UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JS-6

CIVIL MINUTES - GENERAL

Case No.	CV 16-06997-RGK-RAO	Date	April 19, 2018
Title	***United States ex rel. Doe v. Janssen Pharmaceutical N.V. et al.***		

Present: The Honorable	R. GARY KLAUSNER, UNITED STATES DISTRICT JUDGE	
Sharon L. Williams	Not Reported	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.
Attorneys Present for Relator:	Attorneys Present for Defendants:	
Not Present	Not Present	

Proceedings: **(IN CHAMBERS) Order Re: Janssen Defendants' Motion to Dismiss (DE 40); Johnson and Johnson's Motion to Dismiss (DE 41)**

I. INTRODUCTION AND FACTUAL BACKGROUND

On September 16, 2016, relator Alexander Volkhoff, LLC filed the first *qui tam* complaint in this action against defendants Janssen Pharmaceutical N.V., Janssen Pharmaceuticals, Inc., Janssen Ortho, LLC, and Janssen Research & Development, LLC (collectively, the "Janssen Defendants"), as well as their parent company, Johnson and Johnson (together with the Janssen Defendants, the "Defendants"). In the original complaint, the relator alleged 40 claims under the federal False Claims Act ("FCA") and parallel state statutes pertaining to Defendants' allegedly unlawful marketing of certain pharmaceuticals for off-label use. Defendants' fraudulent activity, the relator alleged, caused the government to pay for many prescriptions that health care providers would not otherwise have submitted for reimbursement.

After the United States declined to intervene, Defendants filed a motion to dismiss. Instead of opposing the motion, the relator's counsel filed an amended complaint. The First Amended Complaint ("FAC") removed Alexander Volkhoff, LLC as the relator, and instead substituted "Jane Doe," an anonymous natural person, as the only relator in the case.

Defendants now move to dismiss the FAC under Rule 12(b)(1) and Rule 12(b)(6). For the following reasons, the Court **GRANTS** Defendants' Motions (DE 40, 41).

II. JUDICIAL STANDARD

A. Rule 12(b)(1)

Under Federal Rule of Civil Procedure ("Rule") 12(b)(1), a party may move to dismiss an action for lack of subject-matter jurisdiction. "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute . . . which is not to be expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). "It is to be presumed that

[an action] lies outside this limited jurisdiction, . . . and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Id.*

B. Rule 12(b)(6)

To survive a motion under Rule 12(b)(6), a complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible if the plaintiff alleges enough facts to permit a reasonable inference that the defendant is liable for the alleged misconduct. *Id.* A plaintiff need not provide "detailed factual allegations" but must provide more than mere legal conclusions. *Twombly*, 550 U.S. at 555. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678.

When ruling on a Rule 12(b)(6) motion, the court must "accept all factual allegations in the complaint as true." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). The court must also "construe the pleadings in the light most favorable to the nonmoving party." *Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1159 (9th Cir. 2012). The court, however, is "not bound to accept as true a legal conclusion couched as a factual allegation." *Twombly*, 550 U.S. at 555.

III. DISCUSSION

A. Counts I – VI: False Claims Act

The False Claims Act states that "[w]hen a person brings a [qui tam action], no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5). Known as the "first-to-file rule," this section of the FCA prevents new relators from either intervening in the qui tam action or bringing a new qui tam action based on the same underlying facts. *See United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1187 (9th Cir. 2001). Defendants argue that because Jane Doe was not the first to file this qui tam case, the first-to-file rule bars her from proceeding as the relator in this case. The Court agrees with Defendants.

In September 2016, relator Alexander Volkhoff, LLC filed the original complaint. In February 2018, the FAC was filed, replacing Alexander Volkhoff, LLC with the anonymous "Jane Doe" as the sole relator in this action. Jane Doe is therefore not the first person to file this qui tam action, but rather the second. But because Doe is a "person other than the Government," she may not "intervene or bring a related action" based on the same facts. 31 U.S.C. § 3730(b)(5). The Court therefore must dismiss her claims.

The Tenth Circuit in *United States ex rel. Little v. Triumph Gear Systems* addressed a similar situation. There, the original complaint named Joe Blyn as the relator and named Donald Little as Blyn's counsel of record. *Little*, 870 F.3d 1242, 1245 (10th Cir. 2017). The amended complaint, however,

named as relators only Little and a third person, Kurosh Motaghed. *Id.* Blyn, by contrast, was removed from the amended complaint without explanation. *Id.* Applying the first-to-file rule, the Tenth Circuit dismissed the new relators' FCA claims. *Id.* at 1245–51. As nonparties to the action, the court explained, neither Little nor Motaghed had the power to amend the complaint under Rule 15, and the first-to-file rule barred them from intervening under Rule 24. *Id.* The court accordingly held that Little and Motaghed could not proceed as relators in the case. *Id.*

The same issue is present here. Jane Doe was a nonparty to the action because she was not named as a relator in the original complaint. She therefore had no power to file the amended complaint, and could not intervene because of the first-to-file rule.[1] *See* 31 U.S.C. § 3730(b)(5); *United States ex rel. Manion v. St. Luke's Regional Med. Ctr.*, No. CV-06-498-S-EJL, 2008 WL 906022, at *7 (D. Id. Mar. 31, 2008) ("The statute not only prevents a person from bringing a 'related action' but also from intervening in any way."). As such, the first-to-file rule bars Jane Doe from filing the FAC and strips the Court of jurisdiction over her claims.[2]

Trying to save her FCA claims, Jane Doe argues that because she and Alexander Volkhoff, LLC are in fact the same person, the first-to-file rule does not apply. But besides asking the Court to take her word for it, Jane Doe's argument fails for two reasons. First, the Ninth Circuit has explained that the first-to-file rule is "exception-free," and Jane Doe has not cited any other authority supporting the "unity of identity" exception that she argues for. *See Lujan*, 243 F.3d at 1187 ("§3730(b)(5)'s plain language does not contain exceptions."). And second, Alexander Volkhoff, LLC is an independent legal entity while Jane Doe is a natural person, so the two are distinct "persons" for purposes of the first-to-file rule. It is well-established that "LLCs are distinct legal entities, separate from their stockholders or members," and here, the Court takes judicial notice that Alexander Volkhoff, LLC is a limited liability company officially registered with the Delaware Secretary of State.[3] *Abrahim & Sons Enters. v. Equilon Enters., LLC*, 292 F.3d 958, 962 (9th Cir. 2002). As such, Jane Doe and Alexander Volkhoff, LLC are not one in the same.

[1] To remain consistent with Circuit precedent that adopted a narrow definition of "intervention" as only including Rule 24 intervention, the Tenth Circuit sidestepped the issue of whether Little and Motaghed "intervened" for purposes of the first-to-file rule. *Little*, 870 F.3d at 1247–49. The court noted, however, that the Circuit precedent may not "remain good law" in light of a subsequent Supreme Court decision that adopted a broader definition of "intervention." *Little*, 870 F.3d at 1247 n.6 (citing *United States ex rel. Eisenstein v. City of N.Y.*, 556 U.S. 928, 933 (2009)). Here, the Court is not bound by Tenth Circuit precedent. But it is of no moment whether the Court characterizes Jane Doe's FAC as an "intervention" or instead adopts the Tenth Circuit's framing. Jane Doe is barred from filing the FAC either way.

[2] The Ninth Circuit has explained that it "treat[s] the first-to-file bar as jurisdictional," although some courts have questioned this. *Compare United States ex rel. Hartpence v. Kinetic Concepts, Inc.*, 792 F.3d 1121, 1130 (9th Cir. 2015) (bar is jurisdictional), *with United States ex rel. Savage v. CH2M Hill Plateau Remediation Co.*, No. 4:14-cv-5002-EFS, 2015 WL 5794357, at *4–5 (E.D. Wash. Oct. 1, 2015) (bar is a matter of statutory standing). The Court follows the Ninth Circuit's guidance and dismisses Doe's claims under Rule 12(b)(1).

[3] Accordingly, the Court grants Defendants' Motion for Judicial Notice under Federal Rule of Evidence 201. (DE 44.)

The Court therefore concludes that the first-to-file rule bars Jane Doe from filing her FCA claims in the FAC. Accordingly, the Court grants Defendants' Motion to Dismiss Counts I–VI.

B. Count VII: FCA Retaliation

In Count VII of the FAC, Jane Doe alleges that Defendants violated section 3730(h) of the FCA by retaliating against her for reporting fraud to the government. Unlike with Jane Doe's other FCA claims, Defendants appear to concede that the first-to-file rule does not apply to the retaliation claim. *See, e.g.*, *United States ex rel. Carson v. Manor Care, Inc.*, 851 F.3d 293, 306–07 (4th Cir. 2017). Defendants argue, however, that because Doe has failed to establish any basis for proceeding anonymously, the Court must dismiss her retaliation claim.

The Ninth Circuit has explained that although anonymous complaints are disfavored, plaintiffs may proceed anonymously under certain limited and unusual circumstances. *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1067–68 (9th Cir. 2000). In cases where the anonymous plaintiff fears retaliation if her identity is revealed, courts may allow the plaintiff to remain anonymous after evaluating the following three factors: (1) the severity of the threatened harm; (2) the reasonableness of the anonymous party's fears; and (3) the anonymous party's vulnerability to . . . retaliation. *Id.* (citations omitted). Courts should also consider the prejudice to the opposing party and the public interest. *Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate*, 596 F.3d 1036, 1042 (9th Cir. 2010). The burden is on the anonymous party to show both that she has a fear of severe harm and that her fear is reasonable. *Id.* at 1043.

Here, Jane Doe did not explain in the FAC her basis for proceeding anonymously, nor does she respond to Defendants' argument that she failed to establish a basis for remaining anonymous. The Court consequently finds that she fails to meet her burden to show why the Court should let her proceed anonymously. Because Doe fails to meet this burden, the Court grants Defendants' Motion to Dismiss Count VII.

C. State Law Claims

Under 28 U.S.C. § 1367, the Court may decline to exercise supplemental jurisdiction over related state law claims if "the district court has dismissed all claims over which it has original jurisdiction." § 1367(c)(3). The relator's FCA claims were the only basis for federal jurisdiction, and the Court has dismissed them. Consequently, the state law claims are the only remaining claims left in this case. Because the Court should avoid "needless decisions of state law," the Court declines to exercise supplemental jurisdiction over the relator's state law claims. *See United States ex rel. Modglin v. DJO Global, Inc.*, 114 F. Supp. 3d 993, 1028 (C.D. Cal. 2015) (citing *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966)).

The Court therefore dismisses the state law claims without prejudice.

IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Defendants' Motions to Dismiss (DEs 40, 41.) Specifically, the Court holds as follows:

Counts I–VI are **DISMISSED** pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction.

Count VII is **DISMISSED** pursuant to Rule 12(b)(6) for failure to state a claim.

Counts VIII–XXXIX are **DISMISSED WITHOUT PREJUDICE** pursuant to Rule 12(b)(1).

IT IS SO ORDERED.

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Initials of Preparer _____