CASE NO. 07-11170-JJ

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA *ex rel*. RICHARD FEINGOLD,

Appellant,

v.

BLUE CROSS AND BLUE SHIELD OF SOUTH CAROLINA, PALMETTO GBA, LLC, and UNKNOWN DURABLE MEDICAL EQUIPMENT SUPPLIERS,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA,
Case No. 99-938-CIV-GOLD/TURNOFF

BRIEF *AMICUS CURIAE* OF TAXPAYERS AGAINST FRAUD EDUCATION FUND IN SUPPORT OF APPELLANT AND REVERSAL

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U.S. ex rel. Feingold v. Palmetto GBA, LLC
Case No. 07-11170-JJ

CERTIFICATE OF INTERESTED PERSONS AND DISCLOSURE STATEMENT

(1) Taxpayers Against Fraud Education Fund (TAFEF) is a nonprofit public interest organization.

(2) TAFEF is represented by its Executive Director, Joseph E. B. White.

(3) TAFEF represents no parties in this matter and has no pecuniary interest in its outcome. However, TAFEF has an institutional interest in the effectiveness and correct interpretation of the False Claims Act.

(4) Pursuant to Eleventh Circuit Rule 26.1, the following is a list of the persons and entities that have an interest in the outcome of this matter.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes and Legislative Material

Secondary Sources

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The federal False Claims Act (FCA) has become the U.S. Government's primary weapon in fighting fraud against the American tax dollar. The Act has proven particularly effective in targeting Medicare fraud. Alarmingly, even Medicare contractors, the Government's appointed guardians of federal healthcare funds, have defrauded the Government of millions of healthcare dollars.

While the federal False Claims Act has recovered millions of stolen funds from these dishonest contractors, confusion over the proper Fed.R.Civ.P. Rule 9(b) standard and a 1998 Eleventh Circuit decision have created a safe haven for fraudfeasors in this Circuit. Specifically, some courts, such as the lower court, have applied a rigid Rule 9(b) standard to False Claims Act actions, forcing relators to meet a heightened summary judgment standard *prior to discovery*. Moreover, in *U.S. ex rel. Body v. Blue Cross & Blue Shield of Alabama*, 156 F.3d 1098 (11th Cir. 1998), this Circuit read a full immunity provision into the Medicare Act, allowing fraudfeasing contractors to drain the Medicare coffers with impunity. Thankfully for the federal fisc, few courts have embraced the onerous Rule 9(b) mandate embraced by the lower court and no court outside of the Eleventh Circuit has adopted the *Body* interpretation.

Taxpayers Against Fraud Education Fund (TAFEF), a nonprofit public interest organization dedicated to combating fraud against the federal Government, encourages the Court to reject the lower court's rigid Rule 9(b) standard and to revisit its earlier *Body*

decision. TAFEF has a profound interest in ensuring that the False Claims Act is appropriately utilized. The issues here are the application of Rule 9(b) to the FCA and the applicability of the FCA to Medicare contractor-defendants accused of defrauding Medicare. The lower court's decision along with this Court's earlier *Body* decision gravely undermine the efficacy of the FCA in policing fraud against the federal Government, because it impermissively constructs an additional pre-discovery pleading requirement and exempts from FCA liability Medicare contractors who knowingly make or certify fraudulent claim records, allowing healthcare providers to fraudulently or falsely receive millions of dollars in reimbursement funds from the federal Government. The Court should reverse this decision.

STATEMENT OF THE ISSUES

I. Whether the district court erred in ruling that a non-employee relator who had a "wealth of information" about a defendant's fraudulent scheme did not have sufficient "indicia of reliability" to satisfy Fed.R.Civ.P. 9(b) because he could not prove prior to discovery that claims were actually submitted to the Government?

II. Whether the district court erred in dismissing the relators' 31 U.S.C. § 3729 claims on the grounds that fraudulent claim records knowingly made or certified by a Medicare contractor, which allows a healthcare provider to get a false or fraudulent claim paid or approved by the Government, are not actionable because the Medicare Act includes a full immunity provision for Medicare contractors?

SUMMARY OF THE ARGUMENT

Congress amended the False Claims Act (FCA) in 1986 to rid the Act of unnecessary procedural and substantive hurdles that had discouraged citizens from filing *qui tam* actions against fraudfeasing entities. Intending the FCA *qui tam* mechanism to be uniquely pro-plaintiff, Congress thoroughly reviewed and accounted for every conceivable obstacle to *qui tam* suits. Notably, however, Congress did not examine the interplay between Federal Rule of Civil Procedure 9(b) and the FCA, for, unlike today, there was no record of Rule 9(b) derailing meritorious claims. Congress simply did not envision the mischief courts would inflict on FCA *qui tam* actions by wielding the

distinctively pro-defendant Rule 9(b) to eviscerate meritorious suits. Thus, in interpreting the application of Rule 9(b) to the FCA, courts should respect the true intent and purpose behind the Act by not endorsing pro-defendant readings that directly undermine and undo the explicit will of Congress.

The lower court, in turning a blind eye to the Act and its legislative purpose, adopted the most onerous application of Rule 9(b) by demanding that a relator meet a heightened *pre-discovery* standard that is not found in the law. In fact, the U.S. Supreme Court, in *Rotella v. Wood*, 528 U.S. 549 (2000), stressed that Rule 9(b) "allow[s] pleadings based on evidence reasonably anticipated after further investigation or discovery." Here, however, while the lower court commended the relator for the "wealth of information" he provided about the fraud and the inner workings of the corporation, it prematurely terminated the action simply because the relator did not physically possess the "evidence reasonably anticipated after further investigation or discovery": the individual claims submitted the Government.

Despite the lower court's premature obsession with seeing the individual pieces of paper that were actually submitted to the Government, the Eleventh Circuit has explicitly rejected this proposition that specific claims are an irreducible minimum to satisfy Rule 9(b). Indeed, in *U.S. ex rel. Clausen v. Laboratory Corp. of America*, 290 F.3d 1301 (11th Cir. 2002) and its progeny, this Court has merely required that the complaint contain "some indicia of reliability" to support the allegation that false claims were

submitted. Moreover, in *Clausen* this Court suggested that the amounts of charges, actual dates, billing policies "or even second-hand information about billing practices" would suffice. The lower court, however, faulted the relator for providing "second-hand information about billing practices," even though it was admittedly a "wealth of information concerning the history of the [ ]scheme" and "an abundance of allegations concerning the ways in which claims [were] processed and submitted."

The lower court's Rule 9(b) standard resurrects the types of procedural and substantive hurdles Congress attempted to remedy in the 1986 FCA Amendments. The Court should remand this case for review under a Rule 9(b) standard that is consistent with the intent of Congress, the Rule's Committee's intent, the U.S. Supreme Court's view, prior holdings of this Court, as well as the synergy of Rules 8, 9, and 11.

In addition, the Court should revisit its earlier decision, *U.S. ex rel. Body v. Blue Cross & Blue Shield of Alabama*, 156 F.3d 1098 (11th Cir. 1998), which the lower court used to pardon the fraudulent actions of the defendant-Medicare Contractor. The FCA, 31 U.S.C. §§ 3729 *et seq.*, imposes civil liability on any person who "knowingly makes . . . a false record . . . to get a false . . . claim paid or approved by the Government." *Id*. § 3729(a)(2). The Medicare Act, 42 U.S.C. § 1395u(e), provides Medicare contractor employees immunity for false payments certified or made "in the absence of gross negligence or intent to defraud the United States." 42 U.S.C. § 1395u(e)(1) and (2). Likewise, the Medicare Act extends the same level of immunity to the Medicare

contractor. *Id.* § 1395u(e)(3). Indeed, as the legislative history explains, Congress intended to limit Medicare contractors to "the *same* immunity from liability . . . as would be provided their certifying and disbursing officers." H.R. Conf. Rep. No. 89-682 (1965), *reprinted in* 1965 U.S.C.C.A.N. 1943, 2231 (emphasis added).

The district court, following this Court's *Body* decision, held that fraudulent claim records knowingly made or certified by a Medicare contractor, which allows a healthcare provider to get a false or fraudulent claim paid or approved by the Government, are nevertheless excluded from the scope of the False Claims Act because the Medicare Act includes a supposed full immunity provision that permits fraudfeasing contractors to escape liability with impunity. This reading of the Medicare statute is inconsistent with its plain language, irreconcilable with applicable legislative history, and at odds with accepted FCA prosecution policy and practice.

This interpretation, which fails to recognize that contractor immunity only applies to payments certified or made "in the absence of gross negligence or intent to defraud" the Government, significantly restricts the reach of the False Claims Act in a manner that Congress did not intend, weakening False Claims Act protection with respect to the Medicare system, leaving hundreds of billions of dollars in federal funds in jeopardy. The decision is legally unsustainable, and should be reversed.

This interpretation selectively reads the language of 42 U.S.C. § 1395u(e)(1)-(3), which explicitly limits carrier immunity to "payments referred to in paragraph (1) or (2)."

Id. § 1395u(e)(3). The lower court's interpretation overly restricts the plain meaning of paragraphs (1) and (2), which, by their very terms, limits immunized "payments" to those certified or made "in the absence of gross negligence or intent to defraud the United States." *Id.* § 1395u(e)(1) and (2). Thus, the Medicare Act includes no "full immunity" bypass to False Claims Act liability.

The interpretation embraced by this Circuit is particularly flawed with respect to the Medicare system, a federally funded program, which, by its very nature, depends upon Medicare contractors making honest claim records for subsequent submission to the federal Government. By adopting a blanket rule that pierces the FCA shield protecting Medicare, this Circuit jeopardizes the federal fisc, the very entity Congress sought to protect.

Additionally, the relevant legislative history shows beyond question that the interpretation embraced in this Circuit is contrary to the intent of Congress. In the accompanying Conference Report, Congress, in clarifying the existing scope of liability, unequivocally stressed that the Medicare Act's immunity veil only pardons a carrier to the same extent as its individual employees. Congress, when recently amending the Medicare Act, again stressed the continued False Claims Act liability of fraudfeasing Medicare contractors. Thus, the law of this Circuit not only ignores the plain meaning of the Medicare Act, but it disregards the relevant legislative history.

Furthermore, the district court stressed that it was tied to the controlling case law announced in *Body*. However, this Court now has an opportunity reject its earlier *Body* decision. The Eleventh Circuit currently stands alone in offering a free pass to fraudfeasing Medicare contractors, for no other defendant outside of this Circuit has successfully argued the "full immunity" defense to FCA liability. In fact, in the nearly nine years since the *Body* decision, at least four Medicare contractors have inked False Claims Act settlements with the Department of Justice, returning over $264 million to the public treasury. Thus, the Eleventh Circuit's interpretation has become a beacon for fraudfeasing contractors, while the United States Congress, the Department of Justice, and even fraudfeasing Medicare contractors have failed to read blanket immunity into the Act. (Indeed, just a few months ago, the Tenth Circuit joined the chorus of those rejecting *Body* in *U.S. ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702 (10th Cir. 2006).) The Court now has an opportunity to review and reject its earlier *Body* interpretation, thus fortifying this jurisdiction from scheming Medicare contractors.

ARGUMENT

I. THE DISTRICT COURT ERRED IN RULING THAT A NON-EMPLOYEE RELATOR DID NOT SATISFY FED.R.CIV.P. 9(B) BECAUSE HE DID NOT HAVE SUFFCIENT "INDICIA OF RELIABILITY" THAT THE DEFENDANT ACTUALLY PRESENTED A FALSE CLAIM TO THE GOVERNMENT, EVEN THOUGH HE THOROUGHLY RESEARCHED THE FRAUDULENT PRACTICES OF THE COMPANY AND PROVIDED A "WEALTH OF INFORMATION" DETAILING THE FRAUDLENT SCHEME

A. The District Court's Strict Application of Rule 9(b) to the False Claims Act Ignores the Explicit Pro-Plaintiff Structure of the 1986 FCA Amendments

It is an important rule of statutory construction that, "in interpreting a statute, the court should look to the old law, the mischief and the remedy." *Comm'r of Internal Revenue v. Kohn*, 158 F.2d 32, 34 (4th Cir. 1946); *see also United States v. St. Paul, M. & M. R. Co.*, 247 U.S. 310, 318 (1918). "A recognized rule of construction of statutes is to look to the law when the statute was enacted in order to see for what it was intended as a substitute, and the defects in the old law sought to be remedied by the new statute." *Century Wrecker Corp. v. Vulcan Equipment Co.*, 733 F. Supp. 1170, 1172 (E.D. Tenn. 1989). In converting Federal Rule of Civil Procedure 9(b) into a substantive rule, the lower court has reasserted the very "mischief" identified by Congress in amending the FCA in 1986 and has eviscerated Congress's attempted remedy.

The FCA is "the government's primary litigative tool for the recovery of losses sustained as the result of fraud against the government." *Avco Corp. v. U.S. Dep't of Justice*, 884 F.2d 621, 622, (D.C. Cir. 1989) (citing S. Rep. No. 99-345, 99th Cong., 2d

Sess. 1, 2 (1986), *reprinted in* 1986 U.S. Code Cong. & Admin. News 5266 (hereinafter referred to as "S. Rep." and cited only to U.S.C.C.A.N.)); *see also U.S. ex rel. McNutt v. Haleyville Med. Supplies, Inc.*, 423 F.3d 1256, 1259 (11th Cir. 2005) (citing *Avco*). The FCA's modern incarnation resulted from amendments in 1986. At that time, "fraud against [the] government [was] so rampant and difficult to identify [that the] government needed all [the] help it could get from private citizens." *Cooper v. Blue Cross and Blue Shield of Florida, Inc.*, 19 F.3d 562, 566 (11th Cir. 1994) (citation omitted). Accordingly, in an attempt to encourage the filing of more *qui tam* suits and to "make the FCA a 'more useful tool against fraud in modern times,'" Congress extensively overhauled the statute. *Cook County v. U.S. ex rel. Chandler*, 538 U.S. 119, 133 (2003) (citation omitted).

One of the main problems of the old law ("mischief"), according to Congress, was the unnecessary procedural and substantive hurdles added by lower courts throughout the country that discouraged the filing and/or prosecution of *qui tam* cases under the FCA.

> Since the act was last amended in 1943, several restrictive court interpretations of the act have emerged which tend to thwart the effectiveness of the statute. The Committee's amendments contained in S. 1562 are aimed at correcting restrictive interpretations of the act's liability standard, burden of proof, *qui tam* jurisdiction and other provisions in order to make the

> False Claims Act a more effective weapon against Government fraud.

S. Rep. at 5269. Congress's "overall intent in amending the *qui tam* section of the FCA [was] to encourage more private enforcement suits." S. Rep. at 5288-5289; *see also id*. at 5266-67 ("The proposed legislation seeks ... to encourage any individual knowing of Government fraud to bring that information forward.").

Congress made many changes, all with the purpose of achieving these goals. It eliminated the Agovernment knowledge bar," which precluded suits if related information was already in the government's possession; provided relators with a guaranteed share of any recovery; expanded relators' participation in the litigation even where the government elects to intervene; clarified the burden of proof; and increased the damages available under the Act. 31 U.S.C. §§ 3729(a)-(b), 3730(d). The amendments also explicitly stated that specific intent to defraud need not be shown, clarifying that a defendant is liable if it acts with deliberate ignorance or reckless disregard of the truth or falsity of information. *Id.* § 3729(b).

Every change made in 1986 made it more likely for FCA claims to be filed and to succeed. *U.S. ex rel. Chandler v. Cook County*, 277 F.3d 969, 975 (7th Cir. 2002), *aff'd* 538 U.S. 119 (2003). Indeed, Congress purposefully intended the litigation structure under the FCA to be uniquely pro-plaintiff. *U.S. ex rel. Longhi v. Lithium Power Techs.*, 2007 U.S. Dist. Lexis 21273, slip op. at 24 (S.D. Tex. Mar. 23, 2007).

While it is true that Congress did not expressly address the application of a restrictive or narrow approach to Rule 9(b) as a potential hurdle in FCA actions, TAFEF submits that it is only because courts had not yet applied restrictive Rule 9(b) rulings to the FCA.[1] Throughout its legislative history and consideration of amendments, Congress was thorough in addressing every narrow or restrictive lower court decision it found. *See generally,* S. Rep. 5266 *et seq*. There can be no mistake that the lower court's Rule 9(b) standard is uniquely anti-plaintiff and emphatically discourages "individual[s] knowing of Government fraud [from] bring[ing] that information forward." *Id*. at 5267. Therefore, the lower court's Rule 9(b) standard resurrects the very "mischief" Congress sought to remedy.

[1] The first time Rule 9(b) was mentioned in conjunction with an FCA case in this Circuit was *Cooper, supra,* almost a decade after the FCA amendments were passed. *U.S. ex rel. Clausen v. Laboratory Corp. of America*, 290 F.3d 1301 (11th Cir. 2002) was the first decision in this Circuit to analyze why Rule 9(b) should apply to FCA cases. *See id*. at 1309-10. The difficulty of applying Rule 9(b) to a statute that does not require proof of fraud to prevail was discussed in *U.S. ex rel. Bledsoe v. Community Health Sys.,* 342 F.3d 634, 642 (6th Cir. 2003) (relator identified that FCA actions do not require proof of intent, damages, or reliance). The danger of applying Rule 9(b) at all is that courts will accidentally add in many of those elements Congress took out and then make relators plead them with specificity. *See e.g., Clausen, supra,* at 1310 (appearing to require pleading reliance and damages). Problems with the "evolution" of Rule 9(b) are well-articulated in a recent academic essay on point. C. Fairman, "An Invitation to the Rulemakers—Strike Rule 9(b)", 38 U.C. Davis L. Rev. 281, 282-83, 307 (2004) (Academia joins the Supreme Court in condemning the use of Rule 9(b) "by *ad hoc* judicial fiat" as a substantive rule.). At the very least, *Clausen* should be clarified to only require pleading what the FCA requires relators to prove.

B. The District Court's Interpretation of Rule 9(b) Constructs Additional Pre-Discovery Pleading Hurdles that Were Not Intended by Congress

Similar to the lower court here, and in an effort to "clear their dockets", other courts have transmogrified procedural rules into substantive determinations by applying Rule 9(b), or other heightened pleading standards, pre-discovery. Twice the Supreme Court has unanimously rejected this approach. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) (employment discrimination); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993) (civil rights). The Court rejected the notion that heightened pleading was intended to dispose of meritless claims.

> This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.

Swierkiewicz, supra, at 512.[2] The Supreme Court has never deviated from its view that "'The Federal Rules reject the approach that pleading is a game of skill in which one

[2] TAFEF suggests that the *Clausen* line of cases is based on a naked assumption that presentment is a requirement of proof for trial, which point was never analyzed in *Clausen*. *U.S. ex rel. Sanders v. Allison Engine Co.*, 471 F.3d 610, 620 (6th Cir. 2006) (*Clausen* never distinguished between subsections of the FCA). With a properly developed record, this Court will likely follow the logical and consistent analysis of the FCA in *Sanders* holding that "presentment [of a claim] is not required as a matter of law to establish a violation of *subsection (a)(2) or (a)(3)*." *Id*. at 622. It is "incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he

misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits'." *Id.* at 514 (quoting *Conley*, *supra*, at 48).

The Supreme Court's most extensive commentary on Rule 9(b), itself, came in *Rotella v. Wood*, 528 U.S. 549 (2000). A stringent Rule 9(b) would be irreconcilable with the Court's holding and analysis.

> Rotella has presented no case in which Rule 9(b) has effectively barred a claim like his, and he ignores the flexibility provided by Rule 11(b)(3), allowing pleadings based on evidence reasonably anticipated after further investigation or discovery. *See, e.g., Corley v. Rosewood Care Center, Inc. of Peoria*, 142 F.3d 1041, 1050-1051 (7th Cir. 1998) (relaxing particularity requirements of Rule 9(b) where RICO plaintiff lacks access to all facts necessary to detail claim).

Id. at 560 (emphasis added). Necessary to the Court's holding was its understanding that Rule 9(b) is "flexible" and has to be read in concert with Rule 11, which allows pleadings based on evidence anticipated after further investigation or discovery. The Court also emphasized that plaintiffs meet Rule 9(b) when the plaintiff, not everyone but the

may ultimately need to prove to succeed on the merits …." *Swierkiewicz*, 534 U.S. at 511-12. *Clausen* should be limited to (a)(1) claims.

defendant, lacks "access to all facts necessary to detail [a] claim." *Id*. Significantly, the case the Court cited on this point, *Corley*, relied on concerns that are directly applicable to FCA cases. In *Corley*, the Seventh Circuit stated that:

> We have noted on a number of occasions that the particularity requirement of Rule 9(b) must be relaxed where the plaintiff lacks access to all facts necessary to detail his claim, and that is most likely to be the case where, as here, the plaintiff alleges a fraud against one or more third parties.

Corley, 142 F.3d at 1051. The exact same situation exists in FCA cases, since the relator is bringing an action for fraud committed, not against herself, but against a third party—the Government.[3] Thus, *Rotella*, reading Rules 8, 9, and 11 together, would allow a relator to pass Rule 9(b) where evidence was reasonably anticipated after further investigation or discovery, where plaintiff lacked access to all facts necessary to detail the claim **or** where the allegation of fraud is against third parties.[4] Rule 9(b) is intended to

[3] Courts, such as the lower court, which hold against the relator the fact that he sues on behalf of the government, act in direct contravention of the 1986 amendments and Eleventh Circuit law. "Under the False Claims Act, any person may serve as a *qui tam* relator. The relator need not have any relation at all to the defendant. Neither is there a requirement that the relator suffer injury at the hands of the defendant …." *Walker,* at 1359 (citations omitted).

[4] The flexible Rule 9(b) is also consistent with the Rules Committee's intent. "Official Form 13 demonstrates that even fraud may be pleaded without long or highly detailed particularity." *Guidry v. U.S. Tobacco Co. Inc*., 188 F.3d 619, 632 (5th Cir. 1999); *see also Swierkiewicz*, 534 U.S. at 513 n.4 (referring to Forms as sufficient pleadings). Form

dismiss cases where none of the elements are plead with sufficient specificity, not just one of the elements, because only then is the complaint insufficient to put defendant on notice. *See Michaels Building Co. v. Ameritrust Co., N.A.*, 848 F.2d 674, 679-81 (6th Cir. 1988) (in determining whether a complaint satisfies Rule 9(b) look not at what is missing, but rather what is there; the standard is whether the defendant has fair notice of the substance of plaintiff's claim sufficient to prepare a responsive pleading).

C. The District Court's Ruling Is Inconsistent with the Controlling Case Law

This Circuit's Rule 9(b) analysis is consistent with the Supreme Court's view. In *Friedlander v. Nims,* 755 F.2d 810 (11th Cir. 1985), this Court held that "a court considering a motion to dismiss … should always be careful to harmonize the directives of Rule 9(b) with the broader policy of notice pleading."[5] *Id.* at 813 n. 3 ("eliminate

13, states a fraudulent conveyance claim by alleging that "Defendant C. D. on or about _____ conveyed all his property, real and personal [or specify and describe] to defendant E. F. for the purpose of defrauding plaintiff and hindering and delaying collection of the indebtedness evidenced by the note above referred to." FRCP Form 13. This form is declared by Rule 84, Fed. R. Civ. P., to be "sufficient under the rules and [is] intended to indicate the simplicity and brevity of statement which the rules contemplate." Wright & A. Miller, § 1298 (1990) (Form 13 satisfies Rule 9(b).

[5] Lower courts have followed this Court's directive to read Rule 9(b) and Rule 8's notice pleading together. *See, e.g., SEC v. Digital Lightwave, Inc.,* 196 F.R.D. 698, 701 (M.D. Fla. 2000) (Rule 9(b)'s purpose "'is to ensure that allegations are specific enough to provide defendants sufficient notice of the acts complained of and to enable them to

fraud actions in which **all the facts** are learned through discovery" (emphasis added)). It held that while "[a] district court may dismiss a case for failure to comply with the pleading rules . . . this is a severe sanction" which is "justified when a party chooses to disregard the sound and proper directions of the district court." *Id.* at 813. In *Hendley v. American National Fire Insurance*, 842 F.2d 267, 269 (11th Cir. 1988), this Court upheld a dismissal of an affirmative defense under 9(b) because defendant "steadfastly refused to offer specifics about the fraud claims it made…. [T]he resistance continued through the pretrial order; appellant never earmarked *any facts* as demonstrative of fraud." *Id.* (emphasis added). Thus, the Court made it clear—where **all the facts** are learned after discovery, such as in *Friedlander*, or where **no facts** are earmarked at any time, as in *Hendley*, Rule 9(b) triggers dismissal.

In *Durham v. Business Management Associates*, 847 F.2d 1505 (11th Cir. 1988), this Court repeated the flexible standard that "[t]he application of [Rule 9(b)] must not abrogate the concept of notice pleading." *Durham*, at 1515. Where the plaintiff alleged that he received fraudulent correspondence from the defendant "from time to time during the next several years," *Durham* held that Rule 9(b) was satisfied. *Id.* at 1512 ("alternative means are also available to satisfy the rule").

prepare an effective response and defense.'" (quoting *SEC v. Physicians Guardian*, 72 F. Supp.2d 1342, 1352 (M.D. Fla. 1999))).

Of course, the "particularity demanded by Rule 9(b) necessarily differs with the facts of each case."[6] While Rule 9(b) generally requires that a plaintiff set forth the "who, what, when, where, and how" of the fraud, it "does not require the setting out of 'detailed evidentiary matter.'" *Georgia Gulf Corp. v. Ward*, 701 F. Supp. 1556, 1560 (N.D. Ga. 1987) (quoting *Friedlander*, 755 F.2d at 813 n.3). Indeed, a fraud complaint is not "required to … set forth the specific details of any particular transaction underlying the alleged accounting fraud." *In re World Access, Inc. Securities Litigation*, 119 F. Supp.2d 1348, 1354 (N.D. Ga. 2000). Another court emphasized that Rule 9(b) does not require unreasonable detail: "Failure to state the dates and times of receipt of kickbacks is not fatal to the complaint, as the defendants have been apprised of the nature of the action against them, and are therefore on notice of sufficient allegations upon which to

[6] *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1067-1068 (5th Cir. 1994). Courts in this Circuit have expressly declined to establish "a hard and fast rule for what a complaint must allege to comply with the requirements of Rule 9(b)." *Aldridge v. Lily-Tulip, Inc.*, 741 F. Supp. 906, 913 (S.D. Ga. 1990), *aff'd in part and rev'd in part on other grounds*, 953 F.2d 587 (11th Cir. 1992). In addition, courts generally relax the Rule 9(b) standard when the factual information needed is within the defendant's knowledge or control, the fraud alleged was complex and occurred over a period of time, or the conduct alleged was routine to the defendants. *Eaby v. Richmond*, 561 F. Supp. 131, 137 (E.D. Pa. 1983)(courts have granted limited discovery on issues which the plaintiffs could not have reasonably had access to prior to filing the complaint); *U.S. ex rel. Butler v. Magellan Health Servs.*, 74 F. Supp. 2d 1201, 1215 (M.D. Fla. 1999) (specificity requirements less stringent where "the alleged fraud occurred over an extended period of time and consisted of numerous acts"); *Cincinnati Gas & Electric Co. v. General Electric Co.*, 656 F. Supp. 49, 76 (S.D. Ohio 1986) (documents routinely prepared by the defendants). This is consistent with the Supreme Court's holding and analysis in *Rotella*.

mount a defense." *Georgia Gulf, supra*, at 1560. Notwithstanding the Eleventh Circuit's flexible approach of reading Rule 8's notice pleading and Rule 9(b) together, the District Court below required the pleading of specific claims and reports.[7]

Perhaps the case most often cited for the proposition that identification of specific claims for payment is necessary to satisfy Rule 9(b) is *U.S. ex rel. Clausen v. Laboratory Corp. of America*, 290 F.3d 1301 (11th Cir. 2002). However, far from requiring that specific claims be identified in the complaint, *Clausen* expressly rejected such a requirement, requiring only that the complaint contain "some indicia of reliability" to support the allegation that false claims were submitted. *Id*. at 1311 ("[S]ome indicia of reliability must be given in the complaint to support the allegation of an actual false claim for payment being made to the Government."). The Court did not purport to limit the ways in which a relator might provide such "indicia of reliability," although it suggested some ways in which such reliability might be demonstrated. In discussing the complaint at issue, the Court suggested that amounts of charges, actual dates, billing policies "or

[7] To highlight the improper nature of the lower court's form over substance, TAFEF presents three cases where the lower court's standard was proposed by defendants, but rejected by the courts, and the meritorious cases resulted in recoveries of nearly $800 million that would have been lost. *See U.S. ex rel. Johnson v. Shell Oil Co.*, 183 F.R.D. 204, 206-07 (E.D. Tex. 1998) ($400 million http://www.usdoj.gov/opa/pr/2001/February/052civ.htm); *U.S. ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 20 F. Supp.2d 1017, 1049 (S.D. Tex. 1998) ($200 million http://www.usdoj.gov/opa/pr/2003/June/03_civ_386.htm); *U.S. ex rel. Franklin v. Parke-Davis*, 147 F. Supp.2d 39 (D. Mass. 2001) ($190 million http://www.taf.org/settlements/PfizerMay2004Settlement.pdf). This is hardly consistent with the intent of Congress.

even second-hand information about billing practices" would have sufficed. *Id*. at 1312. The Court emphasized that:

> this discussion merely lists some of the types of information that might have helped Clausen state an essential element of his claim with particularity but does not mandate all of this information for any of the alleged claims. Although Clausen has provided none of these items of information here, some of this information for at least some of the claims must be pleaded in order to satisfy Rule 9(b).

Id. at 1312 n. 21 (emphasis added). Thus, *Clausen* rejected a rigid test for determining compliance with Rule 9(b) and, in particular, rejected the proposition that specific claims are an irreducible minimum to satisfy Rule 9(b).[8]

[8]Many other courts have held that it is not necessary for the relator to identify specific claims for payment submitted, reasoning that such identification is not necessary to put defendants on notice of their alleged misconduct or that the individual billing records are in the possession of the defendant. *See, e.g., U.S. ex rel. Fry v. Guidant Corp.*, 2006 U.S. Dist. LEXIS 65702 (M.D. Tenn. Sept. 13, 2006); *U.S. ex rel. Singh v. Bradford Regional Medical Center*, 2006 U.S. Dist. LEXIS 65268 (W.D. Pa. September 13, 2006); *U.S. ex rel. Downy v. Corning, Inc.*, 118 F.Supp.2d 1160, 1173 (D.N.M. 2000); *U.S. ex rel. Pogue v. Diabetes Treatment Ctrs. of Am.*, 238 F. Supp. 2d 258, 268-69 (D.D.C. 2002); *U.S. ex rel. Lee v. SmithKline Beecham Clinical Labs,* 245 F.3d 1048, 1051 (9th Cir. 2001); *U.S. ex rel. McCarthy v. Straub Clinic & Hosp., Inc.*, 140 F. Supp. 2d 1062, 1067-69 (D. Haw. 2001).

In a subsequent unpublished opinion, *U.S. ex rel. Hill v. Morehouse Medical Associates, Inc*., 2003 WL 22019936 (11th Cir. 2003), the Eleventh Circuit confirmed this interpretation of *Clausen*, holding that the complaint satisfied Rule 9(b) even though it did not identify specific claims. The Court construed *Clausen* as simply requiring that "to comply with Rules 8 and 9(b), 'some indicia of reliability must be given in the complaint to support the allegation of' fraud." *Id*. slip op. at 3 (quoting *Clausen, supra*). The Court expressly rejected the proposition that identification of specific claims for payment was necessary to provide such indicia. "Failure to allege patient names and the exact dates that claims were submitted to the government . . . is not fatal to a claim under the FCA." *Id*. at n. 8 (emphasis added) (showing a strong desire not to require or encourage violations of "patient confidentiality by copying private records").

In an even more recent published opinion, this Court upheld yet another complaint that did not identify specific claims for payment. In *U.S. ex rel. Walker v. R & F Props. of Lake County, Inc*., 433 F.3d 1349, 1353 (11th Cir. 2005),[9] the Court held that the

[9] In this Circuit, *Clausen* must be read consistently with *Frielander, Hendley* and *Durham* (reading Rule 8 and Rule 9 together) and *Corsello* and *Atkins* must be read consistently with *Clausen* and *Walker* ("indicia of reliability"). *Bonner v. Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (absolute rule that prior decision cannot be overruled by a panel—only en banc). The lower court appears to require *Atkins* to read out of *Frielander, Durham* et al. the Rule 8 analysis and out of *Clausen* and *Walker* et al. the allowance for any "indicia of reliability", thus reading *Atkins* to overturn *Frielander, Hendley, Durham, Clausen, Hill*, and *Walker*. This is an impossible interpretation of *Atkins* under *Bonner* which should be rejected by this Court.

complaint satisfied Rule 9(b), even though the relator was not involved in the billing process and did not identify claims for payment submitted as a result of such practices:

> The Amended Complaint also alleges that Walker had at least one personal discussion with LFM's office administrator …. These allegations are sufficient to explain why Walker believed LFM submitted false or fraudulent claims ….

Id. at 1360 (emphasis added). The Court recognized that what was important was not that the complaint identify specific claims, but that the relator have a reason for believing that such claims were submitted. The lower court's holding is irreconcilable with the *Clausen* line of cases.[10]

In this case, Relator meets the *Clausen* "indicia of reliability" standard. *Clausen* focuses on the FCA requirement that a claim be "submitted" to the Government. Relator reliably alleges that Palmetto, as a DMERC, submitted claims to the Government. (R70, Amended Complaint ("AC") ¶11). Furthermore, Relator reliably alleges that Palmetto submitted *false* claims to the government, providing an exemplary date, check number

[10] The *Karvelas* court followed *Clausen* in clarifying that "[t]hese details do not constitute a checklist of mandatory requirements that must be satisfied by each allegation included in a complaint. However, like the Eleventh Circuit, we believe that 'some of this information for at least some of the claims must be pleaded in order to satisfy Rule 9(b).'" *U.S. ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 233 (1st Cir. 2004) (*Clausen* cite omitted). The court adopted the view that courts look at the complaint as a whole and allow cases to advance even where "'some questions remain unanswered[.]'" *Id.* n.17 (cite omitted).

and DME which Relator submits never supplied the FUCPs it claimed to supply. (R70, AC ¶145). [11]

Notably, even the Defendant did not dispute below that it had submitted claims for DMEs.[12] (R84, Def.'s Mot. at 29). In addition, Relator reliably alleges that statistically Palmetto approved massive amounts of FUCP claims for payment. (R70, AC ¶¶ 81, 105-06, 113-14, 116, 118-22, 140-141).[13] Relator also reliably alleged that Palmetto submitted false statements to the government by identifying *specific* reports that were

[11] He also explained that he determined DMEs were not providing FUCPs by contacting medical supply companies, nursing homes, and medical professionals. (R70 AC ¶¶ 132, 135).

[12] In *Singh*, the court remarked,

> we fail to see how identification of the claims, in this case, would provide a sufficient or better safeguard against spurious charges. As noted, no where do Defendants claim that the relevant claims for reimbursement were not filed during the relevant time period. Since Relators' allegations do not depend upon any single claim, even if Relators added the identifying claim information that Defendants argue is necessary, the Defendants would be no further protected from spurious charges than they are now.

Singh, *supra*, slip op. at 20-21. The entire purpose of the DMERC is to submit claims to the Government. In those type of cases, as opposed to cases like *Clausen* where there are multiple payors, Rule 9(b) as to submission should be relaxed. Little indicia of reliability is needed as to the "submission" of claims when the exclusive payor is the Government or where providing the identity of the claim would not help defendant prepare a responsive pleading. At that point it is simply form over substance.

[13] *See* Relator's Appellate Brief, at 12-16 for the statistical breakdown showing Palmetto was responsible for submitting a suspiciously disproportionate amount of FUCP claims, in comparison to other Regions, submitted more FUCP claims than FUCPs were manufactured, and dramatically reversed billing after learning of Relator's lawsuit. All of these are further "indicia of reliability".

falsified, providing the date and the entity to which it was submitted and explaining its falsity. (R70, AC ¶¶ 178-182, *see also* pp. 79-106).

Additionally, Relator knew the region for which Defendant was the DMERC, as he had successfully recovered money for the federal government against at least two DMEs for the very same scheme. The District Court viewed this as a strike against Relator—that he had a suspicious financial incentive to bring the suit. *But see* n. 3 *supra*. However, that he has been right two times before about the same type of fraud is itself an "indicia of reliability".

At base, the District Court's decision appears at odds with the facts of this case. The Court found that Relator failed "to identify or produce a single fraudulent claim form or report prepared by Palmetto." (R126, Order at 16). Clearly, as shown above, this was error—Relator specifically identified exemplary claims and reports. Under *Clausen*, such exemplary claims establish indicia of reliability that false claims were submitted to the Government.

In the end, Taxpayers Against Fraud Education Fund has an interest in protecting Congress's primary goal in amending the FCA in 1986—"to encourage more private enforcement suits". The lower court's Rule 9(b) standard resurrects the types of procedural and substantive hurdles Congress attempted to remedy. Taxpayers Against Fraud Education Fund respectfully requests that this Court remand this case for review under a Rule 9(b) standard that is consistent with the intent of Congress, the Rule's

Committee's intent, the Supreme Court's view, prior holdings of this Court, as well as the synergy of Rules 8, 9, and 11.

II. THE DISTRICT COURT ERRED IN RULING THAT FALSE CLAIM RECORDS MADE OR CERTIFIED BY A MEDICARE CONTRACTOR, WHICH ALLOWS A HEALTHCARE PROVIDER TO GET A FALSE OR FRAUDULENT CLAIM PAID OR APPROVED BY THE GOVERNMENT, ARE NEVERTHELESS EXCLUDED FROM THE SCOPE OF THE FALSE CLAIMS ACT BECAUSE A SUPPOSED GRANT OF FULL IMMUNITY PERMITS THE CONTRACTOR TO ESCAPE LIABILITY WITH INPUNITY.

A. The District Court's Ruling Ignores The Plain Language Of The Medicare Act.

In 31 U.S.C. § 3729(a)(2), the False Claims Act imposes civil liability and treble damages upon any person who "knowingly makes . . . a false record . . . to get a false . . . claim paid or approved by the Government." *Id*. The Medicare Act provides in relevant part:

> (1) No individual designated pursuant to a contract under this section as a certifying officer shall, in the absence of gross negligence or intent to defraud the United States, be liable with respect to any payments certified by him under this section.
>
> (2) No disbursing officer shall, in the absence of gross negligence or intent to defraud the United States, be liable with respect to any payment by him under this section if it was based upon a voucher signed by a certifying officer designated as provided in paragraph (1) of this subsection.
>
> (3) No such carrier shall be liable to the United States for any payments

referred to in paragraph (1) or (2).

42 U.S.C. § 1395u(e) (emphasis added). As the lower court correctly deduced, the Medicare statute extends immunity to Medicare carriers for "payments referred to in paragraph (1) or (2)." *Id*. § 1395u(e)(3). The lower court held that under this provision of the Medicare Act, a fraudulent claim record made by a Medicare carrier to get a false claim paid or approved by the Government does not fall within the scope of the False Claims Act, even if the record was made with the intent to defraud the United States.

By its terms, Section 1395u(e)(3) immunity does not extend to "any payments" made or certified by a Medicare carrier, but instead only to those payments "referred to in paragraph (1) or (2)." The lower court, following an Eleventh Circuit interpretation that has yet to be adopted by any other circuit, interpreted the language in Section 1395u(e)(3) to extend "full immunity" to Medicare contractors simply because "[a] clause limited immunity to payments not involving gross negligence or fraud is conspicuously absent" from paragraph (3). *U.S. ex rel. Body v. Blue Cross & Blue Shield of Alabama*, 156 F.3d 1098, 1111 (11th Cir. 1998). However, as the United States Supreme Court warned, "There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978). By striking the reference to paragraphs (1) and (2), the district court rewrites paragraph (3) to read: "No such carrier shall be liable to the United States for any payments." Perhaps the U.S. Supreme Court said it best in *United*

States v. Naftalin: "The short answer is that Congress did not write the statute that way." 441 U.S. 768, 773 (1979).

In addition to selectively reading the language of Section 1395u(e)(3), the district court also ignores the explicit qualification of "payments" defined in Sections 1395u(e)(1) and (2). Most importantly for this case, these sections explicitly limit "payments" to those certified or made "in the absence of gross negligence or intent to defraud the United States." *Id.* § 1395u(e)(1) and (2). Thus, Congress, in limiting carrier liability to these particularly defined payments, explicitly clarified that fraudfeasing contractors cannot escape liability by simply arguing that they are not legally accountable for their fraudulent actions. The lower court's interpretation is, therefore, legally unsustainable.

B. The District Court's Ruling Is Inconsistent With The Relevant Legislative History.

Whatever one may think of the arguments that can be made from the actual text, no one can say the Medicare Act unambiguously grants "full immunity" to Medicare carriers under Section 1395u(e)(3). Accordingly, the lower court's strained interpretation at least demands a review of the legislative history. *See Blum v. Stevenson*, 465 U.S. 886, 896 (1984). Once the legislative history is consulted, any residual uncertainty about whether to read a full immunity bypass into the statute disappears. Indeed, the Conference Report accompanying the Medicare Act states that Section 1395u(e)(3) is intended to limit

Medicare contractors to "the *same* immunity from liability for incorrect payments as would be provided their certifying and disbursing officers." H.R. Conf. Rep. No. 89-682 (1965), *reprinted in* 1965 U.S.C.C.A.N. 1943, 2231 (emphasis added). Because certifying and disbursing officers are immune from liability only when they act "in the absence of gross negligence or intent to defraud the United States," 42 U.S.C. §1395u(e)(1) and (2), the characterization of Section 1395u(e)(3) in the accompanying legislative history insists that the contractor's immunity be similarly limited. By contrast, the reading adopted by the lower court and this Circuit requires the courts to ignore this legislative history. Because Section 1395u(e)(3) may plausibly be interpreted in a manner consistent with the applicable legislative history, the courts should adopt this strained interpretation that blindly disregards the underlying congressional intent.

Furthermore, when Congress recently amended the Medicare Act, the accompanying legislative history reiterated the intent underlying the original statute: "[T]he False Claims Act *continues, as in the past,* to remain available as a remedy for fraud against Medicare by certifying officers, disbursing officers, *and Medicare administrative contractors alike*…" 149 Cong. Rec. S15644 (emphasis added). Conversely, neither the defendant nor the lower court nor the earlier *Body* decision point to a single legislative utterance championing unlimited carrier immunity. Thus, in addition to misinterpreting the Medicare Act, the district court's analysis directly conflicts with the relevant legislative history, blatantly casting a jaundiced eye upon the

intent of Congress.

C. The District Court's Ruling Impermissively Legislates An Exception to the False Claims Act.

Congress "endorse[d]" the Supreme Court's interpretation that the federal False Claims Act "'was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government.'" S. Rep. 99-345, 99th Cong., 2d Sess., at 19, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5284 (quoting *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968)). The district court's ruling, on the other hand, impermissively legislates a Medicare contractor "full immunity" limitation that appears nowhere in the relevant statutory language, weakening the False Claims Act shield that Congress erected around the Medicare system.

In other words, reading "full immunity" into Section 1395u(e)(3) trumps the explicit language and purpose of the False Claims Act, repealing by implication Congress's intention to "reach all types of fraud." However, such a reading is inconsistent with the "cardinal principle of statutory construction that repeals by implication are not favored." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976) (internal quotation marks and citation omitted). As the United States Supreme Court has stressed, "[j]udges are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts,

absent a clearly expressed congressional intention to the contrary, to regard each as effective." *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 265-66 (1992) (citations omitted). For nearly four decades, courts outside of the Eleventh Circuit have honored the congressional intent behind both the False Claims Act and the Medicare Act, holding Medicare contractors liable "for all types of fraud, without qualification." Thus, the two Acts are not only "capable of co-existence," but have succeeded in protecting the Medicare system from fraudfeasing Medicare contractors.

D. The District Court's Ruling Conflicts With Accepted False Claims Act Prosecution Policy And Practice.

While the lower court was arguably bound by the mandate of *U.S. ex rel. Body v. Blue Cross & Blue Shield of Alabama*, 156 F.3d 1098 (11th Cir. 1998), few others have felt compelled to follow this interpretation of the Medicare Act. Indeed, perhaps because they view this reading of the Act as being inconsistent with its plain language and irreconcilable with with its applicable legislative history, fraudfeasing carriers have, time and time again, refused to reach out for this supposed ironclad plank of immunity. Instead, since the *Body* decision first discovered this alleged passageway around FCA immunity, at least another four Medicare contractors have signed FCA settlement agreements with the Department of Justice, recovering over $264 million in ill-received

federal funds.[14]

Thus, unlike the Eleventh Circuit, the United States Congress, the United States Department of Justice, and fraudfeasing Medicare contractors have refused the invitation to read "full immunity" into the Act. When the court properly reads the Act, it should rule that the type of fraud alleged in this case could form the basis for an FCA claim, when the Medicare contractor makes or certifies a fraudulent claim record with "gross negligence or intent to defraud the United States." Perhaps this is why Medicare contractor fraud cases involving millions of federal dollars have been successfully settled under the federal False Claims Act, and no other jurisdiction has reached the same conclusion as this Circuit. With an annual budget of over $325 billion in federal funds, the Medicare system—and the U.S. taxpayer—deserve an accurate reading of the

[14] *See, e.g., U.S. ex rel. Doe v. Pennsylvania Blue Shield*, 54 F. Supp. 2d 410 (M.D. Pa. 1999) (Pennsylvania Blue Shield, the Part B carrier for Pennsylvania, Delaware, New Jersey and the District of Columbia, and its parent, Highmark, Inc., paid $38.5 million to settle four False Claims Act suits); *U.S. ex rel. Dodson v. Blue Shield of Calif.*, No. C94-3626 EEL, (N.D. Cal. 1998) (The United States recovered $12 million in settlement of a *qui tam* case alleging that the Part B carrier for Northern California mischarged costs under its carrier contract and misrepresented its performance to HCFA); *U.S. ex rel. Knoob v. Health Care Service Corporation*,No. 95-4071 (S.D. Ill. 1998) (United States recovered $140 million in settlement of a suit alleging that the Part B carrier for Illinois and Michigan had shredded claims, deleted claims from its computer system, paid all claims under $50, shut off its beneficiary and provider telephone lines, and intentionally misrepresented its performance to HCFA). In yet another example, a Medicare contractor, Anthem Blue Cross & Blue Shield (formerly Blue Cross & Blue Shield of Connecticut), in order to improve its ratings under the Contractor Performance Evaluation Program, intentionally overpaid tens of millions of dollars to hospitals, falsifying cost reports. The United States reached a $74 million settlement with Anthem in December 1999.

Medicare Act.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accord with Fed. R. App. P. 32(a)(7)(C), the undersigned certifies that this brief complies with the type-volume limitation set forth in the Rule. Excluding the portions exempted by Rule 32(a)(7)(B)(iii), the brief contains 6,574 words as reported by the word count function of Microsoft Word. The brief was prepared in Microsoft Word in Times New Roman font, 14-point type for both text and footnotes.

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