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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, and
THE STATE OF CALIFORNIA ex
rel., NANCY A. SMITH, and
WENDY S. JOHNSON,

Relators,

v.

NEIL ALAN VAN DYCK, DPM,
NEIL ALAN VAN DYCK, DPM,
Inc.,

Defendants. ¹

No. 2:12-cv-1783-GEB-DB

**ORDER GRANTING IN PART AND
DENYING IN PART RELATORS'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT**

Qui tam relators Nancy A. Smith and Wendy S. Johnson ("Relators") move for partial summary judgment against Neil Alan Van Dyck, DPM, ("Defendant") "on the causes of action for fraud that Defendant admitted to in his October 26, 2015 criminal plea," arguing that "[t]he undisputed facts confirm Relators are entitled to summary judgment on Causes of Action I and II of Relators' Second Amended Complaint" Mot. Partial Summ. J. at 1:21-24, ECF No. 90. Defendant filed a statement of non-opposition. Statement Non-Opp'n, ECF No. 91. Thereafter, the United States filed a statement of interest in which it seeks to "clarify several issues in Relators' Motion," Statement Interest at 1:21, ECF No. 92, and Relators responded to that statement,

¹ Defendant Neil Alan Van Dyck, DPM, Inc. has not yet appeared in this action and the Doe defendants have been dismissed. Therefore, the caption reflects dismissal of the Doe defendants.

1 Resp. Statement Interest, ECF No. 93.

2 Relators allege in Cause of Action I violations of the
3 False Claims Act prescribed in 31 U.S.C. § 3729(a)(1)(A)-(B).
4 Second Amended Complaint at ¶¶ 150-151, ECF No. 62. Relators
5 allege in Cause of Action II violations of the California False
6 Claims Act prescribed in Cal. Govt. Code § 12651(a)(1)-(2). Id.
7 at ¶ 158. The "Relators [also] request partial summary judgment
8 against Defendants [on these claims] in the amount of
9 \$3,775,000." Mot. Partial Summ. J. at 10:6-7. What these claims
10 concern is encapsulated in the Second Amended Complaint as
11 follows: "Relators . . . , on behalf of the United States and the
12 State of California, seek redress under the Federal and
13 California False Claims Acts for damages and penalties resulting
14 from Defendants' submission of improper claims for payment to
15 government funded insurance programs for services and durable
16 medical equipment that were inadequately documented or otherwise
17 unsupported and thus deemed not medically necessary." Second
18 Amended Complaint at 1:21-27.

19 The United States asserts in its statement of interest
20 that Relators are not entitled to summary judgment for themselves
21 on either claim, and that summary judgment on the liability
22 issues under the Federal False Claims Act should be entered for
23 the United States and summary judgment on the liability issues
24 under the California False Claims Act should be entered for the
25 State of California. The United States also states:

26 [A]lthough Relators request judgment
27 against [Defendant] in the amount of
28 \$3,775,000, Relators have provided no
evidence to support how this amount should be
divided between the first and second cause of

1 actions. This deficiency is particularly
2 salient because any judgment for damages
3 under 31 U.S.C. § 3729(a)(1)(A)-(B) (Cause of
4 Action I) must be paid to the United States,
5 whereas any judgment for damages under Cal.
6 Gov. Code §§ 12650-12655 (Cause of Action II)
7 must be paid to the State of California.
8 Here, Relators request judgment on both cause
9 of actions, but offer no explanation on how
10 the monies should be divided between the
11 United States and the State of California.
12 This issue must be resolved before judgment
13 on damages can be entered under either cause
14 of action in this case.

15 Moreover, once determined, those amounts
16 will be for judgment to the government
17 parties. Relators can only seek a percentage
18 share - still to be determined - of the
19 damages and civil penalty monies as they are
20 actually recovered in this qui tam action.
21 Id. § 3730(d)(2) (relator is paid out of the
22 proceeds of the qui tam action). Any award
23 to Relators is therefore dependent on the
24 proceeds of this qui tam action. Thus, if
25 Relators want to seek a share of any monies
26 collected in the United States' criminal
27 action against [Defendant], United States v.
28 Van Dyck, Case No. 2:15-cr-00200 GEB, they
must show entitlement to it in this action
after the United States receives a judgment.
Such issues were not briefed by Relators in
the current motion and thus cannot be
resolved through this motion. For example,
the monies recovered in the criminal case
included harm suffered by private insurance
companies, which Relators cannot claim a
share of. See 31 U.S.C. § 3729(b)(2)
(defining the term "claim" to require a nexus
with the United States). Additionally, the
scope of conduct between the civil and
criminal actions are not identical and thus
those issues have to be addressed before a
determination could be made of what amount,
if any, Relators are entitled to.

Statement Interest at 3:2-3:22.

Each subject cause of action incorporates portions of
the Second Amended Complaint and includes paragraphs which have
not been shown to be undisputed facts. However, the following
facts and admissions in the factual basis attached to Defendant's

1 plea agreement in the related previously filed criminal action
2 are undisputed facts and admissions:

3 From 2009 through 2014, [Defendant]
4 offered "spa"-type services at his podiatric
5 practice, including routine foot care. These
6 services were typically performed by
7 unlicensed staff in [Defendant]'s practice.
8 In many instances, records reflect that
9 [Defendant] was not even present at his
10 podiatry practice when the billed-services
11 were performed. Despite the fact that
12 [Defendant], or more often his staff, were
13 performing routine foot care that was not
14 covered by Medicare, Medi-Cal, Tricare, or
private insurance, [Defendant] submitted
claims to these entities for podiatric
services that falsely represented either that
a "nail avulsion" service was performed
(using billing code 11730), when in truth and
in fact, routine foot care was performed, or
that the routine foot care was necessitated
by an injury or symptoms (using billing codes
11720 & 11721) that, in truth and fact, were
not present.

15 In addition, [Defendant] also purchased
16 single-use-application Dermagraft skin
17 substitute patches that are used to help in
18 the wound closure for feet. [Defendant] cut
19 the patches into multiple pieces which he
20 then applied to different patients and for
21 which he fraudulently billed Medicare for
22 each application. Based on records obtained
23 from Dermagraft and [Defendant]'s billing
24 records, there were at least 50 instances
25 where [Defendant] billed Medicare \$1,500 per
26 application where [Defendant] had altered the
27 single-use Dermagraft patch and applied the
28 pieces to multiple patients. Medicare paid
[Defendant] \$1,200 on each fraudulent bill
submitted for the Dermagraft applications.

. . . .

24 The total amount of Fraudulent claims
25 submitted to Medicare, Medi-Cal, Tricare, and
26 private insurers under billing codes 11730,
27 11720, 11721, and for multiple applications
28 of Dermagraft patches from 2009 to August
2014 was over \$2,860,000. Those entities paid
approximately \$1,230,000 to Van Dyck on the
fraudulent claims, including over \$1,075,000
paid by Medicare, Medi-Cal, and Tricare, all

1 of which are government health care programs.
2 Additionally, Medicare rejected \$240,000 in
3 claims submitted under Codes 11730, 11720,
and 11721 and Tricare rejected \$65,015 in
claims submitted under those claims.

4 Factual Basis for Plea at A-1 through A-2, ECF No. 90-4.

5 Based on this undisputed evidence, the liability
6 portion of the motion concerning this evidence is granted.
7 However, the evidentiary record does not evince that summary
8 judgment should be entered on damages, since the Relators failed
9 to accompany the motion with a "Statement of Undisputed Facts,"
10 required by Local Rule 260(a), containing the damages and
11 penalties sought "enumerated discretely." See Falcon
12 Enterprises, Inc. v. Publishers Serv., Inc., 438 F. App'x 579,
13 582 (9th Cir. 2011) ("The district court appropriately denied
14 [the] Motion for Partial Summary Judgment [because the movant]
15 failed . . . to offer sufficient evidentiary support by
16 neglecting to submit a statement of undisputed facts . . .").

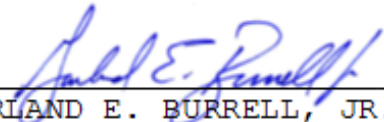
17 The Relators make more precise arguments on the damages
18 and penalty issues in their reply brief to the United States's
19 statement of interest. Resp. Statement Interest at 2:4-3:11.
20 However, this argument is not considered because the "general
21 rule [is invoked that the movants] cannot raise a new issue for
22 the first time in their reply briefs." State of Nev. v. Watkins,
23 914 F.2d 1545, 1560 (9th Cir. 1990). Therefore, the damages and
24 penalties arguments in the Relators' reply brief are disregarded.

25 Accordingly, partial summary judgment is GRANTED
26 against Defendant and in favor of the United States on the
27 liability issues proscribed by the federal False Claims Act, and
28 is GRANTED against Defendant and in favor of the State of

1 California on the liability issues proscribed in the California
2 False Claims Act; the motion is otherwise DENIED.

3 Dated: February 14, 2018

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GARIAND E. BURRELL, JR.
Senior United States District Judge