to satisfy InterQual criteria would influence the Government's decision to pay the claims.

Accordingly, the Court **GRANTS** Defendants' Motions to Dismiss Ms. Winter's First and Second causes of action without leave to amend.

B. Conspiracy Claim

To maintain a claim for conspiracy under 31 U.S.C. Section 3729(a)(1)(C), a plaintiff must show: "(1) that the defendant conspired with one or more persons to get a false or fraudulent claim paid by the United States; (2) that one or more of the conspirators performed any act to effect the object of the conspiracy; and (3) that the United States suffered damages as a result of the false or fraudulent claim." *Corsello v. Lincare, Inc.*, 428 F.3d 1008, 1014 (11th Cir. 2005) (internal citation and quotation marks omitted).

Because the Court concludes that Ms. Winter cannot demonstrate that Defendants submitted false claims based on the certifications that the inpatient services provided were medically necessary, Ms. Winter's conspiracy claim fails as a matter of law. *See, e.g., U.S. ex rel. Woodruff v. Haw. Pac. Health*, 560 F. Supp. 2d 988, 1004 (D. Haw. 2008) (holding that absent evidence of a false claim as alleged, the defendants cannot have conspired to have a false claim paid by the Government); *United States ex rel. Fent v. L-3 Commc'ns Aero Tech. LLC*, 2007 WL 3283689, at *5 (N.D. Okla. Nov. 2, 2007) (holding that there can be no conspiracy "to submit a false claim if no false claim has been shown to exist"). Accordingly, the Court **GRANTS** Defendants' Motions to Dismiss Ms. Winter's conspiracy claim without leave to amend.

C. Retaliation Claim

The S&W Defendants and the RollinsNelson Defendants argue that Ms. Winter's retaliation claim must be dismissed because they were not her employer and, therefore, they cannot be liable for retaliation under Section 3730(h). Since 1986, the FCA has protected "whistleblowers" from retaliation "*by their employers*." *Moore v. Cal. Inst. of Tech. Jet Propulsion Lab*, 275 F.3d 838, 845 (9th Cir. 2002) (emphasis added). Although Congress removed the term "employer" from Section 3730(h) of the FCA when it amended the statute in 2009, courts have subsequently determined

that the amendment was intended to broaden the category of employees eligible for whistleblower protection (to include contractors and agents), not to broaden the class of persons subject to liability under this Section. *U.S. ex rel. Lupo v. Quality Assurance Servs., Inc.*, 242 F. Supp. 3d 1020, 1029 (S.D. Cal. 2017); *see, e.g., Wichansky v. Zownie*, 2014 WL 289924, at *3–5 (D. Ariz. Jan. 24, 2014); *Lipka v. Advantage Health Grp., Inc.*, 2013 WL 5304013, at *12 (D. Kan. Sept. 20, 2013). Accordingly, the Court agrees with numerous other courts that have found that liability under Section 3730(h) does not extend to individuals, such as co-workers, supervisors, or corporate officers who lack an employment relationship with a plaintiff. *Accord United States v. Kiewit Pac. Co.*, 41 F. Supp. 3d 796, 814 (N.D. Cal. 2014); *Wichansky*, 2014 WL 289924, at *3–5.

Ms. Winter argues that even if the statute is limited to claims against employers, the S&W Defendants and RollinsNelson Defendants are liable under Section 3730(h) as employers because they exercised dominion and control over her. However, the vague and conclusory allegations she relies on demonstrate, at best, that the S&W Defendants and RollinsNelson Defendants may have participated in the decision to terminate her merely because of the individuals' corporate positions and the corporations' ownership of Sycamore, which oversaw operations at Tri-City. These allegations are not sufficient to show that Ms. Winter had the required employment relationship with these defendants.[1] Indeed, Ms. Winter candidly admits that Tri-City was her employer. SAC ¶ 170. Accordingly, the Court concludes that Ms. Winter cannot maintain a retaliation claim against the S&W Defendants or the RollinsNelson Defendants and, therefore, the Court **GRANTS** their Motions to Dismiss the retaliation claim without leave to amend.

D. Leave to Amend Would Be Futile

Where a motion to dismiss is granted, a district court must decide whether to grant leave to amend. Generally, the Ninth Circuit has a liberal policy favoring amendments and, thus, leave to amend should be freely granted. *See, e.g., DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992). However, a Court does not need to grant leave to amend in cases where the Court determines that permitting a plaintiff to amend would be an exercise in futility. *See, e.g., Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987) ("Denial of leave to amend is not an abuse of discretion where the pleadings before the court demonstrate that further amendment would be futile.").

In light of the foregoing, the Court concludes that Ms. Winter's claims "cannot be saved by any amendment." *Miller v. Yokohama Tire Corp.*, 358 F.3d 616, 622 (9th Cir. 2004). Ms. Winter has had multiple opportunities to amend her original complaint and has not suggested any facts that she could add that could save her claims, and the Court cannot conceive of any amendment. Because Ms. Winter's claims rest entirely on her legally faulty theory that admitting patients that do not satisfy InterQual criteria gives rise to a false claim, the Court concludes that it would be futile to permit Ms. Winter to further amend her complaint. *See id.* ("[w]here the plaintiff has previously filed an amended complaint . . . [a] district court's discretion to deny leave to amend is particularly

[1] Ms. Winter alleges that there is an alter ego relationship between S&W, Weiner, and RollinsNelson and between Rollins, Nelson, and RollinsNelson. However, she does not allege that any of these defendants have an alter ego relationship with Tri-City.

broad.") (internal citation and quotation marks omitted).

IV. Conclusion

For all the foregoing reasons, Defendants' Motions are **GRANTED**. All of Ms. Winter's claims against the S&W Defendants, the RollinsNelson Defendants and Dr. Pascual are **DISMISSED, without leave to amend**. In light of the Court's ruling on the merits of Ms. Winter's claims and because identical law and facts on the issue of objective falsity apply to all of the defendants, the Court also concludes that non-moving defendants Rafaelito Victoria, M.D., Arnold Ling, M.D., Cynthia Miller-Dobalian, M.D., Edgardo Binoya, M.D., Namiko Nerio, M.D., and Manuel Sacapano, M.D. are entitled to dismissal of all of Ms. Winter's claims against them and that non-moving defendant Tri-City is entitled to dismissal of all of Ms. Winter's claims against it except for the retaliation claim. Accordingly, the Court exercises its discretion and *sua sponte* **DISMISSES, without leave to amend**, all of Ms. Winter's claims against the non-moving defendants except Ms. Winter's retaliation claim against Tri-City. *See Omar v. Sea-Land Serv., Inc.*, 813 F.2d (9th Cir. 1987) ("A trial court may dismiss a claim sua sponte under Fed[eral Rule of Civil Procedure] 12(b)(6). . . Such a dismissal may be made without notice where the claimant cannot possibly win relief."); *see also Bonny v. Society of Lloyd's*, 3 F.3d 156, 161 (7th Cir. 1993) ("A court may grant a motion to dismiss even as to nonmoving defendants where the nonmoving defendants are in a position similar to that of moving defendants or where the claims against all defendants are integrally related."). Accordingly, all claims in this action are **DISMISSED, with prejudice,** except Ms. Winter's retaliation claim against Tri-City.[2] Ms. Winter's counsel shall advise the Court on or before January 3, 2018 whether Ms. Winter intends to pursue her retaliation claim in the bankruptcy court or in this Court.

IT IS SO ORDERED.

[2] Although Defendants have raised several other persuasive arguments in support of their motions—including whether Ms. Winter alleged the required elements of her FCA claims, specifically scienter, with the required particularity and specificity required by Federal Rules of Civil Procedure 8 and 9(b)—the Court concludes it is not necessary to address these arguments in light of its ruling.