IN THE UNITED STATES DISTRICT COURT
FOR SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA and the STATE OF INDIANA *ex rel.* MCCULLOUGH and HOLDEN,	)	
Plaintiffs-Relators,	)	Case No. 1:21-CV-00325-TWP-TAB
v.	)	
ANTHEM INSURANCE COMPANIES, INC., et al.,	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF THE MCE DEFENDANTS' MOTION TO DISMISS RELATORS' THIRD AMENDED COMPLAINT

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INTRODUCTION

This case is about Relator McCullough's discontent with being fired from his position at Indiana Medicaid and his (and Relator Holden's) disapproval of decisions made by McCullough's replacement on behalf of Indiana. Relators allege that, with McCullough's replacement at the helm, Indiana Medicaid "improperly" decided not to recoup payments for the claims at issue in this case. But as the Court has already ruled, Relators' personal and political disagreement with decisions made by Indiana Medicaid cannot stand as the basis for a False Claims Act (FCA) *qui tam* action.

In its prior dismissal order, the Court recognized the "very strong evidence" cutting against Relators' theory of materiality: "Indiana Medicaid had knowledge of the claims at issue, reviewed those claims with IBM, and affirmatively decided not to pursue recoupment of the alleged overpayments." Order on Defs.' Motion to Dismiss (Sept. 30, 2025) (Filing No. 205) ("Order") at 20 (quoting *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 579 U.S. 176, 180 (2016)). The Court ruled Relators had failed to include a key ingredient to rebut this evidence: factual allegations supporting "an alternative reason" for Indiana Medicaid's "continued payment of improper claims despite actual knowledge of the alleged violations." *Id.* So, the Court gave Relators another chance to come forward with legitimate facts supporting a real alternative explanation that could support materiality. *Id.* Relators have failed to meet this requirement.

According to every iteration of Relators' complaint, including the most recent Third Amended Complaint,[1] Indiana Medicaid *made the decision* not to pursue the claims at issue in this suit, despite its awareness that IBM Watson had identified those claims as potentially improper.

[1] The Third Amended Complaint (Filing No. 209) is referred to herein as the "TAC"; the Second Amended Complaint (Filing No. 67) as the "SAC"; and the Court's order dismissing the SAC as the "Order" (Filing No. 205). Citations to paragraph numbers herein are citations to the TAC unless otherwise noted. The new allegations added by the TAC are ¶¶ 36-46 and ¶¶ 313-40.

None of Relators' new allegations in the TAC provides a plausible "alternative reason" for Indiana's decision. Instead, Relators merely repeat their prior allegations about Indiana's policy choices and restate generic allegations about providers' and insurers' obligations to comply with the law and the states' opportunity to recoup overpayments—a path Indiana *chose* to forego. Relators also invoke past enforcement actions, which this Court already has rejected as undermining materiality, as well as more recent enforcement policy statements, which do not address the claims at issue. The MCE Defendants (Anthem Insurance Companies, Inc., CareSource Indiana, Inc., Coordinated Care Corp., and MDwise, Inc.) seek dismissal of this case, with prejudice.

NEW ALLEGATIONS

Relators' new allegations mostly reiterate the old ones. In particular, Relators continue to recite their disagreement with the State's decisions, rather than identify fraud by the MCEs. Relators assert that, under the direction of Indiana Medicaid, IBM Watson analyzed claims submitted to MCEs, and IBM flagged potentially improper claims. TAC ¶¶ 36-37, 39. In 2017, Indiana Medicaid declined McCullough's request to add additional staff to the Program Integrity Team and subsequently terminated McCullough. *Id.* ¶ 38. Relators disagree with the State's staffing decisions, alleging the team was resourced at levels below *Relators*' desired levels. *Id.* ¶¶ 38, 42. The post-McCullough team allegedly did not "fully review and analyze, let alone [] take steps to pursue recoveries" based on the IBM reports. *Id.* ¶ 40. Indiana Medicaid had "internal discussions within the Program Integrity team" as related to the IBM Watson reports and the MCEs, *id.* ¶ 40, and the Program Integrity Director who replaced McCullough "incorrectly" decided not to pursue recoupment of MCE claims based on IBM's analysis. *Id.* ¶¶ 41, 43.

Indiana Medicaid's decision allegedly was due to several factors, including: (a) Indiana Medicaid and the Program Integrity Director did not attach the same significance to the IBM Watson results as Relators, *id.* ¶¶ 41-42; (b) Indiana Medicaid was subject to vague "pressure" purportedly exerted by Defendants, *id.* ¶ 42; and (c) Relators' unsupported speculation that Indiana Medicaid did not recoup overpayments for fear of facing administrative challenges which could be expensive to defend, *id.* ¶ 42.

The "new" allegations repeat that IBM Watson's findings purportedly were accurate, *id.* ¶ 44, and include generic assertions about providers' obligations, *id.* ¶ 45. The allegations also purport to identify recoveries by Indiana Medicaid on claims similar to the claims at issue. *Id.* ¶¶ 46, 326-35. In addition, the TAC adds generic legal summaries that Indiana Medicaid would seek to recoup amounts paid for any improperly paid claims, and that compliance with applicable billing requirements is important because the requirements are "conditions of payment." *Id.* ¶¶ 313-23, 337-40. Here, Relators quote an unidentified source from the very agency that declined to intervene in this lawsuit, in a statement apparently obtained after the Court's ruling on the motion to dismiss the SAC, asserting a "general interest in ensuring the integrity of Medicaid payments." *Id.* ¶ 315.

Finally, the TAC asserts that Indiana Medicaid determined MDwise will no longer be an Indiana MCE. *Id.* ¶¶ 325, 336, n. 31. Relators do not allege this determination in any way involved conduct alleged in the TAC.

Under well-established precedent of the United States Supreme Court and the Seventh Circuit, these new allegations, combined with those reiterated from the insufficient SAC, cannot overcome the Court's ruling that Relators failed to plead materiality.

LEGAL STANDARDS

The FCA and the Indiana False Claims Act are anti-fraud statutes. *United States ex rel. Fowler v. Caremark RX, LLC*, 496 F.3d 730, 741-42 (7th Cir. 2007). Allegations sounding in fraud are examined under the more exacting standard of Rule 9(b). *Viacom, Inc. v. Harbridge Merch. Servs.*, 20 F.3d 771, 776-77 (7th Cir. 1994). Relators' allegations must therefore meet the heightened pleading requirements of Rule 9(b). *Fowler*, 496 F.3d at 741-42.

To state a claim under the FCA, among other requirements, a complaint must sufficiently allege the purported fraud was "material" to a government payment decision—that is, the government would not have paid or likely would not have paid the claim had it known of the supposed fraud. *Universal Health Servs., Inc. v. United States, ex rel. Escobar*, 579 U.S. 176, 181, 192, 194, 195 n.6 (2016) ("a misrepresentation . . . must be material to the Government's payment decision in order to be actionable under the [FCA]"); *see also* 31 U.S.C. § 3729(b)(4) (defining "material"). "The materiality standard is demanding," *Escobar*, 579 U.S. at 194, and "strict." *United States v. Molina Healthcare of Ill., Inc.*, 17 F.4th 732, 740 (7th Cir. 2021). Under this standard, "a misrepresentation is not 'material merely because the Government designates compliance with a particular statutory, regulatory, or contractual requirement as a condition of payment.'" *United States ex. rel. Streck v. Eli Lilly & Co.*, 152 F.4th 816, 846 (7th Cir. 2025) (quoting *Escobar*, 579 U.S. at 190).

"[*M*]*ateriality requires more*: typically, proof either that (1) a reasonable person would view the condition as important to a 'choice of action in the transaction' or (2) the defendant knew or had reason to know that the recipient of the representation attaches importance to that condition." *Molina*, 17 F.3d at 743 (emphasis added; quoting *Escobar*). "Should the government decide to pay despite knowing of the party's noncompliance, that would be 'very strong evidence'

(though not dispositive) that the condition is not material." *Id.* (quoting *Escobar*). It is therefore a relator's burden to allege "reasonable alternative explanations" for the government's continued payment under these circumstances. *Streck*, 152 F.4th at 848.

ARGUMENT

I. Relators still have not pleaded materiality.

As noted, in its Order dismissing the SAC, the Court recognized "there may be alternative reasons that could explain . . . Indiana Medicaid's continued payment of improper claims despite actual knowledge of the alleged violations"; and, critically, the SAC "d[id] not provide an alternative reason that supports materiality." Order at 20. In the SAC, Relators had explicitly alleged "the Program Integrity team at Indiana Medicaid did not pursue recoupment based on a number of valid overpayment findings generated by IBM between 2018 and 2021—including the findings at issue in this *qui tam* action." SAC ¶ 40. The Court zeroed in on this allegation, noting Indiana Medicaid's "conscious choice to no longer emphasize correct payments of claims" and to "allow the alleged overpayments to go unpursued" doomed Relators' materiality allegations. Order at 21. The Court accordingly gave Relators one more bite at the apple to provide a reason. *Id.* at 34.

Relators have not done so. The new allegations in the TAC (¶¶ 36-46, ¶¶ 313-40) do nothing to erode the Court's prior holding of immateriality. Instead, Relators have backtracked from their old narrative and substituted a new, equally insufficient tale about the conduct and choices by Indiana Medicaid's Program Integrity team. But this is more of the same: the new allegations merely underscore this case is about Relators' inappropriate second-guessing of Indiana Medicaid officials, and they reinforce this Court's prior conclusion that Indiana Medicaid made a conscious decision *not* to recoup the claims alleged to be at issue here. Other new allegations describe prior recoupment efforts and current state policies or are generic assertions that

defendants should follow the law—all of which are insufficient to meet the pleading standard for materiality. *See, e.g.*, *United States ex rel. Kietzman v. Bethany Circle of King's Daughters of Madison, Ind., Inc.*, 305 F. Supp. 3d 964, 977 (S.D. Ind. 2018) (granting motion to dismiss FCA claim, including for failure to adequately allege materiality).

A. Relators allege no "alternative reason" for Indiana Medicaid's continued payment of the claims at issue.

The TAC still lacks the crucial ingredient identified by this Court as missing: an "alternative explanation" for Indiana Medicaid's continued payment of the claims at issue, despite full knowledge of the IBM Watson reports, other than that the IBM findings were not material to Indiana. Order at 21. As the Seventh Circuit recently has stated, where the government has actual knowledge of the alleged falsehood, a court should consider whether there are "reasonable alternative explanations" for the government's continued payments. *Streck*, 152 F.4th at 848. For example, the government might continue to make payments because doing so was "necessary to keep [a] critical access hospital open" or because the government otherwise "needed time to work out a way not to prejudice Medicaid recipients who had nothing to do with this problem." *Id.* (citing *United States v. Corp. Mgmt., Inc.*, 78 F.4th 727, 738 (5th Cir. 2023); *Molina*, 17 F.4th at 744)).

Relators make no such allegations here. Instead, they largely abandon their theory in the SAC about "lobbying" pressure and offer a new, watered-down story, in which they allege that "the Program Integrity team at Indiana Medicaid incorrectly curtailed its earlier plans to utilize IBM Watson's data analysis and findings to recoup improper Medicaid overpayments from the MCE Defendants and the Hospital Defendants." TAC ¶ 43. These allegations still fail as a matter of law (*see* I.B, *infra*). They also fail to conform to the Court's roadmap for surviving a demanding materiality inquiry.

B. Relators' disagreement with Indiana Medicaid's *decision* to exclude IBM Watson from its Program Integrity strategy does not support materiality.

Why did Indiana Medicaid decide not to pursue recoupments of the claims identified in the IBM Watson reports? According to the TAC, it was because, in Relators' opinion, Indiana Medicaid made the "incorrect[]" "decision" not to "fully review and analyze" the IBM reports, "let alone . . . take steps to pursue recoveries" after consideration in "internal discussions." TAC ¶¶ 38-43. That tells the Court all it needs to know to order dismissal again. FCA cases may proceed where defendants have submitted false claims material to government payment decisions, not where a relator second-guesses government officials about what matters to them. In the same vein, Relators allege Indiana Medicaid elected not to sufficiently resource the Program Integrity team. *Id.* ¶¶ 38, 42. But the extent to which Indiana Medicaid saw fit to resource the Program Integrity team undermines, rather than supports, materiality here.

Courts strike down attempts by relators to use the FCA to challenge policymakers. In one such case, the relator alleged the Food & Drug Administration's approval of a medical device was fraudulently obtained. But the First Circuit held, "[t]he FDA's failure actually to withdraw its approval of [the device] in the face of [relator's] allegations precludes [relator] from resting his claims on a contention that the FDA's approval was fraudulently obtained." *D'Agostino v. ev3, Inc*., 845 F.3d 1, 8 (1st Cir. 2016). In affirming the district court's refusal to grant the relator yet another chance to amend, the First Circuit explained "[p]ractical problems of proof [] inform our conclusion," including the question of, "What if former officials no longer in government were of one view, and current officials of another?" *Id.* The First Circuit found its reasoning "akin to those practical effects that counsel in favor of not allowing state-law fraud-on-the-FDA claims" as "[t]he FCA exists to protect the government from paying fraudulent claims, not to second-guess agencies' judgments." *Id.*

In another case, a relator alleged the FDA "was the victim of 'fraud'" even though the FDA had known about her allegations since prior to approving the vaccine that was the subject of the allegations. The court dismissed the complaint, holding the "well-pleaded facts" in the complaint did not support relator's conclusions and explaining, "Congress . . . 'enacted the FCA to vindicate fraud on the federal government, not second guess decisions made by those empowered through the democratic process to shape public policy.'" *United States ex rel. Jackson v. Ventavia Rsch. Group, LLC*, 667 F. Supp. 3d 332, 361-22 (E.D. Tex. 2023) (quoting *United States ex rel. Harman v. Trinity Indus. Inc.*, 872 F.3d 645, 668-69 (5th Cir. 2017)).[2]

In short, these well-reasoned decisions support dismissal of Relators' case here, where Relators seek to second-guess Indiana Medicaid officials, including Relator McCullough's successor. This Court should reject Relators' attempt to delve into the policymaking decisions of Indiana Medicaid's Program Integrity team.

Moreover, the allegations of limited resources as a reason Indiana Medicaid did not pursue recoupment are undermined by Relators' other allegations about Indiana Medicaid's considered choice. The TAC alleges Indiana Medicaid had "internal discussions within the Program Integrity team" to consider the IBM Watson reports and the MCEs, *id.* ¶ 40, and the Program Integrity Director "chose to pause overpayment recovery efforts vis-à-vis MCE claims based on IBM's algorithmic analysis." *Id.* ¶ 41. To be sure, Relators deride this "decision" as being "incorrect[]," in their view. *Id.* ¶¶ 41, 43. But, as noted above, this Court already ruled such "explanations" are insufficient to satisfy the required FCA materiality element. *See* Order at 20-21.

[2] In *Harman*, the Fifth Circuit held there can be no materiality when the government was aware of the allegations and "has never been persuaded that it has been defrauded." 872 F.3d at 669. "Such decision making is policy making, not the task of a seven-person jury—such a result confounds the premise of *qui tam* actions: that the government was the victim." *Id.*

Relators' accusation that Relator McCullough's replacement was incompetent—alleging the Program Integrity Director had "significant gaps in her understanding of IBM Watson's algorithmic analysis" and decided not to act "apparently not understanding" the consequences, TAC ¶ 41—also is unavailing. Relator McCullough may not supplant his successor's judgment as to what is material to Indiana Medicaid's decision to pay claims, nor can he rely on his perceptions of her incompetence.

In a spaghetti-to-wall approach, Relators reiterate another suggestion as to why Indiana Medicaid decided not to recoup: that it was due to "pressure" supposedly exerted by defendants. *Id.* ¶ 42. But the Court already rejected this approach: "Relators' argument that Indiana Medicaid began curtailing recoupments based on improper political pressure indicates a conscious choice to no longer emphasize correct payments of claims thus undermining Relators' arguments for materiality." Order at 20-21. Instead of "lobbying" as the source of such pressure, Relators now speculate that the "pressure" on Indiana Medicaid stemmed from having to defend administrative appeals should defendants challenge recoupment decisions. TAC ¶ 42. But even if that were the case, it still would reflect Indiana Medicaid's reasoned choice not to allocate its resources as Relators insist. Moreover, that Indiana Medicaid purportedly was shy about the prospect of having to defend its actions in administrative proceedings is not a plausible explanation for why Indiana Medicaid would choose not to recoup claims. *Cf. Streck*, 152 F.4th at 848. If the claims were important to Indiana Medicaid to recoup, such as if Indiana Medicaid believed there was a significant sum of improper payments, certainly Indiana Medicaid would have taken further action. Indeed, the unnamed state employee quoted in the TAC (¶ 315) purportedly said as much. *See* I.D., *infra*.

These allegations of third-party pressure fail for the same reason the Court already identified: it "indicates a conscious choice" by Indiana Medicaid, undermining materiality. Order at 20-21. Where an agency has "already examined [the defendant's conduct] multiple times over and concluded that neither administrative penalties nor termination was warranted," "that is not enough" to satisfy the FCA's materiality element. *United States v. Sanford-Brown, Ltd.*, 840 F.3d 445, 447-48 (7th Cir. 2016) (citation omitted).

C. Prior recoveries By Indiana Medicaid undermine rather than support materiality.

Relators spill much ink in the TAC detailing *other* recoveries by Indiana Medicaid purportedly similar to the claims at issue. TAC ¶¶ 46, 326-335. To no avail. This Court already has addressed prior enforcement actions from 2010-2017. The Court explained: "[Relators'] argument that Indiana Medicaid was previously successful in recoupment attempts based on the same violations of billing requirements as the alleged violations in this case does not weigh in favor of materiality." Order at 21. To the contrary, the argument "undermine[d]" materiality because it showed a "conscious decision [by Indiana Medicaid] to reduce compliance efforts and proper payment safeguards." *Id.* The Court's prior ruling here is in accord with other jurisdictions. *See, e.g.*, *United States ex rel. Foreman v. AECOM*, 19 F.4th 85, 111-12 (2d Cir. 2021) ("allegations that the government initiated enforcement actions against a different contractor based on labor billing allegations similar to those in the Complaint are 'at best only neutral with regard to a finding of materiality . . . .'") (quoting *United States v. Strock*, 982 F.3d 51, 64 (2d Cir. 2020)).

D. New state enforcement efforts do not demonstrate materiality.

Relators also miss the mark by invoking recent policy statements and other actions taken by Indiana government officials to increase enforcement of Medicaid billing rules.

1. Executive Order and legislative report

Relators cite a January 2025 Executive Order, which "highlight[s] Indiana Medicaid's policy" to prevent overpayments obtained by fraud, and a September 2025 legislative report, which states that Indiana Medicaid "strengthened" its recovery efforts in 2024 and 2025. TAC ¶¶ 321, 323-24. Relators further allege that beginning in 2024, Indiana Medicaid began using new "data analytic tools" to identify improper payments. *Id.* ¶¶ 331-36.

These recent policy announcements and enforcement decisions are not evidence of materiality regarding the claims at issue in this *qui tam* action. Relators ignore a basic disconnect: the TAC focuses on claims between 2011 through 2020, *see, e.g.*, *id.* ¶¶ 109, 118, 126 & Ex. 18, yet the new enforcement actions began in 2024. None of these enforcement actions bears on the earlier claims by Relators.

The state's new policy to "strengthen" its pursuit of alleged overpayments is, at most, another "conscious choice" by the government to change course. Order at 21. But these new enforcement efforts do not provide a "reasonable alternative explanation" for Indiana Medicaid's *earlier* "conscious choice to no longer emphasize correct payments of claims," which was the basis for the Court's ruling. *Id.* For example, Relators make no allegation that Indiana Medicaid paid the earlier claims at issue because doing so was the only way to insure low-income Medicaid beneficiaries. *See Streck*, 152 F.4th at 847-48 (discussing scenarios where continued payments would not negate materiality). To the contrary, Relators allege that before 2015, Indiana Medicaid had pursued alleged overpayments more zealously—but Relators have never suggested that doing so compromised the state's ability to provide Medicaid coverage for deserving beneficiaries.

2. Anonymous FSSA official

Similarly unavailing is the TAC's reliance on an alleged statement by an anonymous official from the Indiana Family and Social Services Administration ("FSSA"), stating that Indiana Medicaid would seek to recoup amounts paid for any claims found not to be legally entitled to payment. TAC ¶¶ 313-16. Apparently unhappy that Indiana Medicaid declined to intervene in this action, Relators' counsel contacted an anonymous official within the Indiana government and procured a quote that Relators hold out in support of their materiality theory. *See id.* ¶¶ 313-15.

As a preliminary matter, the TAC's attribution to FSSA of a quote by an unidentified "senior official with necessary authority" falls short of pleading standards. *United States ex rel. Roop v. Hypoguard USA, Inc*., 559 F.3d 818, 825 (8th Cir. 2009) (an allegation that "unidentified government agents" would have denied defendant's claims "does not comply with Rule 9(b)").

More important, the alleged statement does not say "the MCEs defrauded Indiana," or even "we disagree with the Court's materiality findings." Rather, FSSA's alleged position is that *if* the Court should find materiality, *then* FSSA would seek to recoup alleged overpayments. That is, of course, backwards—the question is whether the purported false claims were material to FSSA/Indiana Medicaid, not whether the Court thinks they should have been material.[3]

Relators' reliance on the Executive Order, legislative report, and anonymous official are all too little, too late: "allegations of post hoc prosecutions or other enforcement actions do not carry the same probative weight as allegations of nonpayment" because "[a]llowing . . . rel[iance] on post hoc enforcement efforts to satisfy the materiality requirement would allow the government to engage in [] materiality manufacturing, and at relatively low cost." *Foreman*, 19 F.4th at 112

[3] *See, e.g.*, *Harman*, 872 F.3d at 668-69 (5th Cir. 2017) ("Such decision making is policy making, not the task of a seven-person jury—such a result confounds the premise of *qui tam* actions: that the government was the victim.").

(quoting *Strock*, 982 F.3d at 63-64). Indeed, the FCA's materiality requirement "focuses on the potential effect of the false statement when it is made, not on the actual effect of the false statement when it is discovered." *United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 916-17 (4th Cir. 2003); *see also United States v. Burge*, 711 F.3d 803, 812 (7th Cir. 2013) ("[t]he materiality of a false statement is evaluated at the time the statement is made").

E. Generic allegations of materiality still do not suffice.

Finally, the TAC adds generic and conclusory allegations of materiality that do nothing to further Relators' cause. Courts in this circuit routinely dismiss FCA claims where relators offer only "conclusory allegations" regarding the materiality of a misrepresentation to a government payment decision. *See, e.g.*, *United States v. Molina Healthcare of Ill., Inc.*, No. 17 C 6638, 2019 WL 3555336, at *3 (N.D. Ill. July 31, 2019) ("[e]ven if Relator's Complaint had sufficient particularity, it would separately fail the FCA's materiality requirement"); *Illinois ex rel. Strakusek v. Omnicare, Inc.*, No. 19 C 7247, 2021 WL 308887, at *14 (N.D. Ill. Jan. 29, 2021) (relator failed to "connect[] [the assertions of materiality] to factual allegations about how officials in the Illinois Medicaid program respond" to alleged misrepresentations).

The TAC's "threadbare recitals" of materiality are insufficient as a matter of law. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). For instance, the TAC asserts that compliance with applicable billing requirements is a "condition of payment" by Indiana Medicaid and a "condition of payment" for matching funds paid by CMS to Medicaid, as evidenced by a CMS form and language in Indiana Medicaid enrollment agreements. TAC ¶¶ 317-321. These mere recitations of law are not dispositive of materiality. Again, as the U.S. Supreme Court, the Seventh Circuit, and this Court (in its prior Order) all have recognized: "statutory, regulatory, and contractual requirements are not automatically material, even if they are labeled conditions of

payment." *Escobar*, 579 U.S. at 191; *see also Molina*, 17 F.4th at 740 ("It is not enough simply to say that the government required compliance with a certain condition for payment."); Order at 19.

The compliance certification Relators cite, moreover, is of the most general nature. To show compliance with Indiana Medicaid's policies is material, Relators note Indiana Medicaid requires providers "to expressly certify their compliance with Indiana Medicaid policies as well as applicable federal and state laws and regulations." TAC ¶ 320. But a "'general statement' about certifying compliance with the whole body of applicable [state] regulations . . . 'is not sufficient to satisfy Rule 8, let alone Rule 9(b).'" *Kietzman*, 305 F. Supp. 3d at 975 (quoting *United States ex rel. McGinnis v. OSF Healthcare Sys.*, No. 11-cv-1392, 2014 WL 378644, at *7 (C.D. Ill. Feb. 3, 2014)).

Nor are the TAC's other generic assertions—about Indiana Medicaid wanting to detect fraud, waste, and abuse; seeking to recover overpayments; and disseminating training and materials about its billing requirements—sufficient to overcome this Court's prior decision. TAC ¶¶ 45, 322-23, 337-40. These general statements about billing and regulatory compliance do not plead with particularity that potential purported improper claims identified by a computer were material to a government payment decision. "A misrepresentation about compliance with a statutory, regulatory, or contractual requirement must be material to the Government's payment decision in order to be actionable under the [FCA]." *Escobar*, 579 U.S. at 181. The fact that Indiana Medicaid "found a particular issue important enough to regulate speaks little to the intended consequence of noncompliance." *United States ex rel. Krahling v. Merck & Co., Inc.*, NO. 10-4374, 2023 WL 8367939, at *12 (E.D. Pa. July 27, 2023) (quoting *United States ex rel. Schimelpfenig v. Dr. Reddy's Lab'ys. Ltd.*, No. 11-cv-4607, 2017 WL 1133956, at *7 (E.D. Pa. Mar. 27, 2017)), *aff'd*, No. 23-2553, 2024 WL 3664648, at *1 (3d Cir. Aug. 6, 2024)).

The other non-sequiturs added to the TAC likewise do not add up to a sustainable materiality theory. For instance, the purported accuracy of IBM Watson's reports remains irrelevant to whether or why Indiana Medicaid decided not to pursue Defendants. TAC ¶ 44. Indeed, the Court already considered and rejected similar allegations when it dismissed the SAC. *See* Order at 4-5 (describing allegations from the SAC about the purported accuracy of the reports). Moreover, the allegations that MDwise was terminated as an MCE for Medicaid, TAC ¶¶ 325, 336, are wholly irrelevant because they do not allege fraud. There is no suggestion—in the allegations or otherwise—that the termination related in any way to the claims in this lawsuit. *See id.*

II. MCE Defendants' other arguments against the SAC apply to the TAC.

The TAC also does not sufficiently allege falsity, scienter, or causation. Nor does it plead allegations with the specificity required by Rule 9(b) or overcome the FCA's public disclosure bar. And the *qui tam* provisions of the FCA remain unconstitutional.[4] The new allegations in the TAC do not address these deficiencies identified by the MCE Defendants in their briefing to dismiss the SAC. Because the Court held the SAC did not suffer from these defects, the MCE Defendants preserve without restating those arguments here, as equally applicable to the TAC and for the same reasons identified in their prior briefing.

III. This case should be dismissed with prejudice.

This Court provided Relators with an opportunity to cure pleading deficiencies specifically identified by this Court. Since they now have shown they are unable to cure their failure to plead materiality, amendment would be futile, and dismissal with prejudice is appropriate. *Tribble v.*

[4] The question of constitutionality of the FCA's *qui tam* provisions is currently before the Eleventh Circuit in *United States ex rel. Zafirov v. Fla. Med. Assocs., LLC*, Case No. 24-13581 (11th Cir.), and the Third Circuit in *United States ex rel. Penelow v. Janssen Prod. LP*, Case No. 25-1818 (3d Cir.).

Evangelides, 670 F.3d 753, 761 (7th Cir. 2012) (district courts "have broad discretion to deny leave to amend . . . where the amendment would be futile").

CONCLUSION

For the foregoing reasons, the MCE Defendants respectfully request that Relators' TAC be dismissed in its entirety with prejudice.

January 23, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2023, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's ECF. Parties as well as the government attorneys may access this filing through the Court's system.

I further certify that this Brief, together with the related pleading cited herein, has been served via certified mail on the Attorney General of the United States (as required by Rule 5.1(a)(2)) at:

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[5] The Assistant Attorney General for Administration is designated to accept service on the Attorney General's behalf. See 28 C.F.R. § 0.77(j).