UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA *ex rel.* DAVID M. KESTER, STATE OF CALIFORNIA *ex rel.* DAVID M. KESTER, STATE OF COLORADO *ex rel.* DAVID M. KESTER, STATE OF CONNECTICUT *ex rel.* DAVID M. KESTER, STATE OF DELAWARE *ex rel.* DAVID M. KESTER, DISTRICT OF COLUMBIA *ex rel.* DAVID M. KESTER, STATE OF FLORIDA *ex rel.* DAVID M. KESTER, STATE OF GEORGIA *ex rel.* DAVID M. KESTER, STATE OF HAWAII *ex rel.* DAVID M. KESTER, STATE OF ILLINOIS *ex rel.* DAVID M. KESTER, STATE OF INDIANA *ex rel.* DAVID M. KESTER, STATE OF LOUISIANA *ex rel.* DAVID M. KESTER, STATE OF MARYLAND *ex rel.* DAVID M. KESTER, STATE OF MASSACHUSETTS *ex rel.* DAVID M. KESTER, STATE OF MICHIGAN *ex rel.* DAVID M. KESTER, STATE OF MINNESOTA *ex rel.* DAVID M. KESTER, STATE OF MONTANA *ex rel.* DAVID M. KESTER, STATE OF NEVADA *ex rel.* DAVID M. KESTER, STATE OF NEW JERSEY *ex rel.* DAVID M. KESTER, STATE OF NEW MEXICO *ex rel.* DAVID M. KESTER, STATE OF NEW YORK *ex rel.* DAVID M. KESTER, STATE OF NORTH CAROLINA *ex rel.* DAVID M. KESTER, STATE OF OKLAHOMA *ex rel.* DAVID M. KESTER, STATE OF RHODE ISLAND *ex rel.* DAVID M. KESTER, STATE OF TENNESSEE *ex rel.* DAVID M. KESTER, STATE OF TEXAS *ex rel.* DAVID M. KESTER, STATE OF VIRGINIA *ex rel.* DAVID M. KESTER, and STATE OF WISCONSIN *ex rel.* DAVID M. KESTER,

Plaintiffs and Relator,

-against-

No. 11 Civ. 8196 (CM)

NOVARTIS PHARMACEUTICALS CORPORATION, ACCREDO HEALTH GROUP, INC., BIOSCRIP CORPORATION, CURASCRIPT, INC., CVS CAREMARK CORPORATION,

Defendants.

ORDER DENYING DEFENDANTS' MOTION FOR RECONSIDERATION

McMahon, J.:

Defendants CVS Caremark Corporation ("Caremark"), Accredo Health Group, Inc. ("Accredo"), and Curascript, Inc. ("Curascript") have moved for reconsideration of this Court's June 10, 2014 order granting in part and denying in part their motions to dismiss the complaint of Plaintiff-relator David M. Kester ("Relator") pursuant to Rule 9(b) of the Federal Rules of Civil Procedure. *See U.S. ex rel. Kester v. Novartis Pharm. Corp.*, 11 Civ. 8196 (CM), 2014 WL 2619014 (S.D.N.Y. June 10, 2014) (hereafter "*Novartis II*"). Familiarly with that opinion is presumed. For the reasons discussed below, the motion is denied.[1]

To prevail on a motion for reconsideration, the movant must demonstrate "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Doe v. New York City Dept. of Soc. Servs.*, 709 F.2d 782, 789 (2d Cir. 1983). The Court's review "is narrow and applies only to already-considered issues; new arguments and issues are not to be considered." *Tolin v. AMBAC Fin. Grp., Inc.*, No. 08 Civ. 11241 (CM), 2010 WL 431971, at *1 (S.D.N.Y. Feb. 5, 2010) (quoting *Morales v. Quintiles Transnational Corp.*, 25 F. Supp. 2d 369, 372 (S.D.N.Y. 1998)). A motion for reconsideration "is not a substitute for appeal and 'may be granted only where the Court has overlooked matters or controlling decisions which might have materially influenced the earlier decision.'" *Id.* (citations omitted).

Defendants raise two arguments in support of their motion for reconsideration: (1) the Relator's complaint fails to allege a "reverse false claim" with particularity, and (2) certain aspects of the Relator's state law claims should be dismissed for failure to plead fraud with particularity.

[1] This opinion is to be referred to in all future correspondence and papers as "*Novartis III*."

Defendants admit that they failed to raise these arguments in their briefs in support of their motions to dismiss the Relator's complaint. They justify their failure because they "did not previously submit exhaustive memoranda regarding the Rule 9(b) deficiencies in each individual count of the Complaint, but instead submitted concise letters that focused on overarching issues affecting the entire Complaint." Def. Br. at 2; *see also id.* at 5. But Defendants may not raise new arguments for dismissal through a motion for reconsideration. While the Court requested letter briefing from Defendants on the Rule 9(b) issues, I did not tell the parties to omit salient arguments. I will not consider these arguments in a procedurally improper manner—"new arguments and issues are not to be considered" on a motion for reconsideration. *Tolin*, 2010 WL 431971, at *1.

Furthermore, whatever they may say now, Defendants' letter briefs were quite extensive. Nonetheless, they failed to mention the Relator's cause of action under the "reverse false claim" provision of the False Claims Act ("FCA"), 31 U.S.C. § 3729(a)(1)(G), and they raised no issues relating to the state law claims other than those I actually addressed in *Novartis II*.

Defendants had an additional opportunity to address any Rule 9(b) deficiencies in the Relator's complaint in the briefing on their currently pending motions to dismiss pursuant to Rule 12(b)(6). *See* Docket Nos. 174, 176. In fact, Defendant Caremark reiterated in its brief on that motion the same Rule 9(b) arguments it had raised by letter. Ironically, Caremark did not raise any of the arguments it now tries to raise on the motion for reconsideration in its briefing on that motion. It seems clear enough that Defendants, having read *Novartis II*, have become aware of arguments that did not occur to them before. That affords no reason for me to reconsider anything.

Finally, Defendants appear to misunderstand this Court's opinion in *Novartis II* insofar as it addressed the state law claims.

In *Novartis II*, the Defendants argued that the Relator had failed to plead his claims under the 27 state law analogues of the FCA with particularity. The Relator asserted a claim under each of the state statutes generally, without identifying any particular subsection(s) on which he relied. The state FCA statutes are generally modeled on the federal statute and provide several possible bases for liability, including: presentment of a false claim for payment (similar to FCA subsection (a)(1)(A)), making a false statement material to a false claim (similar to FCA subsection (a)(1)(B)), conspiracy to violate the state false claims act (similar to FCA subsection (a)(1)(C)), and a "reverse false claim" provision (similar to FCA subsection (a)(1)(G)). Accordingly, the Relator's state law claims could survive a Rule 9(b) challenge if he pleaded any theory of liability under the state statutes with sufficient particularity.

The only argument propounded to support dismissal of the Relator's state law claims was that he failed to identify the specific false claims that the Defendants submitted to state Medicaid programs with the requisite particularity. *See Novartis II*, at *11.

Denying the motion to dismiss those state law claims, I noted that not every subsection of the state FCA statutes requires proof that the defendant submitted a false claim for payment. For example, conspiracy claims under the state statutes, like their federal counterpart, do not require proof of the submission of a false claim—no conspiracy needs to succeed in order to be actionable. Thus, the Relator was not required to plead the submission of a false claim with particularity in order for his state conspiracy claims to survive a Rule 9(b) challenge. *See id.* I declined to dismiss the state law claims because, at a minimum, they stated a claim for relief under a state law conspiracy theory.

On reconsideration, Defendants cite the specific provisions of the state law analogues of the FCA that require proof of submission of a false claim (*i.e.*, state analogues of subsections (a)(1)(A) and (a)(1)(B)), and they again argue that Relator failed to plead the specific false claims submitted to the government with particularity. They are free to make that argument on a new motion; indeed, they have five business days from today to file a short supplemental brief addressing the omitted issues, and Relator has five business days thereafter to file a responsive brief addressing any new arguments (no reply permitted). But a motion for reconsideration is not an appropriate vehicle for this.

CONCLUSION

For the foregoing reasons, the Defendants' motion for reconsideration is denied *sua sponte* with no need for any response. The Clerk of the Court is directed to close out the motion at Docket No. 214 and to remove same from the Court's list of pending motions.

Dated: June 26, 2014

U.S.D.J.

BY ECF TO ALL COUNSEL