

with the government's five intervened claims." Dkt. No. 504-1 at 4 n.2. Dent, Johnson, and BlueWave thus have conceded that their liability for the state claims alleged by Relators Lutz and Webster is co-extensive with their liability for federal False Claims Act violations in which the United States has intervened. They also have conceded by omission any and all arguments regarding the state claims that do not "rise and fall" with the intervened aspects of the litigation.

II. UNDISPUTED FACTS

On February 6, 2013, Relators Lutz and Webster filed a *qui tam* complaint alleging that several corporate defendants (BlueWave Health Care Consultants, Inc. ["BlueWave"], Health Diagnostics Laboratory ["HDL"], and Singulex) and key individuals including Defendants Dent and Johnson were involved in a nationwide scheme to offer and pay kickbacks to physicians who ordered HDL and/or Singulex tests in violation of the federal False Claims Act ("FCA"), analogous state false claims acts, and California and Illinois insurance fraud statutes. On July 9, 2014, Lutz and Webster filed a First Amendment Complaint (the "Lutz-Webster FAC"), in which they named as defendants many of the individuals – including Dent and Johnson – whose illegal conduct was described in their initial complaint. Lutz and Webster then filed a Second Amended Complaint (the "Lutz-Webster SAC") on October 29, 2014. Dkt. No. 40-1. The Lutz-Webster SAC contains the same factual allegations that were raised in the original complaint and FAC. Finally, on April 4, 2016, Lutz and Webster filed a Third Amended Complaint to add claims under state False Claims Act that were inadvertently omitted from the SAC. Dkt. No. 275. Apart from adding the aforementioned state claims, the Third Amended Complaint is identical to the Lutz-Webster SAC.

For more than two years, from February 2013 until March 2015, the United States investigated the Lutz-Webster allegations, including those against Dent, Johnson, and

BlueWave. On March 31, 2015, the government filed a notice of its election to intervene in the matter against Dent, Johnson, BlueWave and other defendants. Dkt. No. 60. In its Complaint in Intervention, the government pleads that Dent, Johnson, and BlueWave have violated § 3729(a)(1)(A), (B), and (C) of the federal False Claims Act, just as Lutz and Webster had alleged prior to the government's intervention. *Compare* Dkt. No. 40-1, ¶¶ 403-09 *with* Dkt. No. 75, ¶¶ 222-37.

While the United States has intervened in all of Lutz and Webster's claims against Dent, Johnson, and BlueWave that arise under the federal False Claims Act, the various plaintiff states declined to intervene in the claims pursued under the operative state False Claims Acts and private insurance statutes in California and Illinois. Lutz and Webster thus pursue non-intervened those state law claims

During the discovery period, Lutz and Webster obtained from six Plaintiff states – Colorado, Florida, Illinois, Indiana, North Carolina, and Virginia – data sufficient to document each and every claim for an HDL laboratory test submitted to those state Medicaid programs. Lutz and Webster provided that data, along with business records affidavits for every state but Colorado, which has yet to provide an affidavit, to Defendants.¹ Dkt. No. 519, Exhibits 1-11.

III. LEGAL STANDARDS

A. Effect of Complaint in Intervention

The federal FCA permits the government to intervene, or decline to intervene, in a *qui tam* action filed by a relator-plaintiff. 31 U.S.C. § 3730(b)(4). “If the government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action.” *Id.* § 3730(c)(1). Accordingly, “by automatic

¹Lutz and Webster expect to have the Colorado business records affidavit well in advance of the July 21, 2017, deadline prescribed by the Court. Dkt. No. 418.

operation of the statute, the government's complaint in intervention becomes the operative complaint as to all claims in which the government has intervened." *United States ex rel. Sansbry v. LB & B Assocs., Inc.*, 58 F. Supp. 3d 37, 46-47 (D.D.C. 2014) (citing *United States ex rel. Feldman v. City of N.Y.*, 808 F. Supp. 2d 641, 648-49 (S.D.N.Y. 2011)).

B. Summary Judgment

Summary judgment is appropriate only when, no material facts are in dispute and the movant is entitled to judgment as a matter of law. Fed.R. Civ. P. 56(a); *Carlson v. Boston Scientific Corp.*, 856 F.3d 320, 324 (4th Cir. 2017). In considering a motion for summary judgment, the court will not "weigh the evidence and determine the truth of the matter." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Instead, the court will draw any permissible inference from the underlying facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986). "If a movant asserts that a fact cannot be disputed, it must support that assertion either by 'citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials'; or 'showing. . . that an adverse party cannot produce admissible evidence to support the fact.'" *Jeter v. Palmetto Health*, 2012 WL 6522093, at *2 (D.S.C. Nov. 14, 2012), *report and recommendation adopted in part sub nom. Jeter v. Palmetto Health Internal Med. Ctr.*, 2012 WL 6521454 (D.S.C. Dec. 14, 2012), *aff'd sub nom. Jeter v. Palmetto Health*, 515 F. App'x 234 (4th Cir. 2013).

IV. ARGUMENT

Defendants Dent, Johnson, and BlueWave purport to move for summary judgment against the Lutz-Webster complaint. However, all of their arguments in support of summary

judgment concern aspects of the case in which the United States has intervened. According to the memorandum filed in support of their motion, Lutz and Webster’s “state claims rise and fall with the government’s five intervened claims.” Dkt. No. 504-1 at 4 n.2. Lutz and Webster believe that all of Dent, Johnson, and BlueWave’s arguments lack merit. But they yield, as they must, to the government’s prosecution of the aspects of the case into which it has intervened. They incorporate by reference the United States’ response to Dent, Johnson, and BlueWave’s Motion for Summary Judgment.²

Dent, Johnson, and BlueWave (unlike their co-defendant Mallory) raise no arguments relating to Lutz and Webster’s state law claims, aside from the contention that those claims “rise and fall” with the government’s complaint in intervention. As noted above and in response to Mallory’s motion for summary judgment, Lutz and Webster obtained, and provided to defendants, data that documents every claim for HDL laboratory testing submitted for payments to Medicaid programs in Colorado, Florida, Illinois, Indiana, North Carolina, and Virginia. Dent, Johnson, and BlueWave take no issue with, and thus concede by omission, the materiality of their conduct as it pertains to the plaintiff states’ decisions to pay HDL claims; the causal link between the conduct and the presentment and payment of the kickback-tainted claims; and any other element specific to the state law claims. Thus, the motion for summary judgment of the Lutz-Webster complaint fails to the same degree and for the same reasons as Dent, Johnson, and BlueWave’s motion against the United States’ complaint in intervention.

V. CONCLUSION

For the foregoing reasons, and any other reasons presented by the government in its opposition to summary judgment, this Court should deny Dent, Johnson, and BlueWave’s Motion

² Lutz and Webster also incorporate by reference their response to Defendant Mallory’s motion for summary judgment of their complaint. Dkt. No. 519.

for Summary Judgment of Relators Scartlett Lutz and Kayla Webster's Third Amended Qui Tam Complaint.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2017 I filed the foregoing on the Court's Electronic Filing System which forwarded an electronic copy to all counsel of record.

Respectfully submitted,

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