Quarterly Review

Taxpayers Against Fraud Education Fund | Washington, D.C. | WWW.TAF.ORG
April 2015 · Volume 76

Recently, eleven teachers in the Atlanta Public Schools system were convicted on racketeering charges for falsifying answers on students' state-administered standardized tests. The teachers were part of a larger fraud and corruption scandal that implicated nearly 200 teachers and principals throughout the school district. Soon after, the District of Columbia Public Schools' largest food vendor agreed to pay that system $19 million to resolve a whistleblower lawsuit alleging that food often arrived to schools late and/or in insufficient amounts. And days later, the federal government announced plans for creating a process to allow students who were defrauded by for-profit colleges and universities to apply for student loan forgiveness. As I prepare to become a father for the first time, I'm once again jolted to the reality that lying, cheating, and stealing come in a wide variety of forms, and that fraudsters can be anyone—including the people we trust to educate and feed our schoolchildren.

Whistleblowers expose misconduct like this, and thereby help protect not only our tax dollars, but they often protect the most vulnerable among us as well. When providers, pharmaceuticals companies, pharmacies, and device manufacturers defraud Medicare and Medicaid, our elderly, infirm, and poor suffer. When defense contractors cut corners, our troops and soldiers put in harm's way. And we all put our faith in the integrity of the construction companies that build our roads and highways. Although financial incentives can certainly encourage whistleblowers to come forward—especially employees who will likely lose their jobs and possibly become unemployable in their fields for exposing fraud—whistleblowing is about much more than money. Whistleblowing is about people.

As always, we applaud the efforts of whistleblowers who stand up on behalf of all of us—as well as the private attorneys and government lawyers work with them.

Enjoy the April 2015 issue,

All the best,
Cleveland Lawrence III

RECENT FALSE CLAIMS ACT & *QUI TAM* DECISIONS

January 1, 2015 – March 31, 2015

I. FALSE CLAIMS ACT LIABILITY

A. Violations of the Anti-Kickback Statute and/or Stark Law

U.S. ex rel. Kalec v. NuWave Monitoring, LLC, 2015 WL 1424501 (N.D. Ill. Mar. 26, 2015)

Two relators, John and Loretta Kalec, brought a *qui tam* action alleging that their employer, NuWave, and its owners overbilled Medicare and Medicaid for services the relators rendered. The relators also claimed that the defendants violated the Anti-Kickback Statute, which resulted in the submission of fraudulent claims to the government. NuWave provided neuro-monitoring services in which technicians and doctors monitored patients' neurological activity during surgical procedures in order to prevent neurological damage. NuWave provided this service to hospitals in Illinois and Indiana. Loretta Kalec was an on-site technician for NuWave. As such, she set up the equipment and monitored patients' status during surgeries. John Kalec was a physician who provided remote neuro-monitoring, during which he advised surgical staff regarding patients' neurological status as necessary. He often monitored multiple patients at a time. NuWave billed the government directly for the remote monitoring, but the hospitals billed for technician time.

The relators alleged that the defendants charged most hospitals a five-hour minimum for its technicians' services regardless of whether the procedure lasted for five hours. For some other hospitals, the relators alleged that the defendant directed its technicians to start billing their time before the patient entered the

surgical suite and continue until fifteen minutes after they left. They alleged that these practices, which were taught to Mrs. Kalec as a technician, were in violation of Medicare's policy of reimbursing providers only for the actual time spent monitoring patients. Additionally, physicians who provided remote monitoring, such as Dr. Kalec, often monitored three to five surgeries at a time. Medicare and Medicaid regulations allowed physicians to monitor multiple patients at once, however, they only reimbursed for the actual time spent monitoring each surgery. The relators alleged that the defendants violated those regulations by billing physician time simultaneously for multiple patients.

The relators gave an example of a particular day for which they allege the defendants overbilled the government for the services. The relators claimed that on that day, Dr. Kalec provided remote monitoring services for eight surgeries over the course of approximately eight hours, so NuWave should have billed Medicare for eight hours. However, the relators contended, the defendants billed the government for 23 hours of Dr. Kalec's time and "collected all amounts paid by Medicare for [those] claims." The relators contended that Dr. Kalec reviewed his time records and payments received for his services in order to determine how many hours the defendants had billed. They alleged that the defendants violated the FCA by submitting bills to government healthcare programs which inflated technician hours and billed for simultaneous physician time.

The relators also alleged that the defendants induced a certain doctor at one of the hospitals that it serviced to request that NuWave perform neuro-monitoring services in a large number of his cases in exchange for making him the Director of NuWave and paying him a salary despite the fact that he did not actually perform any services for NuWave, in violation of the AKS. They alleged that the defendants violated the FCA by submitting claims to the government that were tainted by AKS violations.

They further alleged that the owners of NuWave knew about these improper practices. They claimed that Dr. Kalec asked the owners whether they were properly billing government healthcare programs and they responded that "NuWave's billing practices were not Dr. Kalec's concern." When he pushed to see the bills submitted to the government for his services, the relators alleged that Dr. Kalec was pressured to resign.

Finally, the relators alleged that the defendants conspired with the hospitals where NuWave provided services to overbill the government in violation of the FCA.

The defendants moved to dismiss for failure to plead fraud with the particularity required by Rule 9(b). The defendants also moved to dismiss the claims against the owners in their individual capacities.

Holding: The U.S. District Court for the Northern District of Illinois denied the defendants' motion to dismiss the claims related to the remote neuro-monitoring, but granted the motion in all other respects.

The defendants argued that the relators failed to allege that NuWave actually submitted a claim to the government for the services rendered on the day that the relators used as an example, or that they ever submitted a claim for any services. The court rejected this argument, explaining that the relators alleged that NuWave "routinely fraudulently billed Medicare by improperly apportioning its doctors' time" and cited a sample day as a representative example of the fraudulent billing practice. The court found that it could reasonably infer that a claim was submitted to the government for Dr. Kalec's services on that day because, as the physician who performed the services and was paid for them, he was in a position to know how many hours he worked and what he was ultimately paid for that day. That he was paid indicated that the claim had been paid by the government, according to the court.

The court granted the defendants' motion to dismiss the relators' claims regarding the overbilling of technician time. The court explained that the hospitals actually billed for technician time, and the relators voluntarily dismissed the hospitals where NuWave provided services from the case. Because Mrs. Kalec could not, like Dr. Kalec, assess how many hours she worked compared with how many hours were actually billed, the court held that the relators could not rely on the representative example that they presented as proof of overbilling for Dr. Kalec's remote monitoring time. Thus, the court found that the relators did not provide sufficient indicia of reliability that a false claim for technician time was actually submitted.

Additionally, the court rejected the relators' argument that the NuWave conspired with the hospitals where it provided services to defraud the government because the hospitals knew that NuWave was inflating their technician time and submitted claims based on the falsely inflated technician time cards prepared for the hospitals by NuWave. The court explained that "knowledge [was] not enough to sustain a conspiracy claim,] and that the relators' claims failed because they did not allege the particulars of any agreement between the hospitals and NuWave to defraud the government.

The court held that the relators failed to plead their allegations regarding FCA claims stemming from NuWave's alleged AKS violations because they did not identify a single patient referred by the physician alleged to have received the kickbacks. Thus, the court explained, they failed to link the kickback scheme to an actual false claim that was submitted.

The court also granted the defendants' motion to dismiss the claims with respect to NuWave's owners. The court observed that the only allegations against them as individuals were that they knew that NuWave was not correctly apportioning its physicians' time and that they denied Dr. Kalec access to NuWave's bills. The court found that the relators failed to allege that the owners had any active role in submitting false claims or in preparing fraudulent documents.

- Opinion

U.S. ex rel. Cooper v. Pottstown Hosp. Co., LLC, 2015 WL 1137664 (E.D. Pa. Mar. 13, 2015)

The relator was a former orthopedic surgeon and independent contractor for the defendant, Pottstown Hospital, a subsidiary of defendant Community Health Systems ("CHS"). CHS provided management, legal, and advisory services to Pottstown. The relator had an employment contract with Pottstown; he also had a separate on-call contract that compensated him $650/day for every day he served as the doctor on call. He claimed that the payments he received under the on-call contract were actually kickbacks paid to induce him to refer patients to Pottstown, in violation of the Anti-Kickback Statute. He further alleged that CHS drafted and authorized the contract, which certified that "no part of his compensation would be in exchange for the referral of patients to Pottstown and that he would be compensated in a manner that complied with state and federal laws," including the AKS.

The relator had a financial stake in another hospital that opened a facility near Pottstown—Physicians Care Surgical Hospital ("PCSH"). He claimed that when Pottstown learned of his financial interest in PCSH, Pottstown's CEO and CFO "urged and pressured" him to divest his interest or risk termination of his on-call contract; he alleged that CHS authorized Pottstown's efforts. When he refused to divest his stake in PCHS, Pottstown terminated his on-call contract. Several months later, he negotiated a new on-call contract that included language allowing him to keep his financial interest in PCSH, but barred him from contracting for professional services with any other facility in the area. He alleged that shortly after signing the new on-call contract, his employment contract was not renewed because of his financial interest in PCSH, but his on-call contract remained in effect. He then secured new employment with a different hospital in the area, prompting Pottstown to terminate his on-call contract, citing that contract's restrictive covenant. The realtor alleged that Pottstown's decision to terminate his on-call contracts was based on his affiliation with PCSH, which meant that the payments he had received pursuant to the contracts were actually intended to induce the referral of patients to Pottstown, in violation of the AKS. Thus, he alleged, the defendants' certifications to the government—in their claims for reimbursement under the federal healthcare programs—that they were in compliance with all applicable regulations and statutes, including the AKS, were fraudulent and in violation of the False Claims Act. The defendants moved to dismiss for failure to state a claim under Rule 12(b)(6).

Holding: The U.S. District Court for the Eastern District of Pennsylvania granted the defendants' motion to dismiss.

The court held that the relator failed to plead a violation of the AKS because he failed to allege any facts that showed that his on-call contracts were anything but arms-length contracts for his services. The court noted that he did not allege that there was no business need for on-call surgeons or that he was compensated in excess of fair market value. Further, the court observed that the relator's conversations with Pottstown management, in which the hospital allegedly attempted to force him to divest his interest in PCSH, could not have had any bearing on the underlying purpose of the first on-call contract because those conversations occurred after the contract was already in effect. Additionally, the court recognized that the defendants were fully within their rights to terminate the first on-call contract because of the relator's financial interest in PCSH—and to terminate his employment contract when he violated the terms of the second on-call contract. The fact that the second on-call contract expressly allowed the relator to keep his financial interest in PCSH, the court determined, was inconsistent with the relator's theory that Pottstown intended to induce him to refer patients to Pottstown only. The court held that because the relator failed to plead facts sufficient to show an AKS violation, he failed to state a claim against the defendants under the FCA. The court granted the defendants' motion to dismiss.

- Opinion

U.S. ex rel. Cairns v. D.S. Med. LLC, 2015 WL 590325 (E.D. Mo. Feb. 11, 2015); 2015 WL 6300992 (E.D. Mo. Feb. 12, 2015)

The relator brought a *qui tam* action alleging that a group of defendants violated the False Claims Act by submitting false claims to Medicare and Medicaid. The government intervened. The defendants included Sonjay Fonn, a physician who had privileges to perform spinal implant surgeries at a hospital in Missouri. Generally, Fonn would inform the hospital which implants he needed to use for his surgeries and the hospital would purchase the requested devices. The hospital then sought reimbursement for the cost of the implants through Medicaid and Medicare, when applicable. Fonn formed defendant Midwest Neurosurgeons ("MWN") as his medical practice and submitted claims through MWN to Medicare and Medicaid for his professional services associated with the spinal surgeries. Fonn and his fiancé, defendant Deborah Seeger, formed defendant D.S. Medical ("DSM"), a distributor of spinal implant devices, which sold exclusively to Fonn. DSM received a commission from the manufacturer for the devices it distributed. The plaintiffs alleged that DSM rented space from MWN and that the two companies had shared employees and contractors. The plaintiffs alleged that after forming DSM, Fonn used the company as his exclusive supplier of spinal implant devices, began using the devices more often in surgeries, and began performing more of the surgeries. The plaintiffs also alleged that Fonn

and Seeger solicited and received an increase in commissions from the manufacturer for the distribution of the devices.

To be eligible for reimbursements from the government, both Fonn (on behalf of MWN) and the hospital he used signed certifications stating that they abided by all relevant Medicare rules and regulations. The plaintiffs alleged that these certifications were false because the defendants' financial arrangements violated the Anti-Kickback Statute (AKS) and the Stark Law. According to the plaintiffs, Fonn, personally and through MWN, solicited and received improper remuneration from Seeger and DSM in exchange for ordering and causing the hospital to order implant devices from DSM; Seeger and DSM paid illegal kickbacks to Fonn and MWN to induce Fonn to order more implant devices from Seeger and DSM; and the commission paid to DSM in exchange for device orders were illegal. The plaintiffs alleged that the defendants caused the hospital to submit false claims for reimbursement to the government. The plaintiffs further alleged a conspiracy among the defendants to engage in the fraudulent schemes in violation of the FCA. The defendants moved to dismiss for failure to state a claim under Rule 12(b)(6) and failure to plead with particularity under Rule 9(b).

Holding: The U.S. District Court for the Eastern District of Missouri denied the defendants' motion to dismiss.

Failure to State a Claim

The defendants argued that the plaintiffs' allegations failed because they did not allege that the reimbursement claims submitted by the hospital to Medicare and Medicaid were false because the devices and services would not have been purchased "but for the [d]efendants' kickback scheme." The court, though, determined that the plaintiffs did allege "but for" causation, as they asserted that Fonn chose the devices he used in his surgeries because of the illegal kickbacks scheme.

The defendants further argued that the plaintiffs only alleged a scheme that was "possibly" illegal, but not conduct that was "plausibly" illegal. According to the defendants, the alleged inducement and remuneration scheme was more likely the result of Fonn and Seeger's financial relationship—which the defendants argued did not violate the Stark Law, since Fonn and Seeger were not married. The court also rejected this argument, observing that although Fonn and Seeger did not technically violate the Stark Law because they were not married, their personal relationship did not "conclusively shield them" from liability under the FCA.

The court further rejected the defendants' argument that the hospital's certifications could not have been false even if the defendants violated the AKS and Stark Law. The court determined that compliance with the AKS was a condition of payment, and that seeking reimbursement for devices and services that would not have been purchased or performed but for kickbacks are false claims. The court further noted that a "non-submitting party may be liable for causing the submission of such a false claim by another party," regardless of whether the submitting party knew about the unlawful conduct.

Finally, the court rejected the defendants' argument that even if the purchases of the devices were a result of kickbacks, Fonn's professional services were not. The court explained that the services that MWS sought reimbursement for were to implant the "very devices for which Fonn allegedly accepted kickbacks." Thus, the court found, those services were the result of the same fraudulent scheme that was responsible for Fonn's selection of the manufacturer to supply the devices to DSM and involved the same underlying transaction. The court denied the defendants' motion to dismiss for failure to state a claim.

Failure to Plead Fraud with Particularity

The court held that the plaintiffs properly pled that the defendants and the hospital were required to certify that they were in compliance with the relevant laws, and that those certifications were false because Fonn was engaged in Stark Law and AKS violations. The court further noted that the plaintiffs provided an example of the certification signed by Fonn, provided bank account entries that traced the alleged illegal remuneration from DSM to Seeger and Fonn, identified particular meetings between Fonn, Seeger, and the manufacturer in which the alleged kickback agreement was reached, and alleged that Fonn selected which implant devices to use in his surgeries based on those kickbacks, and produced detailed exhibits that described specific surgeries for specific patients that resulted in allegedly false claims to the government. The court concluded that these detailed allegations were sufficient to identify the "who, what, where, when, and how" of the alleged scheme and denied the defendants' motion to dismiss for failure to plead fraud with particularity.

- U.S. Complaint in Intervention
- Opinion (Rule 9(b)
- Opinion (Rule 12(b)(6))

U.S. ex rel. King v. Solvay S.A., 2015 WL 475935 (S.D. Tex. Feb. 4, 2015)

The relators brought a *qui tam* action alleging that a drug manufacturer violated the False Claims Act by engaging in off-label marketing and paying illegal kickbacks to Medicaid Pharmaceutical and Therapeutics Committee ("P & T Committee") members in order to obtain favorable classifications for certain drugs. The relators alleged that the defendant targeted members of states' P & T Committees, paid them kickbacks and "pushed its off-label messages for its drugs in an effort to obtain placement of the drugs on state Medicaid formularies" in violation of the Anti-Kickback Statute and Stark Law. They

alleged that the defendant falsely certified compliance with the AKS and Stark Law in violation of the FCA. The U.S. District Court for the Southern District of Texas denied the defendant's motion for summary judgment. The defendant asserted several affirmative defenses. The relators moved for summary judgment on those defenses.

Holding: The district court partially granted and partially denied the relators' motion for summary judgment.

The court denied the relators' motion for summary judgment as moot with respect to several of the defenses, noting that the defendant had withdrawn those defenses. The court then considered the remaining affirmative defenses. First, the court granted the relators' motion for summary judgment on the defendant's waiver and estoppel affirmative defenses. The relators argued that, as a matter of law, those defenses were unavailable to the defendant in a suit brought on behalf of the government. The court observed that while the defendant was able to point to a few instances in which an estoppel or waiver defense could stand against the government, the defendant failed to show that those defenses could stand in this case. The court explained that if the government paid for prescriptions that represented false claims, then "the outcome impact[ed] the public fisc." The court further noted that the defendant did not cite any exceptions or present any arguments as to why an exception should apply.

Second, the court granted the relators' motion for summary judgment on the defendant's laches affirmative defense. The court rejected the defendant's argument that federal prosecutors were on notice of the defendant's alleged unlawful conduct for years prior to the filing of the *qui tam* suit, but failed to take any action. However, the court observed that there was a general rule that "laches will not lie against the government," and the defendant failed to offer any reason why an exception should apply to that rule.

Third, the court granted the relators' motion for summary judgment on the defendant's failure to mitigate affirmative defense. The relators asserted, and the court agreed, that the government did not have a duty to mitigate when fraud was alleged. The court rejected the defendant's argument that "because [FCA] liability [could] be premised on a lower standard than fraud and because government knowledge [had been] held not to establish an absolute defense to liability," the failure to mitigate defense was applicable in FCA suits. Instead, the court observed that the FCA is still an anti-fraud statute, even though the FCA does not require specific intent to defraud. Because the government was under no duty to mitigate, the court granted the relators' summary judgment motion.

Fourth, the court denied the relators' motion for summary judgment on the defendant's affirmative defense that the superseding conduct of third parties caused the government's alleged damages. The court rejected the relators' argument that the defense should be dismissed because the defendant did not plead it with particularity. The court determined that there were "instances in which the superseding conduct of third parties caused [the relators'] damages, the superseding conduct was not fraudulent, and therefore [the defendant] would not be required to plead the defense with particularity." The court allowed the defendant to proceed with this defense.

Fifth, the court denied the relators' motion for summary judgment on the defendant's learned intermediary affirmative defense—which is a doctrine that excuses a drug manufacturer from warning each patient who purchases its drug about the drug's potential dangers, as long as the manufacturer properly warns prescribing physicians. The relators argued that the learned intermediary defense could not be asserted against the government, and that there was "no causal connection between the warnings given by a prescribing physician and the [FCA] violations." The defendant countered that because the relators would not be presenting evidence of individual false claims, but instead were relying on statistical analysis and extrapolation, they should be required to account for the role of the learned intermediary. The court agreed, concluding that while this defense could not generally be used against the government, the relators should account for the role of the intermediary "given their unique theory of liability." The court held that it was premature to grant summary judgment for the relators on this issue, and denied their motion.

Lastly, the court denied the relators' motion for summary judgment on the defendant's affirmative defense that the government suffered no damages. The court agreed with the defendant that dismissing the defense prior to a full review of the evidence was "inconsistent with a full adjudication of the essential elements necessary to support the claims in this case." The court found that it was premature to grant summary judgment on the damages defense.

- Opinion

See *U.S. ex rel. Solis v. Millennium Pharms., Inc.*, 2015 WL 1405459 (E.D. Cal. Mar. 30, 2015); 1469166 (E.D. Cal. Mar. 26, 2015).

See *U.S. ex rel. King v. Solvay S.A.*, 2015 WL 338032 (S.D. Tex. Jan 23, 2015).

See *U.S. ex rel. Kester v. Novartis Pharm. Corp.*, 2015 WL 109934 (S.D.N.Y. Jan. 6, 2015).

II. JURISDICTIONAL ISSUES

A. Section 3730(b)(5) First-to-File Bar

***U.S. ex rel. Hicks v. Evercare Hosp.*, 2015 WL 452288 (S.D. Ohio Feb. 3, 2015)**

The three relators were nurses who worked for defendant Evercare Hospice, which was a subsidiary of defendant Evercare Hospital. The relators alleged that the defendants violated the False Claims Act by enrolling and re-certifying patients for Medicare hospice benefits when the defendants knew that the patients were not eligible for hospice care. Further, the relators alleged that the defendants defrauded Medicare by admitting patients without mandatory consent or power-of-attorney designations, billing for continuous care when such care was neither reasonable nor necessary, and providing inadequate services to patients. The government intervened and moved to dismiss, arguing that the first-to-file bar precluded the relators' claims.

Holding: The U.S. District Court for the Southern District of Ohio granted the government's motion to dismiss.

The government argued that another *qui tam* complaint had been filed against the same defendants in another district court and alleged the same fraudulent schemes, and thus, precluded the present relators' FCA allegations. The court agreed, and rejected the relators' argument that the government's motion was premature because the previously filed *qui tam* case could be challenged as jurisdictionally precluded or otherwise infirm. The court determined that the two complaints were sufficiently similar, and overlapped "temporally and substantively." In response to the relators' argument that if the court dismissed their case and the previously filed case was also dismissed, then the defendants would be able to escape liability, the court noted that it had reviewed the previously filed complaint and found it to be more comprehensive than the relators' complaint. In addition, the court observed that the government intervened in the earlier *qui tam* suit and filed its own consolidated complaint; thus, the government's interests in the allegations against the defendants were protected. The court granted the government's motion to dismiss.

- Opinion

See *U.S. ex rel. Moore v. Pennrose Props., LLC*, 2015 WL 1358034 (S.D. Ohio Mar. 24, 2015).

See *U.S. ex rel. Garcia v. Novartis AG*, 2015 WL 1206122 (D. Mass. Mar. 17, 2015).

B. Section 3730(e)(4) Public Disclosure Bar and Original Source Exception

***U.S. ex rel. Solis v. Millennium Pharms., Inc.*, 2015 WL 1405459 (E.D. Cal. Mar. 30, 2015); 1469166 (E.D. Cal. Mar. 26, 2015)**

The relator was a former sales representative who worked at various times for each of the defendants—three pharmaceutical companies the relator alleged violated the False Claims Act. The relator alleged that the defendants co-promoted the Integrilin for uses that were not approved by the Food and Drug Administration, and paid illegal kickbacks to physicians to induce them to prescribe the drug. According to the relator, the defendants caused physicians to improperly prescribe the drug and correspondingly to submit false claims to the government for reimbursement in violation of the False Claims Act; the reimbursement claims falsely certified that the doctors were in compliance with all relevant laws.

Integrilin was designed to reduce blood clots and helped prevent heart attacks. The relator alleged that the defendants promoted the drug for early use for patients suffering from certain types of heart conditions and other cardiovascular problems for which the drug was not approved, despite the danger to patients. He alleged that the defendants provided sales representatives with information regarding off-label uses that they were to discuss with physicians, even if the physicians did not ask about it. The defendants also allegedly identified a "key opinion leader" physician who often prescribed Integrilin for

off-label uses and used that doctor to induce others to prescribe the drug. According to the relator, through this alleged off-label promotion, the defendants caused physicians to prescribe and seek reimbursement for prescriptions that were ineligible for reimbursement, in violation of the FCA.

The relator further alleged that the defendants violated the Anti-Kickback Statute by providing grant money, honoraria, and meals to physicians in order to induce them to prescribe the drug for off-label uses.

Defendant Millennium moved to dismiss, arguing that the relator's claims were precluded by the FCA's public disclosure bar. The two other defendants, Schering-Plough and Merck, moved to dismiss the relator's claims for failure to state a claim under Rule 12(b)(6) and failure to plead fraud with particularity as required by Rule 9(b).

Holding: The U.S. District Court for the Eastern District of California granted Millennium's motion to dismiss pursuant to the public disclosure bar, but denied Merck and Shering-Plough's motion to dismiss.

Public Disclosure Bar

The court held that the relator's claims against Millenium had been publicly disclosed in five previous federal lawsuits; the relator's allegations were substantially similar to those in the prior suits, which included claims of off-label co-promotion of Integrilin and the payment of kickbacks to physicians to induce them to prescribe the drug. The prior suits also described the type of kickbacks allegedly paid to the physicians and referenced the FCA and AKS and allegations that Millennium committed fraud against the government through its off-label promotion and AKS violations. The court rejected the relator's argument that because the prior suits referenced "Subject Drugs" rather than Integrilin, they were not specific enough to constitute a public disclosure as to Integrilin. The court pointed out that the prior suits indicated which drugs were included in the "Subject Drugs" category, that Integrilin was one of those drugs, and that the choice to use a generic term rather than listing all the drugs hundreds of times throughout the prior complaints did not make the allegations any less similar to the relator's.

The court also rejected the relator's claim that he was an original source of his allegations, explaining that while he relator may have direct and independent knowledge of the subject matter of the allegedly fraudulent claims and he provided that information to the government before filing his *qui tam* action, he "had nothing to do with the initial public disclosure made in the [previous] five federal lawsuits," which were filed two years before the relator filed his complaint. The court granted Millennium's motion to dismiss.

Failure to State a Claim/ Failure to Plead with Particularity

The court found that the relator sufficiently alleged that Merck and Schering-Plough violated the FCA by knowingly engaging in improper and dangerous off-label promotion. The court held that the defendants' argument that Medicare pays a flat fee for inpatient hospital care based on broad diagnostic categories, and therefore, the use of Integrilin was irrelevant to the medical services being invoiced was a "factual defense…that [did] not change the viability of [the relator's] pleadings." The court also rejected the defendants' argument that any remuneration they provided to physicians was reasonable and did not violate the AKS. Rather, the court explained that the relator provided details regarding the compensation allegedly paid to physicians in order to induce the prescription of Integrilin and alleged that the submissions of prescriptions for reimbursement for the drug by physicians who received remuneration were false because they were influenced by the illegal payments. The court found that the relator properly alleged that the payments were a "substantial factor" in the submission of the false claims, and thus, denied the Merck and Schering-Plough's motion to dismiss.

- Opinion (Millenium)
- Opinion (Schering-Plough and Merck)

U.S. ex rel. Calilung v. Ormat Indus., Ltd., 2015 WL 1321029 (D. Nev. Mar. 24, 2015)

The relators brought a *qui tam* action against their former employer, Ormat Technologies, Inc., and its subsidiaries, alleging that the defendants fraudulently obtained millions of dollars in grant money pursuant to the American Recovery and Reinvestment Act ("ARRA"). Ormat owned and operated geothermal power plants in various locations around the globe, and its subsidiaries operated its power plants in California and Hawaii. ARRA was enacted to create jobs and to "invest in…environmental protection, and other infrastructure that [would] provide long-term economic benefits." To that end, ARRA provided grants for those engaged in developing renewable energy. These grants were intended to replace tax credits that would usually be offered to qualifying entities; entities receiving grants under ARRA could not also receive tax credits. Geothermal energy facilities were "qualified facilities," and were eligible for the grants under ARRA. The grants provided that the facilities be reimbursed for 30% of the value of the construction and operation of the property. ARRA required that the facilities be "placed in service" in 2009, 2010, or 2011. The grant money would be re-appropriated in the event that the property was disposed of or otherwise ceased to be a qualified facility within five years of the grant. ARRA also required grantees to submit status reports on a regular basis.

The relators alleged that the defendants used false information to obtain $130 million in grant money for the construction of a plant in California (the "Brawley Plant"). Specifically, the relators alleged that the defendants misrepresented the "placed in service" date by representing that the plant was placed in service in 2010 when it had actually been in service since 2008. Further, the relators alleged that the

defendants delayed submitting their application for grant funds in order to incur more expenses so that the government would award a larger amount of funds. The relators also alleged that the defendants fraudulently obtained $14.7 million in grant funds for an expansion of the Brawley Plant by overvaluing the plant and exaggerating its energy output, and by failing to report to the government the change in the plant's value due to its inability to reach projected energy outputs. The relators claimed that the defendants delayed the report so that they could avoid the five-year grant recapture period.

In addition, the relators alleged that the defendants fraudulently obtained approximately $14 million in grant funds for the expansion of a plant in Hawaii (the "Puma Plant"). The relators alleged that the defendants owned the plant for many years and decided to expand it to add additional energy output in 2010. The relators claimed that the plant was ready to produce energy in late 2010 but the defendants were waiting for the Hawaii Public Utilities Commission to approve a purchase agreement. The relators alleged that in order to obtain the ARRA grant, the defendants manipulated the process by producing energy for free in 2011, so that the plant could be considered "placed in service" that year and thus, eligible to receive ARRA funds. The relators also alleged that the defendants claimed that the expansion was a stand-alone new property when in fact it depended on the original plant's byproduct to operate. They further alleged that the defendants allocated the entire cost of drilling a new well—which would serve both the original Puma structure and the new expansion—to the expansion in order to inflate the total expenses that would be available for grant reimbursement.

The relators alleged that the defendants violated the FCA by reporting false and misleading information and by omitting material information in the ARRA grant requests, and by failing to submit reports to the government on the status of the Brawley Plant. The defendants moved to dismiss pursuant to the public disclosure bar, as well as for failure to state a claim under Rule 12(b)(6) and failure to plead fraud with particularity as required by Rule 9(b). Finally, the defendants argued that the relators' allegations should be dismissed because the FCA's tax bar provision precluded their *qui tam* claims.

Holding: The U.S. District Court for the District of Nevada denied the defendants' motion to dismiss in part and granted it in part.

Tax Bar

The court observed that the FCA includes a provision that makes it inapplicable to allegations of tax fraud. The defendants argued that this tax bar extends to actions involving the grants they received in lieu of tax credits. The court rejected that argument and found that the ARRA was not a tax program, but rather a financing program for clean energy projects that had no impact on tax liability. Moreover, the court found that the relators' claims did not depend on a violation of the Tax Code, nor did the Internal Revenue Service have any authority to recover ARRA grant money. The court rejected the defendants' argument that the section of ARRA dealing with the grants was part of the Tax Code because it was included as a note to a section of the Code and it specifically incorporated definitions from the Code. Instead, the court explained that the ARRA explicitly indicated that it was outside of the Tax Code, as it stated that grants were given *in lieu of tax credits*. The court denied the defendants' motion to dismiss on the basis of the FCA's tax bar.

Public Disclosure Bar

The defendants argued that the relators' claims were publicly disclosed in their SEC filings, including their Form 10-Ks, Form-10Qs, and Form 8K's—all of which were submitted before the relators filed their *qui tam* action. The court found that the SEC filings qualified as public disclosures under the FCA as a type of federal report which was made readily available on public, easily navigable websites.

However, the court held that the relators' claims pertaining to the "placed in service" date for the Brawley Plant was not substantially similar to the information disclosed in the defendants' SEC filings. The court observed that the public filings stated that the Brawley Plant was "substantially completed in December 2008" and that the defendants anticipated reaching "commercial operation of the power plant and sale of power in…2009." The court explained that the publicly-available information would not have alerted the government to the relators' allegations that the defendants' use 2010 as the placed in service date in their ARRA grant applications with the intent to defraud the government. Thus, the court held that the relators' allegations regarding the placed in service date of the Brawley Plant were not precluded by the public disclosure bar. Furthermore, the court found that the relators were original sources of their allegations regarding the placed in service date of the Brawley plant based on their work on the ARRA grant applications and their involvement in the discussions regarding what to include in the applications. The court explained that the relators alleged several pieces of material information that were not included in the SEC filings, such as the fact that the plant was producing energy prior to 2010 and that the plant began selling energy as early as 2008 and had earned $2.5 million by 2010.

Conversely, the court held that the relators' allegations that the defendants misrepresented the value of the plant and delayed filing their application in order to drive up reimbursable costs were substantially similar to information contained in the SEC filings—which the court determined documented the increasing costs of the plant. Specifically, the court noted that the filings disclosed that the operating costs of the plant had exceeded its revenues and that the defendants had "temporarily deferred submitting an application" for an ARRA grant while they were attempting to stabilize the energy production at the plant. Further, the court held that the relators' allegations that the defendants inflated the costs of the expansion of the Brawley Plant were also publicly disclosed in the SEC filings; the filings indicated that the fair value estimation of the plant was $23.7 million, which could have alerted the government that a grant in the amount of $14.7 million was far more than 30% of the plant's costs. In addition, the court held that the relators' claims relating to the Puma expansion had been publicly disclosed in the SEC filings; the filings stated that the expansion was placed in service in 2011 and the production wells were connected to both plants through a gathering system, and the court reasoned that one could infer that the expansion well would also be connected to both plants. Thus, the court held, the relators' allegations that the defendants misrepresented the expansion as a

stand-alone facility and that they misallocated the total cost of drilling the well to the expansion were substantially similar to the disclosures in the filings.

The court, however, found that the relators were original sources of their allegations regarding the Puma Plant expansion, noting that both relators worked directly on the application and alleged material facts not that were included in the SEC filings. The court observed that the relators alleged that in their conversations with the defendants' executives, they were told that the expansion was designed to bring the Puma plant up to its full operating energy output, rather than add additional energy output. Further, they alleged that the drilling for the new well was funded by a reserve account that had been designated for maintenance of the original plant. Additionally, the relators alleged that they spoke with management who told them that the expansion was designed to utilize the original plant's byproduct to generate power and that they discussed the factual inaccuracies included in the application with supervisors. The court found that these allegations materially added to the publicly disclosed information and served as further evidence that the expansion was not a stand-alone facility. But the court held that the relators were not original sources of their claims related to the inflated value or delay in filing the grant application for the Brawley Plant. The court determined that the relators "fail[ed] to highlight a single fact that they [knew] on their own and apart from the publicly disclosed information." Further, the court held that the relators were not the original sources of the allegations that the defendants inflated the cost estimates for the Brawley Plant expansion. The court explained that the filings stated that the defendants valued the expansion at $23.7 million, and that the relators' "ability to recognize the potential legal consequences of certain publicly disclosed transactions [did] not alter the fact that the transactions were already publicly available. The court granted the defendants' motion to dismiss these claims on public disclosure grounds.

Failure to State a Claim/Failure to Plead Fraud with Particularity

The court rejected the defendants' argument that the relators' claims should be dismissed because they failed to allege that the defendants submitted an objectively false claim. The court observed that the relators properly alleged that the defendants made knowing misrepresentations regarding the Brawley Plant's placed in service date and that if the plant was actually placed in service in 2008, then it would not have been eligible for ARRA grant funds. Additionally, the relators alleged that the defendants' alleged misrepresentations regarding the Puma expansion would also be objectively false if the expansion could not operate as a stand-alone facility. Finally, the court found that the relators' alleged that the defendants' false statements contributed to the award of ARRA grant money. The court denied the defendants' motion to dismiss for pleading deficiencies.

The court also denied the defendants' motion to dismiss the subsidiaries from the case. In reaching its decision, the court rejected the defendants' argument that the relators failed to plead that the subsidiaries engaged in any fraudulent activities, finding that the relators sufficiently alleged that those entities violated the FCA under an alter ego theory. The court explained that the relators alleged that the companies all shared common ownership, board membership, management, and resources, and that Ormat was the ultimate owner of the companies and it controlled them such that they were "mere shell corporations." Further, the court found that the relators sufficiently alleged that the subsidiaries were directly involved in the submission of the grant applications and that employees working at the subsidiaries, along with Ormat, had discretion over what was included in the applications.

- First Amended Qui Tam Complaint
- Motion to Dismiss First Amended Qui Tam Complaint
- Opposition to Motion to Dismiss First Amended Qui Tam Complaint
- Reply Supporting Motion to Dismiss First Amended Qui Tam Complaint
- Opinion

U.S. ex rel. Moore v. Pennrose Props., LLC, 2015 WL 1358034 (S.D. Ohio Mar. 24, 2015)

Two relators filed a *qui tam* case against the same defendants—construction companies performing work pursuant to a government contract. The relators alleged that the defendants submitted fraudulent bills to the government in violation of the False Claims Act. The relators had previously filed separate cases that were either dismissed voluntarily or dismissed for failure to prosecute. After they filed the current case, the defendants moved to dismiss pursuant to the FCA's public disclosure bar and its first-to-file bar.

Holding: The U.S. District Court for the Southern District of Ohio granted the defendants' motion to dismiss pursuant to the first-to-file bar.

Public Disclosure Bar

Because the relators' claims arose from defendants' conduct prior to the effective date of the 2010 amendments to the public disclosure bar, the court held that it would apply the pre-amendment language to the relators' claims. The court rejected the defendants' argument that the relators' submission of their disclosure statement to the government as part of one of the prior *qui tam* filings constituted a public disclosure of the present claims. The court explained that compliance with the FCA's statutory notice requirement "in no way qualif[ies] as a public disclosure," because there was no evidence that the information in the disclosure statement was ever disseminated further than the government. The court also rejected the defendants' argument that the previous *qui tam* complaints were public disclosures. Again, the court explained that the prior cases were filed under seal and the information in the complaints was not disclosed to anyone outside of the government. The court further rejected the defendants' argument that a public disclosure occurred when the relators discussed their claims with each other and with their attorneys, observing that those discussions did not trigger the public disclosure bar, and finding no evidence that either relator discussed the case with anyone else; the court noted that the defendants did not claim that either of the relators contacted any

newspaper or television station. Further, the court recognized that the filing of a *qui tam* complaint does not categorically prevent a relator from discussing the alleged fraud.

First-to-File Bar

The court held that the relators' claims were barred by the first-to-file provision, explaining that under the clear and unambiguous meaning of that provision, as long as another previous *qui tam* case is still pending, subsequent *qui tam* cases based on the same facts are barred. The court explained that the relators' previous *qui tam* case was still pending when they brought the current case. The court rejected the relators' argument that the previous case had been dismissed when they filed their first amended complaint in the current *qui tam* action, explaining that filing an amended complaint did not create an exception to the time-of-filing rule. The court indicated that determining jurisdiction from an amended complaint would frustrate the purpose of the FCA because it would render the pre-filing disclosure requirement meaningless and would allow relators without direct and independent knowledge of the fraud to "secure a place in the jurisdictional queue with merely skeletal allegations, only to then file an amended complaint after actually becoming an original source, and thereby trump any meritorious, related actions that were filed in the meantime." Thus, the court held that the relators' own first-filed complaint barred their present action; the present action was dismissed on first-to-file grounds.

- Opinion

U.S. ex rel. Bogina v. Medline Indus., Inc., 2015 WL 1396190 (N.D. Ill. Mar. 24, 2015)

The relator alleged that the defendant, Medline Industries—a manufacturer and distributor of durable medical equipment—violated the False Claims Act by using rebates, bribes, and kickbacks to induce physicians to purchase its products in violation of the Anti-Kickback Statute. The relator claimed that the physicians submitted false claims when they sought reimbursement from government healthcare programs because they falsely certified their compliance with the AKS. The court also alleged that one of the skilled nursing facilities that purchased Medline's products, Tutera, participated in the scheme by receiving kickbacks and then purchasing additional equipment as a result. Four years before the relator filed his *qui tam* case, another relator filed an action alleging that the defendant violated the FCA by paying kickbacks to induce physicians to purchase its products. The defendants moved to dismiss the present relator's case, arguing that his claims had been publicly disclosed in the prior suit and that he was not an original source of his allegations. The prior case settled and the news media reported the claims against the defendants and their corresponding payment of $85 million.

Holding: The U.S. District Court for the Northern District of Illinois granted the defendants' motion to dismiss.

The court did a side-by-side comparison of the allegations in the previously settled case and the claims in the relator's current case and found that the only difference between the two complaints was that the current relator specifically named and joined Tutera as a defendant. The relator claimed that he had intimate knowledge of Tutera's involvement of the scheme because he was a business associate of the company's owner for many years and after the owner died, he received certain electronically-stored information from the owner's wife that contained documentation pertaining to the fraud scheme. The relator argued that because of this personal knowledge, he was an original source of his claims, as he added details of the fraud and of the parties involved. The court held that the relator did not add sufficient details regarding the scheme such that his allegations materially added to the publicly disclosed information. The court rejected the relator's argument that the claims were not publicly disclosed because all of the parties involved were not disclosed, explaining that there need not be a disclosure of all of the specific defendants involved in the alleged fraud scheme in order for there to be a public disclosure. Moreover, the court explained that Tutera was implicated in the prior lawsuit, as the prior relator alleged that nursing facilities, including Tutera, were Medline's primary customers.

The court also rejected the relator's argument that he was an original source of his claims because he learned of the fraud through his own investigation and experience. The court noted that the relator's complaint parroted the complaint in the prior case to a great extent, and that he did not learn of the fraud through his own experience, but second hand from his former business associate many years later. The court observed that the relator never worked for Medline or Tutera, nor was he personally involved in any of the alleged fraudulent activity. The court dismissed the relator's claims with prejudice, finding that any attempt to amend the complaint to cure its deficiencies would be futile.

- Opinion

U.S. ex rel. Garcia v. Novartis AG, 2015 WL 1206122 (D. Mass. Mar. 17, 2015)

The three relators brought a *qui tam* action against their former employers and affiliates, alleging that the defendants improperly marketed the drug Xolair, and caused physicians who prescribed the drug to submit false healthcare reimbursement claims to the government. One of the relators formerly worked for

pharmaceuticals company, Novartis; the other two relators worked for another pharmaceutical company, Genentech. Both companies co-promoted Xolair, which was used to treat moderate to severe allergic asthma in patients twelve years old and older. The relators alleged that the defendants promoted the drug for off-label uses (including to treat mild asthma, for allergy symptoms that may lead to asthma, and for other allergy-related uses that did not involve asthma) and paid kickbacks to physicians (including gifts, free medical and office equipment, and other various items) in order to induce them to prescribe the drug. Further, the relators alleged that the defendants encouraged healthcare providers to submit claims for reimbursement at improper rates by advising them to use improper medical codes. In addition, the relators alleged that the defendants improperly targeted Disproportionate Share Hospitals ("DSHs") and other hospitals receiving federal funds to increase reimbursements from government healthcare programs. The defendants moved to dismiss the relators' complaint, arguing that their claims were precluded by the FCA's first-to-file and public disclosure bars, and that the relators failed to plead fraud with particularity as required by Rule 9(b).

Holding: The U.S. District Court for the District of Massachusetts denied the defendants' motion to dismiss pursuant to the first-to-file and public disclosure bars, but granted the motion to dismiss for failure to plead fraud with particularity under Rule 9(b).

First-to-File Bar

The defendant argued that a previous *qui tam* case filed by the two former Genentech employees barred the present suit, pursuant to the FCA's first-to-file rule. The court disagreed, explaining that when the first-filed case was voluntarily dismissed the courtit expressly permitted the filing of a subsequent second case.

Public Disclosure Bar

The defendants also argued that the relators' claims were precluded by the public disclosure bar, citing two earlier employment lawsuits by former employees of Genentech—including one of the relators in the instant case. The court found that while the wrongful termination cases disclosed several elements of the present *qui tam* case—including the off-label marketing allegations, the illegal kickback allegations, and the billing code allegations—those suits did not did not sufficiently disclose the essential element of the fraud against the government alleged in the present case. Further, the court found that the present *qui tam* complaint alleged critical details about the alleged unlawful practices that were absent from the wrongful termination suits, and alleged a wider-reaching scheme in terms of geographic location, time period, and types of fraud. Thus, the court found that the relators' allegations were not based on publicly disclosed information. However, the court still analyzed whether or not the relators were original sources of their claims. The court held that they were, explaining that the relators had first-hand knowledge as sales representatives for the defendants, including training and instructions in how to carry out the alleged fraud.

Failure to Plead Fraud with Particularity

The court found that while the relators alleged particularized details about the fraud scheme, they failed to connect the fraud to the submission of any particular claims to the government for reimbursement. The court noted that the relators failed to provide even a single example of fraudulent conduct resulting in the defendants' or any physicians with whom they discussed unapproved uses of Xolair receiving a reimbursement payment from a federal healthcare program. Thus, the court explained, the relators' allegations did not provide the sufficient indicia of reliability that false claims were actually submitted to the government. The court granted the defendants' motion to dismiss on particularity grounds with prejudice, noting that the relators had been given multiple opportunities to amend their complaint to cure its deficiencies, and finding that an additional amendment would be futile.

- First Amended Qui Tam Complaint
- Def. Genetech Motion to Dismiss First Amended Qui Tam Complaint
- Defs. Novartis and Roche Motion to Dismiss First Amended Qui Tam Complaint
- Opposition to Defs. Motions to Dismiss First Amended Qui Tam Complaint
- Defs. Consolidated Reply Supporting Motion to Dismiss First Amended Qui Tam Complaint
- Opinion

U.S. ex rel. Gravett v. Methodist Med. Ctr. of Ill., 2015 WL 1004679 (C.D. Ill. Mar. 4, 2015)

The relator, a former emergency room physician at Methodist Medical Center, brought a *qui tam* action against Methodist and its parent company, Comprehensive Emergency Solutions ("CES"), alleging that the defendants directed their employees to use incorrect Current Procedural Terminology ("CPT") codes for more expensive medical services than actually provided. The defendants allegedly submitted the upcoded bills to the government for reimbursement, in violation of the False Claims Act. After the relator filed his *qui tam* action, the government conducted an investigation and requested documents from the defendants containing information regarding patients, their treatment, and the CPT codes used for them. The relator subsequently amended his complaint to add examples of patients for whom he believed incorrect CPT codes were used—including patients both from when he was employed by Methodist and afterwards. The defendants moved to dismiss, arguing that the relator's claims were barred by the FCA's public disclosure rule and that the relator failed to plead fraud with particularity as required by Federal Rule of Civil Procedure 9(b).

Holding: The U.S. District Court for the Central District of Illinois denied the defendants' motion to dismiss on public disclosure grounds, but granted the motion to dismiss for failure to plead with the required particularity.

Public Disclosure Bar

The defendants argued that the relator's claims were based on publicly disclosed information revealed during the government's investigation of the *qui tam* case. Moreover, the defendants contended that because the information was taken directly from documents disclosed to the government, the relator could not qualify as an original source of his allegations. The court concluded that documents disclosed to the government during an investigation qualify as public disclosures under the FCA. The court also noted that it would not be possible for the relator to have personal knowledge of specific patients or treatments provided after his termination, noting that he provided no other basis to support a claim that he had direct knowledge of the information included on reimbursement claims submitted after his termination.

However, the court held that the relator did have direct and independent knowledge of the substance of the alleged fraud, as supported by the examples he provided of patients who were treated while he was employed by Methodist. The court further recognized that prior to filing his *qui tam* suit, the relator met with the FBI and filed a written disclosure of the information in his possession that formed the basis of his suit. Therefore, the court held that the relator satisfied the FCA's original source requirements with respect to the claims alleging fraud during his employment; the court denied the defendants' motion to dismiss those claims on public disclosure grounds.

Failure to Plead Fraud with Particularity

The court held that all of the relator's claims failed to satisfy Rule 9(b). The court discussed the thorough detail with which the relator described the alleged scheme to increase billings by manipulating the defendants' computerized systems for tracking patient care. Further, the court noted, the relator provided representative examples of patients whose treatment allegedly resulted in upcoding. However, the court explained, the relator failed to allege that any false claims were actually submitted or paid. The court observed that the relator was employed as an emergency room physician and there was no indication that he was responsible for, or had firsthand knowledge of, the defendants' actual billing practices.

The court granted the defendants' motion to dismiss with prejudice, concluding that the relator had already amended his complaint three times and that he was unable to provide sufficient detail regarding the submission of the allegedly false claims.

- Opinion

U.S. ex rel. King v. Solvay S.A., 2015 WL 925612 (S.D. Tex. Mar. 2, 2015)

The two relators were former sales managers for the defendant, a manufacturer and distributor of the drug AndroGel, which the relators alleged the defendant illegally marketed for off-label purposes. The relators claimed that the defendant promoted the drug for the treatment of "male menopause," or "andropause" in men with regular testosterone levels, but that the drug was actually meant to treat men with low testosterone. The relators further alleged that the defendant paid illegal kickbacks to physicians to induce them to prescribe AndroGel for off-label purposes, resulting in the submission of false claims to the government healthcare programs. The defendant moved for summary judgment, arguing that the relators' claims were barred by the FCA's public disclosure rule.

Holding: The U.S. District Court for the Southern District of Texas granted the defendant's motion for summary judgment.

The relators argued that their claims were not precluded by the public disclosure bar because the newspaper and magazine articles relied on by the defendants were based on the defendant's own press releases, did not highlight the off-label marketing of the drug to physicians, or mention the payment of illegal kickbacks to doctors—all of which the relators claimed were "at the core of the alleged fraud." Moreover, the relators contended that they were original sources of the information on which their claims were based. The court observed that the articles discussed the "invention" of diseases, such as male menopause and andropause, and discussed the fact that physicians were prescribing AndroGel preemptively for middle-aged men with normal testosterone levels. The articles also pointed out that off-label marketing of drugs for uses that were not approved by the government was prohibited. Further, the articles stated that scientific studies showed that testosterone levels varied widely in men and that there was "a lot of uncertainty about the effects of age-related lowering of testosterone" and many "worrisome side effects." The court held that these disclosures alone were enough to put the government on the trail of fraud, and thus, held that the FCA's public disclosure provision had been triggered. The court further found that the relators' claims were based upon the public disclosures, pointing out that the articles discussed physicians prescribing AndroGel for the treatment of andropause (which was not an approved use) and "hinted" at the kickback scheme by suggesting that physicians speaking on a panel to promote AndroGel had "financial ties" to the defendant.

The court also agreed with the defendant that the relators were not original sources of their allegations because they failed to provide the government with their information prior to filing their *qui tam* suit. The court rejected the relators' argument that they had disclosed their allegations to the government in

a meeting with the U.S. Attorney in Philadelphia, noting that the meeting took place one day prior to filing the suit and the relators did not provide the government with a copy of the complaint or a written disclosure statement. Thus, the court granted the defendants motion for summary judgment.

- Def. Motion for Partial Summary Judgment
- Rel. Opposition to Def. Motion for Partial Summary Judgment
- Opinion

U.S. ex rel. Galmines v. Novartis Pharms. Corp., 2015 WL 851837 (E.D. Pa. Feb. 27, 2015)

The relator was a former employee for the defendant, a drug manufacturer and distributor. He brought a *qui tam* action alleging that the defendant violated the False Claims Act by engaging in off-label marketing of the drug Elidel, causing physicians to submit false claims to Medicare and Medicaid for reimbursement for prescriptions of the drug for unapproved uses. He also alleged that the defendant paid kickbacks to various physicians for prescribing high volumes of Elidel, in violation of the Anti-Kickback Statute. He claimed that the defendant thereby violated the FCA by causing the physicians to submit claims containing false certifications that they were in compliance with the AKS. A discovery dispute arose between the parties wherein the relator sought discovery for conduct that occurred after the date that he filed his initial complaint. The defendant opposed the discovery request and the U.S. District Court for the Eastern District of Pennsylvania ruled that in order to obtain discovery relating to conduct that took place after the original filing date, the relator needed to allege fraudulent conduct continuing after that date. The relator moved for leave to file a fourth amended complaint ("FAC"), but the defendant opposed the motion, arguing that amendment would be futile because the new allegations were not pled with particularity as required by Federal Rule of Civil Procedure 9(b) and because the allegations were precluded by the FCA's public disclosure bar. The court previously denied the defendant's motion to dismiss on public disclosure grounds, finding that the relator was an original source of the allegations contained in his earlier complaints, even though he only asserted direct and independent knowledge of the defendant's practices that caused false claims to be presented, but not the allegedly false claims themselves. The court examined whether the new allegations in the proposed FAC were barred by the public disclosure provision and if so, whether the relator qualified as an original source.

Holding: The court granted the relator's motion for leave to file a FAC.

Public Disclosure Bar

First, the court held that the allegations in the FAC had been previously publicly disclosed, finding that the relator had already conceded the point. However, the court held that because the relator was an original source of the allegations regarding the underlying fraud scheme, he also qualified as an original source of the new allegations of continuing fraudulent conduct contained the FAC. The court rejected the defendant's argument that the relator could not have direct and independent knowledge of any alleged unlawful conduct that took place after he stopped working for the company, explaining that the defendant's reading of a strict time limitation into the original source exception "comport[ed] with neither the law nor the policy behind the False Claims Act." The court noted that the relator was not required to have firsthand knowledge of all the relevant information on which his allegations were based in order to qualify as an original source, thus, his allegations were not strictly limited to information about which he had direct and independent knowledge as long as he had direct and independent knowledge of the critical elements of the alleged fraud scheme. The court further observed that the duration of the alleged scheme goes to the question of damages, not to liability, and held that any limitations on the relator's ability to recover for periods of time other than the duration of his employment did not arise from the original source exception but were part of the requirements that the complaint be properly pled. The court deduced that requiring relators to have direct and independent knowledge of the entire time period during which fraud is alleged would create situations in which no relator could bring a *qui tam* action alleging wrongful conduct for certain time periods—noting that the public disclosure bar and the first-to-file rule prohibit cases based on the same facts but during different time periods. The court noted that adopting the defendant's interpretation of the original source exception would give defendants the incentive to fire whistleblowers immediately and then continue with their fraudulent practices after the first *qui tam* complaint was filed. Thus, the court denied the defendant's public disclosure bar challenge to the relator's motion for leave to file the proposed FAC.

Failure to Plead Fraud with Particularity

Finally, the court held that the relator properly pled his additional allegations under Rule 9(b). His supplemental allegations, the court noted, included details about how the defendant instructed its employees to market Elidel after he left the company, giving specific examples. The court concluded that taken together with the original allegations, the new allegations were sufficiently pled. The court granted the relator's motion for leave to file a FAC.

- Opinion

U.S. ex rel. McGee v. IBM Corp., 2015 WL 877458 (N.D. Ill. Feb. 26, 2015)

The relator brought a *qui tam* action alleging that a group of defendants violated the False Claims Act by conspiring to defraud the Department of Homeland Security of grant funds in conjunction with a program designed to provide specialized municipal emergency responder vehicles. The relator's company, Responder Systems, was subcontracted to work on the project. The vehicles were required to have interoperable voice, video, and data "mobile platform" systems designed to enable first responders to instantly relay mission-critical information to a centralized database in the event of a terrorist attack or natural disaster. The defendants included IBM, Johnson Controls Inc. ("JCI"), Wireless Information Technologies Enterprises ("WIT"), Technology Alternative Inc. ("TAI"), Public Safety Communications ("PSC"), and several other companies and their respective executives. TAI had designed a system similar to the one the government was aiming for, and had contacted a county official, Dudley Donelson, to request that the county apply for the DHS grant. Donelson allegedly agreed, provided that TAI include PSC, a company in which Donelson had a financial interest, in any resulting contracts awarded to TAI from the grant. TAI allegedly agreed to that condition, despite knowing that PSC was not qualified to perform the work. Donelson's county was awarded the grant, and Donelson and TAI allegedly began to search for prime contractors who would include TAI and PSC as subcontractors on the project. Concerned about PSC's lack of technical expertise, TAI and Donelson allegedly recruited WIT, a more established technology company, to work with them. WIT allegedly agreed to list PSC officers as WIT personnel and to subcontract its work to PSC in exchange for kickbacks from PSC's billings on the project. TAI, PSC, and WIT entered into a teaming agreement in which they agreed to seek work on the project rather together than submit competing bids. The relator alleged that the agreement was actually a bid-rigging agreement wherein PSC, TAI, and WIT ensured that they would work on the project through Donelson's connection with the county.

IBM bid on and was awarded the contract for Phase I as a prime contractor. The relator alleged that IBM agreed to the terms of the teaming agreement and touted TAI's mobile platform in the proposal; IBM included TAI, PSC, and WIT as subcontractors, despite knowing that the proposed platforms were not operational. IBM warranted that it would supervise all work, meet all of the obligations of the contract, that the subcontractors used were competent to perform their duties, and that it did not have any conflict of interest that could affect performance of the contract. IBM subsequently entered into a subcontract with TAI to supply, install, and maintain its mobile platform. TAI allegedly installed only 47 of the 80 platforms that were required by the contract and none were functional. Although TAI failed to perform under the contract, IBM accepted the work and paid TAI for 99% of the total contract price—the cost of which was then passed on to the government.

The relator claimed that because of TAI's inability to complete the work on the project, IBM asked the relator's company, Responder, to take over TAI's role on the project. Responder fixed the problems with the non-functional platforms that TAI had installed and installed the additional required platforms. However, the relator alleged that because IBM had already paid the money meant for that part of the project to TAI, it was unable to pay Responder. In order to pay Responder, the relator alleged that IBM submitted fraudulent bills to the government that described the work Responder performed as "maintenance" and various other line items, rather than the actual installation and repair of the platforms that TAI failed to perform. Additionally, IBM allegedly billed the government for work that PSC performed that was outside the scope of the project.

Despite knowing that PSC could not perform the work required under the contract, IBM allegedly committed to subcontracting additional work to PSC during Phase II of the project and submitted a proposal to the county stating that PSC's new design met all systems requirements. IBM's bid was accepted, but PSC failed to install functional platforms. The platforms that were installed were so fatally flawed that when IBM asked Responder to fix the problems, it declined to do so, after determining that "no amount of effort would render the Phase II design functional."

IBM was not involved in Phase III of the project. Instead JCI bid on and won the contract from the county, allegedly because of Donelson's influence. When Responder approached JCI about becoming a subcontractor on the project, JCI allegedly informed Responder that it was using "who the County told them to hire"—the same companies that had already been subcontracted on the project, including, the relator believed, PSC. The relator alleged that Phase III of the project was not completed correctly, but that JCI submitted invoices to the government that certified that the work was being performed in accordance with the contract specifications.

The relator filed a *qui tam* action alleging that the defendants conspired to, and did, violate the FCA by engaging in these practices. JCI, IBM, and individual defendant, Chin, who was president of WIT, moved to dismiss, arguing that the relator's claims were precluded under the FCA's public disclosure provision and that he failed to plead the alleged fraud with particularity as required by Federal Rule of Civil Procedure 9(b).

Holding: The U.S. District Court for the Northern District of Illinois denied IBM's motion to dismiss on all grounds. The court, though, granted JCI's and Chin's motions.

Public Disclosure Bar

The court found that the 2010 amendments to the public disclosure bar were not applicable to the relator's claims because the events that gave rise to the *qui tam* suit took place before the effective date of the amendments. Thus, the court treated the public disclosure argument as a jurisdictional challenge.

IBM and JCI claimed that the relator's allegations had been publicly disclosed through the news media and through a federal audit. The relator argued that he was an original source of any allegations that were based upon

previous public disclosures. The court first considered whether the relator's allegations were based upon the publicly disclosed information. As to JCI, the court held that the relator's allegations were substantially similar to information that was previously disclosed in news articles relating to JCI taking over the prime contract for the project from IBM and the issues the county faced during the project. The court found that the news articles discussed the same general scheme that was alleged by the relator. The court rejected the relator's argument that because JCI directly told him that it "hired who the County told them to hire," and bragged about the relationship it had with an "influential contractor," he had first-hand knowledge of the fraud and thus, his allegations were not based upon the publicly disclosed allegations. The court found that those assertions did not "substantiate an allegation of an FCA violation" or add any material information to the allegations that were previously disclosed. The court further rejected the relator's argument that his allegations were not based upon the disclosed allegations because he alleged that JCI did not successfully complete Phase III of the project. The court observed that there were numerous news articles published about the project's lack of success after JCI became involved and that the allegation that JCI was not successful did not substantiate a FCA violation or materially add to what was already disclosed. The court further held that the relator was not an original source of his allegations against JCI, explaining that he did not offer any proof that he disclosed his allegations regarding JCI to the government prior to filing his *qui tam* suit. Thus, the court held that the relator's claims against JCI were barred.

The court, though, found that the relator was an original source of the allegations against IBM, finding that he had direct and independent knowledge of the allegations against IBM and disclosed that information to the government prior to filing his complaint. The court explained that through Responder's role as subcontractor on the project, the relator personally participated in meetings with IBM, other subcontractors, and county officials, and personally participated in the installation and repair of the platforms. The relator was also privy to IBM's project related internal documents, memoranda, and correspondence related to the alleged scheme. The court also noted that the relator alleged that he had conversations with IBM employees regarding the fraudulent invoicing. Thus, the court determined that due to his personal knowledge of IBM's practices, the relator qualified as an original source of his allegations against IBM and those allegations were allowed to proceed.

Failure to Plead Fraud with Particularity

Although the court held that the relator's claims against JCI were barred, it still assessed whether those claims were pled with the required particularity. Regarding the fraudulent inducement claims, the court found that the relator failed to allege that JCI promised anything to the government that it did not intend to deliver, which induced the government to award JCI the contract for Phase III. The court rejected the relator's allegations that JCI fraudulently induced the government to award the contract by utilizing its connection with Donelson, and that JCI told the relator that it only subcontracted with parties the county told it to. The court explained that the relator did not allege that JCI made any actual promises to the government. Further, the court held that the relator did not identify who made the allegedly false statements, how they were false, when any false statements were made, or how they induced the government to grant JCI the contract.

The relator argued that JCI was involved in bid-rigging in violation of the FCA; he asserted that his allegations sufficiently stated a claim because he alleged that JCI told him that it would only hire subcontractors that the county told it to. But the court observed that those statements were not in themselves fraudulent and that even if they were, the relator failed to allege that JCI knowingly engaged in a bid-rigging scheme. The court determined that the relator attempted to "bootstrap its bid-rigging allegations that occurred prior to JCI's involvement in the project and apply them with equal force to JCI." The court found these allegations lacking under Rule 9(b).

As the court found that the relator failed to adequately plead the fraudulent inducement and bid-rigging claims, it rejected his argument that every invoice JCI submitted "must necessarily be false." Additionally, the court rejected the relator's worthless services allegations, explaining that under Seventh Circuit precedent he was required to show that the services provided by JCI were actually worthless, but that he failed to meet that standard —while he alleged that the platforms installed for the project were "non-functional" and "unreliable," he did not allege that they were of no value whatsoever. Moreover, the court dismissed the relator's allegations that JCI was involved in a conspiracy to defraud the government. The court explained that the relator failed to allege who JCI entered into an agreement with, how they decided to file false claims, who filed the claim, and how much the payment was for. Thus, the court granted JCI's motion to dismiss.

The court also held that the relator did not properly plead his claims against Chin. The court rejected the relator's argument that because Chin signed the teaming agreement, he was personally liable for WIT's alleged FCA violations. The court held that because the relator did not make any allegations regarding Chin's role in the fraud scheme, he failed to plead his claims against Chin with particularity. According to the court, the terms of the teaming agreement were not illegal or fraudulent in and of themselves, and the lack of allegations that Chin, as opposed to WIT, was directly involved in the fraudulent acts was fatal to the relator's claims against Chin. The court granted Chin's motion to dismiss.

However, the court held that the relator adequately pled IBM's involvement in the fraudulent scheme. The court noted that the relator was subject to a relaxed reading of the Rule 9(b) requirements because the relevant facts were particularly in the possession of IBM and the relator provided substantial grounds for his allegations. The court explained that because the relator's allegations were sufficient to draw a reasonable inference that IBM violated the FCA, they satisfied the requirements of Rule 9(b). Similarly, the court held that the relator sufficiently pled fraudulent inducement in violation of the FCA, observing that he pled that IBM's bid for the contracts contained knowingly false statements that fraudulently induced the government to award IBM the contract. The relator alleged that IBM employees told him that they knew that PSC could never build a functional platform, yet IBM awarded PSC the subcontract, and certified to the government that each subcontractor was "competent to perform [its] respective duties and obligations." The court found that it could reasonably infer that IBM knowingly misrepresented to the government that PSC was qualified to complete the work, and that the government relied on this representation in awarding IBM the contract. Further, the court determined that the relator pled IBM's submission of knowingly false invoices with specifity, noting that he provided specific invoice numbers, dates and amounts paid, and descriptions of the work that was billed for.

Additionally, the court found that the relator adequately pled that IBM knew that TAI was not performing under the subcontract but continued to accept and pay for the work TAI performed and then seek reimbursement from the government; internal IBM documents showed that IBM knew that only a small fraction of the platforms were working at all and that TAI "never succeeded in deploying a functional platform." The court also held that the relator properly pled that IBM participated in a conspiracy to violate the FCA. The court explained that the relator's allegations allowed it to "reasonably infer that IBM and TAI had an agreement whereby IBM would accept TAI's work, despite its nonconformance with the contract specifications, and submit claims certifying the correctness of this work to the government in order to receive repayment." The court acknowledged that the relator did not allege the specifics of the agreement between TAI and IBM, but that was the sort of information that would likely be unobtainable by the relator at the pleading stage, and the court could reasonably infer the existence of a conspiracy to defraud the government because there was "no other plausible reason why IBM would accept and pay for defective work, and then submit claims to the government falsely certifying that adequacy of the work". Further, the court found that it could reasonably infer that IBM conspired with PSC to violate the FCA for the same reasons as TAI. The court denied IBM's motion to dismiss the relator's claims.

- Def. Chin Motion to Dismiss
- Def. IBM Motion to Dismiss
- Def. JCI Motion to Dismiss
- Opposition to Defs. Motions to Dismiss
- Def. JCI Reply Supporting Motion to Dismiss
- Def. IBM Reply Supporting Motion to Dismiss
- Def. Chin Reply Supporting Motion to Dismiss
- Opinion

U.S. ex rel. Whipple v. Chattanooga-Hamilton County Hosp. Auth., 2015 WL 774887 (6th Cir. Feb. 25, 2015)

The relator alleged that the defendant, a hospital where he was previously employed as the Interim Director of Care Management, violated the False Claims Act by knowingly submitting false claims for reimbursement to the federal health care programs—including Medicare and Medicaid. Specifically, he alleged that the defendant submitted claims for inpatient care for patients who should have been billed on an outpatient basis; improperly added observation service charges for outpatient surgeries; improperly billed hemodialysis procedures as inpatient admissions; and performed carotid artery stenting without receiving authorization. The relator asserted that he discovered the fraud by reviewing billing data and patient records, observing operations, supervising patient admissions, and reviewing claims submitted to the government for reimbursement during his employment.

Before the relator brought his suspicions to the government, the U.S. Department of Health and Human Services (HHS) conducted its own audit and investigation of the defendant's billing after receiving an anonymous tip that the defendant was billing observation patients as inpatients. The government referred the matter to AdvanceMed, a private company the government hired to investigate and combat Medicare fraud. AdvanceMed conducted an investigation and reported evidence of overbilling and upcoding to the HHS Office of the Inspector General (OIG), which opened its own investigation. OIG subsequently told the defendant about its concerns, prompting the defendant to retain Deloitte Financial Services to conduct an internal investigation. Deloitte reported that the defendant had improperly billed for inpatient services and for observation services after outpatient surgeries. AdvanceMed completed its investigation and also determined that the defendant had overbilled the government on numerous occasions. OIG instructed AdvanceMed to administratively resolve the issue with the defendant, resulting in the company paying the government approximately $477,000.

The relator subsequently brought a *qui tam* action, unaware of the administrative investigation and settlement. The defendant moved to dismiss the relator's complaint, arguing that the claims were precluded by the FCA's public disclosure bar. The U.S. District Court for the Middle District of Tennessee granted the defendant's motion to dismiss, holding that the relator's allegations had been publicly disclosed through various "investigations, oversights and audits conducted by the government, consultants, attorneys and contractors." The relator appealed to the U.S. Court of Appeals for the Sixth Circuit.

Holding: The Sixth Circuit reversed and remanded the district court's ruling.

First, the circuit court held that the district court properly evaluated the defendant's motion to dismiss as a jurisdictional challenge. Next, the appeals court reviewed the substantive issues involved in the defendant's public disclosure bar challenge. The court rejected the defendant's argument that the relator's allegations were publicly disclosed because they were the subject of a government audit and investigation, and thus, the government was on notice of the fraud. The circuit court held that the district court erred in concluding that the disclosures were public "simply because [they] occurred in the course of an administrative audit of investigation." The court determined that the relator's allegations were not publicly disclosed because the information was disclosed privately and not distributed beyond the participants in the administrative audit and investigation. The court explained

that a disclosure to the government in an administrative audit or investigation did not equate to a "public" disclosure.

Further, the circuit court rejected the defendant's argument that the allegations were publicly disclosed in the administrative audit and investigation because the information was disclosed to others outside the government who were "strangers to the fraud." The defendant asserted that because AdvanceMed and Deloitte conducted the audits and investigations, the fraud was publicly disclosed. The court, however, found that though AdvanceMed was a private corporation, it was acting on behalf of the government, had an incentive to keep the information confidential. The court concluded that the disclosures to AdvanceMed did not constitute public disclosures outside the government. Additionally, the court found that the disclosures to Deloitte were not publicly disclosed because the information was disclosed during the course of the internal audit, was not released into the public domain, and Deloitte also had an incentive to keep the information confidential. The circuit court reversed the district court's decision.

- Relator-Appellant Opening Brief
- TAFEF Amicus Curiae Brief Supporting Relator-Appellant
- Defendant-Appellee Opening Brief
- Relator-Appellant Reply Brief
- Opinion (6th Cir.)

U.S. ex rel. Griffith v. Conn, 2015 WL 779047 (E.D. Ky. Feb 24, 2015)

The two relators, Jennifer Griffith and Sarah Carver, were former employees of the Huntington, West Virginia Hearing Office in the Office of Disability Adjudication and Review ("ODAR"). They alleged that Social Security lawyer Eric Conn conspired with Administrative Law Judge David Daugherty to manipulate the case assignment system in order to have Conn's cases assigned the Daugherty. The relators alleged that Daugherty would conduct "sham" proceedings and then approve the applications of almost all of Conn's clients in exchange for kickbacks, in violation of the FCA. The relators also alleged that several doctors assisted Conn and Daugherty in this scheme by fabricating medical evidence. Griffith worked as a master docket clerk in charge of keeping track of incoming cases. She alleged that her supervisor complained to her about missing information in certain cases. She further claimed that she uncovered the scheme in her investigation into the missing information and reported the issues to her supervisors. Carver worked as a senior case technician and asserted that she also observed problems with the way Daugherty handled cases. She claimed that she tracked cases through an electronic tracking system and noticed that Daugherty would change information in the system so that all of Conn's cases would be assigned to him. She also alleged that Daugherty would hear "two days of solid [Conn] cases…15 minutes apart," while most judges took over an hour to conduct one hearing.

Griffith resigned from her position after receiving a negative performance review. She alleged that her supervisor told her during the review that it was "her goal to get rid of [Griffith] by the end of that year and that there was nothing [she] could do about it." After she resigned, Griffith continued to make complaints about Daugherty's actions, including assisting an ALJ in filing a complaint with the ALJ union. She also made an anonymous phone call to the Social Security Administration's Office of Inspector General to report the "misappropriation of cases," complaining that cases were taken off the docket and assigned to other judges, decided with little or no medical evidence, and "decided favorably based on their attorney." In addition, she filed an online fraud complaint with the OIG alleging that Conn faxed lists of his cases to Daugherty before hearings and that Daugherty would pull the cases from the docket, assign them to himself, and then grant the applications with little or no evidence.

OIG contacted Griffith and Carver and the relators had several meetings with OIG agents and other government officials. They eventually filed a *qui tam* action alleging that the defendants were defrauding the government. The defendants moved to dismiss, arguing that the relators' claims were precluded by the public disclosure bar.

Holding: The U.S. District Court for the Eastern District of Kentucky granted the defendants' motion to dismiss Carver's claims but denied the motion to dismiss Griffith's allegations of conduct that took place after she quit her job as a government employee.

The relators conceded that the information had been publicly disclosed but argued that they were original sources of their allegations. The defendants conceded that the relators timely disclosed the relevant information to the government prior to filing their *qui tam* suit and that the relators had direct and independent knowledge of the information on which they based their allegations. However, the defendants argued that disclosing fraud to the government was part of the relators' jobs as government employees, thus, the relators did not voluntarily provide the information to the government and could not qualify as original sources. The court considered the definition of "voluntary" as it used in the FCA. The court rejected the relators' argument that all disclosures to the government are voluntary except those compelled by subpoena. Instead, the court concluded that "voluntary" means without any "corresponding obligation" including a job-related obligation.

The court observed that the employee requirements of the SSA include the duty to report fraud; the relators recognized that such a duty existed and that they understood that duty. The court explained that the employee manuals the relators received and read explained the duty to report fraud as a job-specific duty of their positions. Thus, the court held that neither relator could "voluntarily disclose" information to the government while they were government employees. As a result, the court dismissed Carver's claims in their entirety.

With respect to Griffith's claims, however, the court found that because she continued to report the allegedly fraudulent conduct after she resigned and no longer had a duty to report fraud to the government, the post-employment disclosures were voluntary. The court rejected the government's assertion at oral argument that the voluntariness of the disclosure was limited to the first disclosure, explaining that nothing in the text of the original source exception supported such a reading. Further, the court rejected the defendants' argument that Griffith could not be an original source because the information that she based her allegations on was learned while she was a government employee; again, the court determined that no such prohibition was found anywhere in the original source exception. The court further rejected the defendants' contention that "government employees [would] now quit their jobs in droves to file *qui tam* suits," concluding that if Congress were concerned about such a result, it could have explicitly excluded all government employees from filing *qui tam* suits. The court further observed that there was no indication that government employees would take the risk of quitting their high valued jobs "for a chance at winning the lawsuit lottery." With respect to Griffith in particular, the court acknowledged that she did not quit her job to become a whistleblower, but because she was allegedly told by her supervisors that they were trying to get rid of her as a result of her complaints regarding the fraud scheme. Thus, the court held that Griffith was an original source of the disclosures that she made after she left her job at ODAR and allowed those claims to proceed.

- Defs. Motion to Dismiss
- Relators' Opposition to Defs. Motion to Dismiss
- U.S. Statement of Interest
- Defs. Reply Supporting Motion to Dismiss
- Opinion

U.S. ex rel. Little v. Shell Exploration Prod. Co., 2015 WL 737766 (5th Cir. Feb. 23, 2015)

The relators filed a *qui tam* action alleging that defendants Shell Exploration Production Company and related entities violated the False Claims Act by depriving the United States of royalties. The relators had previously worked for the Minerals Management Service ("MMS"), an agency within the U.S. Department of the Interior that administered the defendants' leases. The relators alleged that the defendants violated MMS rules and guidelines by deducting costs of "gathering" oil—which included extracting and moving oil to a place designated by the government—from the royalty amounts they paid to the government on their leases. According to the relators, the defendants were only permitted to deduct the cost of "transportation," which included moving the oil to market, beyond the government-designated location. Thus, the relators alleged, the defendants mischaracterized gathering costs as transportation costs and deducted them illegally, in violation of the FCA. The defendants claimed that the relators' allegations were based on information that had been previously publicly disclosed in administrative hearings and rulemakings, agency reports, previous lawsuits, and a government investigation and audit. They also argued that the relators could not bring a *qui tam* case because they were government employees at the time they learned of the alleged fraud. The defendants moved for summary judgment and the U.S. District Court for the Southern District of Texas granted their motion, holding that the FCA prohibited government employees from filing *qui tam* actions and that the relators' allegations had been publicly disclosed. The relators appealed the rulings to the U.S. Court of Appeals for the Fifth Circuit. The circuit court reversed, holding that government employees can bring *qui tam* actions and that the district court applied an overly broad standard for "public disclosure;" the circuit court remanded for redetermination. On remand and in a five-page opinion, the district court again granted the defendants' summary judgment motion. The relators again appealed to the Fifth Circuit.

Holding: The Fifth Circuit reversed the district court's ruling and directed the Chief Judge of the Southern District of Texas to reassign the case to a different district judge on remand.

In its remand order, the circuit court found that the district court failed to examine the relators' allegations with the appropriate level of detail, noting that the relators provided a great deal of specifics regarding the alleged fraud scheme and concluding that "[w]hen specifics are alleged, it is crucial to consider whether the disclosures correspond in scope and breadth." At a minimum, the appeals court determined, the public disclosures were required to provide evidence of the defendants' fraudulent scheme. The circuit court had directed the district court to consider, with those more exacting standards in mind, whether the public disclosures revealed that the defendants deducted gathering expenses prohibited by the relevant regulations or alternatively, whether this type of fraud was "so pervasive in the industry that the company's scheme, as alleged, would have been easily identified." The circuit court found that, not only did the district court fail to follow those explicit instructions, but its opinion was "so broad, conclusory, and unsupported by the summary judgment record that [the circuit court was] compelled to conclude that [the district court] did not comply with [the circuit court's] opinion."

The circuit court then addressed the district court's conclusions regarding the public disclosures at issue in the case. As to the administrative hearings and rulemakings, the circuit court took issue with what it deemed an improper and cursory analysis by the district court. The district court noted that during the public comment period in response to the MMS's attempt to clarify the difference between gathering and transportation, the defendants asserted that they *should* be able to deduct the cost of gathering. The circuit court found that the district court erred when it held that this statement served as a public disclosure that the defendants *did* deduct the cost of gathering, even though MMS rejected the defendants' proposed changes. The circuit court explained that in order to serve as a public disclosure for FCA purposes, there had to be allegations of fraud and held that the defendants' "ordinary participation in the regulatory process [did] not constitute a public disclosure of later fraudulent behavior."

The circuit court also rejected the district court's finding that the relators' allegations were disclosed in an agency report the defendants submitted to the government. The appellate court determined that the district court mischaracterized what was disclosed in the agency reports. Specifically, the district court maintained that the defendants "told the United States that [they] considered gathering [to be] transportation," when the actual agency report stated only that the defendants planned to act consistently with two administrative decisions—the Auger and Mars decisions—relating to the gathering and transportation costs. While the district court characterized these decisions as holding that gathering costs could be deducted, the circuit court disagreed, and held that the decisions concerned substantially different facts from the fraud scheme that the relators alleged. The Auger decision, the Fifth Circuit explained, dealt with the defendants' request to deduct the costs of constructing a floating production platform as transportation costs; the defendants were allowed to deduct those costs because the platform was integral to the transportation system. The circuit court stated that the Auger decision did not address the allegation that the defendants mischaracterized gathering costs as transportation costs in order to deduct them. The Mars decision involved an MMS directive requiring the defendants to move oil they had already gathered to a different government-mandated storage location sixty miles away. The administrative court found that the defendants were not permitted to deduct the costs as transportation costs for such a small journey. The Mars decision did not involve the relator's allegations that the defendants were mischaracterizing gathering costs as transportation costs. Thus, the circuit court held, the defendants' agency report was not a public disclosure of the relators' allegations.

The circuit court further rejected the district court's ruling that the relators' allegations were publicly disclosed in three previous lawsuits. The appeals court explained that the first case involved the issue of whether it was legal for the defendants to deduct *any* costs from the royalties on their leases under the pre-1988 version of the regulations—regulations that were not applicable to the relators' allegations at all. The second case involved allegations that the defendants misreported the market value of off-shore oil to pay reduced royalties, which the circuit court similarly found to be completely irrelevant to the scheme alleged by the relators. The third case involved the mismeasurement of gas and the overestimation of otherwise allowable transportation costs. Once more, the circuit court held that the case did not disclose any of the relators' allegations.

The circuit court also rejected the district court's finding that a government investigation and audit into the defendants' potential improper deductions amounted to a public disclosure. The district court held that while the investigation was not public, it showed "that the other public disclosures—from lawsuits, administrative investigations, and public debate—were sufficient to alert the government about the possibility of fraud." The circuit court found that the district court's holding "disregarded the law of the case," and held that the district court should not have analyzed non-public audits and investigations in connection with the public disclosure bar.

Finding no public disclosures of the relators' allegations, the circuit court reversed the district court's ruling. The Fifth Circuit also directed the Chief Judge of the district court to assign the case to a different district judge on remand, explaining that the change was necessary because the district judge disregarded the circuit court's clear mandate and failed to apply the legal standards established in the Fifth Circuit's opinion or to address the specific questions set out in that opinion.

- Relators-Appellants Opening Brief
- Defs.-Appellees Opening Brief
- Relators-Appellants Reply Brief
- Opinion (5th Cir.)

U.S. ex rel. Morgan v. Express Scripts, Inc., 2015 WL 728029 (3d Cir. Feb. 20, 2015)

The *pro se* relator brought a *qui tam* action alleging that a group of defendants in the pharmaceutical industry inflated the price of brand-name drugs in violation of the False Claims Act. He alleged that the defendants knew that pricing source First Databank inflated its price listings for brand-name drugs, but nonetheless chose the company as their exclusive source of pricing. The relator was never employed by any of the defendants, but was a pharmacist and claimed that he discovered the scheme through his "diligence." The defendants moved to dismiss, arguing that the relator's allegations were based on publicly disclosed information. The U.S. District Court for District of New Jersey granted the motion. The relator appealed to the U.S. Court of Appeals for the Third Circuit.

Holding: The Third Circuit affirmed the district court's decision.

The circuit court explained that what the relator characterized as his "diligence" was actually an "eyeball comparison of two publicly available price listings." The court found that the relator's knowledge of the pharmaceutical industry did not make him an original source. The court further explained that the alleged scheme was widely publicized in news articles, including one that the relator sent to a colleague prior to bringing his suit. In addition, the court noted that the relator had served as an expert in previous lawsuits involving the same alleged fraud scheme. The circuit court affirmed the district court's ruling.

- Opinion

U.S. ex rel. Wilson v. Graham County Soil & Water Conservation Dist., 2015 WL 427649 (4th Cir. Feb. 3, 2015)

The relator filed a *qui tam* suit against two county soil and water conservation districts and several local and federal officials, alleging that the defendants violated the False Claims Act. The relator, a former employee of one of the conservation districts, claimed that the counties were contracted by the U.S. Department of Agriculture to perform cleanup and repair work in areas that had been damaged by extensive flooding. She further alleged that the defendants submitted false claims to the federal government for payment under the contracts—the claims were tainted by conflicts of interest and failures to seek competitive bidding, and included bills for work that was never performed. The relator further alleged that the defendants participated in a cover-up of the fraudulent billing scheme. She voiced her concerns about the alleged fraud to local officials and contacted the USDA. The relator's county commenced an investigation and hired an accounting firm to perform an audit, which revealed several potential irregularities in the county's administration of the USDA contracts. Shortly thereafter, the state issued a report following its own investigation, which identified similar problems. The USDA's Office of Inspector General then issued its own report with similar findings. The U.S. District Court for the Western District of North Carolina dismissed the relator's claims, finding that the claims were precluded under the FCA's public disclosure bar provision. The court determined that the relator's allegations had been previously publicly disclosed in publicly-available reports issued by the county and the state. The relator appealed the district court's ruling and the Fourth Circuit reversed the district court's decision, finding that the reports did not trigger the public disclosure bar because only federal reports can qualify as public disclosures. The U.S. Supreme Court granted *certiorari* and reversed and remanded to the Fourth Circuit for further proceedings, holding that the public disclosure rule also encompasses disclosures made in state and local governmental reports. The circuit court instructed the district court to make the necessary factual findings regarding the applicability of the public disclosure bar to the relator's FCA claims. The district court then held that the relator's claims were barred by the public disclosure rule, finding that the state and local reports, as well as the USDA report, had been publicly disclosed and that the relator's claims were derived from the reports. The district court also held that the relator was not an original source. The relator appealed to the Fourth Circuit.

Holding: The Fourth Circuit reversed the district court's ruling.

The circuit court found that the district court "applied an incorrect legal standard in reaching its conclusion as to public disclosure." The court concluded that in order for a disclosure to be "public" under the FCA, it must be made "to the public at large or to the public domain." The court explained that neither the state and local reports nor the USDA report was distributed to the public, and in fact, the authors of the reports limited the distribution to certain government entities. The court held that disclosure to government entities does not constitute public disclosure. The court recognized that the "government knowledge" bar had been replaced by the public disclosure bar, and *qui tam* claims were no longer barred simply because the government was on notice of the potential fraud. The court held that it did not matter whether the reports were disclosed only to state and local governments or to federal agencies as well because the "relevant information [did not] move beyond a limited sphere of government actors…" Further, the court observed that each report made clear that it was intended for official use only, and not for public dissemination. The court also rejected the defendants' argument that the reports were publicly disclosed because they would have been available to the public via a public records request, noting that the defendants failed to differentiate between information that was theoretically available and information that was "affirmatively provided to others not previously informed thereof." The Fourth Circuit reversed the district court's ruling, and held that the relator's allegations were not precluded by the public disclosure bar.

- Opinion (4th Cir.)

U.S. ex rel. Tyson v. Wells Fargo Bank & Co., 2015 WL 309636 (D.D.C. Jan. 26, 2015)

The *pro se* relator brought a False Claims Act action against Wells Fargo in an attempt to avoid foreclosure on his home. The relator did not make any claims against Wells Fargo specifically, but

alleged generally that "banks pooled mortgage loans into securities; that assignments of loans were lost; that there [were] an increasing number of inaccuracies in foreclosure cases; [and] that his mortgage loan was pooled, securitized, and the subject of a fictitious assignment." The relator contended that after seeing reports on the news about these bank practices, he was "concerned" that Wells Fargo did not have the authority to foreclose on his property. Wells Fargo moved to dismiss, arguing that the relator's claims were precluded by the public disclosure bar.

Holding: The U.S. District Court for the District of Columbia granted Wells Fargo's motion to dismiss.

The court held that the relator's claims had to be dismissed because he failed to follow the proper filing and service requirements for an FCA case, and because FCA relators cannot proceed *pro se*. The court further held that the relator's claims were based only on information in the public domain and were thus barred by the public disclosure bar. The court granted Wells Fargo's motion to dismiss.

- Opinion

U.S. ex rel. Osheroff v. Humana, Inc., 2015 WL 223705 (11th Cir. Jan. 16, 2015)

The relator operated medical office buildings in Miami and alleged that the defendants—three health clinics and several health insurers that contracted with them—violated the False Claims Act by offering impermissible gifts to patients, including transportation, meals, spa and salon services, and entertainment, in exchange for having the clinics perform their healthcare services. The allegations included details about the scheme, including types of transportation and specific meals provided, as well as dates and times of parties and other gifts provided to the patients. The realtor alleged that the defendants violated the FCA by falsely certifying compliance with the Anti-Kickback Statute and Stark Law. He claimed that he learned of the scheme when investigating into whether to open his own clinic. The U.S. District Court for the Southern District of Florida's granted the defendants' motion to dismiss on public disclosure grounds and the relator appealed to the U.S. Court of Appeals for the Eleventh Circuit.

Holding: The 11th Circuit affirmed the district court's decision.

First, the circuit court held that the FCA's amended public disclosure bar only presents grounds for dismissal for failure to state a claim—and not a jurisdictional bar, explaining that the plain language of the provision "instructs courts to dismiss an action when the public disclosure provision applies," and noting that Congress did not remove jurisdictional language from the surrounding provisions (suggesting that the public disclosure provision should be applied differently) and that the government is permitted to oppose motions to dismiss on public disclosure grounds (suggesting that the bar is no longer jurisdictional). Thus, the circuit court treated the defendants' motion as a motion to dismiss for failure to state a claim under Rule 12(b)(6). The relator alleged fraud that occurred before the public disclosure bar was amended, and argued that the new version of the provision should be applied to all the conduct he alleged, but the appeals court found that he waived this argument by not raising it in the district court; the amended public disclosure bar would only be applied prospectively.

The defendants argued that before the relator filed his *qui tam* complaint, his allegations had already been publicly disclosed in several forums, including prior *qui tam* cases and the news media. The circuit court held that regardless of which version of the public disclosure bar was applied, the prior litigation disclosed the allegations in the relator's complaint, since the prior cases alleged that the defendants provided food, entertainment, transportation, and haircuts to patients in exchange for visits to the defendants' clinics. In addition, the court agreed with the defendants that the relator's allegations had been publicly disclosed in the news media, explaining that articles in the local newspapers disclosed that the defendants provided free food and entertainment to patients, including one article that noted that "patients [got] the Ritz-Carlton treatment" and "everything [was] paid for by taxpayer dollars." The appellate court also observed that the clinics' own websites and newspaper advertisements promoted free transportation, entertainment, and food for patients who visited. The 11th Circuit held that the websites and advertisements were public disclosures under either the pre-amendment or post-amendment FCA.

The circuit court rejected the relator's argument that his allegations were not "based on" or "substantially similar to" the information that was publicly disclosed because that information did not allege any wrongdoing. The court noted that some of the articles did include specific allegations of wrongdoing; moreover, the crux of the relator's allegations—that the clinics provided free services to patients that visited the clinics—was publicly disclosed in the advertisements and newspaper articles. The court held that the information disclosed was "sufficient to raise an inference of fraud."

The circuit court also rejected the relator's argument that he was an original source of his allegations because he conducted his own investigation. While the court found that the complaint contained some details that were not present in the public disclosures, such as the type of food and transportation provided and the price or frequency of the services, it held that the information in the complaint did not materially add to the public disclosures. Thus, the 11th Circuit affirmed the district court's decision.

- Relator-Appellant Opening Brief (11th Cir.)

- Defendant-Appellee Pasteur Med. Ctr. Opening Brief (11th Cir.)
- Defendants-Appellees Humana, CarePlus, and CAC-Florida Opening Brief (11th Cir.)
- Relator-Appellant Reply Brief (11th Cir.)
- Opinion (11th Cir.)

See *U.S. ex rel. Hagerty v. Cyberonics, Inc.*, 2015 WL 1442497 (D. Mass. Mar. 31, 2015).

See *U.S. ex rel. Gohil v. Sanofi-Aventis, Inc.*, 2015 WL 1456664 (E.D. Pa. Mar. 30, 2015).

See *U.S. ex rel. Rockey v. Ear Inst. of Chicago, LLC*, 2015 WL 1502378 (N.D. Ill. Mar. 25, 2015).

See *U.S. ex rel. John v. Hastert*, 2015 WL 1006852 (N.D. Ill. Mar. 4, 2015).

See U.S. ex rel. *Kester v. Novartis Pharm. Corp.*, 2015 WL 109934 (S.D.N.Y. Jan. 6, 2015).

III. FALSE CLAIMS ACT RETALIATION CLAIMS

Merritt v. Mountain Laurel Chalets, Inc., 2015 WL 1431165 (E.D. Tenn. Mar. 27, 2015)

The plaintiffs, Melinda Merritt and Benjamin Olivas, brought retaliation claims under the False Claims Act against their former employer, Mountain Laurel Chalets, and its parent companies. Mountain Laurel managed and rented chalets in the Smoky Mountains.

The plaintiffs alleged that the defendants engaged in several schemes to defraud the government in violation of the FCA. They claimed that Merritt discovered that Mountain Laurel employed an undocumented worker and paid her via a shell corporation. They said that Merritt protested the undocumented worker's employment on several instances to her supervisors and co-workers, and filed anonymous complaints with the Internal Revenue Service and Immigration and Customs Enforcement. One of the agencies contacted Mountain Laurel, after which Merritt alleged that management began to treat her poorly and became "cold and difficult toward her." Olivas found out about the undocumented worker and allegedly told management that "he would not accept the risks of falsely paying such an employee." The plaintiffs were subsequently fired; they brought retaliation claims under the FCA. The defendants moved to dismiss for failure to state a claim under Rule 12(b)(6).

Holding: The U.S. District Court for the Eastern District of Tennessee denied the defendants' motion to dismiss.

The court found that the plaintiffs sufficiently pled that they engaged in protected activity under the FCA. The court noted that Olivas told management that he would not take the risk of fraudulently paying the undocumented worker and that such employment was illegal. Merritt also protested the employment to management, informing them that the employment of an undocumented worker was wrong, and reporting her concerns to the IRS and ICE. The court further found that the defendants were aware of the plaintiffs' protected activity because the plaintiffs told management directly about their concerns. As a result, the court denied the defendants' motion to dismiss.

- Opinion

Arthurs v. Global TPA, LLC, 2015 WL 1349986 (M.D. Fla. Mar. 25, 2015)

The plaintiff brought a retaliation claim under the False Claims Act against his former employer. The defendant was a private Health Maintenance Organization health plan that contracted with the Medicare Advantage program to provide plans to eligible Medicare beneficiaries. For each person the defendant enrolled, it received between $700 and $1,200 from the government. The defendant required its sales representatives, including the plaintiff, to sign a "commitment to compliance" which mandates a "zero

tolerance" policy for noncompliance with Medicare regulations. The plaintiff alleged that the defendant violated those regulations by purchasing "age-in" lists that identified people who had recently become eligible for Medicare, and using the lists to make prohibited, unsolicited contact with those people in an attempt to enroll them in the plans. He also alleged that the defendant directed its sales representatives to improperly upsell current members for additional services after identifying them through confidential medical records. In addition, he alleged that the defendant provided unapproved marketing materials to its sales representatives and directed them to make unsolicited contact with former members, all in violation of Medicare regulations. He claimed that these regulatory violations, coupled with the defendant's false certifications of compliance with all Medicare regulations, resulted in violations of the FCA.

The plaintiff alleged that he complained about the Medicare regulation violations to his supervisors on many occasions, but was ignored. He also claimed to have requested the contact information for the defendant's Medicare liaison, but that the defendant refused to give it to him. Additionally, he allegedly discussed the issues with the defendant's outside counsel. At some point he injured his back and had to go on medical leave. During that time, the defendant allegedly asked him to manage an event at a local pharmacy because it had no one else who could. The plaintiff claimed that he maintained the defendant's table at the event for fifteen minutes, as required by Medicare regulations, but the pain became too great and he had to leave. Afterwards, his supervisor called him and admonished him for failing to maintain the table at the event. She allegedly claimed to have come into the pharmacy to check on him and found he was not there. Surmising that he had been set up because of his complaints regarding the Medicare violations, the plaintiff called human resources and complained about his supervisor's actions. Two days later, he was fired. He subsequently brought a retaliation claim under the FCA. The defendant moved to dismiss for failure to state a claim under Rule 12(b)(6).

Holding: The U.S. District Court for the Middle District of Florida denied the defendant's motion to dismiss.

The defendant argued that the plaintiff's complaints about the defendant's alleged Medicare violations could not constitute protected activity under the FCA because he did not allege any fraudulent claims for payment; rather, his allegations consisted of "mere regulatory transgressions outside of the scope of the FCA." The court disagreed, and indicated that the defendant's participation in the Medicare Advantage program was "conditioned as a matter of law on its compliance with Medicare's marketing regulations." Although the plaintiff did not allege the submission of specific claims for payment, the court surmised that the defendant submitted at least one claim for payment during the period of time that the plaintiff alleged it was violating the regulations. Thus, the court found that it could reasonably infer that the plaintiff's conduct constituted protected activity under the FCA. The court denied the defendant's motion to dismiss.

- Qui Tam Complaint
- Motion to Dismiss Qui Tam Complaint
- Opposition to Motion to Dismiss Qui Tam Complaint
- Opinion

U.S. ex rel. Todd v. Fidelity Nat'l Fin., Inc., 2015 WL 1218385 (D. Colo., Mar. 13, 2015)

The relator worked for the defendant, Fidelity National Title Insurance Company, a subsidiary of defendant, Fidelity National Financial, Inc. Both defendants provided title insurance and closing services for real estate transactions, and Fidelity National Title provided title services in connection with the sale of properties by Freddie Mac. The relator alleged that the defendants defrauded Freddie Mac by charging for full and reasonable title searches, while actually providing "worthless" title searches. The relator alleged that Freddie Mac was a government entity due to, among other things, the large amount of government funding it received; and thus, the defendants violated the False Claims Act by overcharging the government for the title searches. He also alleged that he was retaliated against because of his whistleblowing activities. The U.S. District Court for the District of Colorado dismissed the realtor's FCA fraud allegations, holding that Freddie Mac was not a government entity, and therefore, frauds against Freddie Mac do not provide a basis for FCA liability. However, the court allowed the relator's retaliation claims to proceed. The defendants moved for summary judgment on those claims, arguing that they failed as a matter of law and were barred by the statute of limitations.

Holding: The court denied the defendants' motion for summary judgment.

The court rejected the defendants' argument that because the relator's fraud allegations were dismissed, he could not have been engaged in protected activity under the FCA. The court noted that the issue of whether Freddie Mac was a government entity was a "close question," and that given the nature of the fiduciary and financial relationship between Freddie Mac and the government, it was reasonable for the relator to believe that the FCA was applicable.

Additionally, the court rejected the defendants' argument that the relator's retaliation claims should be governed by the pre-2010 version of the FCA (which did not include a statute of limitations provision)—and should be only two years. The court noted that the 2010 amendments to the FCA instituted a 3-year statute of limitations period for retaliation claims. The court further noted that although the relator filed his suit after the amendment, his allegations of retaliation pre-dated the amendments. Ultimately, the

court determined that because the addition of the limitations period in the amendments was "quintessentially procedural," the amended version of the FCA applied to the relator's claims. Consequently, the court denied the defendants' motion to dismiss.

- Opinion

U.S. ex rel. Thorpe v. GlaxoSmithKline PLC, 2015 WL 996433 (D. Mass. Mar. 6, 2015)

The relator was a former pharmaceutical sales representative for the defendant, a pharmaceutical manufacturer and distributor. He alleged that he was retaliated against in violation of the False Claims Act after voicing his concerns to the defendant's CEO about the company's potential off-label marketing. The relator had a history of behavioral problems during his tenure with the defendant. He threatened his co-worker and supervisors with violence on several occasions and was placed on administrative leave after an incident at a conference in which several co-workers heard him making violent threats against several supervisors. During the investigation into the relator's statements at the conference, the defendant discovered that the relator had been arrested for driving under the influence and that he failed to notify the defendant of his arrest, in violation of company policy. The relator refused to meet with the defendant to discuss the investigation into his actions, and was terminated. He then brought a retaliation claim against the defendant, alleging that he had been fired for his participation in the investigation into the defendant's potential off-label marketing. The defendant moved to dismiss for failure to state a claim under Rule 12(b)(6).

Holding: The U.S. District Court for the District of Massachusetts granted the defendant's motion to dismiss.

The court observed that there was "no dispute that [the relator] was engaged in protected activity, that [the defendant] was aware of that activity," and that the relator was fired shortly after "implicit confirmation" to the defendant that he was a *qui tam* relator. However, the court determined that the defendant gave substantial non-retaliatory reasons for the relator's termination, including his erratic behavior and verbal threats, his failure to disclose his arrest to the defendant in violation of company policy, and his refusal to participate in the defendant's internal investigation. The court held that the relator could not meet his burden of showing that but for his whistleblowing activity, he would not have been terminated, and granted the defendant's motion to dismiss.

- Opinion

U.S. ex rel. Lampenfeld v. Pyramid Healthcare, Inc., 2015 WL 926154 (M.D. Pa. Mar. 4, 2015)

The plaintiff brought a retaliation action under the False Claims Act against a group of defendants, including Pyramid Healthcare, a for-profit corporation that operated drug and alcohol treatment facilities, and its parent company. The plaintiff was employed at Pyramid as a nurse and "Detoxification Program Director." She alleged that she complained several times to her supervisors that defendant Brett Scharf, a doctor at Pyramid, was billing government healthcare programs for patient assessments and medical examinations that were never actually performed, in violation of the FCA. She also complained that Scharf provided substandard medical care to patients and endangered patient safety. Shortly after voicing her concerns, she was terminated, allegedly for making false or malicious statements regarding Scharf and for insubordination. The defendants moved to dismiss the retaliation claims against Scharf for failure to state a claim under Rule 12(b)(6).

Holding: The U.S. District Court for the Middle District of Pennsylvania granted the motion to dismiss.

The defendants argued that the claims against Scharf should be dismissed because, as a matter of law, there could be no individual liability for retaliation claims under the FCA. The court noted that circuits were split as to whether individuals could be held liable under the FCA's anti-retaliation provision. The court further determined that the 2009 amendments to the provision were intended to extend protection under the statute to a larger group of plaintiffs—not to extend liability to a larger group of defendants. Therefore, the court found that individual supervisors could not be held liable for retaliation under the FCA; since the relator was employed by Pyramid and not Scharf, her claims against Scharf failed.

- Opinion

Howell v. Town of Ball, 2015 WL 920632 (W.D. La. Mar. 3, 2015)

The plaintiff filed a retaliation claim under the False Claims Act, alleging that his former employer, the Town of Ball, terminated his employment due to his role as an FBI informant in an investigation that led to the arrest and conviction of the town's mayor. The defendant contended that while it was aware of the plaintiff's role in the investigation, the termination was based solely on the recommendation of the

chief of police following an incident of insubordination—not for any purported whistleblowing activities. The defendant moved for summary judgment.

Holding: The U.S. District Court for the Western District of Louisiana denied the defendant's motion for summary judgment.

The court noted that the town aldermen were required to conduct an independent investigation of the chief's recommendation and the issues surrounding the decision to terminate the plaintiff's employment. Instead, after the executive session in which the police chief proposed the plaintiff's termination, the alderman immediately convened a town council meeting and voted unanimously to adopt the chief's proposal. The relator alleged that the aldermen acted as a "cat's paw" for the retaliatory animus held by the chief of police and the mayor of the town against him, and the court found that he sufficiently alleged that theory of liability. Thus, the court explained, the burden shifted to the defendant to show that there was a legitimate reason for the plaintiff's termination. The court found that the defendant did offer a reason—insubordination. Thus, the court indicated that the burden shifted back to the plaintiff to show that his role as an informant was the "but for" cause of his termination. The court found that the plaintiff satisfied that showing, as he alleged that another employee was directed by the mayor to falsify a complaint against him, and that the police chief made several remarks and took various actions against him the mayor and police chief became aware of the plaintiff's participation in the FBI investigation. The court denied the motion for summary judgment.

- Joint Defs. Motion for Summary Judgment
- Def. Hebron Motion for Summary Judgment
- Opposition to Joint Defs. Motion for Summary Judgment
- Opposition to Def. Hebron Motion for Summary Judgment
- Joint Defs. Reply Supporting Motion for Summary Judgment
- Def. Hebron Reply Supporting Motion for Summary Judgment
- Opinion

U.S. ex rel. Ray v. American Fuel Cell & Coated Fabrics Co., 2015 WL 874824 (W.D. Ark. Mar. 2, 2015)

The relator, who formerly worked as a process engineer, sued his former employer, alleging that the company failed to comply with the provisions of a contract with the government to manufacture specific types of fuel cells; specifically, the relator claimed that the defendant made the devices in conditions where the humidity was too high, resulting in faulty fuel cells. The relator alleged that the defendant's failure to get the government's approval for the deviation in humidity resulted in false claims being submitted to the government. He alleged that he was terminated for voicing his concerns about the humidity levels, in violation of the False Claims Act. According to the relator, he discussed his concerns about the issue several times with management, and was reassigned shortly thereafter. As he believed that he would be terminated from his job, in order to maintain records of his work, he emailed himself a large volume of company documents—many of which contained proprietary information. He maintained that he did not take any proprietary documents on purpose, but was only keeping a record of his work for future employment. The defendant terminated the relator after he refused to sign a new non-disclosure agreement that contained more stringent language the defendant developed in response to the relator taking the documents. The defendant moved for summary judgment on the relator's retaliation claim.

Holding: The U.S. District Court for the Western District of Arkansas granted the defendant's motion for summary judgment.

The relator contended that conducting the humidity studies and sending the emails containing relevant documents to himself constituted protected activity under the FCA because it was an act in furtherance of uncovering fraud against the government. The court disagreed, and held that the humidity studies were part of the relator's job duties and that the relator himself admitted that he only took the documents in order to have examples of his work for future employers. The court also found that the relator's claims about the humidity levels could not have reasonably led to a viable FCA action, and that he never indicated to the defendant that failing to comply with the humidity levels dictated by the contract violated any law or constituted fraud against the government. The court explained that the relator never complained to the defendant that it had actually sold defective fuel cells to the government. Further, the court noted that even if the relator was engaged in protected activity, there was no indication that the defendant had any knowledge of that activity. Finally, the court explained that the relator did not show that he was retaliated against in response to his purported protected activity. Management never told the relator not to discuss the humidity issues, and the court found that the defendant gave viable reasons for the relator's termination after he took the documents in violation of the company's non-disclosure policy, and after he refused to sign a new non-disclosure agreement after he took the documents.

- Def. Motion for Summary Judgment

- Rel. Opposition to Def. Motion for Summary Judgment
- Def. Reply Supporting Motion for Summary Judgment
- Opinion

Mikhaeil v. Walgreens, Inc., 2015 WL 778179 (E.D. Mich. Feb. 24, 2015)

The plaintiff filed a suit against the pharmacy she formerly worked for as a pharmacist, alleging that she was terminated for her whistleblowing activities. She pled claims under the retaliation provision of the False Claims Act as well as several common law doctrines. According to the plaintiff, she informed her supervisor on several occasions that her manager was committing fraud by advancing medication to patients at no charge; she alleged that she sent an email to the supervisor containing pictures of the relevant prescriptions and asking: "Is this legal? What about DEA laws?" In addition, she claimed that she informed her supervisors that the manager had failed to reverse an incorrectly filled prescription, resulting in Medicare being billed twice for the same prescription. The plaintiff claimed to have told her supervisor that this constituted fraud, but her supervisor ignored her warnings.

According to the defendant, throughout the plaintiff's employment, she failed to submit reports or documentation regarding the alleged prescription errors through the defendant's in-house "STARS" system. During a meeting with her supervisor regarding her fraud concerns, the plaintiff received several warnings about her failure to submit STARS reports, but she was not reprimanded. The defendant also stated that the plaintiff's conduct raised concerns of a possible privacy violation—she emailed pictures of prescriptions to her supervisor—and that she was suspended pending an investigation and given a final warning regarding her failure to follow protocol. She later again failed to submit STARS reports and was terminated from her job. The defendant moved for summary judgment on the plaintiff's FCA retaliation claim.

Holding: The U.S. District Court for the Eastern District of Michigan denied the defendant's motion for summary judgment.

First, the court considered whether the plaintiff was engaged in protected activity under the FCA. The court observed that the plaintiff's warnings related to prescription violations and potential Medicare fraud, and thus, constituted protected activity. The court rejected the defendant's argument that the plaintiff's conduct was not protected activity because she did not present any evidence of actual fraud. The court determined that the plaintiff investigated the matters herself and presented her supervisors with specific prescription numbers that she was concerned about. The court held that, regardless of whether or not she was correct in her accusations, she was not precluded from presenting a retaliation claim.

Next, the court determined that the defendant was aware of the plaintiff's protected activity because she reported her concerns directly to her supervisor. The court rejected the defendant's argument that the plaintiff's reports failed to provide notice because reporting potential fraud was part of her job duties. The court found that the plaintiff's job description did not necessarily include reporting fraud, but held that even if it did, she was not required to inform the defendant that she was going to bring an FCA action in order for her conduct to be protected; the court observed that the retaliation provision of the FCA has been amended and no longer requires plaintiffs to act "in furtherance of an action" in order to be protected. By reporting her concerns to her supervisor, the court held, the plaintiff satisfied the notice element of her retaliation claim.

Last, the court considered whether there was a causal connection between the plaintiff's protected activity and her termination. While she received several warnings during the time she was employed by the defendant regarding the STARS reports, the plaintiff alleged that after she reported the potential fraud to her supervisor, her work—particularly her STARS reports—became much more heavily scrutinized. In fact, her manager testified that the defendant knew about the plaintiff's failure to submit STARS reports but did not have any concerns about it prior to the meeting between the plaintiff and her supervisor about the fraud concerns. The plaintiff was terminated two weeks after that meeting. The court held that the plaintiff properly established a causal connection between her protected activity and her termination. Consequently, the court denied the defendant's motion for summary judgment.

- Def. Motion for Summary Judgment
- Opposition to Def. Motion for Summary Judgment
- Def. Reply Supporting Motion for Summary Judgment
- Opinion

Lee v. Computer Sci. Corp., 2015 WL 778995 (E.D. Va. Feb. 24, 2015)

The plaintiff brought a claim under the retaliation provision of the False Claims Act, alleging that his former employer, a government contractor that provided the U.S. Department of Defense with information technology support in Iraq and Afghanistan, terminated him because of his whistleblowing activity. The defendant was the prime contractor for the Gyrocam Vehicle Optics Sensor System ("VOSS") at a base in Pakistan; Lockheed Martin was a subcontractor. The plaintiff served onsite as a logistics associate. He alleged that he witnessed Lockheed employees using equipment when they were not supposed to and for unauthorized uses. He further claimed that the employees were

"cannibaliz[ing]" parts from damaged field cameras. He alleged that he reported these issues to his supervisors and was ignored, however he did not report the issues to Army personnel or file an actual *qui tam* suit related to the claims. After he reported the issues to his supervisors, he alleged that the Lockheed employees began to harass him. Shortly thereafter, the Lockheed employees submitted a formal complaint against the plaintiff, stating that he discriminated against employees by race, was manipulative, used his connections to take time off in violation of policy, misused company vehicles, and failed to properly communicate with the staff. He was subsequently suspended and removed from his post pending an investigation into the Lockheed employees' complaint. The defendant's human resources staff investigated the claims and found that the plaintiff created a hostile work environment; he was subsequently terminated. The plaintiff brought a retaliation claim under the FCA and the defendant moved for summary judgment.

Holding: The U.S. District Court for the Eastern District of Virginia granted the defendant's motion for summary judgment.

The court determined that the plaintiff did not take any actions in furtherance of an FCA claim, noting that the plaintiff testified that he had not filed any action or claim, nor did he threaten to report the defendant's actions to the government. In fact, the court observed, the plaintiff testified that he never said that the defendant committed fraud or presented any false claim to the government. Further, the court concluded that the plaintiff's allegations were not sufficient to establish any fraudulent acts, and even if they were, reporting fraud was part of the plaintiff's job description. The court granted the defendant's motion for summary judgment.

- Opinion

Lavin v. United Techs. Corp., 2015 WL 847392 (C.D. Cal. Feb. 23, 2015)

The plaintiffs, Fernando Lavin and German Sandoval, were former employees of Goodrich, which designed and manufactured systems and components for aircraft and helicopters. United Technologies Corporation ("UTC") acquired Goodrich in 2012. The plaintiffs worked on a confidential product pursuant to a government contract. They brought retaliation claims under the False Claims Act, alleging that they were terminated for their whistleblowing activities. Specifically, they claimed that they were terminated for promoting a cost-savings idea which included changing the manufacturing process for one of the defendants' products (the "machining idea"). The defendants allegedly suppressed the machining idea in order to force the government to pay more for their products.

After the machining idea was rejected by the defendants, Lavin alleged that he continued to promote the idea and faced "backlash and threats" as a result. He claimed that he was warned by "senior employees" that he would be fired if he continued to advocate for the machining idea. He claimed that he was required to go on leave several times due to health issues. According to the defendant, Lavin also had many unexcused absences for which he received warnings. After Lavin received a final warning for unexcused absences, he continued to show up late for work or not show up at all, and he was terminated. Lavin claimed that his termination was actually in response to his advocacy for the machining idea.

Sandoval was also involved in promoting the machining idea and alleged that he faced retaliation and threats as a result of his advocacy for the idea. Sandoval also had serious attendance issues which he attributed to emotional and family problems, including a divorce and custody fight. He asserted that he was required to go to court often during work hours and "typically" informed his manager if he had to go to court. While Sandoval claimed that his absences were approved, he alleged that his supervisor gave him warnings for his absences and demoted him to the lowest position for someone with his tenure at the company. He asserted that his demotion was due to his promotion of the machining idea, and not because of his absences. After he received a final warning for his absences, he was suspended and subsequently terminated for arriving late to work. Sandoval alleged that he was terminated because of his promotion of the machining idea rather than for his absences.

The defendants moved for summary judgment on the plaintiffs' claims, arguing that the plaintiffs failed to state a claim.

Holding: The U.S. District Court for the Central District of California granted the defendants' motion for summary judgment.

The court determined that while the plaintiffs repeatedly told their supervisors that the machining idea would be more cost-effective, there was no indication that they ever told the defendants that they believed the rejection of the idea amounted to illegal activity. Further, the court explained, it was "far from clear" that the plaintiffs' complaints regarding the defendants' failure to implement an arguably cheaper machining process amounted to a false claim under the FCA. The court found no evidence of pretext related to the plaintiffs' termination for unexcused absences, and granted the defendants' motion for summary judgment.

- Opinion

***U.S. ex rel. Johnson v. Kaner Med. Group, P.A.,* 2015 WL 631564 (N.D. Tex. Feb. 12, 2015)**

The relator alleged that the healthcare provider she formerly worked for and its owners violated the False Claims Act by submitting false claims to Medicare and Medicaid. As the defendants' former patient financial counselor, the relator's responsibilities included reviewing and explaining patients' insurance coverage and medical records. She alleged that the defendants submitted claims to the government for medical services provided by unlicensed medical assistants, but which falsely represented that the services had been provided by licensed doctors. In addition, she alleged that the defendants unnecessarily collected copays from patients who had Medicare as their primary insurance and Medicaid as their secondary insurance. By failing to return those copays, the relator alleged that the defendants violated the reverse false claims provision of the FCA. Finally, she alleged that she was terminated in response to her whistleblowing activities, which included sending an email to her supervisor complaining about the defendants' billing practices and failure to refund the unnecessarily collected copays. The United States District Court for the Northern District of Texas denied the relator's motion for summary judgment and denied the defendants' request to *sua sponte* grant summary judgment in their favor in the event the court ruled against the relator. Instead, the court concluded that it should "*sua sponte* consider that defendants filed a motion for summary judgment, and, after all parties...had an opportunity to make appropriate supplementation of the summary judgment record, make a ruling on such a *sua sponte* motion." After both parties supplemented the record, the court again considered the relator's motion for summary judgment as well as the defendants' motion for summary judgment.

Holding: The court granted the defendants' motion for summary judgment.

The court rejected the realtor's argument that the defendants' motion should fail because the majority of the cases cited by the defendants in which defendants' motions for summary judgment were granted were cases decided prior to the Fraud Enforcement and Recovery Act of 2009 (FERA)—which amended the FCA—and therefore, were no longer good law. The relator argued that the FERA amendments changed the FCA's knowledge requirement and eliminated the requirement of proof of specific intent to defraud. The court explained that the FCA never included a specific intent to defraud requirement, and that FERA only changed the structure of the wording of the statute. The court further observed that while the relator provided a large volume of claim forms that she alleged were false, she did not provide any evidence that the defendants submitted any false claim forms with the requisite scienter under the FCA. The court explained that the relator did not present any evidence that the medical assistants involved with the services at issue actually lacked the requisite supervision; therefore, there was no evidence that the defendants sought payments from Medicare or Medicaid to which they were not entitled. The court granted the defendants' motion for summary judgment related to the relator's fraud claims.

Turning to the relator's reverse false claims allegations, the court held that those allegations failed because the relator did not present any evidence that the defendants collected any unnecessary co-pays or improperly failed to refund them—certainly, she did not present any evidence of the requisite scienter. Thus, the court granted summary judgment to the defendants on the reverse false claims allegations as well.

Finally, the court granted the defendants' motion for summary judgment on the realtor's retaliation claim. The court explained that the relator did not present any evidence that she was engaged in protected activity prior to her termination or that the defendants had knowledge of any such protected activity. The court found that the email the relator sent to her supervisor regarding her concerns about the defendants' billing practices was directly related to her duties of employment, and thus, was not sufficient to establish that the defendants were on notice of any protected whistleblower activity.

- Opinion

***Cook v. Harrison Med. Ctr.,* 2015 WL 509816 (W.D. Wash. Feb. 6, 2015)**

The plaintiff was a former billing manager for the defendant health care provider's home health division; she had several decades of experience and her responsibilities included using software to prepare the defendant's Medicare billings. Shortly after she began working for the defendant, she received pay raises and positive reviews praising her experience and resourcefulness. A few months later, she began investigating billing irregularities that she maintained were potential Medicare fraud violations. She related her concerns to the customer service representatives for the billing software, and learned that while her supervisor allegedly instructed her to run a certain billing process in the software every day, the process was only supposed to be run at the end of the month. After the plaintiff reported this irregularity to her supervisor, she alleged that the supervisor called a meeting with human resources. During that meeting, the supervisor informed the plaintiff that the two reports generated by the software were supposed to match, but they did not. The plaintiff alleged that her supervisor blamed her for the inconsistency and informed her that she had "probably committed Medicare fraud." Immediately following the meeting, the defendant suspended the plaintiff and fired her a short time later. She requested an explanation for her termination and the defendant responded that an external audit had

been conducted which revealed that she lacked the analytical expertise needed by an experienced billing manager.

It was undisputed that the defendant did not actually overcharge the government, but that the inconsistent reports were the result of improperly running the process in the billing software. The plaintiff brought a retaliation claim under the FCA. The defendant moved for summary judgment in its favor, arguing that the realtor was not engaged in protected activity under the FCA.

Holding: The U.S. District Court for the Western District of Washington denied the defendant's motion for summary judgment.

The court rejected the defendant's argument that the plaintiff could not have been engaged in protected activity because she did not present any evidence that the defendant was violating the FCA. The court found that the plaintiff showed that she had a good faith belief that the billing irregularities resulted in the defendant overcharging the government. The court observed that the plaintiff asserted that though the irregularities stemmed from running the software process too often, she was told by the defendant to run the process every day. The court concluded that she had a good faith belief that the defendant was potentially committing Medicare fraud, citing the external audits' finding that while there was no actual fraud, there was the potential for $80,000 in overpayments due to the defendant's erroneous use of the billing software. Thus, the court held that the plaintiff was engaged in protected activity. Further, the court found that it was undisputed that the defendant knew of the plaintiff's protected activity, as she was suspended immediately after she discussed her concerns with her supervisors. The court also rejected the defendant's argument that there was a valid business reason for the plaintiff's termination, because she was responsible for billing irregularities and was not qualified to perform her job functions. The court noted that the plaintiff's reviews had praised her experience and knowledge, yet she was allegedly terminated because she lacked the required expertise. The court held that the plaintiff presented sufficient evidence of pretext, asserting that she was the "scapegoat" for the possible fraud, and that she was running the software program the way she was instructed to by the defendant. The court denied the defendant's motion for summary judgment.

· Opinion

***Elkharwily v. Mayo Holding Co.,* 2015 WL 468400 (D. Minn. Feb. 5, 2015)**

The plaintiff was a former hospitalist in one of the defendants' Mayo Health Clinics, and was responsible for assisting with the process of releasing patients from the clinic to their primary healthcare providers or consultants after their hospitalization at the clinic ended. The defendants included the Mayo Holding Company and its subsidiaries, the Mayo Clinic Health System, specific clinics, and the plaintiff's supervisors. The plaintiff brought a retaliation claim against the defendants, alleging that he was terminated as a result of his whistleblowing activities. He suffered from bipolar disorder and was required to have a work-site monitor who submitted quarterly reports to the state assessing his performance. In preparation for the submission of his first ninety-day report, the plaintiff's work-site monitor interviewed the plaintiff's supervisors and co-workers and determined that he was disorganized and adversarial, that he improperly classified patients and recommended courses of treatment that did not conform with the clinic's policies, and that he failed to properly document treatment. After completing his review, the work-site manager extended the plaintiff's probationary status for an additional ninety days. The clinic also investigated and prepared its own report, which contained similar concerns about the plaintiff's performance.

Following the preparation of these reports, but prior to an in-person meeting with the plaintiff to discuss the concerns of the work-site monitor and the plaintiff's supervisors, an incident occurred during which the plaintiff ordered a nurse to give an incorrect dose of medicine to a patient. The nurse reported the incident to her supervisors, who in turn reported the incident to the work-site monitor. When confronted about the incident, the plaintiff allegedly stated that he believed he was ordering the correct medication, and that the incident was "insignificant." The clinic then placed him on leave in order to fully investigate. During this investigation, the defendants discovered more concerns related to the plaintiff's interpersonal skills and performance. Shortly thereafter, the plaintiff's supervisors and work-site monitor met with him to explain their concerns and ask for his resignation—which he gave them.

A few days after he resigned, the plaintiff challenged the grounds for his termination, asserting that he was actually terminated for voicing his concerns about alleged malpractice and fraud at the clinic. Specifically, he alleged that he was fired for reporting patient safety concerns, concerns regarding losses of revenue due to patient transfers for services the clinic did not provide, ways to improve the transition process for patients, and malpractice related to the care for several patients. Further, he alleged that he reported instances of alleged fraud on Medicare, including unnecessary emergency room and hospital admissions, improper wound-care coding, and over-billing for patient contact time. The plaintiff did not document any of his alleged concerns through the hospital's reporting mechanisms, and the court noted that there were no records to substantiate many of his claims. The court observed that the written complaints that he pointed to as evidence that he informed the defendants of potential FCA violations did not contain any allegations of fraud. The plaintiff appealed his termination internally and after the appeal was denied, he filed the FCA suit. The defendants moved for summary judgment, arguing that the plaintiff did not establish that he was engaged in protected conduct, that the defendants were aware of

his alleged protected activity, or that his termination was motivated solely by his alleged protected activity.

Holding: The U.S. District Court for District of Minnesota granted the defendants' motion for summary judgment.

The court held that the plaintiff failed to demonstrate that any of the complained of conduct occurred at all, "let alone that he made a report in furtherance of an FCA action." For instance, the court explained that the plaintiff did not submit any evidence to show that he had a basis to conclude that the defendants were defrauding Medicare through its billing practices; in fact, he admitted that he was unaware of what the defendants actually billed Medicare. He also failed to present any facts to support his allegations of improper wound care coding or fraudulent hospital admissions. The court concluded that the plaintiff failed to provide any specific facts or information on which he based his fraud accusations, and he therefore lacked a good faith basis for his allegations. The court further found that even if there was evidence in the record to support the plaintiff's allegations of possible FCA violations, there was no evidence that the defendants were aware of his protected activity. The court observed that he did not allege that he made any complaints that, "even generously read, notified [the defendants] of activity taken in furtherance of an FCA claim." Finally, the court determined that even if the plaintiff had made reports regarding FCA violations, there was no evidence that his termination was a result of those reports or was "anything other than performance based." The court explained that there was overwhelming evidence that the defendants were concerned with the plaintiff's performance, work habits, and interpersonal skills. The court granted the defendants' motion for summary judgment.

- Opinion

U.S. ex rel. Petras v. Simparel, Inc., 2015 WL 337472 (D.N.J. Jan. 26, 2015)

The relator was the former CFO for Simparel, an "apparel manufacturing software solution provider." He brought a *qui tam* action against the company and its founder and its CEO (the "Simparel defendants"), as well as two affiliated companies, alleging that the defendants violated the False Claims Act by failing to meet their obligations to the Small Business Administration. The relator alleged that L Capital, a private equity firm licensed by the SBA as a small business investment company, invested SBA funds in Simparel in exchange for preferred shares in the company and two of three seats on the board of directors. However, L Capital failed to comply with the terms and conditions of its SBA funding, and consequently, the SBA was appointed as L Capital's receiver, and thereby became a stockholder in Simparel.

The relator alleged that the defendants conspired to "avoid or decrease Simparel's obligation to the SBA as a minority preferred shareholder by intentionally and knowingly decreasing the value of Simparel and using [Simparel's] intellectual property and assets…to their own benefit," which resulted in a violation of the reverse false claims provision of the FCA. Specifically, the relator alleged that the Simparel defendants failed to present any information to the SBA regarding the company's financial condition; that the founder and the CEO surreptitiously formed another company (one of the other two defendants) with a vertical relationship to Simparel that used Simparel's proprietary software without a license; and that former Simparel employees shared the proprietary software with another company (the other defendant) without a license agreement. The relator further alleged that the defendants violated the FCA by failing to uphold their obligation to give the SBA the benefit of its ownership interest in Simparel. Finally, the relator alleged that he was terminated as a result of his whistleblowing activities and sought relief under the FCA's anti-retaliation provision.

The Simparel defendants filed a motion to dismiss the relator's claims. They argued that the relator did not plead the fraud claims with the particularity required by Rule 9(b). They claimed that he only pled breach of contract and breach of fiduciary duty claims, which are not actionable under the FCA. They also argued that his retaliation claims failed because he did not allege that they had knowledge of his "intent to investigate an FCA case;" the individual defendants further argued that the relator failed to state a retaliation claim against them, since they were not his "employer" for the purposes of the FCA. The affiliated company defendants separately moved to dismiss the fraud claims for lack of personal jurisdiction and failure to satisfy Rule 9(b)'s pleading requirements.

Holding: The U.S. District Court for the District of New Jersey granted the defendants' motions to dismiss.

The court rejected the Simparel Defendants' argument that the relator's reverse false claims allegations failed because he did not allege that the defendants submitted a knowingly false record or made a knowingly false statement to the government. The court explained that the amended FCA does not require tht defendants present a false statement to the government, but only that they knowingly conceal or avoid an obligation to pay money to the government. However, the court agreed with the Simparel Defendants that the relator did not allege an obligation to the government as contemplated by the FCA, explaining that the relator failed to allege any obligation to pay money to the government; rather, at most, his allegations consisted of breach of fiduciary duty or breach of contract claims. The court held that the obligations the relator alleged the Simparel defendants concealed and avoided were "clearly outside the scope of the FCA's definition of an obligation," and therefore, granted the motion to dismiss the reverse false claims allegations. The court also dismissed the conspiracy claims, since all of the underlying fraud claims had been dismissed.

The court also held that the relator's retaliation claims failed because he did not allege that he put the Simparel defendants on notice of any potential protected whistleblower activity. The court explained that the relator only alleged that he reported his suspicions of fraudulent actions to the SBA-appointed agent for Simparel, but not to anyone within the company. Furthermore, the court rejected the relator's "common sense" argument that the Simparel defendants must have known that he met with the SBA agent, and that he was fired for that reason. The court held that it could not infer whether the information the relator gave the agent was ever conveyed to Simparel's founder or CEO—or to anyone else at the company. The court also held that the founder and the CEO were not the relator's employer for the purposes of the FCA, explaining that while some courts have extended liability to "de facto employers" after the FCA was amended to remove the word "employer," the Third Circuit had not yet accepted that notion and thus, liability under the FCA's anti-retaliation provision only extends to "employer entities," and not to individual supervisors. As a result, the court dismissed the relator's retaliation claims.

The court also granted the affiliated companies' motion to dismiss, explaining that because the relator only alleged conspiracy claims against those defendants, and since all of the underlying FCA claim had been dismissed, the conspiracy allegations against those defendants would be dismissed as well.

- Opinion

McAllister v. Lee County, 2015 WL 310563 (M.D. Fla. Jan 23, 2015)

The plaintiff—a pilot and EMT for Medstar, Lee County's medical helicopter program—brought a retaliation claim under the False Claims Act against the county and his individual supervisors, alleging that he was terminated from his job in response to his discovery that Medstar was using helicopters that were not federally-certified and suffered from various safety issues, resulting in the county improperly billing Medicare and Medicaid for millions of dollars in unauthorized flights. The plaintiff alleged that he reported these issues to his supervisors, as well as to county officials, but was ignored. He claimed that he also raised the issue with the Federal Aviation Administration and spoke to the news media. He alleged that, as a result of these actions, he was placed on administrative leave for "trumped up" incidents and received negative performance reviews despite being given excellent reviews prior to his reports of purported misconduct. He was never reinstated from administrative leave, and was eventually terminated along with other pilots when the county eliminated the Medstar program entirely. According to the plaintiff, the county was still hiring EMTs at the time he was terminated, but never offered to allow him to transfer positions. The defendants moved to dismiss for failure to state a claim under Rule 12(b).

Holding: The U.S. District Court for the Middle District of Florida denied the defendants' motion to dismiss.

The court held that the plaintiff properly alleged that he notified county, state, and federal authorities of the alleged misconduct and that he was mistreated and terminated as a result. Further, the court held that the plaintiff's allegations that he notified the government agencies and news organizations regarding the alleged misappropriations supported the reasonable conclusion that the county could have feared that he would report fraudulent billing to Medicare or Medicaid or would bring a *qui tam* case. The court denied the defendants' motion to dismiss.

- Qui Tam Complaint
- Opinion

Jones-McNamara v. Holzer Health Sys. Inc., 2015 WL 350593 (S.D. Ohio Jan. 23, 2015)

The plaintiff was the former Vice President of Corporate Compliance for a hospital system. He sued the company, alleged that the defendant was disproportionately using a particular ambulance service in exchange for gifts and luncheons. She claimed that in her role as a compliance officer, she investigated the alleged kickback scheme, but the defendant impeded her investigation and eventually terminated her employment. The defendant moved for summary judgment.

Holding: The U.S. District Court for the Southern District of Ohio granted the defendant's motion for summary judgment.

The court held that, even assuming that the plaintiff could show that she was engaged in protected activity and that the defendant knew about the activity, her claims still failed because she could not establish that she was terminated as a result of any such activity. The court explained that the evidence the plaintiff relied on to show causation was insufficient to establish that she was fired because of protected whistleblower activity, as the testimony merely showed that there were "a number of issues" that led to her termination. The plaintiff argued that because the defendant's Vice President of Human Resources had forwarded to her assistant emails in which the plaintiff raised concerns about the alleged kickbacks, the defendant was building a case to fire her for voicing her concerns. The court, however, explained that the plaintiff's theory

required impermissible inferences about the HR professional's motives. The court noted that there could have been non-retaliatory reasons for the plaintiff's termination, as the defendant pointed to other motives, including that the plaintiff was not a good fit for the company, was unprofessional, and did not work well with others. The court held that the plaintiff was unable to demonstrate that these reasons were pretextual, finding that the plaintiff failed to show that that the defendant "applied its policies (or did not apply them) to Plaintiff differently than it did to other comparable employees who engaged in substantial identical conduct." The court further explained that the evidence supported the defendant's claim that it believed the plaintiff was unprofessional and problematic, and that regardless of the truth of that sentiment, the defendant had proven that it believed that to be the case when the plaintiff was terminated. Thus, the court granted the defendant's motion for summary judgment.

- Opinion

Reynolds v. Winn-Dixie Raleigh, Inc., 2015 WL 136375 (M.D. Ga. Jan. 9, 2015)

The plaintiff brought a retaliation claim under the False Claims Act alleging that he was terminated from his position as a pharmacist by the defendant pharmacy for reporting the submission of potentially fraudulent claims to Medicaid. The plaintiff allegedly informed his supervisor that the pharmacy was missing a large amount of the drug Xanax and that he believed a pharmacy employee had stolen it for personal use. He alleged that his supervisor told him not to report the loss to anyone else. The plaintiff also alleged that he complained to the pharmacy manager and his supervisors about the defendant's "partial-fill" policy, in which the pharmacy allegedly filled only part of customers' prescriptions and then billed Medicaid for the entire prescription. The plaintiff allegedly informed the pharmacy manager that the "partial-fill" policy was "not really federally compliant," and he "counseled" the pharmacy manager about her practice of charging Medicaid full cost for drugs that were available to the public at a lower cost using the defendant's discount card. Meanwhile, the plaintiff was suspended from work, pending an investigation into his backdating of prescriptions for a certain patient in order to have Medicaid cover the costs; he was terminated after the investigation was completed. The plaintiff maintained that he was actually terminated as a result of his whistleblowing activities and not as a result of the backdating. The defendant moved for summary judgment.

Holding: The U.S. District Court for the Middle District of Georgia granted the defendant's motion for summary judgment.

The court held that the plaintiff was not engaged in protected activity with respect to his claims regarding the missing Xanax because there was no reasonable possibility of litigation ensuing, as the defendant did not submit any claims related to the Xanax that would have violated the FCA. However, the court held that the plaintiff's claims related to the defendant's "partial-fill" policy and subsequent Medicare overcharges for discounted drugs created genuine factual disputes as to whether he was engaged in protected activity. Nevertheless, the court granted the defendant's motion for summary judgment, holding that the plaintiff failed to provide any evidence suggesting that the supervisors responsible for the defendant's decision to terminate him knew of any protected activity in which he may have been engaged. The court explained that the plaintiff only alleged that he informed the pharmacy manager about these issues, and noted that the pharmacy manager was not involved in the decision-making process regarding the plaintiff's termination.

- Opinion

Farmer v. Eagle Sys. & Serv., Inc., 2015 WL 134019 (E.D.N.C. Jan. 9, 2015)

The plaintiff brought a retaliation action under the False Claims Act, alleging that he was constructively terminated by his employers—government contractors that supplied the U.S. government with security equipment—as a result of his whistleblowing activities. The plaintiff had been an order-filler in the defendants' warehouse, and he alleged that he witnessed employees steal night vison goggles from the warehouse. He claimed that he reported the theft to his supervisors, but rather than take action against the employees in question, the supervisors responded with "numerous incidents of retaliation, ridicule, threats, intimidation and harassment." Co-workers engaged in similar conduct, causing the plaintiff to feel unsafe at work. The plaintiff alleged that when he reported his treatment to human resources, they "condoned, maintained and ratified [it]." He alleged that the treatment eventually "became so unbearable" that he resigned and brought the present FCA suit. The defendants moved to dismiss for failure to state a claim under Rule 12(b)(6).

Holding: The U.S. District Court for the Eastern District of North Carolina granted the defendants' motion to dismiss.

The court held that the plaintiff was not engaged in protected activity because the alleged underlying illegal acts could not have been the basis for an FCA claim. The court noted that a plaintiff can only be engaged in protected activity where litigation is a reasonable possibility, and explained that allegations of theft of government property were not actionable under the FCA unless they were accompanied by

allegations of making a false claim, filing a false record, or knowingly delivering to the government less than all of its property. The court held that the "plaintiff's belief that a simple theft of government property would alone trigger FCA liability [was] unreasonable," and granted the defendants' motion to dismiss.

- Opinion

See *U.S. ex rel. Hagerty v. Cyberonics, Inc.*, 2015 WL 1442497 (D. Mass. Mar. 31, 2015).

See *Tang v. Vaxin, Inc.*, 2015 WL 1487063 (N.D. Ala. Mar. 31, 2015).

See *U.S. ex rel. Temple v. Sigmatec, Inc.*, 2015 WL 1486986 (N.D. Ala. Mar. 30, 2015).

See *U.S. ex rel. Ibanez v. Bristol-Myers Squibb Co.*, 2015 WL 1439054 (S.D. Ohio Mar. 27, 2015).

See *U.S. ex rel. Rockey v. Ear Inst. of Chicago, LLC*, 2015 WL 1502378 (N.D. Ill. Mar. 25, 2015).

See *U.S. ex rel. Fabula v. American Med. Response, Inc.*, 2015 WL 927548 (D. Conn. Mar. 4, 2015).

See *U.S. ex rel. McFeeters v. Northwest Hosp., LLC*, 2015 WL 328212 (M.D. Tenn. Jan 23, 2015).

See *U.S. ex rel. Wuestenhoefer v. A.J. Jefferson*, 2015 WL 226026 (N.D. Miss. Jan. 16, 2015).

See *U.S. ex rel. Campie v. Gilead Sci., Inc.*, 2015 WL 106255 (N.D. Cal. Jan. 7, 2015).

IV. COMMON DEFENSES TO FCA ALLEGATIONS

A. *Pro Se* Relator

***U.S. ex rel. Verrinder v. Wal-Mart Corp.*, 2015 WL 898034 (D. Mass. Mar. 3, 2015)**

A *pro se* relator brought a *qui tam* action alleging that a group of pharmacies violated the False Claims Act by submitting claims to Medicare and Medicaid for prescription drugs that were labeled with incorrect expiration dates. The relator was an attorney licensed to practice in Nevada. He filed a motion to transfer the case from the U.S. District Court for the District of Massachusetts to the U.S. District Court for the District of Nevada, arguing that it would be more convenient for the parties and witnesses.

Holding: The Massachusetts district court denied the relator's motion to transfer and stated that the case would be dismissed without prejudice within thirty days of the order unless the relator obtained counsel.

The court noted that *qui tam* relators are prohibited from prosecuting *qui tam* claims *pro se* because they represent the interests of the government. The court explained that while the relator in this case was a lawyer, he was not admitted to practice in the district in which the case was filed. The court denied the relator's motion to transfer and held that the case would be dismissed after thirty days unless he obtained counsel.

- Opinion

***U.S. ex rel. Tyson v. Wells Fargo Bank & Co.,* 2015 WL 309636 (D.D.C. Jan. 26, 2015)**

The *pro se* relator brought a False Claims Act action against Wells Fargo in an attempt to avoid foreclosure on his home. The relator did not make any claims against Wells Fargo specifically, but alleged generally that "banks pooled mortgage loans into securities; that assignments of loans were lost; that there [were] an increasing number of inaccuracies in foreclosure cases; [and] that his mortgage loan was pooled, securitized, and the subject of a fictitious assignment." The relator contended that after seeing reports on the news about these bank practices, he was "concerned" that Wells Fargo did not have the authority to foreclose on his property. Wells Fargo moved to dismiss, arguing that the relator's claims were precluded by the public disclosure bar.

Holding: The U.S. District Court for the District of Columbia granted Wells Fargo's motion to dismiss.

The court held that the relator's claims had to be dismissed because he failed to follow the proper filing and service requirements for an FCA case, and because FCA relators cannot proceed *pro se*. The court further held that the relator's claims were based only on information in the public domain and were thus barred by the public disclosure bar. The court granted Wells Fargo's motion to dismiss.

- Opinion

See *U.S. ex rel. Morgan v. Express Scripts, Inc.,* 2015 WL 728029 (3d Cir. Feb. 20, 2015).

B. Relator Waived/Released Defendant from FCA Claims

***VanLandingham v. Grand Junction Reg'l Airport Auth.,* 2015 WL 545250 (10th Cir. Feb. 11, 2015)**

The plaintiff was a former airport security coordinator for the defendant airport authority and was responsible for oversight of all airport security. She brought a retaliation claim under the False Claims Act alleging that she was terminated from her job in response to her whistleblowing activities. The plaintiff alleged that the defendant requested and received money from the Federal Aviation Administration and the Transportation Safety Administration to build a fence around the perimeter of the airport by falsely representing to the government that the purpose of the fence was to prevent wildlife incursions, when in fact, the defendants wanted the fence for security—a purpose that was ineligible for federal funding. The defendant allegedly instructed the plaintiff to tell the airport tenants that the fence was being constructed to meet a TSA requirement, and she refused, believing that was a lie. The defendant then allegedly reassigned the plaintiff to work in a sandwich shop in the airport, and fired her a month later. The defendant offered the plaintiff a separation agreement and release that provided seven weeks pay, three months of medical insurance, and outplacement services in exchange for her agreement to release the defendant from "any and all causes of action" relating to her employment or termination. The agreement further stated that the plaintiff was signing voluntarily after having sufficient time to consult with an attorney, and that she had seven days to revoke the agreement after she signed. Without consulting with an attorney, the plaintiff signed the agreement. Subsequently, she met with a lawyer and brought the retaliation claim. Citing the separation agreement and release, the defendant moved to dismiss for failure to state a claim under Rule 12(b)(6). The U.S. District Court for the District of Colorado dismissed the plaintiff's suit, finding that she knowingly and voluntarily released all claims against the defendant. The district court further rejected the plaintiff's argument that the release violated public policy. The plaintiff appealed to the U.S. Court of Appeals for the Tenth Circuit, arguing that she felt forced to sign the agreement, did not have the time or money to seek legal advice, and was unaware that there were laws to protect whistleblowers.

Holding: The Tenth Circuit affirmed the district court's ruling.

The circuit court found that the plaintiff signed the waiver knowingly and voluntarily and determined that the language of the release was broad enough to encompass all possible claims against the defendant—even those the plaintiff was not aware of when she signed the agreement, including FCA claims. The court concluded that the plaintiff had ample time to consult with an attorney to better understand her rights, but she chose not to do so. Further, the circuit court explained that while the FCA provides that *qui tam* actions "may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting," the FCA's anti-retaliation provision does not contain the same requirement. Therefore, the court held, the plaintiff was not precluded from waiving her retaliation claim on public policy grounds. The circuit court affirmed the district court's decision.

- Opinion (10th Cir.)

See *U.S. ex rel. Gohil v. Sanofi-Aventis, Inc.*, 2015 WL 1456664 (E.D. Pa. Mar. 30, 2015).

C. *Res Judicata*/Collateral Estoppel

U.S. v. Anghie, 2015 WL 163046 (N.D. Fla. Jan. 13, 2015)

The U.S. government brought an action alleging that a group of defendants—a nonprofit organization and its founders (who were employed by the University of Florida ("UF"))—violated the False Claims Act by submitting false information to the government in order to secure several government contracts for the development of a nuclear fuel for aerospace applications. The government alleged that the defendants submitted contract proposals to the Small Business Association ("SBA") that contained fraudulent information regarding the identities of personnel and the work to be performed. In order to bid on and receive set-aside contracts from the SBA, the defendants were required to meet certain specifications with respect to the amount of control exercised by the small business entity, including the designation of a Principal Investigator ("PI") who was employed by the small business. The government alleged that the defendants submitted proposals that falsely identified the PI, research scientists, engineers, and other staff working on the contracts; in addition, the government claimed that the defendants misrepresented their relationship with UF, the origin of some of the research produced, and the use of subcontractors. Moreover, according to the government, after the contracts were awarded, the defendants submitted invoices that claimed labor hours that were never paid and they submitted "stolen" research information that had been produced by UF graduate students and other professors rather than by the defendants themselves.

The contracts underlying the FCA suit had previously served as the basis for the defendants' criminal convictions for conspiracy and wire fraud, in which the trial court found that the defendants knowingly made misrepresentations to the government to qualify for the contracts and caused "real and substantial harm to the government when funds set aside for small businesses [we]re diverted to other uses." The court further held that the defendants' misrepresentations were material to the government's decision to award the contracts. Following the defendants' criminal convictions, the government brought this civil suit and moved for summary judgment, arguing that the defendants were estopped from defending the FCA claims because of their criminal convictions.

Holding: Adopting the report and recommendation of the magistrate judge, the U.S. District Court for the Northern District of Florida granted the government's motion for summary judgment.

The defendants argued that they should not be estopped from defending the FCA claims because those counts did not precisely correspond to the counts in the criminal convictions and therefore. The court agreed that not all of the counts corresponded exactly. However, the district court held that because the criminal proceeding determined that the defendants knowingly submitted contract proposals that contained false information, they were estopped from defending 12 of the 22 FCA counts. The defendants argued that they should be allowed to defend the remaining FCA counts because the evidence in the criminal proceeding did not establish that any of the defendants' statements "caused the Government to make payments or whether the payments were made based upon work product produced by the Defendants." But the district court held that because the defendants were convicted of wire fraud in connection with their failure to properly disclose the identity of the PI—particularly in light of the testimony from the SBA that it would not have recommended the contract award or made payment under the contract if it had known that the named PI was not actually involved in the contract—the defendants were precluded from defending those claims. The court also rejected the defendants' argument that the incorrect statements included on the forms they submitted for payment were not material to the government's decision to pay the claims "so long as the government receive[d] and accept[ed] the scientific work product for which it bargained." Again relying on the SBA's testimony that it would not have paid the defendants' claims had it known the truth, the court explained that the government's acceptance of the work product prior to learning of the falsity of the claims for payment did not negate the FCA claim. Further, the court explained that while the government received some work product under the contact, the payments made were still based on false proposals and technical reports, and therefore, the defendants failed to establish the existence of a genuine issue of material fact regarding whether the claims for payment amounted to FCA violations. Consequently, the court granted the government's summary judgment motion on all counts.

Finally, the court rejected the defendants' argument that the amount of damages claimed by the government should be offset by the amount of fines they had already paid due to their criminal convictions. The court explained that the criminal court's "pronouncements regarding restitution are not determinative of the damages award in this case," and that a restitution finding in a criminal case does not foreclose the government from seeking different damages in a subsequent civil case. The court then held that any work product the government received from the defendants was tainted because the contracts were awarded under SBA programs designed to benefit small businesses. Because the contracts were diverted to the defendants rather than eligible small businesses, the court reasoned that there was a "real and substantial harm to the government," and the damages amount was the entire amount paid under the contracts. The court then awarded the government treble damages, as well as the maximum civil penalty for each count, based on the "pervasive nature of the contract fraud … the

number of contracts involved, and the extensive resources expended by the Government in investigating and prosecuting the fraud."

- Magistrate Report and Recommendation
- Order Adopting Magistrate Report and Recommendation

D. Sovereign Immunity

Klaassen v. Univ. of Kan. Sch. Of Med., 2015 WL 437747 (D. Kan. Feb 3, 2015)

The plaintiff was a former medical professor at the University of Kansas School of Medicine. He a retaliation action under the False Claims Act against the medical school, the University of Kansas, the university's medical center, and various school officials in their individual capacities, alleging that he was terminated in retaliation for his whistleblowing activities. The plaintiff was responsible for winning research grants that funded his salary and the salaries of the graduate students working with him. After he won a grant, he became the "principal investigator" responsible for the scientific direction of the project funded by the grant. He became concerned that the medical school was siphoning money from the grants he won for the basic sciences to pay for other programs. He confronted university officials many times to express his concerns about the potential misuse of the federal grant funds. As a result of his continued complaints regarding the alleged mishandling of funds, the plaintiff claimed that he was removed from his position as chair of his department, placed on administrative leave, was removed as the principal investigator on several of his grants, was censured, and was eventually terminated. He brought a retaliation claim under the FCA, as well as several common law claims. The defendants moved to dismiss for failure to state a claim under Rule 12(b)(6), arguing that they were not subject to the plaintiff's FCA claims because the university was an arm of the state.

Holding: The U.S. District Court for the District of Kansas granted the defendants' motion to dismiss.

Citing Supreme Court precedent which held that the substantive fraud provisions of the FCA are not applicable to states or arms of the state, the district court determined that states are also immune from suit under the retaliation provisions of the FCA. The court held that it was indisputable that the institutional defendants were considered arms of the state, and thus, concluded that the University of Kansas, the University of Kansas School of Medicine, and the Medical Center were not subject to a retaliation suit under the FCA. The court noted that multiple federal courts had come to the same conclusion, and that although the 2009 amendments to the FCA broadened the scope of the retaliation provisions, there was no "clear congressional intent to hold states liable for retaliation under the FCA." The court also dismissed the claims against the individual defendants, observing that a suit against a state official in their official capacity was treated as a suit against the state.

- Opinion

U.S. ex rel. Willette v. Univ. of Mass., Worcester, 2015 WL 260530 (D. Mass. Jan 21, 2015)

The relator brought a *qui tam* action alleging that a medical school in the University of Massachusetts system, as well as multiple individuals—one of whom was deceased and represented by his estate, while the others were only identified as "John Does"—violated the federal and Massachusetts False Claims Acts. The relator had been employed by the Center for Health Care Financing (CHCF), the system's consulting division that was responsible for identifying third-party entities that might be responsible for the cost of health care services provided to certain patients. He alleged that the defendant improperly inflated the costs of services provided to Medicaid patients, resulting in the submission of false claims. He also claimed that another former employee—the now deceased defendant—embezzled money millions of dollars from the defendant and when he reported the theft, he was terminated from his job in retaliation. The medical school moved to dismiss both claims, for failure to state a claim under Rule 12(b)(6) and failure to plead fraud with particularity under Rule 9(b). The school also argued that the medical school was not subject to *qui tam* liability because it was a state agency entitled to immunity.

Holding: The U.S. District Court for the District of Massachusetts granted the defendant's motion to dismiss with prejudice.

Sovereign Immunity

The court held that the medical school was an "arm of the state," and therefore was not subject to *qui tam* liability, finding that the Commonwealth of Massachusetts exerted significant control over the school (including appointing sixteen of nineteen voting members of the Board of Trustees for the university); the Board managed the university "on behalf of the Commonwealth;" the school was required to submit annual budgets to the Commonwealth for approval and the Massachusetts General Court appropriated the money for the operation of the defendant; other state courts had also found that the school was an "agency of the Commonwealth;" and the Commonwealth would

bear the burden of any judgment against the school. In reaching its holding, the court rejected the relator's argument that CHCF was independent of the medical school, noting that he admitted that CHCF was a division of the medical school, which he described as a state agency. Consequently, the court granted the school's motion to dismiss.

Leave to Amend

The court also denied the relator leave to amend his complaint for a third time to add named individual defendants—in their individual capacities, not as state employees—who worked for CHCF, explaining that the proposed additions still failed to allege fraud with sufficient particularity under Rule 9(b). The court explained that the realtor failed to include details about the alleged scheme to overbill Medicaid such as time, place, content, or falsity of the claims presented to the government. The court determined that "[t]he meandering explanation of the scheme fails to connect the dots on how the Individual Defendants' efforts to maximize federal reimbursements were fraudulent or otherwise improper under the governing law."

Retaliation

Finally, the court dismissed the retaliation claims and denied the relator leave to amend, finding that the relator's reports of embezzlement by another employee did not concern any submission of false claims to the government and, thus, could not have resulted in a viable FCA case.

- Opinion

U.S. ex rel. Oberg v. Penn. Higher Educ. Assistance Agency, 2015 WL 236630 (E.D. Va. Jan. 16, 2015)

The relator brought a *qui tam* action alleging that a group of defendants defrauded the Department of Education in violation of the False Claims Act. The defendants included the Pennsylvania Higher Education Assistance Agency ("PHEAA"), which was created by the Commonwealth of Pennsylvania for the purposes of improving the higher education opportunities of individuals in Pennsylvania; and the Vermont Student Assistance Corporation ("VSAC"), which was created by the State of Vermont for a similar purpose. The U.S. District Court for the Eastern District of Virginia dismissed the realtor's case, holding that the defendants were state agencies and, therefore, not "persons" under the FCA. On appeal, the U.S. Court of Appeals for the Fourth Circuit reversed and remanded the case with instructions to the district court to conduct an "arm of the state" analysis. All parties moved for summary judgment.

Holding: The Eastern District of Virginia granted the defendants' motions for summary judgment.

In applying the "arm of the state" analysis, the court considered: 1) whether a judgment against the entity would be paid by the state; 2) the degree of autonomy exercised by the entity; 3) whether the entity was involved with state concerns; and 4) how the entity was treated under state law. With respect to the first factor, the court held that a judgment against PHEAA would create "functional liability" and practical consequences for the state. The court determined that a judgment against PHEAA would implicate the state treasury because Pennsylvania retained control over PHEAA's assets and revenue. Further, the court explained that Pennsylvania considered the PHEAA's finances as state money and included the funds in its financial reports. Similarly, the court held that a judgment against VSAC would create functional liability for the State of Vermont, as VSAC's money was intertwined with that state's finances. As a result, the court held that the first factor weighed in favor of considering the defendants arms of the state.

As to the degree of autonomy each entity possessed, the court held that this factor also weighed in favor of considering the entities state agencies. The court explained that the PHEAA's board consisted of only Pennsylvania officials, giving the Commonwealth significant control over the PHEAA. Pennsylvania also retained veto power over PHEAA's actions, and all PHEAA expenses, debt issuances, and contracts required approval from state officials. Further, the Pennsylvania Attorney General represented the PHEAA in any litigation, the entity reported its fiscal condition to the Commonwealth annually, and the Pennsylvania Legislature retained power to modify the PHEAA's activities at any time. Turning to t VSAC, the court held that that entity was similarly situated and therefore, the second factor also weighed in favor of both defendants being arms of the state.

Next, the court held that the entities were sufficiently involved with state concerns, such that the third factor weighed in favor of the entities being state agencies. The court explained that both entities were only permitted to engage in activities centered around making higher education affordable for individuals in their respective states, and that education was "clearly of legitimate state concern."

The court then held that the fourth factor weighed in favor of considering the entities arms of the state. The court explained that Pennsylvania law "clearly regard[ed] PHEAA as a state agency." The court further explained that that entity was created by an amendment to the Pennsylvania Constitution and received its powers and authority from the General Assembly by statute. In addition, the court explained, PHEAA's employees were also employees of the Commonwealth. Moreover, the court observed that Pennsylvania courts have held that the PHEAA was an agency of the state. Similarly, the court found that VSAC's enabling legislation provided that VSAC "shall be an instrumentality of the state" and designated it as "the state agency to receive federal funds assigned to the state of Vermont

for student financial aid programs." VSAC was also subject to laws and regulations governing public bodies in Vermont.

Because all four factors weighed in favor of considering the entities arms of the state, the court granted the defendants' motions for summary judgment.

- Def. PHEAA Motion for Summary Judgment
- Def. VSAC Motion for Summary Judgment
- Opposition to Def. PHEAA Motion for Summary Judgment
- Opposition to Def. VSAC Motion for Summary Judgment
- Reply Supporting Def. PHEAA Motion for Summary Judgment
- Opposition to Reply Supporting Def. VSAC Motion for Summary Judgment
- Opinion

See *U.S. ex rel. Shemesh v. CA, Inc.*, 2015 WL 1446547, 2015 WL 1447755 (D.D.C. March 31, 2015).

E. Tax Fraud Exemption

See *U.S. ex rel. Calilung v. Ormat Indus., Ltd.*, 2015 WL 1321029 (D. Nev. Mar. 24, 2015).

V. FEDERAL RULES OF CIVIL PROCEDURE

A. Rule 9(b) Failure to Plead Fraud with Particularity

U.S. ex rel. Shemesh v. CA, Inc., 2015 WL 1446547, 2015 WL 1447755 (D.D.C. March 31, 2015)

In this intervened *qui tam* case, the relator alleged that his former employer—CA Software Israel Ltd.—and its parent company violated the False Claims Act by making false statements during contract negotiations with the General Services Administration ("GSA") and misleading the government into paying higher rates for the defendants' software and services than it should have paid. The government also alleged that the defendants made misrepresentations during the contract renewal process. CA Software sold computer software licenses and maintenance to federal agencies, pursuant to a contract with the GSA. The relator had been head of CA's sales division.

As part of the contract negotiations, the defendants were required to submit a Commercial Sales Practice Format ("CSP") form, which included pricing information for software licenses and maintenance. While contractors were not required to propose their lowest price to the government, the CSP form asked whether discounts offered to the government were equal to or better than the best price offered to other customers. If the seller answered "no," then it was required to provide detailed information about its discount policies and the circumstances under which other customers received higher discounts than the government. The plaintiffs alleged that the defendants answered "no" on the CSP form they submitted to the GSA during contract negotiations and described their pricing practices that led to lower prices for other customers. The plaintiffs alleged that the defendants then offered the GSA a 35% discount off the list price on its software products, with a "most favored price guarantee" built in. This "Price Reduction Monitoring Clause" assured the government that it received the lowest price offered to any of the defendants' customers and required the defendants to inform the GSA if they sold any of the products included in the contract at prices lower than those listed in the contract. If the defendants sold the products at a lower price to other customers, then they were required to retroactively apply the higher discount to the GSA's orders. The defendants allegedly told the GSA that their maintenance fees were never discounted, but offered the government a 2% discount on maintenance fees.

The GSA accepted the offer and the initial contract became effective and operative for five years. The plaintiffs alleged that at the end of the five-year period, the defendants submitted a new CSP form that offered the government a 50% discount on the list prices; the contract was extended several times at that

level. The government alleged that during negotiations for the contract extensions, the defendants' representations that the 50% discount on pricing was the lowest price given to any other customer were knowingly false. The government also alleged that the defendants failed to comply with the Price Reduction Monitoring Clause when they failed to monitor their pricing in accordance with the agreement and to notify the government when they gave larger discounts to customers other than the government.

The plaintiffs alleged that the defendants misrepresented their pricing practices and policies during the contract negotiations and thus, all claims submitted by the defendants under the GSA contract were false. They alleged that the defendants offered other customers discounts far greater than those offered to the GSA, including discounts in excess of 90% of the list price. Further, they alleged that the defendants' failure to disclose that information to the government pursuant to the Price Reduction Monitoring Clause resulted in additional false statements. In support of their allegations, the plaintiffs cited emails and memoranda in which the defendants' officers and managers discussed the deep discounts given to customers other than the government.

Additionally, they alleged that the relator during a contract negotiation in which the relator participated, a senior vice president for the defendants stated that a proposed 80% to 90% discount would be approved because it was "common practice." The plaintiffs also alleged that the relator personally facilitated many other deals with private customers that received discounts greater than 50% on the same products purchased under the GSA contract. Additionally, the plaintiffs alleged that private customers often received discounts on maintenance fees, despite the defendants' representation to the government that those discounts were never given. The plaintiffs provided several specific examples of contracts containing far deeper discounts than the defendants gave the GSA. Though the relator worked for the defendants' office in Israel, the plaintiffs alleged that the defendants employed a global policy wherein discounts less than 50% would be approved by a regional manager, discounts between 50% and 74% would be approved by an area manager, and discounts larger than 74% were approved by the senior vice president for worldwide pricing.

The defendants moved to dismiss both the relator's complaint and the government's complaint-in-intervention for failure to state a claim under Rule 12(b)(6) and failure to plead fraud with particularity under Rule 9(b). They also argued that some of the relator's claims were barred by the statute of limitations.

Holding: The U.S. District Court for the District of Columbia denied the defendants' motion to dismiss the plaintiffs' claims under Rule 12(b)(6) and Rule 9(b), but held that the relator's claims were limited by the FCA's six-year statute of limitations.

Failure to State a Claim/Failure to Plead Fraud with Particularity

The court held that the plaintiffs sufficiently pled the falsity element of FCA liability. The court, accepting the plaintiffs' "well pleaded facts as true, and under relator's theory of the case," found that the defendants failed to disclose their actual pricing information, which caused the government to pay substantially higher prices than other similarly-situated customers. The court explained that the plaintiffs properly pled that the defendants provided the government with an inaccurate average discount price, which induced the government to enter into the GSA contract under fraudulent circumstances; and thus, all subsequent claims under the contract were false. Further, the court observed that the plaintiffs properly pled falsity by alleging that the defendants failed to disclose discounts given to other customers during the entirety of the government's contract, as required by the Price Reduction Monitoring Clause.

The court further held that although the plaintiffs failed to identify a specific employee who knew that he or she was submitting a false claim for payment to the government, the plaintiffs still properly pled scienter because they pled facts from which the court could draw a reasonable inference that the defendants knew that their representations to the government were false. The court noted that the plaintiffs described the defendants' management structure for approving various levels of discounts, as well as several instances of management stating that the defendants' pricelist required substantial discounts. The plaintiffs also described the defendants' standard pricing policy for software licenses and maintenance and asserted that this information was not disclosed to the government. The court held that it could reasonably infer from the plaintiffs' allegations that the defendants knew that the discounts given to the government were not an accurate representation of the defendants' pricing.

The court rejected the defendants' argument that the alleged false statements were not material to the government's decision to pay their claims. The court indicated that, given that the pricelist and general pricing policies described to the government were the basis for the negotiated price, any misrepresentations regarding price would clearly be material to the government's decisions to enter into the contract and to pay claims submitted pursuant to the contract. Thus, the court held that the plaintiffs stated a claim under Rule 12(b)(6).

The court also held that the plaintiffs pled fraud with the particularity required by Rule 9(b). The court noted that the plaintiffs alleged how and when the statements at issue were made, and they provided "numerous examples contrasting these false statements with [the defendants'] normal pricing practices." The court observed that the plaintiffs failed to identify a specific employee responsible for communicating with the government, but it excused this deficiency, in light of the fact that the alleged fraudulent scheme spanned several years with "multiple re-certifications of the same false statements every time that [the defendants were] required, but failed, to inform the government" that the contract pricing did not accurately reflect the defendants' pricing offered to other customers. Further, with respect to the government's claims regarding false statements during negotiations for contract extensions, the court rejected the defendants' argument that the government did not allege falsity because it did not allege that the defendants violated a specific contract provision. The court, though, would not allow the defendants "to relegate the government's allegations to a matter of contract interpretation that [could] be decided at the motion to dismiss stage." The defendants also argued that the government's reading of the contract provisions was incorrect, claiming that the government was only entitled to the "average discount" the defendants' other customers received. But the court held that the defendants failed to allege unambiguous language in the contracts to support that argument.

Moreover, the court held that at the motion to dismiss stage, when parties offered conflicting interpretations and neither is more persuasive than the other, all reasonable inferences should be made in favor of the non-moving party—here, the plaintiffs.

Similarly, the court rejected the defendants' argument that they were not required to notify the government of changes in the actual pricing pursuant to the Price Reduction Monitoring Clause, but instead were only required to inform the government about changes in their pricing *policy*—which the defendants contended did not change throughout the length of the contract extensions. The court, though, found that the government's interpretation of the clause was reasonable. The court also held that the government properly alleged that the defendants failed to monitor their pricing at all, explaining that the government conducted an audit of the defendants' records and found missing and incomplete price monitoring records.

Further, the court held that the government properly pled materiality in its claims regarding the extensions, explaining that had the government known that the contract price was not based on complete and accurate data, it would not have extended the contract. Ultimately, the court also held that the government pled its claims regarding the contract extensions with sufficient particularity under Rule 9(b), noting that the government pled several examples of false statements made during the contract renewal process, included when the false statements were made, and what parts of the contracts were implicated.

Statute of Limitations

The government limited its intervention to the time period from 2006 forward—six years prior to the date of its complaint-in-intervention. However, the relator's claims spanned back to 2001, when the GSA first entered into the contract with the defendants. The court rejected the relator's argument that the FCA's ten-year statute of repose applied, and therefore, the court should allow the *qui tam* claims to reach back to 2003. Instead, the court held that the statute of repose only applies to the government's claims.

The relator also argued that the Wartime Suspension of Limitations Act ("WSLA") tolled the limitations period and reinstated his claims. The court, however, found that regardless of whether or not the WSLA applied to civil claims, it did not apply to this case because the relator's claims were not related to the war effort. Thus, the relator's claims were dismissed, to the extent that they extended beyond the six-year limitations period.

- Second Amended Qui Tam Complaint
- United States Complaint-in-Intervention
- Motion to Dismiss Second Amended Qui Tam Complaint
- Motion to Dismiss U.S. Complaint-in-Intervention
- Opposition to Motion to Dismiss Second Amended Qui Tam Complaint
- Opposition to Motion to Dismiss U.S. Complaint-in-Intervention
- Reply Supporting Motion to Dismiss Second Amended Qui Tam Complaint
- Reply Supporting Motion to Dismiss U.S. Complaint-in-Intervention
- Opinion (Qui Tam Complaint)
- Opinion (U.S. Complaint-in-Intervention)

U.S. ex rel. Hagerty v. Cyberonics, Inc., 2015 WL 1442497 (D. Mass. Mar. 31, 2015)

The relator brought a *qui tam* action alleging that his former employer engaged in a fraudulent scheme to induce physicians to prescribe medically unnecessary procedures and then bill government healthcare programs. The defendant was a manufacturer and distributor of the Vagus Nerve Stimulator Therapy ("VNS") system, a medical device used to treat epilepsy and depression. The relator alleged that the defendant improperly promoted the early replacement of VNS systems, citing low battery life, for patients whose batteries were functioning properly and who did not need a replacement VNS. He alleged that the defendant imposed sales quotas focused on selling replacement VNS systems; failure to meet those quotas resulted in immediate placement on a performance improvement plan. According to the relator, the defendant encouraged sales representatives to falsely tell physicians that all VNS devices should automatically be replaced years earlier than was medically necessary. In addition, the relator alleged that some sales representatives falsified the results of device tests so that it appeared that devices were low on battery when in fact, they were not.

The relator alleged that as a sales representative for the defendant, he learned the "inner workings" of the defendant's business model, compensation structure, and reimbursement rates for the VNS system from federal healthcare programs. He claimed that the majority of recipients of VNS systems were covered by government healthcare programs, with 20 to 25 percent of the defendant's revenue coming from Medicare, 25 percent from Medicaid, and additional government programs making up the majority of the rest of its revenue. The relator claimed that physicians seeking reimbursement from the government were required to certify that each device was medically necessary; thus, the relator alleged, the defendant caused physicians to submit false claims for VNS systems that were replaced unnecessarily. He further alleged that he voiced his concerns regarding the scheme to his supervisors, who disregarded his claims and terminated his employment shortly thereafter.

After being fired, the relator filed a wrongful termination suit against the defendant. The complaint did not mention the government healthcare programs or the FCA, but alleged that the defendant defrauded physicians and patients by selling them unnecessary replacement VNS systems. A few months later, a research collective published a website report that included references to the relator's wrongful

termination complaint and discussed his allegations regarding the premature VNS replacements. The article mentioned the possibility of patients "organiz[ing] in a class" to sue the defendant. Shortly thereafter, the relator voluntarily dismissed his wrongful termination suit and filed a *qui tam* action that alleged fraud against the government, conspiracy to defraud the government, and retaliation. The defendant moved to dismiss the relator's claims.

Holding: The U.S. District Court for the District of Massachusetts denied the defendant's motion to dismiss the relator's fraud and conspiracy claims on public disclosure grounds, but granted the defendant's motion to dismiss those claims pursuant to Federal Rule of Civil Procedure 9(b). The court denied the defendant's motion to dismiss the relator's retaliation claim.

Public Disclosure Bar

As an initial matter, the court held that the post-2010 amended public disclosure provision was non-jurisdictional, since it allows the government to prevent the dismissal of an FCA claim that would otherwise fall within the public-disclosure bar.

The relator argued that his claims had not been publicly disclosed; he noted that neither his prior lawsuit nor the media report triggered the bar, since his FCA claims focused on fraud on government healthcare programs, not on patients and physicians. The court agreed, observing that the previous disclosures did not mention any fraud against the government and therefore, the "essential element" was never disclosed.

Despite ruling that the relator's allegations had not been publicly disclosed, the court determined that the relator would have qualified as an original source, because he materially added to any public disclosures. Without the relator's new claims regarding fraud against federal healthcare programs, the court noted, there would be no basis for an FCA claim.

Failure to Plead Fraud with Particularity

The court held that the relator's claims failed to meet the particularity requirements of Rule 9(b) because, while the details of the fraud scheme were adequately pled, the relator failed to identify any actual false claims submitted to the government. The court found that "as a matter of logic," a fraudulent scheme designed to cause the unnecessary purchase of a product would result in the submission of some false claims, but ultimately, the court held that Rule 9(b) requires the relator to provide a degree of particularity to strengthen the inference of fraud "beyond a mere possibility." The court explained that the relator failed to allege any specific medical procedures that were actually unnecessary or any specific dates or dollar amounts for which false claims were submitted. Further, the court held that the relator's rough categorizations regarding the alleged fraud's impact on the government healthcare programs (*e.g.* 20 to 25 percent Medicare, 20 percent Medicaid, etc.) was not adequate to plead that any specific patient was actually covered by a government-funded program. Thus, the fraud claims were dismissed for lack of particularity.

Conspiracy

The relator alleged that the defendant conspired with its employees to violate the FCA. The court held that because the relator's complaint failed to properly allege fraud under the FCA, his conspiracy claim also failed. The court explained that even if that were not the case, the relator's conspiracy claim would fail because a corporation cannot conspire with its officers or employees to violate the FCA.

Retaliation

The court rejected the defendant's argument that the relator's retaliation claim failed because he did not engage in protected activity; according to the defendant, the relator's allegations could not have "reasonably led" to a viable FCA action. The court, though, explained that while the relator's fraud claims failed to meet Rule 9(b)'s particularity requirements, his investigations and inquiries regarding the defendant's possible role in causing false claims to be submitted constituted protected activity under the FCA. The court also rejected the defendant's argument that it did not know about the protected conduct, observing that the relator brought his concerns regarding possible fraud to the attention of his supervisors. Finally, the court rejected the defendant's argument that the relator was not terminated because of his protected activity. The court noted that the relator alleged that one month after he informed his supervisor about his concerns, he was put on a performance improvement plan, and one month after that he was terminated, despite having met 90 percent of his quota before he was fired. The court concluded that the temporal proximity of his termination was sufficient to support the allegation that he was fired because of his protected conduct.

- First Amended Qui Tam Complaint
- Motion to Dismiss First Amended Qui Tam Complaint
- Opposition to Motion to Dismiss First Amended Qui Tam Complaint
- Reply Supporting Motion to Dismiss First Amended Qui Tam Complaint
- Opinion

U.S. v. Robinson, 2015 WL 1479396 (E.D. Ky. Mar. 31, 2015)

The United States brought an action under the False Claims Act against an optometrist who provided services to nursing home residents. The defendant was employed by Associates in Eye Care ("AEC"), a practice group of optometrists. The government alleged that the defendant provided cursory eye

examinations to nursing home patients and performed unnecessary follow-up exams in order to overbill government healthcare programs. The government claimed that the defendant's records indicated that on average, he saw more than 60 patients per day; in addition, he claimed to have examined over 90 patients on fifteen particular days, and on one day, he claimed to have examined 117 patients in one day. All of these patients were Medicare beneficiaries. The government alleged that it would be impossible for the defendant to spend enough time with each patient to warrant the charges passed on to Medicare. Medicare contractors audited the defendant's records and concluded that at least 35 of the 96 services they reviewed should have been downcoded or denied. A couple of years later, Medicare contractor, AdvanceMED performed another audit of AEC's claims to Medicare for the defendant's services and concluded that 23 out of the 24 claims submitted were not medically necessary. The government also employed several experts—including other doctors who provided eye care to nursing home residents—who opined that it would be impossible to meaningfully examine the number of patients that the defendant claimed to have seen in a 24-hour period. Moreover, the government offered testimony of a medical expert who inspected 30 sample examinations and concluded that 25 of them were medically unnecessary.

The government alleged that the defendant violated the FCA by submitting claims to Medicare for services that were not reasonable or necessary, or that were for a type or level of service that was not actually provided. The defendant moved for summary judgment, arguing that the government could not show that any of the services he provided were medically unnecessary. He also argued that the government had improperly extrapolated damages from an insufficient sample to establish FCA liability.

Holding: The U.S. District Court for the Eastern District of Kentucky denied the defendant's motion for summary judgment.

The court rejected the defendant's argument that the expert testimony relied on by the government was insufficient to establish that the claims he submitted lacked medical necessity because necessity of services was an "individualized assessment" and there were "no recognized objective criteria." The court noted that objective falsity was only one way to establish an FCA claim; the court determined that the government argued that the defendant's claims were false under a false certification theory, alleging that the defendant had a duty to comply with the relevant Medicare regulations on which payment by the government was conditioned. Taking into account the testimony of the government's expert witness, the testimony of similarly situated doctors who explained that it would be impossible for the defendant to perform the number and type of examinations he claimed, and the audit results, the court found that the government created an issue of material fact that should be submitted to the jury.

The government also claimed that the defendant provided "worthless or upcoded services" for the exceedingly high volume days on which the defendant indicated that he saw upwards of 90 patients/day —and as many as 117 in one day. The government's expert witness opined that 15% of the claims he examined were of "some medical value," and that he could not conclude with certainty whether or not the other 85% had medical value; he did conclude that because certain types of examinations the defendant claimed to have performed would take considerable time, it would be impossible to administer those examinations to the volume of patients the defendant claimed to have seen. The government also offered evidence from the AdvanceMED audit of the defendant's claims, which concluded that on numerous occasions the defendant billed for services performed in one day that would take more than 24 hours to perform. Thus, the court held that the government created an issue of material fact for the jury.

The court also rejected the defendant's argument that the government's claims regarding the high volume days failed because the government did not prove the scienter element. The court explained that the government presented several facts that showed that the defendant acted with at least reckless disregard or in deliberate ignorance of the truth or falsity of the billing codes used for many of his claims. The government alleged that the defendant often waited until after he finished the examinations of an entire wing or floor of a nursing home to complete his charts, which could have led to inaccuracy. Further, the defendant actually contacted Medicare to inquire about whether time spent on certain examinations was a factor in how to code those examinations. Even despite this evidence, the court concluded, a reasonable jury could infer the defendant's knowledge from the "physical impossibility of his seeking payment from Medicare for more than 24 hours of work in a single day."

Finally, the court rejected the defendant's argument that the samples the government used to extrapolate liability and damages were improper as a matter of law, and that the government was required to present individualized proof of each FCA element for each of the 25,799 claims at issue in the case. The court observed that statistical sampling was a well-recognized and appropriate means for establishing liability and that requiring the government to present individual evidence as to each false claim would be unreasonable and a waste of resources. The court noted that it would also frustrate the purpose of the FCA, encouraging the submission of large volumes of false claims to the government so as to prevent the government from logistically being able to prosecute the fraud. The court denied the defendant's motion for summary judgment.

- U.S. Complaint
- Def. Motion for Summary Judgment
- Opposition to Def. Motion for Summary Judgment
- Reply Supporting Def. Motion for Summary Judgment
- Opinion

Tang v. Vaxin, Inc., 2015 WL 1487063 (N.D. Ala. Mar. 31, 2015)

A *pro se* relator filed a lawsuit against Vaxin, Inc., a company that performed scientific research related to drugs and vaccines, pursuant to several grants and contracts with the federal government. The relator claimed that he was the "scientific founder" of Vaxin and that he was tasked with winning grants and contracts to fund Vaxin's research as well as cover his salary. When the relator failed to win enough grants to fund his department, the defendant's CEO allegedly began deferring the relator's salary. At some point during his employment, the relator grew "suspicious that federal funds were being misused." He claimed that Vaxin was required to provide him with financial reports from the grants he won, but that he never saw any reports, despite requesting them several times. Fearing that he would be fired soon, the relator allegedly took his company desktop computer home from. Eventually, Vaxin terminated the relator—allegedly without giving him a reason. He filed a *qui tam* action against Vaxin and its CEO, alleging that they misused federal funds in violation of the False Claims Act, and that they retaliated against him because of his whistleblowing activities. The defendants filed a motion to dismiss, as well as several counterclaims, including breach of contract, tortious interference, conversion, and breach of fiduciary duty. The relator argued that the counterclaims were filed in retaliation for his lawsuit against the defendant.

Holding: The U.S. District Court for the Northern District of Alabama granted the defendants' motion to dismiss the relator's fraud claims with prejudice and granted Vaxin's motion to dismiss the retaliation claims without prejudice. The court also granted the defendants' motion to dismiss all claims against the CEO with prejudice.

The court found that the relator failed to properly allege the "who, what, where, when, and how" of the fraudulent scheme, and concluded that the relator failed to meet Rule 9(b)'s requirements. The court explained that the relator's seemingly sole reason for believing that Vaxin was violating the FCA was his contention that he was not able to review the financial reports concerning his grants, which he claimed "indicat[ed] fraud." The court found that this was insufficient to state a fraud claim. The court dismissed the relator's fraud claims with prejudice, noting that while it would normally allow a relator to amend his complaint, this relator was "apparently using this litigation to 'reveal whether fraud occurred'" in an attempt to support his suspicions that the defendants were misusing government funds. The court concluded that the relator would never be able to provide information about how any alleged false claims were actually submitted.

The court also held that the relator failed to allege that he had engaged in protected activity under the FCA, explaining that the relator merely requested financial reports, and that the requests were not sufficient to put Vaxin on notice that he was contemplating bringing a *qui tam* action. The court also dismissed the claim against Vaxin's CEO, holding that supervisors cannot be liable in their individual capacity for retaliation claims.

Finally, the court found that the relator's argument that the defendants' counterclaims "lacked merit," and were thus brought in retaliation for his *qui tam* action, was insufficient to state a claim that the counterclaims were retaliatory. The court explained that the relator did not specify whether Vaxin had any factual basis for its counterclaims.

- Opinion

U.S. ex rel. Prather v. Brookdale Senior Living Cmty., Inc., 2015 WL 1509211 (M.D. Tenn. Mar. 31, 2015)

The relator was a registered nurse employed by the defendant, Brookdale Senior Living, Inc. ("BSLI"), which provided retirement living services (including home health aide services and skilled nursing services) to recipients of Medicare benefits. She brought a *qui tam* action against several defendants: BSLI and its affiliates, Brookdale Senior Living Communities, Inc. and Brookdale Living Communities, Inc. ("Brookdale Communities Defendants"), which provided retirement living services—including skilled nursing services to Medicare recipients; Innovative Senior Home Health ("Innovative"), which provided home health care to Medicare recipients; and ARC Therapy Services, LLC ("ARCTS"), which provided outpatient therapy services to Medicare recipients.

Prior to 2011, each of the affiliates submitted its own claims directly to Medicare, but in 2011, BSLI made the decision to centralize the billing into the main office. At that time, BSLI had a large backlog of about 7,000 unbilled Medicare claims worth approximately $35 million. BSLI referred to those claims as "held claims" and they were allegedly backlogged because they were not in compliance with Medicare rules—specifically because they related to care that was provided without properly certified plans of care or the required face-to-face encounter documentation. BSLI began the task of auditing and billing the held claims to Medicare, which was dubbed the "held claims project." The relator was directly involved in the held claims project, wherein she reviewed patient charts in order to ensure compliance with Medicare and internal requirements, including physician signed orders, face-to-face documentation, and completeness of charts. She alleged that BSLI instructed her to only do a "quick review" for missing signatures and dates

and not to look for any other problems related to Medicare billing. She claimed that if she encountered problems, she was instructed to ignore the issues and submit the claims for payment. As a result, the relator alleged, the diagnosis justifying home health care was inconsistent with the care actually provided, and Medicare was billed for therapy and home health care services that were not provided under a doctor certified plan of care. She also alleged that she witnessed the defendants billing Medicare for services that were not provided or for amounts in excess of what was properly billable.

The relator gave several examples of alleged fraudulent claims related to patient care. She alleged that one patient was diagnosed as having an open wound of the upper arm that did not need any therapy, but was provided with 20 physical and speech therapy visits. Another patient was diagnosed with a pressure ulcer with no need for therapy and minor follow up required, but received 12 combined therapy visits and 24 skilled nursing visits. The relator alleged several other examples of unnecessary therapy at the defendants' facilities.

The relator also alleged that BSLI implemented incentive programs for the completion of held claims, which led to improper and incomplete claims being sent to Medicare for reimbursement. These incentives allegedly included bonuses for the nurses, including the relator, as well as compensation for doctors who signed orders quickly to facilitate the billing. The relator alleged that she informed her supervisors that she had uncovered many problems with the held claims and that she was not comfortable billing them to Medicare. The relator further alleged that BSLI engaged in a scheme with its affiliated entities, Innovative and ARCTS, in which the defendants engaged in double-billing of Medicare for routine treatment that should have been provided by the assisted living faculty at no cost to Medicare. In addition, she alleged that BSLI offered unnecessary "screenings" to patients in their facilities in order to identify patients to target for therapy sessions.

The relator alleged that the defendants overbilled Medicare in violation of the FCA, kept the overpayments in violation the reverse FCA, and conspired to violate the FCA. The defendants moved to dismiss the relator's claims for failure to plead fraud with particularity under Rule 9(b).

Holding: The U.S. District Court for the Middle District of Tennessee granted the defendants' motion to dismiss.

The defendants argued that the relator's claims failed because she did not identify any actual representative false claims submitted to the government. The court agreed, explaining that while the relator gave several representative examples of potentially medically unnecessary treatment and improper therapy that she claimed was "billed to Medicare," she did not allege any specific claim that was actually submitted to Medicare. The court noted that the relator did not plead any particulars of the alleged false claims, such as dates, amounts charged, services rendered, or payments received. While she described broad schemes to defraud Medicare by filing unnecessary claims and inflating reimbursement information, her "complaint lacked particularity as to any actual false claims presented to the government."

Further, the court concluded that the relator's allegations that the defendants made false statements failed because she did not allege any particular facts regarding the false statements the defendants made, including when the statements were made them and the contents of the statements. Additionally, the court noted that the relator failed to allege what reimbursement the defendants received from the government as a result of the false statements.

The court similarly also found that the relator's reverse FCA allegations failed to meet the particularity requirements of Rule 9(b). The relator alleged that the defendants knew that they had been overpaid by Medicare but did not take the required steps to repay that obligation to the government or to inform the government of the overpayment. The court determined that the complaint contained only "boilerplate assertions that restat[ed] the statutory language pertaining to reverse false claims." The court explained that the relator failed to identify any specific obligation owed by the defendants, or what specific record or statement the defendants made to the government to avoid that obligation.

Finally, the court found that the relator failed to properly plead a conspiracy to violate the FCA, since she did not allege an agreement or overt act among the named entities to commit fraud against the government. Further, because the relator's fraud claims failed, as she did not properly plead presentment of claims to the government, the conspiracy claim also failed.

- Opinion

***U.S. ex rel. Gohil v. Sanofi-Aventis, Inc.,* 2015 WL 1456664 (E.D. Pa. Mar. 30, 2015)**

The relator brought a *qui tam* action against his former employer, a pharmaceutical manufacturer, alleging that the defendant violated the False Claims Act by engaging in off-label drug promotion and paying illegal kickbacks (including grants, speaking fees, travel, entertainment, and sports and concert tickets) to induce physicians to prescribe its drug for off-label uses, which caused the submission of false healthcare reimbursement claims to the government. The relator's duties included marketing, promotion, and sales of drugs, including the drug Taxotere, a chemotherapy agent. Originally, the Food and Drug Administration approved Taxotere only for treating of cancer after the failure of a primary type of chemotherapy, which is called second line treatment. In 2002, the FDA approved the drug for first line treatment for certain types of lung cancer. However, the relator alleged that prior to 2002, the defendant

promoted Taxotere for first line treatment of various cancers, and that before and after Taxotere was approved for first limited line treatment, the defendant promoted it for use in the treatment of cancers for which it was not approved. According to the relator, the defendant also misrepresented the safety and effectiveness of the drug. The relator also alleged a conspiracy claim under the FCA, claiming that the defendant and the physicians who allegedly participated in the illegal kickbacks scheme reached an agreement to defraud the government.

The relator filed his *qui tam* action in May 2002. He was reassigned in June of that year, and while the government was still investigating his *qui tam* claims, he initiated a wrongful termination action against the defendant in state court. The parties engaged in discovery in the wrongful termination case and eventually settled those claims. The settlement agreement contained a broad release for the defendant. After the government declined to intervene and the *qui tam* complaint was unsealed, the defendant moved to dismiss, arguing that the FCA claims had been publicly disclosed in the wrongful termination suit and in a 1997 article published in the Wall Street Journal that discussed assertions that the defendant was promoting its drugs for off-label uses. The defendant also argued that the release included in the wrongful termination settlement agreement insulated it from the relator's *qui tam* suit. In the alternative, the defendant argued that the relator failed to state a claim under Rule 12(b)(6) and failed to plead the alleged fraud with particularity as required by Rule 9(b).

Holding: The U.S. District Court for the Eastern District of Pennsylvania granted the defendant's motion to dismiss the off-label allegations for failure to meet the requirements of Rule 9(b); the relator's claim was dismissed without prejudice. The court denied the motion to dismiss in all other respects.

Public Disclosure Bar

The court found that the relator's claims were not based upon the information disclosed in his wrongful termination suit or in the Wall Street Journal article because neither of those disclosures discussed the submission of false claims to the government. The court explained that the Journal article discussed the allegations of several of the defendant's ex-employees who claimed that the defendant marketed various drugs off-label. The court noted that the article made "passing reference" to Taxotere, which may have allowed readers to conclude that the defendant promoted that drug off-label, but the article only discussed the fact that such promotion may "run afoul of FDA regulations"—it did not mention fraud on government healthcare programs.

The court noted that the disclosures made in the relator's wrongful termination case presented a "closer question." The statement of facts in that case discussed the defendant's alleged off-label promotion of Taxotere in detail, and also included allegations of AKS violations. However, the court ultimately concluded that since the wrongful termination suit did not discuss the fraudulent submission of claims to government healthcare programs, it did not publicly disclose the relator's *qui tam* allegations. Therefore, the court denied the defendant's motion to dismiss on public disclosure grounds.

Relator Released Defendant from FCA Claims

The court then considered the defendant's argument that the prior settlement agreement precluded the relator's *qui tam* claims. The court determined that the release was broad enough to encompass the relator's *qui tam* action, but held that since it was signed after the *qui tam* complaint was filed, it could not preclude that action. The court observed that courts have uniformly acknowledged that a relator cannot unilaterally settle an FCA case after the *qui tam* complaint has been filed. The court also rejected the defendant's argument that the release was effective as to the relator and thus, the relator should be dismissed from the case and the government should be allowed to bring claims against the company if it desired. The court observed that the defendant's "recommendation ignor[ed] the clear congressional intent of encouraging private enforcement of the FCA," and denied the defendant's motion to dismiss pursuant to the release.

Failure to State a Claim/Failure to Plead Fraud with Particularity

The court observed that the relator provided specific details regarding who executed the defendant's alleged off-label scheme, the duration of the fraud, where and how the sales pitches were made, and why the marketing was fraudulent. The court found however, that the relator failed to allege the specific unaccepted medical indications for which the defendant promoted Taxotere. The court noted that this was a "defect which [the relator] could easily cure," considering his allegation that he was trained in the fraudulent marketing scheme as an employee of the defendant. Thus, the court granted the defendant's motion to dismiss the off-label claims without prejudice and with leave to the relator to file an amended complaint.

Next, the court considered the relator's FCA claims related to the AKS. The court held that the relator properly pled FCA liability by providing numerous examples of illegal kickbacks paid to physicians and alleging that the defendant was aware that compliance with the AKS was a condition precedent to payment from federal healthcare providers. Further, the relator alleged that the defendant caused physicians to knowingly submit claims tainted by AKS violations to the government. The court denied the defendant's motion to dismiss the AKS allegations.

The court also held that the relator properly pled a conspiracy between the defendant and physicians to increase the use of Taxotere through a kickback scheme. The court explained that it could "easily infer the existence of an agreement" from the relator's allegations, including the description of several instances in which the defendant paid a kickback to a physician, followed by the physician's increased prescription of Taxotere. The court also noted that the relator provided details regarding how the defendant assisted physicians in submitting claims to federal healthcare programs. As a result, the court denied the defendant's motion to dismiss the conspiracy claim.

- Opinion

***U.S. ex rel. Britton v. Lincare, Inc.,* 2015 WL 1487134 (N.D. Ala. Mar. 30, 2015)**

The relator was a service representative for the defendant, an oxygen respiratory company that provided nebulizers to patients. When the relator delivered the nebulizers to patients, he provided education services on their proper use. He alleged that the education services were not reimbursable under Medicare, but that the defendant billed the government for the services anyway, in violation of the False Claims Act. The defendant moved to dismiss for failure to state a claim under Rule 12(b)(6) and failure to plead fraud with particularity as required by Rule 9(b).

Holding: The U.S. District Court for the Northern District of Alabama granted the defendant's motion to dismiss.

Because the claims involved conduct that took place prior to the 2009 amendments to the FCA, the court analyzed the allegations using the pre-amendment language. The court held that under the pre-amendment FCA relators were required to claim actual presentment of a false claim to the government. The court held that the relator failed to plead the actual submission of a false claim with the particularity required by Rule 9(b), observing that he did not provide a sample claim or any billing data, did not specify when the conduct occurred, and did not allege that he had any knowledge of the defendant's billing practices or of the actual submission of a single false claim. The court granted the defendant's motion to dismiss.

- Opinion

***U.S. ex rel. Hagood v. Riverside Healthcare Assoc., Inc.,* 2015 WL 1349982 (E.D. Va. Mar. 23, 2015)**

Two relators brought a *qui tam* action against their former employer, a non-profit hospital, and its parent company and affiliates, alleging that the defendants defrauded the government healthcare programs. The relators claimed that the defendants' computerized billing software contained systematic flaws that double or triple charged for some services, charged for services that were never provided, or charged for services that were performed without a physician's order. The relators included a table containing a list of individuals who were allegedly overcharged for services; the table included patients' account numbers, names, service item codes, dates of service, and alleged extent of the improper charges assessed by the defendants. The relators asserted that 20-30% of the patients listed were covered by a government healthcare plan. The relators also claimed that the defendants filed false claims for pharmaceuticals that were not actually administered. The relators claimed that the billing software improperly double or triple charged patients for medication and they provided another table containing patients who were overcharged for a medication, Versed, and alleged that 20-30% of those patients were covered by government healthcare plans. Additionally, the relators claimed that the billing software routinely upcoded the services rendered and charged the government for services at a higher level than it should have been charged. Again, they provided a table of patients who were billed at a higher service code than they should have been or who were charged when they were not seen at all. Finally, the relators alleged that the defendants had actual knowledge that their billing practices were improper after a 2006 audit which found that the defendants had overcharged patients $3.5 million due to double and triple billing for services. The relators also presented emails from the defendants' employees corroborating their allegations regarding the alleged fraudulent billing.

The defendants moved to dismiss the relators' claims for failure to plead fraud with particularity under Rule 9(b).

Holding: The U.S. District Court for the Eastern District of Virginia granted the defendants' motion to dismiss.

The court held that while the relators alleged particularized details regarding the alleged fraudulent scheme and specific patients and charges that they believed were false, they failed to allege that the defendants presented any actual false claims to government payors. The court noted that the relators "broadly assert[ed]" that 20-30% of the defendants' patient base was covered by government healthcare plans, but held that it could not infer from the relators' conclusory allegation that the defendants actually overbilled the government for any of the claims listed.

- Opinion

***U.S. ex rel. Bailey v. Gatan, Inc.,* 2015 WL 1291384 (E.D. Cal. Mar. 20, 2015)**

The relators brought a *qui tam* action against their former employer, Gatan, and Gatan's parent company, Roper, alleging that the defendants made false statements during the sale of equipment to the government, in violation of the False Claims Act. Gatan was a manufacturer and distributor of instrumentation and software that enhanced the performance of electron microscopes. The relators claimed that the defendants failed to inform the government that the devices they sold were defective

and caused potentially unsafe and hazardous x-ray radiation. The relators further alleged that Gatan falsely claimed to its employees and the government that its products were exempt from compliance with FDA regulations and that it falsely failed to classify its employees as "radiation workers" despite the radiation risks associated with the equipment. The defendants moved to dismiss, arguing that the relators failed to state a claim under Rule 12(b)(6) and failed to plead the alleged fraud with particularity under Rule 9(b).

Holding: The U.S. District Court for the Eastern District of California denied the motion to dismiss the relators' allegations against Gatan, but granted the motion to dismiss the claims against Roper.

The relators argued that in entering into a contract for sale to the government, the defendants undertook an obligation to expressly comply with the rules set forth in the Federal Acquisition Regulation ("FAR"), including the certification that their products met European "CE standards" for safety. The relators contended that the defendants falsely certified their compliance with those standards, and thereby violated the FCA. The court noted that the relators alleged with particularity multiple false statements made by Gatan defendants, and described not only the content of the statements, but the time period over which the statements were made, as well as who made them. The relators also included a list of defective pieces of equipment, the geographic location of the equipment, and the dates on which the pieces were purchased. The relators further alleged that Gatan knew that its statements were false, and they offered specific examples of instances in which employees relayed their concerns to Gatan staff about the high radiation emission levels in Gatan's products. The court also found that the relators sufficiently pled that Gatan made false assertions that it was exempt from certain FDA regulations, noting that the relators provided several examples of instances in which Gatan made such assertions, even though it was not actually exempt from the regulations. Based on those findings, the court denied the motion to dismiss the claims against Gatan. The court, though, held that the relator failed to properly allege claims against Roper, such that the court would pierce the corporate veil and hold the parent company liable under the FCA.

- Opinion

U.S. ex rel. Foglia v. Renal Ventures Mgmt, LLC, 2015 WL 1104425 (D.N. J. Mar. 11, 2015)

The relator alleged that the defendant, a provider of dialysis services, violated the federal False Claims Act and the New Jersey False Claims Act by overcharging Medicare and Medicaid for the drug Zemplar; the defendant allegedly used only portions of single-use vials of Zemplar and then submitted claims to the government for payment as if full vials had been used, and then used the rest of the vials for other patients. The defendant moved to dismiss, arguing that the fraud claim was not pled with the requisite particularity. The U.S. District Court for the District of New Jersey granted the motion, finding that the plaintiff failed to provide representative examples of false claims actually submitted to the government. The relator appealed the ruling to the U.S. Court of Appeals for the Third Circuit, which reversed and remanded, although recognizing the issue as "a close case as to meeting the requirements of Rule 9(b)." The circuit court noted that on a motion to dismiss, the relator's allegations should be accepted as true, and found that the circumstances alleged by the relator—whereby the defendant used less than a full vial of Zemplar, and the government reimburses for full vials regardless of the amount actually used—"provide[d] an opportunity for the sort of fraud alleged by [the relator]." Additionally, the appellate court determined that only the defendant "ha[d] access to the documents that could easily prove the claim one way or another—the full billing records." The circuit court adopted a "more nuanced" approach to the heightened pleading standards of Rule 9(b) and held that it was sufficient for a relator to allege details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that false claims were actually submitted, in the absence of representative examples. On remand, the defendant moved for judgment on the pleadings.

Holding: The district court denied the defendant's motion for judgment on the pleadings.

In support of its summary judgment motion, the defendant proffered billing records and argued that the documents "easily prov[ed]" that the defendant did not submit false claims. The relator countered that the additional documents could not be considered on a motion for judgment on the pleadings, and that the documents were not properly authenticated. The court rejected the defendant's proffer of billing records in support of its motion for summary judgment. The defendant contended that because the billing records were alluded to in the *qui tam* complaint they fell into the category of "undisputed authentic documents," and were therefore admissible on a motion for summary judgment. The court, though, explained that the relator's mention of the records in the complaint did not mean that he was on notice of the contents of the records, which were particularly in the possession of the defendant when the relator filed his complaint. As a result, the district court denied the defendant's motion for judgment on the pleadings.

- Def. Motion for Judgment on the Pleadings
- Rel. Opposition to Def. Motion for Judgment on the Pleadings
- Def. Reply Supporting Motion for Judgment on the Pleadings
- Opinion

***U.S. ex rel. Lambert v. Elliott Contracting, Inc.,* 2015 WL 1097381 (S.D. W. Va. Mar. 11, 2015)**

A group of relators brought a *qui tam* action against two contracting companies that were involved in the construction of a federal prison, pursuant to a contract with the federal government. Defendant Clark Construction was the general contractor on the project and defendant Elliott Contracting was the subcontractor that handled plumbing and HVAC installation. The relators worked for Elliott in various capacities and alleged that the defendants violated the False Claims Act by falsely certifying to the government that they were in compliance with the Buy American Act (which required that all materials used in the construction of the prison originate in the United States or in a "Designated Country") and the Davis-Bacon Act (which required the defendants to pay their workers the prevailing wage for work on the contract, without deductions or rebates). The relators also alleged that the defendants participated in an illegal kickback scheme involving undocumented workers.

One relator, Michael Spencer, alleged that he was directed by his supervisor at Elliott to remove the country of origin markings showing non-Designated Countries like China or Vietnam as the country of origin on plumbing parts installed at the prison, which he did by grinding off the markings and painting over them. When Clark employees inspected Elliott's work, they discovered the improper plumbing parts and directed Elliott to remove the parts and cease the practice, but according to Spencer, Clark never checked Elliott's work again to determine whether Elliott followed its instructions or discontinued the practice. The relators alleged that Elliott violated the Buy American Act by knowingly using plumbing parts from non-Designated Countries, and that the company violated the False Claims Act by falsely certifying to the government that it did not use such parts. Moreover, the relators claimed that Clark turned a blind eye to the scheme, which violated the FCA.

The other relators—O. Lambert, L. Lambert, Day, and Miller—asserted that they worked as plumbers for Elliott on the construction project but were misclassified and only paid as general laborers. They alleged that Clark knew of the misclassification but did not pursue the matter. They also alleged that Elliott failed to pay them overtime on the construction project. The relators claimed that Elliott intentionally misclassified their work, in violation of the Davis-Bacon Act and then falsely certified to the government that all of its workers were receiving the appropriate wages in their weekly payroll reports, in violation of the FCA. Because Clark signed off on the weekly payroll reports and presented them to the government, the realtors alleged that Clark also violated the FCA.

Furthermore, the relators alleged that Elliott hired undocumented workers in exchange for upfront payments and portions of the workers' weekly paychecks, and that Clark was aware of the kickback scheme and did not perform the required background checks on the workers. The relators also alleged a conspiracy between Elliott and Clark to violate the FCA.

The defendants moved to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) and for failure to plead with particularity under Rule 9(b).

Holding: The U.S. District Court for the Southern District of West Virginia granted the defendants' motion to dismiss the claims related to the Buy American Act, unpaid overtime, kickbacks for undocumented workers, and conspiracy to violate the FCA. The court stayed the realtors' Davis-Bacon Act claims pending an administrative decision by the U.S. Department of Labor.

Failure to State a Claim/Plead Fraud with Particularity

The court held that the relators' Buy American Act claims failed because they did not identify precisely which plumbing parts were fraudulently installed, where they were installed, or when they were installed. The court observed that the relators consistently referred to themselves as "insiders," but they did not allege any more specificity than describing "non-compliant 'plumbing parts.'" If Spencer actually removed the foreign markings himself, the court explained, then he should have been able to identify the types of non-compliant plumbing parts with greater specificity. Observing that the prison was a very large building, the court concluded that the relators' allegations failed to "point [the] defendants in the right direction." Further, the court found that the allegations regarding the Buy American Act were insufficient to assert claims against Clark for allegedly turning a blind eye to Elliott's practices, since the relators failed to identify which Clark representative "discontinued" inspections or when he or she decided to do so. Thus, the court dismissed all the relators' fraud claims related to the Buy American Act.

The court then turned to the relators' fraud claims based on alleged violations of the Davis-Bacon Act. The defendants argued that the Department of Labor (DoL) has primary jurisdiction over those claims, and therefore, the FCA claims should be dismissed. The court noted that where an issue involves "technical and intricate questions of fact and policy that Congress has assigned to a specific agency," referral to that agency is often appropriate. The court found that the relators' allegations that they were paid as general laborers instead of as plumbers, was a misclassification claim rather than purely a false certification claim, and held that referral to the DoL was appropriate, as determining proper labor classifications does not "fall within the typical purview or conventional experience of judges." Further, the court concluded, the structure of the Davis-Bacon Act "suggest[ed] that the principal avenue of enforcement under the statutory scheme [was] administrative." Rather than dismissing the realtors' Davis-Bacon Act laims, however, the court stayed the claims pending the DoL's determination regarding the misclassification claim. The court explained that dismissing the case would unfairly disadvantage the relators because they would be barred from refiling by the FCA's statute of limitations.

Next, the court found that the relators' unpaid overtime claims failed to meet the requirements of Rule 9(b) because they failed to include any information about which Elliott supervisor told them that overtime was a condition

of work on the project or to give estimated dates for when they worked overtime. Because the claims against Elliott failed, the court held that the claims against Clark were similarly deficient. Additionally, the court held that the relators' claims alleging kickbacks for hiring undocumented workers failed to meet the Rule 9(b) requirements because they failed to plead the presentment of false claims with the necessary particularity. The court observed that while the relators provided great detail regarding the alleged scheme itself, they failed to provide any evidence demonstrating that the defendants actually presented claims to the government—such as dates of the claims, contents of the claims, amounts of money charged to the government, or employees involved in submitting the claims.

Finally, the court held that the relators failed properly to plead a conspiracy to violate the FCA because they did not proffer any facts regarding an unlawful agreement between Clark and Elliott to submit false claims. The court noted that the relators alleged that the two companies knew of each other's FCA violations, but did not plead that they agreed to use a false record or statement to induce the government to pay a claim.

- First Amended Qui Tam Complaint
- Def. Clark Motion to Dismiss First Amended Qui Tam Complaint
- Def. Elliott Motion to Dismiss First Amended Qui Tam Complaint
- Opposition to Defs. Motion to Dismiss First Amended Qui Tam Complaint
- Def. Clark Reply Supporting Motion to Dismiss First Amended Qui Tam Complaint
- Def. Elliott Reply Supporting Motion to Dismiss First Amended Qui Tam Complaint
- Opinion

U.S. ex rel. Johnson v. Golden Gate Nat'l Senior Care, LLC, 2015 WL 1040535 (D. Minn. Mar. 10, 2015)

Two relators, and individual and a corporation, brought a *qui tam* action against Golden Gate National Senior Care and its affiliates—including Aegis Therapies, Inc. where the individual relator, Ricia Johnson, was previously employed. Aegis provided rehabilitative services to nursing home facilities. After Johnson left Aegis, she began working for the corporate relator, HDR. Johnson was not licensed in physical or occupational therapy, but alleged that while she was at Aegis, she was directed to monitor patients while they used exercise machines at the facility when no physical therapists were present. She alleged that the defendants regularly billed Medicare as if the work she did was performed by licensed physical therapists, in violation of the FCA. The relators identified several other individuals who Aegis allegedly falsely claimed provided physical or occupational therapy. A magistrate judge granted the relators' motion to amend their complaint and the relators filed an amended complaint. The defendants objected to the magistrate's order and moved to dismiss the relators' new allegations for failure to state a claim under Rule 12(b)(6) and failure to plead fraud with particularity under Rule 9(b).

Holding: The U.S. District Court for the District of Minnesota overruled the defendants' objections to the magistrate's order and denied the motion to dismiss.

First, the court found that the magistrate judge's order—which concluded that the relators showed good cause to amend the complaint to add allegations that the defendants submitted false claims for therapy services that were not performed at all, and that the defendants failed to properly document the underlying therapy services for certain services provided—was not clearly erroneous or contrary to law. Thus, the court overruled the defendants' objections to the magistrate's order. Next, the court rejected the defendants' argument that the relators' "no therapy allegations" failed because they did not show that the lack of therapy would have changed the *per diem* rate—the predetermined daily sum paid to the defendants for each patient—the defendants received from the government. According to the defendants, the relators could not show that the government lost any money. The court observed that the relators alleged that on at least forty-five occasions, therapists wrote notes documenting that no treatment had been provided, but that the defendants billed Medicare for reimbursable therapy services anyway; the relators offered eight specific examples. In rejecting the defendants' argument, the court further acknowledged that the government takes each patient's need for therapy into account when determining how much will be paid for the patient on a *per diem* basis. Further, the court held that "whether a specific claim was fraudulent or caused the government to actually lose money [are] questions for trial or are better addressed at the summary judgment stage."

The court also rejected the defendants' argument that the realtors' "no documentation allegations" failed because any failure to properly document services can only relate to the conditions of participation in the federal healthcare programs, not to the conditions of payment. The court, though, explained that the complaint referenced specific patients, specific incidents, and specific billings, and held that the relators sufficiently stated a claim under the FCA. Any further analysis as to whether the "no documentation" claims actually caused payment of claims, the court found, was "not appropriate at the motion to dismiss stage."

The defendants also argued that certain of the relators' "new" allegations contained in the amended complaint failed to meet the particularity requirements of Rule 9(b) because they did not include details regarding the time, place, or contents of the allegedly false claims. The defendants also argued that the relators' amended claims failed because they were not based on firsthand knowledge. The court, however, held that the relators' complaint included well-pled claims based on information "from Johnson's knowledge and experience and [ ] derived through discovery...not based on generalized

allegations that requir[ed] additional discovery." Thus, the court denied the defendants' motion to dismiss.

- Opinion

U.S. ex rel. Jajdelski v. Kaplan, Inc., 2015 WL 1034055 (D. Nev. Mar. 9, 2015)

The relator filed a *qui tam* action alleging that Kaplan, Inc., an educational institution that owned and operated post-secondary education and vocational institutions throughout the United States, violated the False Claims Act. The relator had worked for Kaplan before being transferred to a subsidiary, Heritage College, and he alleged that Heritage filed fraudulent student financial aid requests. Specifically, the relator claimed that Heritage was enrolling "phantom students" who did not actually exist in order to keep its enrollment numbers high enough to receive federal funds. He also alleged that Kaplan knew of Heritage's fraudulent actions. In addition, he claimed that he was retaliated against in violation of the FCA. The U.S. District Court for the District of Nevada dismissed the relator's fraud claims for failure to meet Rule 9(b)'s particularity standards; the court also dismissed the retaliation claim. The relator appealed to the U.S. Court of Appeals for the Ninth Circuit, which affirmed the dismissal of the relator's retaliation claim but reversed and remanded the district court ruling on the relator's "phantom student scheme" fraud claim. The circuit court found that the district court erred in holding that the relator was required to plead representative examples of false claims submitted by the defendant. Instead, the appellate court determined that the relator was only required to plead "particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted." On remand, the defendant moved for summary judgment.

Holding: The district court granted the defendant's motion for summary judgment.

The district court noted the circuit court's finding that, on a motion to dismiss, the relator was not required to provide representative examples of false claims actually submitted to the government. But the district court held that on summary judgment, after discovery had completed, the relator was required to identify actual false claims submitted by the defendant. The court determined that the relator was not able to do so, despite the large volumes of documents and declarations in evidence. Consequently, the district court granted the defendant's motion for summary judgment.

- Opinion

U.S. ex rel. Balko v. Senior Home Care, Inc., 2015 WL 997873 (M.D. Fla. Mar. 6, 2015)

The relator sued her former employer, a company that provided medical services for elderly patients, alleging that the defendant violated the False Claims Act by overcharging Medicare and Medicaid for wound care services. The relator alleged that the defendant created a scheme whereby all surgical wounds that were less than thirty days old were falsely identified as "not healing" in the defendant's software system used to create bills sent to Medicare and Medicaid. She claimed that the defendant directed all clinicians to code the wounds in that manner in order to receive higher payments from the government. She also alleged that she personally completed data sets in the software program and submitted them to the defendant, and that she had personal knowledge that fraudulent reports were submitted to the government during the time she was employed. She alleged that she met with the defendant's president after her employment ended to tell him about the improper practices and that he admitted that he knew about the scheme and that the defendant "would be liable for substantial financial reimbursement."

The defendant moved to dismiss for failure to state a claim under Rule 12(b)(6) and failure to plead fraud with particularity under Rule 9(b).

Holding: The U.S. District Court for the Middle District of Florida denied the defendant's motion to dismiss.

The court observed that the relator described the fraud scheme in detail and alleged personal knowledge of claims being submitted, both through her employment and based on her conversation with the defendant's president after her employment ended. The court noted that the relator described the time, place, and substance of the alleged fraud, and that she alleged that she witnessed billing codes being changed in order to receive a higher reimbursement from the government. The court found that these allegations met the particularity standards of Rule 9(b) and denied the defendant's motion to dismiss.

- Qui Tam Complaint
- Motion to Dismiss Qui Tam Complaint
- Opposition to Motion to Dismiss Qui Tam Complaint
- Opinion

U.S. ex rel. John v. Hastert, 2015 WL 1006852 (N.D. Ill. Mar. 4, 2015)

The relator was an acquaintance and business partner of the defendant, Dennis Hastert, former Speaker of the U.S. House of Representatives. Upon retirement from the government in 2007, Hastert—who was now employed as a lobbyist and consultant—continued to maintain an office with staff and received a federal allowance for his office expenses pursuant to the Former Speaker Statute law that allows former Speakers of the House to wind down matters pertaining to their former position.

The relator alleged that Hastert generally used the office, staff, equipment, and supplies for his personal business dealings, and not for "matters pertaining to or arising out of his incumbency in office," as required by statute. The relator claimed that he personally met with Hastert at his office three times in 2008 and 2009 to discuss business ventures and that all of the communication and interaction between himself and Hastert was coordinated through the government office. He also alleged that the defendant used his government-issued truck for personal and private businesses dealings, and that he submitted impermissible reimbursement claims to the government for consulting and legal fees notwithstanding his certification to the government that the expenses were incurred in support of his official duties.

The relator brought a *qui tam* action alleging that Hastert violated the False Claims Act by submitting and verifying employee wage contracts and hourly claims for time that was not spent on government work, and by accepting payments from the government for false claims related to expenses incurred during his private business dealings. The defendant moved to dismiss, arguing that the relator's claims were precluded by the public disclosure bar; he also argued that the relator failed to plead the fraud with particularity, as required by Federal Rule of Civil Procedure 9(b).

Holding: The U.S. District Court for the Northern District of Illinois denied the defendant's motion to dismiss for failure to meet the Rule 9(b) requirements but granted the motion to dismiss pursuant to the public disclosure bar.

Failure to Plead Fraud with Particularity

First, the court addressed the defendant's Rule 9(b) arguments. The defendant argued that the relator failed to identify any false statements or certifications of compliance with the FSS that violated a condition of receiving payment; in fact, the defendant asserted that such certifications were not required by the FSS. The relator argued that the defendant impliedly certified that he was in compliance with the FSS by submitting the claims for reimbursement to the government. The court held that the relator properly alleged that the defendant made a certification to the government that he was in compliance with the FSS—which was a prerequisite to payment. The court also concluded that the defendant knew that his claims for reimbursement for the use of his employees, office, equipment, and truck for private business dealings did not comply with the FSS. Moreover, the court found that the relator properly pled the "who, what, where, when, and how" of the fraud scheme, by identifying the defendant; providing the location of the defendant's office; giving the dates of his private business meetings with the defendant; and detailing the reimbursement process and the alleged fraud scheme, including representative examples discussing the particular employees who were paid improperly and specific instances in which the defendant allegedly used his government-issued truck for personal business. Therefore, the court held that the relator's allegations met the Rule 9(b) requirements.

Public Disclosure Bar

Next, the court addressed the defendant's public disclosure arguments. The defendant argued that the relator's claims were based on information that had been publicly disclosed in several Chicago Tribune articles published two years before the relator's suit was filed. The articles reported that the defendant's personnel used his office resources to perform duties related to his private business dealings with the relator. The relator countered that his claims were not based upon anything disclosed in the articles or in any other public disclosure; he asserted that his claims were based on his own experiences and observations and that his allegations provided far more detail regarding the alleged scheme than did the articles. The court observed that the relator's allegations and the articles both alleged the general scheme that the defendant was using his government office for private business, and that the additional information alleged by the relator did not "qualify his lawsuit as 'dissimilar' to the Tribune articles." Thus, the court found that the relator's allegations were "based upon" public disclosures.

The court also held that the relator was not an original source of his allegations. The defendant argued that the relator failed to show that he voluntarily shared his information with the government prior to the public disclosure or to the filing of his complaint. In his response to the defendant's motion to dismiss, the relator attached an affidavit claiming that he met with an FBI agent and disclosed the information more than a year before the articles were published. But the court refused to consider the extraneous document, finding that it could not consider documents outside of the pleadings that were presented in response to a motion to dismiss. The court stated that it would not make an exception to that rule in this case, because the affidavit did not include any well-pleaded allegations about the relator's status as the original source or any specific information about the conversations with the FBI he alleged. As a result, the court granted the defendant's motion to dismiss pursuant to the public disclosure bar.

- Opinion

U.S. ex rel. Oughatiyan v. IPC The Hospitalist Co., Inc., 2015 WL 718345 (N.D. Ill. Feb. 17, 2015)

The relator was a physician who worked as a hospitalist for IPC, which operated a nationwide physician group practice focused on hospital medicine and facility-based services. IPC subsidiaries and affiliates provided medical services to patients at various facilities throughout the United States. The relator brought a *qui tam* alleging that IPC and its subsidiaries and affiliates (collectively, IPC) overbilled federal healthcare programs, including Medicare and Medicaid, in violation of the False Claims Act. The United States intervened. The plaintiffs alleged that the defendants engaged in upcoding and charged the government for more expensive services than they actually provided. The plaintiffs further alleged that IPC incentivized physicians to upcode by awarding bonuses based on the amount of hospitalist bills. Additionally, the plaintiffs alleged that IPC's billing system, IPC-Link, encouraged upcoding. According to the plaintiffs, hospitalists entered data into IPC-Link to record patient encounters and the plaintiffs contended that IPC used that data to rank hospitalists against each other; hospitalists who fell below IPC's revenue per encounter targets were "red-flagged." The plaintiffs provided six case studies on different hospitalists to demonstrate the pressure exerted on the group to upcode. Additionally, the plaintiffs claimed, IPC created a "dashboard" report to track hospitalists who used more expensive codes too infrequently. Because IPC tracked the hospitalists in this way, the plaintiffs alleged that IPC knew that CPT codes corresponding to more expensive services were being billed at a much higher rate than normal.

The plaintiffs also provided several examples of specific claims for which they asserted that the highest level CPT code was used even though there was no basis in the patients' medical records for such billing. These examples listed the claim number, date of service, code billed, amount paid for each claim and date of payment. The plaintiffs further alleged that as a result of the upcoding scheme, IPC hospitalists billed for so many complex procedures that work they claimed to have completed in one day would have taken far more than 24 hours to complete. The plaintiffs provided twelve examples of this phenomenon. The defendants moved to dismiss, arguing that the plaintiffs did not have standing to bring their claims, that they failed to state a claim under Rule 12(b)(6), and that the fraud was not plead with particularity under Rule 9(b).

Holding: The U.S. District Court for the Northern District of Illinois held that the plaintiffs only pled fraud against the Medicare program. All allegations of fraud against other federal healthcare programs were dismissed. The court then denied the IPC company's individual motion to dismiss the Medicare fraud claims. However, the court granted the motion to dismiss filed by IPC's subsidiaries and affiliates.

The court rejected the defendants' argument that the plaintiffs lacked standing because they "[did] not allege any injury that is fairly traceable" to the defendants' conduct. The court observed that this argument was "irrelevant" because the plaintiffs were only required to establish a causal connection between the alleged injury and the defendants' conduct, not establish a relationship with the defendants or among different defendants. Further the court rejected the defendants' argument that the plaintiffs failed to link their claims to any specific defendant, explaining that the plaintiffs linked the claims to IPC by alleging that IPC was responsible for submitting the fraudulent claims.

The court also rejected the defendants' argument that the plaintiffs failed to meet Rule 9(b)'s particularity standards because they failed to allege who was involved in the conduct, where the fraud occurred, and how the fraud occurred. The court observed that while a claim alleging fraud with the requisite particularity often will include the "who, what, when, where, and how" surrounding the fraud scheme, the plaintiffs were not required to plead all of those details for their claims to proceed. Further, the court found that the plaintiffs did establish the "who" (IPC and its subsidiaries and affiliates), the "what" (fraudulent submission of claims), the "when" (from January 2004 to the present), and the "how" (by upcoding). In addition, the court noted that the plaintiffs provided representative examples of the allegedly fraudulent claims submitted. The court also rejected the defendants' argument that the plaintiffs' claims failed because they failed to allege a "pattern of upcoding across all 30 Defendants or particular Defendants in the case," explaining that Rule 9(b) does not require the plaintiffs to allege a pattern. The court, though, observed that all of the examples provided by the plaintiffs involved the Medicare program, stating that there was a "dearth of detail" involving fraud against other healthcare programs in the complaint. As a result, the court held that the plaintiffs' claims involving government healthcare programs other than Medicare should be dismissed because the plaintiffs did not sufficiently allege fraud involving those programs.

Finally, the court held that the plaintiffs failed to state a claim against IPC's affiliates and subsidiaries. The court explained that while the plaintiffs did sufficiently plead that IPC submitted false claims, under Rule 9(b) defendants cannot be "lumped" together. The court found that the plaintiffs sufficiently alleged that IPC took control of, and responsibility for, the billing services for the subsidiaries and affiliates, but did not allege what role the subsidiaries and affiliates played in the alleged fraud. Thus, the court dismissed the claims against those entities.

- Opinion

U.S. ex rel. Barrett v. Beauty Basics, Inc., 2015 WL 566515 (N.D. Ala. Feb. 11, 2015)

The relators brought a *qui tam* action alleging that a defendant sought and received federal funding by falsely certifying that its beauty schools met the standards for accreditation. In 2013, the relators obtained federal financial aid and enrolled in one of the defendant's schools. However, they alleged that

they did not receive grades or have properly licensed instructors, as required by the accrediting institution. The relators claimed that the defendant falsely certified its compliance with accreditation standards in reports to the accrediting institution in order to become and remain accredited, and then falsely certified to the U.S. Department of Education that it met the standards in the program participation agreements ("PPAs") that allowed the defendant to benefit from the federal financial aid program. The defendant moved to dismiss for failure to state a claim under Rule 12(b)(6) and failure to plead fraud with particularity as required by Rule 9(b).

Holding: The U.S. District Court for the Northern District of Alabama granted the defendant's motion to dismiss.

The defendant argued that the relators' claims failed because even if it did fall behind on its accreditation standards in 2013, the statements in its initial PPA in 2009 were not false at the time they were made. The court observed that the 2009 PPA was not mentioned in the relators' complaint and that they only referenced PPAs "made periodically." The court explained that the defendant's arguments about the details of the 2009 PPA could not support its motion to dismiss because the defendant was required to "attack the [c]omplaint as-is, and contrary to the defendant's argument, the [c]omplaint plainly allege[d] a false certification."

However, the court found that the relators failed to meet Rule 9(b)'s particularity requirements. The court explained that the relators did not provide the dates any allegedly false claims were submitted or the amounts charged; rather, they alleged that every certification made during the time they were students was false. The court noted that the timing of the alleged false certifications was "especially important here because it may change the question of FCA liability from whether defendant falsely certified to the United States that it was in compliance" with the accreditation standards, which would constitute an FCA violation, or whether the defendant lapsed into non-compliance after truthfully certifying that it had met the standards. The latter, the court concluded, was a harder question. The court further noted that the timing of the certifications would also affect whether scienter could be inferred. The court granted the defendant's motion to dismiss without prejudice.

- Opinion (10th Cir.)

U.S. ex rel. Tyson v. Wells Fargo Bank & Co., 2015 WL 309636 (D.D.C. Jan. 26, 2015)

The *pro se* relator brought a False Claims Act action against Wells Fargo in an attempt to avoid foreclosure on his home. The relator did not make any claims against Wells Fargo specifically, but alleged generally that "banks pooled mortgage loans into securities; that assignments of loans were lost; that there [were] an increasing number of inaccuracies in foreclosure cases; [and] that his mortgage loan was pooled, securitized, and the subject of a fictitious assignment." The relator contended that after seeing reports on the news about these bank practices, he was "concerned" that Wells Fargo did not have the authority to foreclose on his property. Wells Fargo moved to dismiss, arguing that the relator's claims were precluded by the public disclosure bar.

Holding: The U.S. District Court for the District of Columbia granted Wells Fargo's motion to dismiss.

The court held that the relator's claims had to be dismissed because he failed to follow the proper filing and service requirements for an FCA case, and because FCA relators cannot proceed *pro se*. The court further held that the relator's claims were based only on information in the public domain and were thus barred by the public disclosure bar. The court granted Wells Fargo's motion to dismiss.

- Opinion

U.S. ex rel. Kress v. Masonry Solutions Int'l, Inc., 2015 WL 328299; 2015 WL 365835 (E.D. La. Jan. 26, 2015)

The relator, a former employee of the defendant, brought a *qui tam* suit alleging the defendant violated the False Claims Act by submitting false claims regarding the origin of building materials used in conjunction with the fulfillment of its contract with the federal government, in violation of the Buy American Act ("BAA"). The government contracts at issue required the defendant to comply with the BAA, which provided a preference for domestic construction material, but also allowed contractors to use materials from certain exempt designated countries. The relator alleged that the defendant mislabeled materials purchased from China, a country not exempted by the BAA, as originating in an exempt country, and also over-billed the government for those materials. The realtor alleged that the scheme was accomplished by the defendant's owner creating a dummy corporation where the materials were shipped and rebranded. In addition to the fraud claims, the relator alleged a conspiracy between the defendant and the owner of the company.

When the defendant refused to comply with discovery requests, a magistrate judge granted the relator's motion to compel discovery. However, the defendant still failed to respond to the relator's interrogatories and requests for production. Instead, the defendant filed a motion to review the magistrate judge's order, arguing that in complying with the discovery requests, it would "effectively allow the [relator] 'to acquire knowledge which [the defendant] maintain[ed] [the relator] did not possess.'" The defendant also argued that it should not be compelled to respond to discovery requests because the relator was required to be an original source of his allegations and to plead his allegations with particularity under Rule 9(b).

In addition to the discovery issue, the court considered the defendant's motion to dismiss for failure to state a claim under Rule 12(b)(6) and failure to plead fraud with particularity under Rule 9(b).

Holding: The U.S. District Court for the Eastern District of Louisiana denied the defendant's request to overturn the Magistrate Judge's order and denied the defendant's motion to dismiss.

The court rejected the defendant's discovery arguments, explaining that the purpose of discovery was to "ascertain information that either proves or disproves the Plaintiff's allegation," and that the appropriate use of Rule 9(b) was as a "safety valve" at the initial stage of litigation to "prevent relators from using discovery as a fishing expedition." The court explained that the defendant waited too long to challenge the completeness of the relator's allegations and could not use Rule 9(b) as a means of withholding discovery. Further, the court explained that the relator's status as an "original source" was not relevant to whether the defendant was required to comply with the court's order to provide discovery. The court affirmed the magistrate judge's order and compelled the defendant to answer the relator's discovery requests.

The court also rejected the defendant's argument that the relator's claims failed because the relator did not plead how he had knowledge of certain facts alleged in the complaint or the basis for his allegations. The court explained that this argument was "unfounded," and that the relator was not required to plead the basis of his knowledge to meet the requirements of Rule 9(b), only that he had direct knowledge of the alleged scheme and the details of that scheme.

The court further rejected the defendant's argument that the relator failed to plead that the defendant had actually submitted false claims with particularity. Citing Fifth Circuit precedent, the court explained that the relator need only plead the claims' alleged falsity, not their exact contents; and that pleading the circumstances surrounding the fraud, where the "details of the scheme [were] 'paired with reliable indicia that [led] to a strong inference that claims were actually submitted'" was sufficient to meet the requirements of Rule 9(b). The court held that the relator pled the details surrounding the scheme to mislabel and overcharge the government for materials from China, as well as provided examples of the amounts charged for the materials. Further, the court held that because the relator pled facts regarding a scheme that consisted of numerous acts over an extended period of time and facts that are based on information "peculiarly within the control of [the defendant]," a relaxed reading of Rule 9(b) was warranted.

Finally, the court rejected the defendant's argument that the relator failed to plead a knowing violation of the FCA because he did not allege that any contracting officer determined that the defendant violated the BAA. The court held that the relator's allegations regarding the details of the scheme, the defendant's knowledge, and the materiality of the alleged false statements (i.e. that the false statements would have influenced the contracting officer in charge of ensuring the defendant's compliance with the BAA) negated the defendant's argument that the relator did not plead that a contracting officer actually found the defendant in violation of the BAA. The court denied the defendant's motion to dismiss.

The court also held that the relator properly pled conspiracy between the company's owner and the defendant because he alleged that the owner was acting outside the scope of his employment as an agent of the corporation. The court held that pursuant to the intracorporate conspiracy doctrine, the realtor alleged facts that would allow the inference that the owner and the defendant formed an agreement to defraud the government and performed overt acts in furtherance of that agreement. The court denied the defendant's motion to dismiss the conspiracy claims.

- Opinion (Motion for Judgment on Pleadings)
- Opinion (Discovery)

U.S. ex rel. McFeeters v. Northwest Hosp., LLC, 2015 WL 328212 (M.D. Tenn. Jan 23, 2015)

The relator, an occupational therapist for Northwest Hospital (a subsidiary of Community Health Systems ("CHS")), brought a *qui tam* action alleging that the hospital violated the False Claims Act by overbilling Medicare. According to the relators, the hospital failed to properly document the number of minutes of outpatient therapy services that it administered to Medicare patients; hospital employees were directed to document minutes on patients' charts retroactively, which is improper. The relator also alleged that CHS knew of—and even directed—the scheme. In addition, the relator alleged that she was terminated from her job, in retaliation for whistleblowing activities; she claimed that she was harassed and eventually fired because of her refusal to retroactively add minutes to patients' charts, as well as for her complaints to supervisors regarding the alleged billing scheme and her calls to CHS's confidential hotline and to Medicare. The relator did not claim to have seen any actual bills the hospital sent to Medicare for

the therapy sessions, nor could she verify that the bills contained any particular number of minutes. Instead, she alleged that the defendants "likely" overbilled Medicare for those patients by "blindly" billing for the number of therapy minutes. The hospital moved to dismiss the relator's fraud and retaliation claims for failure to state a claim under Rule 12(b)(6) and failure to plead fraud with particularity under Rule 9(b). CHS also moved to dismiss, arguing that it was not the alter ego of the hospital and was not responsible for its actions.

Holding: The U.S. District Court for the Middle District of Tennessee granted both defendants' motions to dismiss the fraud claims, and granted CHS's motion to dismiss the retaliation claim. However, the court denied the hospital's motion to dismiss the retaliation claim asserted against it.

Failure to State a Claim/Failure to Plead Fraud with Particularity

The court held that the relator's fraud claims failed because she did not identify a single specific claim that the defendants submitted to Medicare for payment, let alone identify a claim in which the defendants made a false statement. The court explained that the "mere allegation that the [d]efendants did not document properly did not prove that the [d]efendants submitted false claims." The court further explained that the relator's allegations regarding fraudulent conduct were not sufficient to allege an FCA cause of action, because an actual false claim to the government is required. The court held that Rule 9(b) requires that relators allege actual false claims, and does not permit relators to allege fraud claims based on the "allegation and assumption that illegal payments must have been submitted." The court declined to apply a more relaxed Rule 9(b) standard, finding that the relator did not plead facts that supported a "strong inference" that a false claim was submitted, since she did not allege any involvement with the defendants' billing processes and did not plead any facts that indicated that that she personally knew that any therapist misrepresented the number of minutes on a patient's chart. Thus, the court granted the defendants' motion to dismiss the fraud claims.

Retaliation

The court held that the relator's engaged in protected whistleblower activities under the FCA, because her reports of fraudulent billing reasonably could have led to a viable FCA action. The court further held that the relator sufficiently alleged that the defendants were aware of her protected activity, because she alleged that she reported her concerns to her supervisors and through CHS's hotline. Finally, the court held that the relator sufficiently alleged that there was a causal connection between her complaints and her eventual termination, because she alleged that shortly after her reports to her supervisors, she was given her first ever negative performance review, was harassed by superiors and co-workers, was placed on suspension, and was finally fired. Therefore, the court denied the hospital's motion to dismiss the retaliation claim. However, the court granted CHS's motion to dismiss that claim, finding that the relator failed to allege specifically that CHS discriminated against her and failed to allege that she was a CHS employee.

- First Amended Qui Tam Complaint
- Community Health Motion to Dismiss First Amended Qui Tam Complaint
- Northwest Hosp. Motion to Dismiss First Amended Qui Tam Complaint
- Reply Supporting Community Health Motion to Dismiss First Amended Qui Tam Complaint
- Reply Supporting Northwest Hosp. Motion to Dismiss First Amended Qui Tam Complaint
- Consolidated Opposition to Motions to Dismiss First Amended Qui Tam Complaint
- Opinion

U.S. ex rel. Badr v. Triple Canopy, Inc., 2015 WL 105374 (4th Cir. Jan. 8, 2015)

The relator, a former medic for the defendant government defense contractor, brought a *qui tam* action alleging that the defendant was contracted to provide security services at airbases in Iraq, but employed untrained and uncertified guards in violation of its contractual obligation to "ensure that all employees have received initial training on the weapon that they carry, [and] that they have qualified on a U.S. Army qualification course." The defendant allegedly hired 332 Ugandan guards to serve under the supervision of 18 Americans. Although the Ugandan guards allegedly consistently failed the marksmanship requirements, the relator alleged that the defendant employed them anyway and billed the government for their performance. The defendant allegedly directed the relator and others to create false marksmanship scorecard sheets for the guards and to place the cards in the guards' personnel files.

The government intervened in the relator's suit with respect to the allegations at Al-Asad. The relator also alleged similar violations at four other bases. The U.S. District Court for the Eastern District of Virginia granted the defendant's motion to dismiss all the plaintiffs' claims for failure to state a claim under Rule 12(b)(6). The district court held that the plaintiffs' claims failed because they did not allege an objectively false statement by the defendant; the court held that the allegedly false scorecards were not material to the government's decision to pay the defendant's claims because the government never reviewed them. In addition, the court held that the relator's non-intervened claims alleging fraud at four other bases failed because he did not plead the fraud with particularity under Rule 9(b). The district court also held that the relator lacked standing to pursue his claims regarding Al-Asad, since the government intervened in that claim and took over responsibility for pursuing it. The government and relator both appealed to the Fourth Circuit.

Holding: The Fourth Circuit reversed the district court's dismissal of the intervened claims, but upheld the district court's dismissal of the non-intervened claims.

The circuit court held that the district court erred in holding that the plaintiffs failed to allege a false statement because they did not allege that the defendant "invoiced a fraudulent number of guards or billed for a fraudulent sum of money." The court explained that a claim to the government for payment is false under the FCA when it "rests on a false representation of compliance with an applicable … contractual term." The circuit court held that the plaintiffs properly pled a false claim by alleging that "the defendant, with the requisite scienter, made a request for payment under a contract and 'withheld information about its noncompliance with material contractual requirements.'" Specifically, the plaintiffs alleged that the defendant knew that the guards it hired failed to satisfy the marksmanship requirement and that the company even falsified records to obscure the failure. The court further held that the plaintiffs sufficiently pled materiality, explaining that "common sense strongly suggests that the Government's decision to pay a contractor for providing base security in an active combat zone would be influenced by knowledge that the guards could not, for lack of a better term, shoot straight." Additionally, the circuit court explained, the defendant's alleged actions in covering up the failure to satisfy the marksmanship requirement suggested that the requirement was material and that the defendant knew so.

The court also reversed the district court's ruling that the plaintiffs did not properly plead that the defendant submitted a false record because the allegedly false scorecards were never actually reviewed by the government. The circuit court explained that the district court's conclusion "misapprehend[ed] the FCA's materiality standard," because it focused on the actual effect of the false statement rather than its potential effect; the appeals court recognized that a false record has the potential to influence the government's payment decision even if the government ultimately does not review it. Because the false scorecards made the invoices appear legitimate, the court explained, the scorecards were "integral to the false statement and satisf[ied] the materiality requirement."

In addition, the circuit court reversed the district court's dismissal of the relator as a party to the intervened Al-Asad claims, explaining that the FCA provides that in the event of government intervention, the relator has the right to continue as a party to the action, subject to limitations.

The circuit court did uphold that district court's dismissal of the relator's non-intervened claims relating to the four additional bases, explaining that the relator did not plead any specifics regarding the actions taken at those bases and failed to satisfy Rule 9(b)'s particularity requirements by not alleging the time, place, or contents of any false representations. Unlike the Al-Asad base, where the relator allegedly witnessed fraud firsthand and made specific factual allegations, the court explained that the relator could only assume that the fraud went on at other the other bases where the defendant operated, which was not sufficient to meet the particularity requirements of Rule 9(b).

- US-Appellant Opening Brief (4th Cir)
- Relator-Appellant Opening Brief
- Def-Appellee Opening Brief (4th Cir)
- Relator-Appellant Reply Brief (4th Cir)
- US-Appellant Reply Brief (4th Cir)
- Opinion (4th Cir.)

U.S. ex rel. Sheldon v. Kettering Health Network, 2015 WL 74950 (S.D. Ohio Jan. 6, 2015)

The relator brought a *qui tam* action against the defendant, a hospital group. The relator alleged that her estranged husband, who was employed by the defendant, accessed and shared her private electronic medical records. The relator alleged that because of this breach, the defendant failed to comply with a provision of the Health Information Technology for Economic and Clinical Health Act ("HITECH Act") which required hospitals to "implement policies and procedures to prevent, detect, and correct security violations," including protecting patients' electronic medical records. The relator alleged that the defendant violated the FCA by certifying its compliance with the HITECH Act and accepting "Meaningful Use" money from the government, which was granted to assist the defendant in switching to electronic medical records and implementing policies and procedures directed towards patient confidentiality. The defendant moved to dismiss for failure to state a claim under Rule 12(b)(6) and failure to plead fraud with particularity under Rule 9(b).

Holding: The U.S. District Court for the Southern District of Ohio granted the defendant's motion to dismiss.

The court explained that an isolated privacy breach, such as the one described by the relator, did not constitute a breach of the HITECH Act. The court determined that the relator failed to allege that the

defendant did not implement the proper security policies, noting that the relator contended that the defendant's security system caught the breach almost immediately. The court rejected the relator's contention that the incident was not "isolated" because there was a "team" of four employees who participated in certifying that the defendant complied with the HITECH Act, finding that the relator failed to articulate any factual basis for her belief that these individuals were involved in the certification process, other than identifying them by name and title. Not only did the court find that the relator could not allege a violation of the HITECH Act, but the court found that the relator failed to specify when any allegedly fraudulent HITECH certifications were made, who made them, or whether that person had knowledge of the alleged falsity at the time the certifications were made. Additionally, the relator did not allege any personal knowledge of the defendant's security systems, the manner in which the defendant failed to meet the requirements of the HITECH Act, any other incidents in which patients' records were compromised, or any details surrounding the defendant's alleged misrepresentation to the government of its compliance with the HITECH Act. The court did not agree with the relator's contention that she had personal knowledge of the defendant's allegedly false claims due to her "own individual experiences" resulting from her husband's unauthorized access to her records. Rather, the court declared that the FCA is "not concerned with any injury to a private party, including the Relator. The only wrongdoing that is actionable is a false claim made to the government in furtherance of receiving meaningful use money from the government." Based on these findings, the court granted the defendant's motion to dismiss.

- Opinion

***U.S. ex rel. Frawley v. McMahon,* 2015 WL 115763 (N.D. Ill. Jan. 5, 2015)**

The relators brought a *qui tam* action alleging that the defendants, a family-owned business conglomerate, submitted false documentation to the City of Chicago for several of their businesses in order to receive certifications as minority-owned and woman-owned businesses. The relators alleged that by submitting false applications for government contracts under the City of Chicago's Minority and Women Owned Business Enterprise Procurement Program, the defendants obtained set-aside contracts, despite not meeting the requirements. The relators alleged that several of the defendants' family businesses were owned, operated and controlled by men who listed their wives, sisters, or mothers as principal owners of the businesses in order to qualify for woman-owned business status. In addition, the relators alleged that the defendants listed minority owners for several of their purportedly minority-owned business enterprises, even though those individuals never participated in any of the business operations.

The relators alleged that the defendants won set-aside contracts for electrical work at O'Hare and Midway airports, which were heavily subsidized by the federal government. In addition, the defendants were awarded federally-funded contracts with the city's Board of Education and with the Chicago Housing Authority ("CHA") to develop public housing. The relators further alleged that the defendants billed the government for unused materials and unperformed work, billed at rates higher than the contract rates, and created and submitted fraudulent "ghost" time sheets and payroll documents for nonexistent employees. The relators contended that the defendants violated the FCA by fraudulently inducing the government to award the set-aside contracts and by submitting false invoices for reimbursement under the contracts. The defendants moved to dismiss for failure to state a claim under Rule 12(b)(6) and failure to plead fraud with particularity under Rule 9(b).

Holding: The U.S. District Court for the Northern District of Illinois granted the defendants' motion to dismiss without prejudice.

The court held that the relators' claims failed because they did not sufficiently allege a connection between the allegedly false claims and federal government funds. The court explained that the relators alleged government funding for the defendants' airport and Board of Education projects "on information and belief," which was insufficient to satisfy Rule 9(b)'s heightened pleading requirements. The court further explained that the relators failed to provide any detail as to the nature of the government funds involved, rejecting the relators' argument that they could not plead specifics because only the defendant had access to the contracts at issue—the court determined that the relators could have obtained the contracts via the Illinois Freedom of Information Act.

The court further held that the relators failed to properly plead a government connection to the false claims with respect to the CHA contracts, because they did not allege that any false claims were presented to the government under the CHA contracts and did not allege that the CHA paid the defendants using HUD money. The court granted the defendants' motion to dismiss without prejudice.

- Opinion

See *U.S. ex rel. Garcia v. Novartis AG,* 2015 WL 1206122 (D. Mass. Mar. 17, 2015).

See *U.S. ex rel. Gravett v. Methodist Med. Ctr. of Ill.*, 2015 WL 1004679 (C.D. Ill. Mar. 4, 2015).

See *U.S. ex rel. McGee v. IBM Corp.*, 2015 WL 877458 (N.D. Ill. Feb. 26, 2015).

B. Rule 12(b)(6) Failure to State a Claim upon which Relief 46 Can Be Granted

U.S. ex rel. Lawson v. Aegis Therapies, Inc., 2015 WL 1541491 (S.D. Ga. Mar. 31, 2015)

The relator brought a *qui tam* action against two defendants, including his former employer, Aegis—a rehabilitation therapy company that provided services to residents at skilled nursing facilities ("SNF"), including the defendant Beverly Health and Rehab Center-Jesup ("Jesup"). The government intervened in the relator's case. The plaintiffs alleged that Aegis provided medically unnecessary therapy services and billed government healthcare programs for the services in violation of the False Claims Act. Medicare covers up to 100 days of SNF care following a qualifying hospital stay. The plaintiffs alleged that Aegis always assumed that patients should stay the maximum number of days covered by Medicare—and billed Medicare for the full reimbursable period for each patient—even when patients did not need that amount of therapy. Additionally, the plaintiffs provided examples of allegedly medically unnecessary care, including "group therapy" that consisted of Aegis assembling a group of six to fifteen patients to ride a stationary bike without regard to outcome, performance, or medical benefit. They also alleged that Aegis encouraged therapists to provide Patterned Electrical Neuromuscular Stimulation ("PENS") unnecessarily, including using it on a patient who was comatose.

The plaintiffs alleged that therapists were pressured to keep patients in treatment for as long as Medicare would pay and at the highest reimbursement levels. However, a district manager for Aegis who oversaw several SNFs where Aegis therapists provided services testified that while Aegis tracked the levels of care being billed to the government as well as the amount of days billed, the standards Aegis set were merely goals and there was no punitive action taken in the event that a therapist did not meet those goals. Rather, the district manager explained that they would use the information regarding whether the therapists met their goals in order to discover what was impacting the numbers. The plaintiffs also alleged that Aegis gave its therapists instructional material that coached them on how to maximize Medicare billing, including instruction on how to "sell" to the Medicare examiner that a patient's condition required therapy.

The defendants' moved for summary judgment, arguing that the plaintiffs failed to establish that they submitted any false claims.

Holding: The U.S. District Court for the Southern District of Georgia granted the defendants' motion for summary judgment.

The court held that the plaintiffs failed to allege that any specific claim presented by the defendants was false. The court observed that the plaintiffs' claims regarding unnecessary PENS treatments had not been borne out in discovery, indicating that while the relator claimed to have witnessed a patient receive the therapy unnecessarily, that allegation was "not tethered to a specific claim presented to the [g]overnment. Further, the court explained, the plaintiffs did not tie the allegations relating to group therapy to any particular patients or claims. Thus, the court granted the defendants' motion for summary judgment.

The court then discussed an alternate reason for granting the defendants' motion—the plaintiffs failed to allege that the defendants knew that they were presenting false claims to the government. The court rejected the plaintiffs' attempt to show scienter through their allegations regarding the defendants' goals for patient billings, observing that Aegis's district manager explained that the goals were not aspirational, but rather, were "simply a business metric that allowed [the defendant] to monitor the facility's pulse." The court noted that the plaintiffs produced no evidence of "pressure" to obtain those goals. Further, the court explained that the defendants' instructional materials did not establish that they pressured therapists to present false claims or to provide medically unnecessary care. The court granted the defendants' motion for summary judgment.

- Opinion

U.S. ex rel. Temple v. Sigmatec, Inc., 2015 WL 1486986 (N.D. Ala. Mar. 30, 2015)

The relator was a former technical director for the defendant, which provided systems engineering and technical assistance to the U.S. Army through a subcontract with Computer Sciences Corporation ("CSC"). The relator alleged that the defendant improperly billed CSC for work that was not funded

under the subcontract, causing CSC to submit false claims for payment to the government in violation of the False Claims Act. Furthermore, the relator claimed that brought his concerns about the defendant's billing to the attention of the defendant's CIO, who told him that the billing practice was legal, and described it as "[r]obbing Peter to pay Paul."

The relator continued to witness the defendant use funds from government-funded projects to pay for unfunded projects. In addition, he said that he discovered that the government lead on the project, Willie Albanes, was approving the defendant's misuse of government funds. Albanes informed the relator that using money from funded projected for unfunded work was illegal, but that it was allowed when he approved it. The relator gave several examples of this conduct, including an instance in which he requested funds for a non-funded project and Albanes granted funds from a funded project to complete the work. Eventually, he was able to speak to the government branch chief about the billing practices, who informed him that the practices were a "misappropriation of funds, illegal, and [came] with a possible jail sentence." The relator subsequently directed all managers in his to stop work on all unfunded projects.

The relator further alleged that he discovered that the defendant's Electromagnetic Environmental Effects ("E3") facility did not have an operating license. He alleged that the facility was emitting radiation at a toxic level. He brought the issues to the attention of his supervisors around the same time that he told them about the improper billing practices. He was terminated shortly thereafter. He also alleged that the defendant violated the FCA's anti-retaliation provision by terminating his employment in retaliation for his investigation and reporting of the improper billing.

The relator brought a *qui tam* action alleging that the billing practices violated the FCA and that he was terminated in violation of the FCA's retaliation provision. The defendant moved to dismiss for failure to state a claim under Rule 12(b)(6) and failure to plead fraud with particularity as required by Rule 9(b).

Holding: The U.S. District Court for the Northern District of Alabama denied the defendant's motion to dismiss the relator's fraud claims. The court granted the motion to dismiss the retaliation claim to the extent that it was based on his allegations regarding the E3 facility.

The relator alleged that due to the improper billing practice, every report, invoice, and payroll record that the defendant submitted to CSC was false, and thus, every claim for payment CSC presented to the government was false. The defendant argued that the relator could not show that the defendant knowingly submitted false claims because it was acting at the direction of Albanes. The court rejected that argument, concluding that despite Albanes's involvement, the government did not have full knowledge of the billing practices, as evidenced by the branch chief telling the relator that the practice was illegal and punishable with jail time. The court observed that the factual issues surrounding a defendant's knowledge were better suited for a decision on summary judgment, not a motion to dismiss. The court also found that the relator alleged enough detail regarding the scheme and gave representative examples of claims that were submitted to the government to satisfy Rule 9(b).

The court explained that the relator's claims regarding the E3 facility did not implicate the FCA and could not form the basis for his retaliation claim. The defendant did not move to dismiss the relator's retaliation claim relating to the billing practices allegations, so that claim was allowed to move forward.

- Qui Tam Complaint
- Opinion

U.S. ex rel. Ibanez v. Bristol-Myers Squibb Co., 2015 WL 1439054 (S.D. Ohio Mar. 27, 2015)

The two relators, Joseph Ibanez and Jennifer Edwards—both former sales representatives for pharmaceutical company Bristol-Myers Squibb ("BMS")—brought a *qui tam* action alleging that BMS and Otsuka America Pharmaceutical, Inc. engaged in a nationwide fraudulent scheme to off-label market the antipsychotic drug Abilify, which caused false claims for reimbursement for prescriptions for the drug to be submitted to the government healthcare programs, in violation of the False Claims Act. The relators also alleged that the defendants paid illegal kickbacks to physicians to induce them to prescribe Abilify, and that these violations of the Anti-Kickback Statute, also caused physicians to submit false claims—claims that falsely certified the physicians' compliance with the AKS. The relators' fraud allegations largely mirrored a prior case that was settled and which required the defendants to enter into a Corporate Integrity Agreement ("CIA"). The relators alleged that the defendants violated the terms of that CIA by continuing to engage in the prohibited fraudulent schemes.

According to the relators, the defendants promoted Abilify to pediatric and geriatric psychiatrists, even though the drug was not approved for use in children or aged patients at all prior to 2007. Abilify was approved for a few specific uses in pediatric patients in 2007 and 2008, and despite the CIA requiring the defendants to change their call targets so that they would not promote Abilify to psychiatrists who only treated patients for whom there was no approved indication, the relators claimed that the defendants continued to promote the drug for off-label uses to pediatric and geriatric psychiatrists. The relators also alleged that the defendants paid kickbacks to physicians in the form of paid speaking engagements and free meals in order to induce them to prescribe Abilify in violation of the AKS. The

relators brought claims alleging that the defendants caused the submission of false healthcare claims to the government, and wrongfully retained overpayments from the government.

Moreover, the relators alleged that they reported the defendants' misconduct and were subsequently fired from their jobs in retaliation for their whistleblowing activities. As a result, they each brought claims for retaliation against BMS.

The defendants filed motions to dismiss all of the relators' claims.

Holding: The U.S. District Court for the Southern District of Ohio granted the defendants' motions to dismiss the fraud claims, but denied BMS' motion to dismiss the retaliation claims.

Failure to State a Claim

The court found that the relators failed to allege any facts to support an inference that the defendants caused the submission of fraudulent claims to the government. The court observed that the relators did not identify a single psychiatrist who wrote a prescription for Abilify for an off-label use, and that was filled and then billed to the government. The court determined that reaching the conclusion that the defendants submitted a false claim required "no fewer than five sequential inferences drawn in [the relators'] favor," namely, that the defendants' off-label promotion caused psychiatrists to write prescriptions for Abilify; the prescriptions were for off-label uses of the drug; the patients who received the prescriptions participated in government heath care programs; the patients actually filled the prescriptions; and some entity submitted claims for reimbursement to government healthcare programs.

The court explained that the relators did not allege any representative examples of false claims submitted to the government. The court rejected the relators' argument that their allegations that a certain Ohio pediatric psychiatrist was targeted by the defendants to receive marketing materials related to off-label uses of Abilify and subsequently wrote almost 150 prescriptions for the drug in only a few months following the call—even though he should have been removed from the defendants' list of call targets entirely pursuant to the CIA—were sufficient. The court explained that the relators' allegations still failed to fill in the several of the inferential gaps that the court identified. Thus, the court dismissed the relators' allegations regarding off-label marketing.

The court also held that the relators' allegations regarding violations of the AKS failed because the relators did not properly plead that the kickbacks were intended to induce physicians to prescribe Abilify. The court explained that the relators failed to allege that any actual prescriptions were written as a result of a doctor receiving kickbacks or that any such prescription was reimbursed by a federal healthcare program. Consequently, the court dismissed the relators' claims regarding AKS violations.

The court also dismissed the conspiracy claims, explaining that the relators failed to allege any agreement between the defendants to defraud the government.

Retaliation

The court found that relator Edwards sufficiently alleged her retaliation claim against BMS, explaining that the reason given for her termination was that BMS believed that she had falsified sales calls. The court determined that Edwards engaged in protected activity by reporting her concerns regarding the alleged fraud schemes and the defendants' violations of the CIA to her supervisors, which put BMS on notice of her whistleblowing activity. In addition, the court noted that Edwards alleged that she was not given an opportunity to respond to the company's allegations against her prior to her termination. The court held that Edwards' allegations demonstrated pretext for her termination.

The court also held that relator Ibanez sufficiently pled his retaliation allegations. The court noted that Ibanez alleged multiple instances of voicing his concerns about BMS's marketing practices to his supervisors. He also alleged that he contacted the government to report his allegations. In response, Ibanez claimed that he began receiving false negative performance reviews and was eventually terminated while on medical leave with no opportunity to respond to the allegations against him. BMS claimed that Ibanez was also being terminated for fraudulent sales calls, but the court similarly held that Ibanez properly pled that he engaged in protected activity and that he was retaliated against as result of that activity.

- Second Amended Qui Tam Complaint
- Def. Bristol-Myers Motion to Dismiss Second Amended Qui Tam Complaint
- Def. Otsuka Motion to Dismiss Second Amended Qui Tam Complaint
- Opposition to Defs. Motions to Dismiss Second Amended Qui Tam Complaint
- Reply Supporting Def. Otsuka Motion to Dismiss Second Amended Qui Tam Complaint
- Def. Bristol-Myers Reply Supporting Motion to Dismiss Second Amended Qui Tam Complaint
- Opinion

U.S. ex rel. Rockey v. Ear Inst. of Chicago, LLC, 2015 WL 1502378 (N.D. Ill. Mar. 25, 2015)

The relator brought a *qui tam* action against her former employer, The Ear Institute of Chicago, and nine of its doctors and audiologists (the "Ear Institute Defendants"). The relator also sued The Ear Institute's billing contractor, Trellis. She alleged that the defendants billed Medicare for services that were not reimbursable, in violation of the False Claims Act. The Ear Institute diagnosed and treated disorders of the ear, facial nerves, and related structures, and employed the relator as a medical biller and coder. According to the relator, in 2008 Medicare changed its regulations to provide that audiology services were reimbursable only if performed or overseen by a physician. Prior to that time, the practice of billing audiologists' work under physicians' names was allowed. The relator claimed that after Medicare changed its regulations, the Ear Institute Defendants continued to direct her to change the names of rendering

providers from audiologists to physicians on clinical forms submitted to Trellis for billing, even if a physician had not performed any service listed on the forms. The relator also alleged that audiologists at the Ear Institute were often not enrolled as Medicare providers, which violated Medicare regulations. Further, the relator alleged that the Ear Institute billed Medicare for therapeutic services that were not reimbursable, as well as for services performed without a physician's order, in violation of Medicare regulations.

The relator claimed that she told a Trellis employee that she had been changing the names of the rendering provider on the clinical forms prior to submitting them, and that the employee told her that Trellis was "unaware that such changes had been made and that any such changes were in fact improper." She alleged that she then alerted Ear Institute Defendants that their billing practices were improper, and they acknowledged that they were aware that the practices were improper but instructed her to continue to submit claims in that manner so that they could collect more money from Medicare. She followed up with an email outlining her concerns.

Shortly afterwards, one of the Ear Institute physicians sent a letter to Medicare explaining that they "recently became aware" that their audiologists should have been listed on the claim forms, but that physicians were listed because of a "billing oversight," and that the Ear Institute did not receive any payments from Medicare that it would not have otherwise received. Medicare responded that after reviewing the situation, it would not require the Ear Institute to refund and resubmit the services performed because it would result in the same amount of money being paid, but that it expected that all services going forward would be billed correctly.

Shortly after the relator sent the email to the Ear Institute Defendants, she received two disciplinary write ups and was then suspended, allegedly for a "conflict of interest" regarding the Ear Institute's billing practices. She was fired a couple of weeks later. She brought a *qui tam* action alleging that the defendants violated the FCA by substituting the names of physicians for audiologists who actually performed the services, by seeking reimbursement for services rendered without a physician's order, and by billing Medicare for non-reimbursable therapeutic services. She also alleged that the Ear Institute Defendants and Trellis conspired to violate the FCA and committed reverse false claims violations. Moreover, she alleged that she was fired because of her complaints regarding the billing issues, in violation of the retaliation provision of the FCA. The Ear Institute Defendants and Trellis moved separately to dismiss for failure to state a claim under Rule 12(b)(6) and failure to plead fraud with particularity under Rule 9(b). The Ear Institute Defendants also moved to dismiss pursuant to the FCA's public disclosure bar.

Holding: The U.S. District Court for the Northern District of Illinois granted Trellis' motion to dismiss in its entirety and granted the Ear Institute Defendants' motion to dismiss in part and denied it in part.

Public Disclosure Bar

The Ear Institute Defendants argued that the letter sent by one of their physicians to Medicare discussing the billing issues publicly disclosed all pertinent information about the relator's claims concerning the substitution of physcians' names on claim forms submitted to Medicare. The relator argued that her allegations were not disclosed because the letter was not truthful, as it claimed that the defendants only "recently became aware" of the errors and that the improper billing was an "oversight" rather than an intentional effort to defraud Medicare. The court rejected the relator's argument and found that her claims were publicly disclosed because "the information conveyed [to the government] could have formed the basis for a governmental decision on prosecution, or could at least have alerted law-enforcement authorities to the likelihood of wrongdoing." The court observed that the letter disclosed all of the elements necessary to show that the defendants had violated Medicare regulations.

The court also found that the relator was not an original source of her allegations. The court rejected her argument that her allegations materially added to the publicly disclosed information because she alleged that the physician lied in the letter because the defendants had long been aware of the improper billing, and that the violations were intentional rather than inadvertent. The court indicated that the relator failed to allege how those details were "capable of influencing" Medicare's decision, and that the letter disclosed that the defendants' billing practices were knowing and intentional, but that they did not know that the practices were improper. The court also rejected the relator's argument that she was an original source because she provided details regarding specific claims that were improperly billed, including examples of invoices and clinical forms. The court explained that all of that information was included in the letter to Medicare.

Failure to State a Claim

The court held that the relator failed to allege that the Ear Institute Defendants knew that their claims were false. The court explained that the substitution of physicians' names for audiologists' names was an accepted practice until 2008 and that the defendants' failure to realize that the regulations had changed did not constitute scienter under the FCA. The court further explained that if the relator alerting the defendants to the issue was the first they had heard of it, their disclosure to Medicare only a month later "compels the conclusion that the billing error was an oversight" that they subsequently remedied. The court also found that the relator's allegation that the defendants told her in response to her complaints that they knew they were violating the regulations and would continue to do so was belied by the fact that the header of the follow up email she sent included "PER YOUR REQUEST," and the email stated that the defendants asked her to send a follow up email outlining the information she gave them at the meeting. The court determined that the defendants' request for the information in writing indicated that the defendants did not know that they were violating the regulations prior to the relator informing them and they wanted to investigate her claims.

Although the court found that the relator's claims failed because she did not properly allege knowledge, it still examined whether she properly pled falsity and concluded that, for the same reasons that she did not plausibly

allege that the Ear Institute Defendants knowingly violated the new regulations, she also failed to plausibly allege that the improper claims submitted with physicians' names instead of audiologists' names were anything but "innocent mistakes." The court also rejected the relator's argument that the claims were "legally false" because the defendants falsely certified compliance with the Medicare regulations. The court explained that the defendant's certifications on their claim forms submitted to Medicare—which stated that their claims were "accurate, complete, and truthful"—were not false because the defendants did not know that they were violating any regulations. The court noted that Medicare did not impose "strict liability for technical regulatory noncompliance," and that there were procedures in place for handling inadvertent inaccuracies.

Further, the court held that the relator failed to allege that the false statements were material. The court observed that the defendants' failure to use the physicians' name did not, as the relator admitted in her email, influence Medicare's decision to pay because it would have paid the same amount regardless of whose name was on the claim form. Medicare indicated as much by not requiring the defendants to resubmit their claims and stating that the overall payment would not have changed in their response to the defendants' letter. The court granted the Ear Institute Defendants' motion to dismiss the claims related to the substitution of physicians' names.

The court, though, held that the relator did properly allege that the Ear Institute Defendants submitted fraudulent claims to Medicare when they billed for services provided without a physician's order and received improper reimbursements for therapeutic services. The court explained that the relator's assertion that, due to her role as the defendant's biller and coder, she would have necessarily seen physicians' orders if any had been submitted with the reimbursement claims was sufficient to meet the Rule 9(b) requirements. The court also held that she properly pled the therapeutic services claims by alleging that she personally changed claim forms for therapeutic services and that she heard audiologists discussing therapeutic services that they provided to patients and then billed to Medicare. While the court recognized that the relator had not pled any specific instances of false claims, it found that she provided sufficient indicia of reliability that claims had been submitted by describing in detail what the claim forms looked like and alleging that the forms were in the defendants' sole possession. The court denied the Ear Institute Defendants' motion to dismiss the claims related to physicians' orders and therapeutic services.

The court dismissed all claims against Trellis. The court noted that the relator's only allegation against Trellis was that it knew that the Ear Institute Defendants' reimbursement claims were false and submitted the bills to Medicare anyway. The court found that the relator failed to allege that Trellis had any sort of duty to investigate or report the Ear Institute's behavior, and thus, dismissed the claims against it.

The court also dismissed the relator's conspiracy claims, explaining that she failed to allege an agreement between the Ear Institute Defendants and Trellis to defraud the government.

Reverse False Claims

The court dismissed the relator's reverse false claims allegation with respect to the rendering provider issue, explaining that because there was no overpayment—as Medicare would have paid the same amounts regardless of whether a physicians' name was listed—the defendants could not have improperly retained an overpayment. However, the court found that the relator properly alleged that the defendants made an objectively false statement to the government in the letter to Medicare regarding the improper claims by maintaining that it did not receive any funds from Medicare that it otherwise would not have. The court explained that the relator alleged that the defendants did receive improper payments pursuant to the physician's order and therapeutic services claims. Thus, the court denied the defendant's motion to dismiss the reverse false claim allegations as to those two types of fraudulent conduct.

Retaliation

The court found that the relator's conduct—which consisted of "merely notifying" the defendants that she was concerned about the billing practices (the court noted that she did not tell the defendants that she believed they were violating the FCA or that she may bring a *qui tam* suit)—was sufficient to constitute protected activity under the FCA. The court observed that there was not much else "a lower-level employee like [the relator could] realistically do to stop a potential FCA violation than report it to a supervisor." Thus, the court denied the Ear Institute Defendants' motion to dismiss the retaliation claim.

- Opinion

U.S. ex rel. Grupp v. DHL Worldwide Express, Inc., 2015 WL 1283755 (2d Cir. Mar. 23, 2015)

The two relators were the owners of a trucking company that shipping company, DHL, and its parent company hired as an independent contractor to transport packages—including packages shipped on behalf of the government. The relators alleged that the defendants violated the False Claims Act by knowingly and falsely representing to the government that next day and 2nd day shipments were transported by air when they actually traveled by ground transportation; the defendants were also accused of improperly imposing jet fuel surcharges on those shipments, as well as applying unnecessary diesel fuel surcharges on ground delivery shipments. This U.S. District Court for the Western District of New York initially granted the defendants' motion to dismiss based on their argument that the relators failed to satisfy a statutory notice requirement that mandated that consumers contest a bill within 180 days of its receipt. The relators appealed to the Second Circuit and the circuit court held that the statutory rule did not apply to *qui tam* actions under the FCA. The case was remanded to the district court, with instructions to address the defendants' motion to dismiss for failure to state a claim under Rule 12(b)(6) and failure to plead with particularity as required by Rule 9(b), as well as their argument

that the FCA's statute of limitations barred some of the relators' claims. The district court granted the defendants' motion to dismiss under Rule 12(b)(6) and Rule 9(b), but denied its motion as to the statute of limitations. The relator again appealed the district court's ruling to the Second Circuit.

Holding: The Second Circuit affirmed the district court's dismissal of the relators' claims.

The circuit court held that the district court properly dismissed the relators' allegations, explaining that the defendants' billing practices were consistent with the contract documents and the logistical requirements associated with operating a shipping company. The court observed that the categorization of the shipping services into "next day," "2nd day," and "ground" referred to when a given package would be delivered, not to how it would be delivered. The court further observed that customers understood when they used the "air express" shipment method that they would be assessed a fuel surcharge regardless of whether the shipment was actually transported by plane. The circuit court affirmed the district court's decision.

· Opinion

***U.S. ex rel. Olson v. Fairview Health Serv. Of Minn.,* 2015 WL 1189823 (D. Minn. Mar. 16, 2015)**

The relator brought a *qui tam* action alleging that Fairview Health Services and its subsidiary hospital falsely represented that the hospital was a children's hospital, in order to avoid a reduction in reimbursements from the state once an amendment to the law governing reimbursements to hospitals for the treatment of indigent patients took effect. According to the relator, the amendment included an exception for children's hospitals, which were having inpatients who were predominately under eighteen years of age. The relator, who was employed by the state's department of human services, alleged that he drafted the language contained in the amendment and that the exception was only intended to apply to stand-alone children's hospitals, not to hospitals with a children's wing.

After the amendment was passed, the defendants allegedly approached the human services department and asked to be exempted from the reimbursement rate reduction. The relator alleged that he explained to the defendants that they could not be exempted because they did not have a separate license for their children's wing. The next year, the relator alleged that he was told by a co-worker that the defendants went above his head, discussed the exemption with his supervisors, and received an exemption for their patient population under 18. The relator claimed that his supervisors did not have the authority to issue the exemption and that he voiced his concerns about the issue to the commissioner of the department. The commissioner conducted an audit, which found that the meaning of children's hospital was not clear within the statute, but that the decision to give the defendants an exemption did not appear to be consistent with the law. The report recommended that the excess amounts paid to the defendants should be revoked. The department the defendants that, despite all parties acting in good faith, it would revoke the extra funds the defendants received.

The relator brought a *qui tam* action alleging that the defendants knowingly presented false claims for payment, contending that the defendants knew that the hospital did not qualify for exemptions following the amendment. He also alleged that the defendants "illegally conspired" with the department of human services employees to receive an exemption. Finally, he alleged that the defendants violated the reverse false claims provision of the FCA by illegally concealing an obligation to pay back money to the government that the defendants knew they had illegally received. The defendants moved to dismiss for failure to state a claim under Rule 12(b)(6) and for failure to plead fraud with particularity under Rule 9(b).

Holding: The U.S. District Court for the District of Minnesota granted the defendants' motion to dismiss.

The relator argued that the defendants presented false claims, in the form of "improper oral requests and demands" to the department of human services, while they lobbied for an exemption, and that once the defendants received the exemption, all of the reimbursement claims they submitted to the government were false. The court rejected these arguments, noting that no state statute defines "children's hospital" and that the government's audit report found that the term was unclear. Given the lack of clarity, the court found, the defendants' reasonable lobbying efforts to exempt its children's wing from the reimbursement reduction could not be characterized as a false claim. The court explained that the defendants merely petitioned the government for a favorable interpretation of an unclear statute. Further, the court held that the relator did not allege any objectively false statements made within the defendants' individual claims for payment.

The court also found that the relator failed to allege a reverse false claim violation because he did not plead that the defendants knowingly concealed an obligation to pay back funds to the government. Further, the court held that the relator failed to allege a conspiracy to violate the FCA, since he did not properly allege an underlying FCA violation. The defendants' motion to dismiss was granted.

· Opinion

***U.S. ex rel. Mathis v. Mr. Property, Inc.,* 2015 WL 1034332 (D. Nev. Mar. 10, 2015)**

The relator brought a *qui tam* action alleging that his landlord violated the False Claims Act by charging him fees that were not permitted under the defendant's contract with the government under the Section 8 voucher program. The relator alleged that he entered into a lease agreement with the defendant, which subsequently entered into a Housing Assistance Payments Contract ("HAP contract") with the Southern Nevada Regional Housing Authority ("SNRHA") to receive payment assistance; the contract also set the monthly rent the defendant could charge. The relator alleged that on the day he was set to move in, the defendant required him to sign a new lease that included a $150 per month "pool maintenance" fee. The relator alleged that this fee was not included in the defendant's HAP contract with SNRHA and that the defendant misrepresented to SNRHA the amount of rent it was collecting from the relator. Several months after signing the new lease, the relator stopped paying the "pool maintenance" fee, after a caseworker for SNRHA advised him that the fee was an illegal side payment that violated the FCA. The relator then filed his *qui tam* suit. The defendant moved to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) and for failure to plead fraud with particularity under Rule 9(b).

Holding: The U.S. District Court for the District of Nevada denied the defendant's motion to dismiss.

The court determined that under the regulations governing the Section 8 program, side-payments or side-rent—including maintenance fees—violated the HAP contract and thus, the FCA. The court explained that the HAP contract did not contain any provision related to pool maintenance fees, and that it could reasonably be inferred that SNRHA did not agree to the fee. Consequently, the court inferred that the fee was an improper side-payment. The court rejected the defendant's argument that it believed that the pool maintenance fees were "luxury expenses" separate from rent, so they did not have to be included in the HAP contract, despite the contract stating that the defendant would not charge the relator any additional rent, including maintenance fees. The court noted that defendant did not inform SNRHA of the changes to the lease agreement, nor did the Authority agree to those changes. Furthermore, the court determined, it could be inferred that the defendant knowingly violated the terms of the HAP contract. Moreover, the court held that it was plausible that SNRHA would have terminated the contract had it known that the defendant was charging the pool maintenance fee, and therefore, the defendant's failure to inform SNRHA of the charge was a material violation of the contract, for FCA purposes. Based on those findings, the court denied the defendant's motion to dismiss.

- Qui Tam Complaint
- Def. Motion for Summary Judgment
- Motion to Dismiss Qui Tam Complaint
- Opposition to Def. Motions to Dismiss and for Summary Judgment
- Def. Reply Supporting Motions to Dismiss and for Summary Judgment
- Opinion

***U.S. ex rel. Landis v. Tailwind Sports Corp.,* 2015 WL 602115 (D.D.C. Feb. 12, 2015)**

The relator filed a *qui tam* action against his former teammate on the United States Postal Service professional cycling team—Lance Armstrong—as well as the companies that owned the team and the principals of those companies ("Owner Defendants"). The government intervened and the United States District Court for the District of Columbia denied the defendants' motion to dismiss. The plaintiffs then moved to strike certain of the defendants' affirmative defenses. Both Armstrong and the Owner Defendants voluntarily withdrew some of their defenses in response, but opposed the motion to strike the remaining defenses.

Holding: The court granted the plaintiffs' motion to strike in part and denied it in part.

First, the court granted the plaintiffs' motion to strike the defendants' failure to state a claim affirmative defense. The court held that because it had previously denied the defendants' motion to dismiss for failure to state a claim, the affirmative defense was stricken.

Next, the court denied the plaintiffs' motion to strike the defendants' waiver, consent, ratification, and release defenses. In doing so, the court rejected the plaintiffs' arguments that these defenses failed because the defendants did not identify a clear and intentional relinquishment of the plaintiffs' rights to sue under the FCA, and did not present support for their assertion that the Department of Justice had the authority to waive the government's right to sue. The court found that the defendants' ratification and waiver defenses were relevant to determining scienter; in light of the high standard for striking a defense, the court allowed these defenses to proceed.

Third, the court granted the plaintiffs' motion to strike Armstrong's affirmative defense that the claims were barred because the relator was convicted of criminal conduct arising from his own role in the alleged fraud. The court observed that the relator was not "convicted" of any crime; rather, he entered into a deferred prosecution agreement with the government. The court explained that while the relator was technically subject to a later conviction, the language of the FCA only requires dismissal of a relator's case when the relator is actually convicted. The court further noted that even if it dismissed the

relator, the action against Armstrong would continue since the government intervened in the *qui tam* suit.

The court then denied the plaintiffs' motion to strike Armstrong's defense that the government did not suffer any injury, and thus, damages were speculative or there were no damages. The court also denied the plaintiffs' motion to strike the defendants' affirmative defense that they provided all the services due to the government with respect to the transactions that were the subject of the FCA suit. The plaintiffs argued that these defenses should be stricken because proof of actual damage to the government was not necessary to establish liability under the FCA. However, the court explained that because a showing of damages is necessary before any trebling, these defenses could proceed.

Fifth, the court denied the plaintiffs' motion to strike the defendants' affirmative defense of failure to mitigate damages. The plaintiffs argued that such a defense could not be used in an FCA or fraud action, while the defendants argued that the government does have a duty to mitigate in FCA cases. The court explained that both sides largely relied on caselaw from outside the circuit, and held that in light of the high bar for striking a defense, the defense could proceed.

Sixth, the court granted the plaintiffs' motion to strike the defendants' affirmative defense that the plaintiffs failed to plead fraud with particularity as required by Rule 9(b); the court similarly struck the Owner Defendants' defense that the fraud allegations were vague, uncertain, and unclear. The court held that the defendants waived their Rule 9(b) defenses by failing to raise those objections in their first responsive pleading. Further, the court acknowledged that the plaintiffs had satisfied Rule 9(b)'s requirements, rendering the defenses moot.

Seventh, the court granted the plaintiffs' motion to strike Armstrong's lack of diligence defense. The court explained that this defense could be raised at the damages stage to challenge any claim by the government for pre-judgment interest, but held the defense did not bar the plaintiffs from proceeding with their FCA claims.

Next, the court denied the plaintiffs' motion to strike Armstrong's affirmative defense of recoupment and set-off. The court observed conflicting caselaw on the question of whether the government waives sovereign immunity by joining a *qui tam* action. In light of the rigorous standard for striking a defense, the court allowed the defense to proceed.

Ninth, the court granted the plaintiffs' motion to strike Armstrong's affirmative defense that the plaintiffs failed to choose between inconsistent remedies, observing that courts have routinely held that the government can plead alternative theories of liability in FCA cases.

Tenth, the court denied the plaintiffs' motion to strike Armstrong's affirmative defense of the FCA's public disclosure bar. The court recognized that it had previously narrowed the scope of the public disclosure bar issues and concluded that striking the defense was unlikely to generate any additional efficiencies.

Eleventh, the court denied the plaintiffs' motion to strike the Owner Defendants' affirmative defenses of contributory negligence, no vicarious liability, and that the government's alleged damages were caused by the acts or omissions of other parties. The court held that because the issues surrounding these defenses would remain the subject of discovery regardless, the defenses would be allowed to proceed.

Lastly, the court granted the plaintiffs' motion to strike the Owner Defendants' bad faith affirmative defense. The court explained that any bad faith on the relator's part would affect his share of the proceeds of any successful recovery, but was not a basis for dismissal of the case in its entirety.

- Opinion

U.S. ex rel. Am. Sys. Consulting, Inc. v. Mantech Advanced Sys. Int'l, 2015 WL 410272 (6th Cir. Feb. 2, 2015)

The relator was a company that competed with Mantech Advanced Systems, in the business of providing technological support services. The relator brought a *qui tam* action alleging that Mantech and its subsidiaries violated the False Claims Act by fraudulently inducing the Defense Information Technology Contracting Organization ("DITCO") to award Mantech a government contract for technological support for inventory tracking. DITCO issued a request for proposals ("RFP") for the contract and received six bids, including submissions from Mantech and the relator. The RFP required each contractor to designate an individual possessing certain qualifications as its program manager; should a contractor need to replace the program manager listed in the contract, the replacement would be subject to government approval. Mantech's proposal listed a particular individual as its prospective program manager, along with that individual's qualifications and resume. During the course of the government's decision making process related to the RFPs, the designated Mantech employee quit, but Mantech neglected to inform the government about his departure.

The realtor alleged that Mantech made two material misrepresentations to the government, in violation of the FCA: (1) Mantech continued to identify the originally named program manager in its responses to government inquiries during the evaluation process and (2) Mantech's "best and final offer"

incorporated its original proposal without disclosing that the original program manager had left the company. The relator alleged that Mantech was given a high rating during the evaluation process due to the government evaluators' positive opinion of the program manager and his qualifications, while the relator received a lower grade because it failed to address its proposed program manager's qualifications at all. Mantech won the bid and the final report from the evaluators noted that not only did Mantech offer the lowest price, but no other offeror exceeded Mantech in technical and managerial capability.

The relator filed a bid protest containing all of these allegations, which DITCO reviewed; DITCO chose to continue to use Mantech. The government officials responsible for reviewing the RFPs and choosing a contractor stated that they recognized that employees were free to change employers at any time, and did not expect or require the specific individual listed on the RFP actually to perform as the program manager, as long as the company provided a program manager with the same skills. Further, the evaluation team's chairperson stated that his evaluation of the defendants' bid would not have changed had he known that the specific program manager was going to change.

The U.S. District Court for the Southern District of Ohio granted summary judgment in favor of the defendants, holding that the alleged misrepresentations made by Mantech were immaterial as a matter of law. The relator appealed to the U.S. Court of Appeals for the Sixth Circuit.

Holding: The Sixth Circuit affirmed the district court's decision.

The circuit court held that materiality could be decided as a matter of law, and rejected the relator's argument that materiality was a question for the jury, and that the district court's grant of summary judgment on that basis was premature. The court also rejected the relator's argument that the district court improperly granted summary judgment because there were genuine disputes of material fact as to whether the government used the qualifications listed for the program manager as an indicator of the kind of person, not the particular person, who would become the program manager for the contract; and whether the government would have made a different decision if it had known that the person originally listed in the proposal had resigned. The court determined that there was no dispute as to whether the government relied simply on the qualifications listed in the contract, rather than the actual name listed, explaining that officials in charge of choosing contractors testified that they used the resume provided only as a sample of what Mantech could offer. The circuit court recognized that the record showed that the evaluators focused on the program manager's qualifications "as a proxy for the applicant's overall human capital." Because the court decided that the actual person listed as a program manager was not material to the government's decision to choose Mantech, it held that the fact that the program manager originally listed on the proposal resigned was also immaterial. Further, the government officials responsible for choosing a contractor testified that the misrepresentations regarding the name of the program manager would not have and did not affect the government's decision to award the contract to Mantech. Additionally, after DITCO reviewed the relator's bid protest, the government continued to use Mantech to perform on the contract.

The relator also argued that the district court erred because it erroneously applied a subjective rather than objective standard of materiality, by emphasizing what the actual decision-makers said and did and whether they were actually influenced by the alleged misrepresentation. The appeals court disagreed, concluding that while there was a lot of subjective evidence in the record, "in the absence of any indication that the actual decision-makers acted unreasonably, their statements remain highly relevant to any objective inquiry." The circuit court noted that statements by the actual decision-makers were often the best available evidence of whether the alleged misrepresentations had an objective tendency to affect the government's decision. The court determined that here, there was no evidence of bias, conflict of interest, irrationality, or ineptitude on the part of the decision-makers.

The relator further argued that the district court erred because it applied the "outcome materiality" test rather than the "natural tendency materiality" test, as it emphasized DITCO's decision to continue working with the defendants after discovering that the original program manager had resigned. Under Sixth Circuit precedent, the court explained, courts are required to apply the natural tendency test, which focuses on the potential effect of the false statement when it was made, not the actual effect when it was discovered. The circuit court noted that the district court's reasoning that DITCO's decision necessarily precluded a finding of materiality was incorrect. Under the circumstances—specifically, that the contract had already been awarded and the government may have made operational changes or other investments in reliance on that award—the court recognized that termination of the contract could have caused losses that exceeded the benefits, and thus, concluded that DITCO's decision to continue with the contract could be a poor indicator of materiality at the outset of the process. The circuit court further recognized that contractors who make material representations in their proposals are "not protected by the government's subsequent decision to continue working with them, for whatever reason." However, the appeals court ultimately found that in this case, nothing in the record indicated that DITCO affirmed the contract because changed circumstances made termination of the contract more costly than it was worth. While not determinative of materiality, the circuit court held that DITCO's decision to continue with the contract provided support for Mantech's argument that the alleged misrepresentations were not material. Consequently, the Sixth Circuit affirmed the district court's decision.

- Opinion

***U.S. ex rel. King v. Solvay S.A.,* 2015 WL 338032 (S.D. Tex. Jan 23, 2015)**

Two relators brought a *qui tam* action alleging that a drug manufacturer engaged in off-label marketing and paying illegal kickbacks to Medicaid Pharmaceutical and Therapeutics Committee ("P & T Committee") members in order to obtain favorable classifications for certain drugs on state Medicaid formularies," in violation of the Anti-Kickback Statute and the Stark Law. The relators alleged that because the defendant falsely certified its compliance with the AKS and Stark Law, its off-label marketing and illegal kickbacks scheme violated the FCA. The defendant moved for partial summary judgment, arguing that the relators failed to provide any evidence that the alleged kickbacks resulted in its drugs being placed on a preferred drug list ("PDL") or being added to a formulary; the defendant contended that the relators' allegations involved states that did not have P & T Committees or PDLs.

Holding: The U.S. District Court for the Southern District of Texas granted the defendant's motion to dismiss in part.

The court held that the allegations regarding states that did not have P & T Committees failed, agreeing with the defendant that if a state did not have a Committee, then it would be impossible to woo its members and cause them to give the defendant's drugs preferred treatment. Thus, the court granted the defendant's summary judgment motion with respect to those claims.

However, the court denied the summary judgment motion with respect to claims based on fraud allegations involving states with P & T Committees, rejecting the defendant's argument that because there were no PDLs in certain of those states—and thus, the relators could not allege that any alleged kickbacks or off-label marketing resulted in a preferred listing for the defendant's drugs—all of the relators' allegations had to be dismissed. The court explained that the defendant viewed PDLs too narrowly, and held that that the allegations involving states that had any kind of formulary—not only PDLs—were sufficient. The court explained that while the drugs did not show up on the current PDLs proffered by the defendant, the drugs could have shown up on a prior PDL or some other type of formulary. The court further held that the relator's allegations regarding off-label marketing were sufficient to survive summary judgment, explaining that while simply being on a PDL does not render the claims for reimbursement false, the placement on the PDLs "could lead to more false claims."

- Opinion

***U.S. ex rel. Ivanich v. Bhatt,* 2015 WL 249413 (N.D. Ill. Jan. 20, 2015)**

The relator brought a *qui tam* action alleging that a doctor and her medical practice violated the False Claims Act by charging Medicare for services performed under the doctor's name, when the services were actually performed by physicians' assistants or nurse practitioners. The relator, a former employee of the practice, claimed that the doctor often was not present in the office and did not supervise services provided by physicians' assistants and nurse practitioners, though the defendants billed Medicare as though the doctor had performed the services. The defendants moved to dismiss under Rule 12(b)(6), arguing that the relator failed to state a claim. The defendants also moved for sanctions against the relator.

Holding: The U.S. District Court for the Northern District of Illinois granted the defendants' motion to dismiss.

The court held that the relator's claims failed because his allegations were "consistent with billing for 'incident to' services," which was permissible under Medicare. The court explained that Medicare authorizes "incident to" services, provided that any member of the physician group supervised the procedures. Since the relator did not allege that no member of the defendants' physician group was present for the Medicare services at issue, the court held that he failed to allege any false claims. The court granted the defendants motion with dismiss without prejudice.

The court denied the defendants' motion for sanctions, noting that the relator's conduct was not the "type of extreme conduct necessary to warrant sanctions, especially considering the early stage of the proceedings." The court explained that the parties had not engaged in significant discovery and that the motions filed had only required minimal briefing. Further, the court explained that there was no indication that the relator had filed his complaint for an improper purpose.

- Opinion

***U.S. ex rel. Wuestenhoefer v. A.J. Jefferson,* 2015 WL 226026 (N.D. Miss. Jan. 16, 2015)**

The relator, a former accountant for the defendant, South Delta Regional Housing Authority (SDRHA), brought a *qui tam* action against SDRHA, its former executive director, Ann Jefferson, and several other employees, alleging that the defendants violated the False Claims Act by defrauding the Department of

Housing and Urban Development (HUD). The relator also alleged that she was terminated from her job as a result of her whistleblowing activities. HUD offered a voucher program that included rental subsidies for eligible low-income families. SDRHA was a public corporation organized to provide affordable housing for eligible low-income individuals, and received funds from HUD to run the rental subsidy voucher program. The funds were earmarked specifically for the voucher program, and the program stipulated that, were SDRHA to misappropriate the funds by using them for any other purpose, SDRHA would be required to return he funds to HUD immediately. Further, SDRHA was required to maintain an administrative fee reserve for the funds it received from HUD for the voucher program and to engage an independent public accountant to conduct audits of its accounts connected with the program. In addition, SDRHA was required to submit financial reports to HUD documenting that the funds received were used in accordance with the program's guidelines, as well as SDRHA's performance. HUD also dispersed funds to SDRHA for Section 8 low-income housing and other related programs.

The relator alleged that Johnson misappropriated funds meant for the HUD programs for personal and other uses, and that the SDRHA's board of directors "acted as a 'rubber stamp' on matters of spending." The relator alleged that shortly after Jefferson arrived on the job, she fired SDRHA's long-standing accountant and the employees who served as its financial department and hired a new accountant to audit SDRHA, in order to hide her misappropriation of funds. The relator alleged that Jefferson took money from the HUD accounts and moved them to the business accounts, then created and paid false invoices with the HUD funds in order to embezzle the money through an intermediary. Though SDRHA's accounting records were required to reflect any money taken from those accounts, the relator alleged that the audits performed by the new accountant did not reflect any debt between the business accounts and the HUD accounts.

The relator contacted the U.S. Attorney's Office for the Northern District of Mississippi and informed the government of her concerns. She also discussed her suspicions with HUD authorities and with the FBI and agreed to act as an informant for the FBI in connection with its subsequent investigation. HUD also launched an investigation as a result of the relator's information and cooperation. The FBI raided SDRHA's offices and Jefferson's home and brought criminal charges; the government was eventually required to disclose the relator's identity to SDRHA. Immediately following the disclosure, the relator alleged that the defendants began discriminating against her. She asserted that Jefferson instructed other employees to falsely claim that the relator was harassing and intimidating them. The relator was put on administrative leave and eventually fired.

Jefferson was convicted of embezzlement, misappropriation of funds, and retaliating against a witness. The relator then filed the instant case alleging violations of the FCA for comingling federal and state funds, creating false invoices, and using federal funds for personal and other uses while improperly writing-off balances owed to HUD accounts. The defendants moved for summary judgment, arguing that the relator's claims were barred by the public disclosure doctrine and for failure to state a claim.

Holding: The U.S. District Court for the Northern District of Mississippi granted the defendants' motion for summary judgment in part and denied it in part.

Public Disclosure Bar

The court rejected the defendants' argument that the allegations in the relator's complaint were publicly disclosed in the financial reports submitted to the government. The court explained that there was no indication that the financial reports had ever been placed in the public domain. The court held that because the financial records submitted to the government "carried an implicit statement that the actions [i.e. the write-offs and mixing of funds] were proper," in order for those allegations to have been publicly disclosed, "the fact that the write-offs and mixing of funds were *improper* must 'plausibly' have been in the public domain." The court explained that because the defendants failed to present any evidence that the information regarding the impropriety of the write-offs was in the public domain, the public disclosure bar did not preclude the relator's allegations regarding the write-offs of funds.

However, the court found that the defendants' improper comingling of funds had been publicly disclosed, since the relevant audits had been submitted to the court during prior litigation. But ultimately, the court determined that the relator failed to cite any authority prohibiting the defendants' alleged comingling, and thus, held that those claims could not be maintained.

Failure to State a Claim

After reviewing the relevant regulations, the court held that the mixing of funds alleged by the relator was actually allowable, and granted the defendants' motion for summary judgment with respect to those allegations. The court explained that while the relator cited a HUD provision requiring separate accounting for HUD and non-HUD funds, that provision did not mandate that SDRHA physically segregate program funds into multiple bank accounts. However, the court held that there was "ample evidence" to support the relator's claims that the defendants embezzled HUD funds and created false invoices. The court explained that Jefferson's criminal convictions served as evidence to support the relator's FCA claims and rejected SDRHA's argument that Jefferson's conduct should not be imputed to the corporation. The court explained that "[u]nlike scienter, the conduct of an employee is attributable to an employer so as long as the relevant acts were 'within the scope and in the course of his agency;'" and that actions outside of the scope of the employee's employment could be imputed to the corporation if his or her conduct was aided by the agency relationship. The court held that there was an issue of material fact as to whether Jefferson's actions were accomplished within the scope of her employment and therefore, denied the defendants' summary judgment motion.

The court reiterated that the requisite scienter for fraud could not be imputed to SDRHA from Jefferson's actions because Jefferson did not act for the benefit of SDRHA, but for selfish reasons. However, the court held that there

was a genuine issue of material fact as to whether scienter could be imputed from SDRHA's board's lack of oversight of Jefferson. Based on a former board member's testimony that the board did not investigate any of Jefferson's spending and acted as a "rubber stamp," the court concluded that there was a dispute as to whether SDRHA acted with deliberate negligence. The defendants' motion for summary judgment on scienter was denied. The court also denied the defendants' summary judgment motion on the materiality issue, stating that "Jefferson's conviction required that the jury conclude that federal funds were paid as a result of the relevant schemes," and therefore finding that the false statements at issue had already been found to be material.

In addition, the court rejected the defendants' argument that the relator failed to present evidence that they submitted any false claims, explaining that while mere payments made out of SDRHA's business account did not give rise to FCA liability, the fact that Jefferson was convicted of submitting false invoices precluded summary judgment for the defendants on that basis. The court also found that Jefferson's conviction for causing the creation of false checks created an issue of material fact as to the relator's allegations that the defendants made a false demand for payment to the government in violation of the FCA. The court explained that Jefferson was convicted of issuance of false checks and submission of false invoices, and that both of those acts were demands for payment from SDRHA, "which when paid upon, equate to a claim against the Government grantee receiving federal funds for a governmental purpose." The court thus, denied the defendants' motion for summary judgment.

Damages

The court rejected the defendants' argument that the relator could not show that the government suffered any damages because all of the alleged false claims occurred after SDRHA had already received the federal funds. The defendants argued that because the relator's claims all related to how the money was spent after it was received from the government, HUD did not suffer any loss as a result of any false claims. The court, though, held that the FCA "expressly allows for liability in cases of fraud against grantees which receive federal funds." In addition, the court explained that the defendants' argument "rest[ed] on the erroneous assumption that HUD lost all interest in the money transferred to SDRHA." Instead, the court determined that HUD maintained the right to re-possess all of its funds in the event of non-compliance with the regulations. Consequently, the defendants' motion for summary judgment on damages was denied.

Reverse False Claims

The relator argued that the write-offs constituted a reverse false claims violation because in preparing the year-end audits, money that was owed to the government and should have been returned or spent for the voucher programs was simply eliminated from the audits and financial records. The court agreed that each write-off constituted a false claim, finding that SDRHA was required to credit to an administrative fee reserve any money that was not spent in furtherance of the voucher programs—which created an obligation to pay money to the government. The court further held that because the audits and financial documents showed that no money was owed, there was an issue of material fact, resulting in the denial of the defendants' motion for summary judgment on the reverse false claims allegations.

Conspiracy

The court rejected the relator's argument that a conspiracy existed between Jefferson, the accountant, and the financial supervisor who submitted the financial records to the government. The court explained that the relator failed to offer any evidence of an agreement between those parties to defraud the government. The defendants' motion for summary judgment on the conspiracy claims was granted.

Retaliation

The court held that the relator was engaged in protected activity because she was, among other things, participating in the FBI investigation and prosecution into the alleged fraud claims. The court also held that the defendants had knowledge of the protected activity because the FBI sent the defendants a letter disclosing the realtor's identity and during FBI interviews SDRHA board members were informed of the relator's role in the investigation. The court then turned to the relator's argument that she was terminated in retaliation for her protected activity. In support of her retaliation claim, the relator argued that Jefferson's conviction for retaliation against a witness established the causation element, as the jury found that Jefferson used "the board of directors [of] SDRHA to suspend and then terminate [the relator's] employment." The court, though, explained that the retaliation against a witness count charged "an array of retaliatory conduct in addition to termination," and thus, it could not "deem the conviction of evidentiary value as to the motivation for [r]elator's termination." The court granted the defendants' motion for summary judgment as to relator's termination. But the court noted that the relator's retaliation claim also alleged harassment she was subjected to after the government disclosed her identity. The court held that the realtor's allegations that Jefferson removed her job responsibilities, barred her from entering the accounts receivable room where she performed the majority of her work, assigned her impossible tasks, and demoted her, retaliatory animus existed. In addition, the court found that while Jefferson's conviction could not create an issue of material fact as to the cause of her termination, it was "direct evidence" that Jefferson possessed a retaliatory motive with regard to the relator's participation in the government investigation. The court also held that because Jefferson's actions were aimed primarily at disrupting the relator's ability to work, vicarious liability could be imputed to SDRHA. Thus, the court denied the defendants' motion for summary judgment regarding harassment.

- Opinion

***U.S. ex rel. Holbrook v. Brink's Co.,* 2015 WL 196424 (S.D. Ohio Jan. 15, 2015)**

The relator was a former employee of Brink's Incorporated, a wholly owned subsidiary of Brink's Company, a world-wide provider of armored security services to financial institutions, retailers, government agencies, mints, and other commercial operations. From 2003 to 2007, the relator was employed as a Branch Manager in Brink's Cleveland Coin Branch facility which secured, sorted, and stored coin for various customers, including the Federal Reserve Bank ("FRB"). As Branch Manager, the relator managed the budget and depository accounts and supervised administrative functions for the FRB and other financial institutions, including the oversight of vault inventory, shipments, and receipts. He alleged that Brink's Inc. and its parent company (collectively "Brink's") conspired with defendant Jackson Metal to defraud the government in violation of the False Claims Act. Jackson Metal was a wholesale metal buyer with the ability to cull pennies of their copper content. The relator alleged that Brink's replaced older pennies that the FRB entrusted to it, containing 95% copper and 5% zinc, with new pennies that contained 97.5% zinc and 2.5% copper, in order to deprive the U.S. Treasury of the rising value of the copper contained in the older pennies.

Brink's entered into a Coin Terminal Agreement ("CTA") with the FRB and agreed to store, process, and distribute coins on behalf of the FRB. The contract provided that Brink's would handle the bank-owned coin only for the purposes of storage and redistribution at the FRB's request, and that title to the coin remained with the FRB, not with Brink's. The CTA further restricted the movement of bank-owned coin, laying out specific procedures for transfer of the coin and allowing it only at the FRB's consent. The CTA required Brink's to weigh incoming bags of dimes, quarters, half-dollars, and dollars and report to the FRB if the bags were not within the correct weight tolerance set forth in the CTA; but the CTA did not require Brink's to weigh penny or nickel bags, instead giving depository institutions credit on deposits of coin on a "said to contain" basis. Brink's was responsible for documenting in "reasonable detail" accountability for the bank-owned coin and notifying the FRB of the dollar value and denomination of coin ordered at any given time. Finally, the CTA required that Brink's provide receipts for the transfers of all bank-owned coin.

The relator alleged that Brink's entered into an agreement with Jackson Metals whereby Jackson Metals paid Brink's $2.45 per bag to ship pennies from Jackson Metals to various customers in need of pennies in exchange for giving Jackson Metals access to bank-owned pennies. Jackson Metals would then replace older bank-owned pennies with newer pennies made mostly of zinc. The relator also alleged that the two parties participated in "penny swaps" in which Brink's gave large amounts of older pennies to Jackson Metals in exchange for new pennies and a $2.45 surcharge per bag. Brink's eventually acquired the technology to cull the pennies itself, and the relator alleged that he was terminated after an internal email exchange in which he suggested that Brink's should alter its arrangement with Jackson Metals to increase its financial benefits—purportedly due to the realtor's lack of discretion regarding the penny-swapping schemes. After he was terminated, the relator alleged that he had telephone conversations with his former co-workers in which they informed him that Brink's was continuing the scheme after he had been fired.

The relator alleged that the defendants deprived the government of the copper in the pennies, should it choose to recycle the older pennies on its own in the future. The relator alleged that the defendants violated the FCA because they knowingly delivered less than all of the government's property back to the government; because Brink's knowingly failed to report its arrangement with Jackson Metals to the government as required under the CTA and therefore knowingly used false records by in order to avoid a material obligation to transmit the property entrusted to them to the FRB; and because Brink's and Jackson Metals conspired to violate the FCA.

The defendants moved to dismiss for failure to state a claim under Rule 12(b)(6) and failure to plead fraud with particularity under Rule 9(b). Specifically, the defendants argued that the version of the FCA in place before the statute was amended by the Fraud Enforcement and Recovery Act of 2009 should apply to any alleged conduct prior to 2009 and that since the relator only pled acts that could violate the post-FERA FCA any claims based on pre-FERA conduct should be dismissed. The defendants also argued that the relator failed to allege with particularity any violations after he was terminated in 2007. Moreover, they argued that even if the court found that the relator pled the post-2007 conduct with particularity, he still failed to state a claim under either the pre-FERA or post-FERA versions of the FCA. Finally, Brink's Company, the parent corporation, argued that it should be dismissed because the relator failed to allege violations germane to it.

Holding: The U.S. District Court for the Southern District of Ohio denied the defendants' motion in part and granted it in part. The court granted Brink's Company's motion to dismiss.

As an initial matter, the court rejected the relator's argument that because he alleged a "unified, ongoing scheme that ha[d] been in operation from 2006 to 2010, the pre-FERA/post-FERA distinction [was] irrelevant" and therefore, the amended FCA should apply to all of his allegations. Instead, the court determined that the FERA amendments were not retroactive and applied only to allegations stemming from actions taken after 2009. As a result, the court applied the pre-FERA version of the FCA to conduct alleged to occur before 2009 and the post-FERA version to conduct alleged after 2009.

The court also dismissed Brink's Company from the case without prejudice, holding that simply being a parent company of a subsidiary that commits a FCA violation—without actually participating in the scheme—did not subject a company to FCA liability. Additionally, the court explained that because the relator did not pursue a "piercing the veil" theory against the defendants, his claims against Brink's Company failed.

Failure to State a Claim upon which Relief Can Be Granted

The court considered the defendants' argument that the relator failed to state a claim because they returned the same amount of government property to the FRB as the FRB entrusted to it. The defendants argued that a penny is a penny, and that the CTA did not differentiate the coins it deposited with Brink's based on their metallurgical content. The defendants contended that because the CTA did not even require Brink's to weigh or count the pennies, the FRB could not have required them to know the number of older copper pennies or newer zinc pennies in its possession at any given time. The court rejected those arguments and held that when read together, the terms of the CTA presupposed that the same exact coins entrusted to Brink's would be returned to the FRB or distributed at the FRB's behest. The court explained that the CTA laid out specific guidelines for how the pennies would be handled, and there was no need for the FRB to distinguish between pennies with higher or lower copper contents, because the pennies should not have been disturbed at all except as requested by the FRB, let alone sorted based on their metallurgical content.

The court rejected the defendants' argument that as legal tender, a penny is a penny "regardless of the embodiment of the currency," explaining that the pennies in this case were not used as legal tender, but were traded and converted based on their metallurgical value. Further, the court explained, Brink's profited from trading pennies "with a higher intrinsic value, to which FRB had title and exclusive right" under the CTA. Therefore, the court held, less property was returned to the FRB than was delivered to Brink's. The court denied the defendants' motion on this ground.

Next, the defendants argued that the relator failed to state a cause of action for conduct prior to FERA because he failed to allege facts regarding the defendants' intent. The court rejected this argument, holding that the relator specifically alleged that Brink's knowingly misrepresented and withheld information from the FRB relating to the security and location of the bank-owned coin and the involvement of Jackson Metals. Further, the relator alleged that due to his role as Branch Manager he had personal knowledge of Brink's depository accounts and administrative functions such that he was aware of Brink's intent to conceal the scheme from the mandatory reports it submitted to the FRB. The court also held that the relator properly stated a claim and pled with particularity his claims under the post-FERA version of the FCA, which removed the intent requirement. Consequently, the court denied the defendants' motion to dismiss on this ground.

Next, the defendants argued that the relator's allegations failed because he did not plead facts showing that the FRB gave the defendants' a receipt showing that Brink's delivered less property than the amount that they received. The defendants asserted that under the pre-FERA version of the FCA, the relator was required to allege "delivery of less property than the amount for which the person receives a certificate of receipt." The court rejected this argument, explaining that the CTA required the FRB to issue receipts, and that while the relator did not have access to the receipts at this stage in the litigation and could not allege details about them, the court could infer that receipts were generated by Brink's and that those receipts showed an incorrect value based on the penny-swapping scheme. Similarly, the court held that the relator properly stated a claim with particularity under the post-FERA version of the FCA, which removed the language regarding receipts. Thus, the court denied the defendants' motion to dismiss for failure to state a claim.

Failure to Plead Fraud with Particularity

The defendants argued that the relator failed to plead with particularity any allegations after his termination in 2007. According to the defendants, the relator could not maintain allegations of ongoing fraud based on two telephone conversations with former co-workers. However, the court explained that the relator did satisfy Rule 9(b)'s pleading requirements, since he was able to allege the 1) who: Brink's and Jackson Metals; 2) what: the penny-swapping scheme; 3) how: through his personal knowledge of the methods by which the scheme was carried out; 4) and when: the length of the contracts between Brink's and Jackson Metals (which the court noted would be revealed during discovery) of the scheme. The court held that because the former co-workers allegedly disclosed information that raised a "reasonable inference" that Brink's was continuing the penny-swapping scheme, the relator had properly pled his allegations post-2007. The court denied the defendants' motion to dismiss these allegations.

Reverse False Claims

The court also rejected the defendants' argument that the relator's claims failed because he did not allege that they submitted any false record to the FRB that was used to avoid or decrease an obligation to transmit property to the government. The defendants noted that the CTA did not state that Brink's had an obligation to return pennies of the same metallurgical content. The court, though, concluded that omitting information in regular logs or reports to the government satisfied the FCA's "false record or statement" requirement, and that by alleging that Brink's misrepresented and withheld material information related to the location of the bank-owned coin and other information regarding the penny-swapping scheme on these logs, the relator properly pled that Brink's had submitted a false record to the FRB. The court explained that the FRB allegedly relied on the logs and reports from Brink's to ensure that Brink's did not deprive the FRB of its property. Further, the court explained that the relator alleged that the defendants had a contractual obligation to return the exact same pennies entrusted to it, which created an obligation to transmit property under the FCA. Thus, the court held that relator properly pled reverse false claims allegations and denied the defendants' motion to dismiss.

Conspiracy to Violate the FCA

The relator alleged a conspiracy claim under the FCA, claiming that Brink's and Jackson Metals conspired to violate the FCA. The court held that under the pre-FERA version of the FCA, which only applied to conspiracies to defraud the government by getting a false claim paid, the realtor was required to allege that both Brink's and Jackson Metals presented false claims to the government or engaged in acts to effect payment of false claims by FRB. Since the court found that the relator only pled facts related to Brink's—not Jackson Metals—failing properly to transmit property to the federal government, it dismissed the conspiracy claims to the extent that they alleged pre-FERA conduct. However, the court held that under the post-FERA version of the FCA, the relator's conspiracy claims survived a motion to dismiss. The court noted that the FCA's post-FERA conspiracy provision applies to all of the FCA's liability provisions. As a result, the court held that the relator could maintain his post-FERA conspiracy claim against the defendants for reverse false claims violations. Although the court observed that "it is not so obvious" that Jackson Metals entered an agreement with Brink's with the intent to defraud the government, ultimately, the court denied the defendants' motion to dismiss the post-FERA conspiracy claim as it held that intent may be pled generally at the motion to dismiss stage.

- Def. Brink's Motion to Dismiss
- Defs Jackson Metals and Luhrman Motion to Dismiss
- Opposition to Defs Motions to Dismiss
- Def. Brink's Reply Supporting Motion to Dismiss
- Defs Jackson Metals and Luhrman Reply Supporting Motion to Dismiss
- Opinion

U.S. ex rel. Doe v. Houchens Indus., Inc., 2015 WL 133706 (S.D. Ind. Jan. 9, 2015)

The relator brought a *qui tam* action alleging that the defendant, a retailer which included a pharmacy and pharmacy services, violated the False Claims Act by misrepresenting its "usual and customary" drug prices on claim forms, thereby overcharging Medicare for generic drugs. The defendant implemented a generic drug discount program in which enrolled customers paid a low price for generic drugs. The relator, a former employee of the pharmacy, alleged that he was directed by his supervisors not to reflect the discounted prices in corresponding requests for payment sent to Medicare, resulting in the defendant seeking reimbursement from the government for generic drugs in excess of the "usual and customary" price charged to customers enrolled in the generic drug program. The defendant moved to dismiss for failure to state a claim under Rule 12(b)(6) and failure to plead fraud with particularity under Rule 9(b).

Holding: The U.S. District Court for the Southern District of Indiana denied the defendant's motion to dismiss.

The defendant argued that the pricing offered for generic drugs under the discount program was not the "usual and customary" price of the drugs, since the discount was not available to the general public. The court explained that because of the open eligibility of the program—which was available to anyone who filled prescriptions at the pharmacy—the discount program price was the "usual and customary" price. The court also rejected the defendant's argument that there was "no law or regulation which would provide [the defendant] with knowledge that Medicare … intended the [discount program] to be … [the] 'usual and customary' charge." The court explained that the relator alleged that he was instructed by his supervisors to seek reimbursement from Medicare at a higher rate than that which the defendant was charging customers, which supported a reasonable inference that the defendant acted with at least reckless disregard for the truth when it used a higher list price as its "usual and customary" price when billing the government. Thus, the court denied the defendant's motion to dismiss.

- Opinion

U.S. ex rel. Campie v. Gilead Sci., Inc., 2015 WL 106255 (N.D. Cal. Jan. 7, 2015)

The relators brought a *qui tam* action against their former employer, a pharmaceutical company supplying drugs for the treatment of HIV/AIDS, cystic fibrosis, and other serious illnesses. The relators alleged that the defendant adulterated and misbranded drugs, which rendered every Medicare and Medicaid claim for those drugs fraudulent under the False Claims Act. The relators claimed that the defendant contracted with a Chinese drug manufacturer to produce the active ingredient in several of its drugs, without disclosing that information to the Food and Drug Administration (FDA), and that the defendant concealed data regarding the quality of the Chinese ingredient from the FDA. Additionally, the realtors alleged that batches of the drug containing the Chinese ingredient failed internal testing for impurities—including testing positive for contaminants such as Teflon, metal fragments, and acetaminophen—but were released for commercial sale anyway, which was hidden from the FDA. The relators also alleged that the defendants mislabeled the drug by misrepresenting the actual source of the active ingredient. According to the relators, the defendant eventually disclosed the use of the Chinese ingredient to the FDA, but assured the

agency that "no field alert or recall was warranted," even though the defendant knew of the impurities present in the drugs. The relators alleged similar claims with respect to allegedly adulterated drugs produced in the defendant's laboratory in Alberta, Canada. The relators contended that if the FDA knew of the allegedly false representations by the defendants, it would not have approved the drug; consequently, they argued, all claims presented to Medicare and Medicaid for the defendant's drug containing the ingredient were false under the FCA. Finally, one of the relators, Campie, alleged that the defendant terminated him from his job as a quality assurance director due to his reports of these alleged violations. He claimed that he informed "top executives" on numerous occasions about his concerns with the defendant's manufacturing process and compliance policies. He said he was ostracized and eventually terminated as a result of his complaints.

The defendant moved to dismiss all the claims for failure to state a claim under Rule 12(b)(6) and failure to plead fraud with particularity under Rule 9(b).

Holding: The U.S. District Court for the Northern District of California granted the defendant's motion to dismiss.

The court held that because the defendant never certified to the Centers for Medicare and Medicaid Services—which administers reimbursements for the government—that it had complied with FDA safety regulations during the Medicaid or Medicare reimbursement process, there were no false or fraudulent statements made in connection with reimbursement for the defendant's drugs. The relators argued that the defendant was liable under a fraud-in-the-inducement theory, argued that the company's fraudulent actions induced the FDA to approve the drugs and in turn, caused the government to pay for the drugs through Medicare and Medicaid. The court rejected this argument, holding that the defendant's allegedly false statements to the FDA during the approval process did not render Medicare and Medicaid requests made to CMS false, because those statements were not made in connection with the government's decision to pay.

Further, the court rejected the relators' argument that because the allegedly false statements to the FDA were "integral to a causal chain leading to payment," it did not matter to which federal agency the statements were made. Instead, the court explained that a false statement made to a government regulatory agency could not form the basis of FCA liability "simply because the fraudulently induced action of that agency was part of a causal chain that ultimately led to eligibility for payment from the payor agency." Specifically, with respect to FDA approval and regulation, the court explained that in order to determine whether an alleged misrepresentation to the FDA formed the basis for liability under the FCA, courts would be required to "delve deeply into the complexities, subtleties and variables of the FDA approval process," for which courts are not equipped.

Moreover, the court rejected the relators' argument that the defendant made false misrepresentations to CMS by impliedly certifying compliance with the FDA safety regulations each time a customer sought reimbursement for one of its nonconforming or mislabeled drugs. The court explained that there was no implied certification to CMS, because payment was not conditioned on compliance with FDA regulations, but merely on FDA approval. The court was similarly unpersuaded by the relators' argument that the defendant violated the FCA because the drugs were not sold "as described." The court explained that this theory of liability was "not cognizable" under the FCA, and that the Medicaid and Medicare statutes do not require drugs to be unadulterated or branded correctly; rather, the statutes only require that the drugs be approved by the FDA. Additionally, the court rejected the relator's "worthless services" theory of liability, explaining that while the allegations that the drugs were contaminated and adulterated were "troubling," they were insufficient to establish that the drugs were "worthless" for the purposes for which they were designed, and not merely "worth less" than they were supposed to be.

Finally, the court dismissed relator Campie's retaliation claim, holding that there were "insufficient allegations from which it [could] be inferred that any adverse employment action he suffered was caused by his engaging in protected activity under the FCA." The court explained that Campie's allegations were conclusory and failed to show sufficient causation between his purported whistleblowing activities and the defendant's decision to terminate him. Further, the court noted that the temporal connection between the two events was not very strong, because Campie alleged that he made "ongoing complaints" beginning in 2006 but he was terminated until 2009.

The court dismissed the relators' claims without prejudice.

- Opinion

U.S. ex rel. Kester v. Novartis Pharm. Corp., 2015 WL 109934 (S.D.N.Y. Jan. 6, 2015)

The relator alleged that Novartis, a pharmaceutical manufacturer, conducted illegal kickback schemes involving drugs covered by federal health care programs and that specialty pharmacies that sold those drugs, including Caremark, Accredo, and Curascript ("Pharmacy Defendants"), participated in the schemes. The relator, a former sales representative for Novartis, alleged that Novartis offered kickbacks in the form of rebates, discounts, and patient referrals to the Pharmacy Defendants to induce them to recommend its drugs to doctors and patients. The relator alleged that he learned about the alleged

scheme from viewing internal documents and attending Novartis sales meetings, and that the schemes were carried out with respect to five different drugs—Myfortic, Exjade, Gleevec, Tasigna, and TOBI. The relator alleged that Novartis and the Pharmacy Defendants violated the False Claims Act by participating in the illegal kickback schemes; according to the relator, the kickbacks caused the Pharmacy Defendants to submit claims for reimbursement for Novartis' drugs to government healthcare programs that falsely certified the Pharmacy Defendants' compliance with the Anti-Kickback Statute, which is a precondition to payment under those programs. The U.S. government and 11 states intervened. The court had previously ruled that the public disclosure bar did not preclude the majority of the relator's claims against the Pharmacy Defendants. The court also previously dismissed the plaintiffs' allegations with respect to the drugs Gleevac, Tasinga, and TOBI, holding that those allegations failed to satisfy Rule 9(b).

In this action, the Pharmacy Defendants moved to dismiss the remaining claims for failure to state a claim under Rule 12(b)(6) and failure to plead fraud with particularity under Rule 9(b). Caremark also moved for reconsideration of the court's previous public disclosure bar ruling.

Holding: The U.S. District Court for the Southern District of New York denied the defendants' motions to dismiss in large part. The court granted Caremark's motion to dismiss the state FCA claims prior to the effective date of the Patient Protection and Affordable Care Act (PPACA), but denied its motion for reconsideration of the court's public disclosure bar rulings.

Public Disclosure Bar

The court previously held that all of the plaintiffs' allegations against Caremark after March 23, 2010 (the effective date of the Patient Protection and Affordable Care Act (PPACA), on which state court filings no longer triggered the federal FCA's public disclosure bar) were not barred by a publicly-disclosed settlement agreement that resolved a previous state court case against Caremark alleging similar fraud during an earlier time period. Although the settlement was executed in 2008, it included a five-year consent decree that extended until 2013. Caremark moved for reconsideration of the court's ruling on public disclosure, arguing that the earlier suit alleged ongoing fraud through 2013, which put the government on notice of the alleged fraud through that year—and barred the relator's allegations of fraud, which ran from 2007 through 2013. The court rejected that argument, holding that it was not reasonable for the government to draw an inference that Caremark continued to violate the settlement agreement several years after it went into effect. Thus, the court denied Caremark's motion to dismiss any claims based on alleged violations occurring after March 23, 2010. However, the court granted Caremark's motion to dismiss several of the state FCA allegations concerning claims submitted prior to March 23, 2010, finding that those state statutes' public disclosure bar provisions must be construed in the same manner as the federal FCA.

The court had also previously ruled that the public disclosure bar did not preclude the relator's claims against Accredo and Curascript. The court determined that the news articles these defendants offered as public disclosures "contained no suggestion of wrongdoing" by either of the two defendants, and were thus, not substantially similar to those allegations made by the plaintiffs. Although the two defendants "brought to the Court's attention earlier lawsuits against their parent companies that [were] quite similar" to the current allegations against Caremark, the court held that because those lawsuits did not contain any reference to Accredo or Curascript—and not simply their parent companies—they did not publicly disclose any allegations with respect to those defendants. The court noted that none of the articles, complaints, or settlements regarding the previous lawsuits provided any information about which alleged misconduct, if any, was committed by the subsidiary companies. Thus, the court denied the Pharmacy Defendants' motion to dismiss on public disclosure grounds.

Failure to State a Claim upon which Relief Can Be Granted

The court had previously held that the relator adequately pled that Accredo and Curascript falsely certified their compliance with the AKS in connection with healthcare reimbursement claims they submitted after March 23, 2010 (the effective date of the Patient Protection and Affordable Care Act (PPACA), on which AKS violations automatically render healthcare claims "false" for FCA purposes). Accredo and Curascript then argued that the plaintiffs failed to identify any particular false certifications made prior to that date. The court, however, explained that, with respect to Medicare, the plaintiff properly alleged that Accredo and Curascript certified compliance with the AKS in Medicaid their subcontracts, but violated the statute and then submitted Medicare claims to the government. The court held that those allegations properly pled an express certification of compliance theory of FCA liability and denied the defendants' motion to dismiss those claims. The court, however, dismissed the relator's claims alleging false certifications to the federal TRICARE program prior to March 23, 2010. The court observed that unlike his Medicare allegations, the relator's TRICARE allegations did not describe a contract, provider agreement or other representation the defendants made to the government regarding compliance with the AKS. Instead, the TRICARE allegations relied on regulatory provisions obligating the defendants to become familiar with, and comply with, program requirements; and permitting the government to exclude providers who commit fraud or engage in illegal kickbacks scheme from the program. Therefore, the court dismissed the pre-March 23, 2010 TRICARE claims.

The court then turned to the relator's state FCA claims and held that he properly pled express false certifications in connection with most of the state Medicaid programs. The court had previously held that the relator failed to plead false certifications with respect to all but four of his state FCA claims. He amended his pleadings to provide greater detail with respect to many the state claims (except for their North Dakota FCA claim, which was voluntarily dismissed), alleging that the Pharmacy Defendants expressly and falsely certified compliance with the AKS in Medicaid provider enrollment agreements with the states, in violation of state FCAs. The agreements required the defendants to "agree[s] to abide" by applicable laws and regulations. The defendants argued that such language amounted only to "forward-looking" promises, not false certifications. But the court reminded the defendants of its earlier rulings that the language of federal Medicare agreements—on which the state Medicaid agreements were modeled—constitutes an express certification of compliance with the AKS; the court held that the state agreements

should be treated the same way. The court made clear that the agreements were not merely predictors of future behavior, but created contractual obligations. As a result, the court denied the defendants' motion to dismiss the Medicaid fraud claims under state FCAs.

Failure to Plead Fraud with Particularity

The court had previously dismissed the relator's allegations with respect to the drugs Gleevac, Tasinga, and TOBI, holding that the complaint failed to satisfy Rule 9(b). Specifically, the court explained that the relator failed to provide any factual basis to support the allegation that Novartis actually caused any pharmacy to submit claims for those drugs. In his amended complaint, the relator provided "dozens of sample claims," including the claim numbers, drugs and quantities, dates, the pharmacies that submitted the claims, and the government programs under which the claims were billed. The Pharmacy Defendants argued that the relator improperly obtained information about the example claims by violating the Health Insurance Portability and Accountability Act ("HIPAA"), and he therefore could not rely on those examples to support his claims. The court explained that the negative implication the defendants derived from the relator's statement in his amended complaint, that "[t]o protect patient privacy, Relator includes no individually-identifiable health information herein," was "not the only way to read the Complaint," and that the relator could have included this statement out of an abundance of caution. While the court declined to dismiss the claims regarding the additional drugs on this basis, it cautioned that the relator would have to provide discovery under oath about how he obtained the information used in his examples.

The Pharmacy Defendants then argued that the sample claims offered by the relator were not sufficiently representative of claims arising from the alleged fraud schemes because the relator did not include samples from each of the government healthcare programs. The court rejected this argument and held that the relator satisfied Rule 9(b), explaining that "[i]f claims submitted by one pharmacy or for one drug provide factual support for the submission of false claims by a different pharmacy or for a different drug…the same reasoning should hold across programs." In addition, the court held that the example claims satisfied Rule 9(b) because they provided a factual basis to support the relator's assertions that the claims were actually submitted to the government. The court denied the defendants' motion to dismiss for failure to plead fraud with particularity.

Reverse False Claims Act

The court rejected the Pharmacy Defendants' argument that the relator's reverse false claims allegations should be dismissed as duplicative of his other FCA allegations. The court reasoned that dismissal was not necessary, since the relator would not be able to obtain double recovery for the same allegedly fraudulent claims.

- Pharmacy Defs Motion to Dismiss
- Third Amended Complaint
- CVS Motion to Dismiss Third Amended Complaint
- Accredo and Curascript Motion to Dismiss Third Amended Complaint
- Opposition to Pharmacy Defs Motion to Dismiss
- CVS Reply Supporting Motion to Dismiss Third Amended Complaint
- Accredo and Curascript Reply Supporting Motion to Dismiss Third Amended Complaint
- Opinion

U.S. ex rel. Perdum v. Wells Fargo Bank, 2015 WL 78794 (N.D. Cal. Jan. 5, 2015)

A relator brought a *qui tam* action under the False Claims Act alleging that Wells Fargo Bank misappropriated funds provided by the U.S. government under the Home Affordable Modification Program and improperly denied her a loan modification for a mortgage under that program. The defendant moved to dismiss the complaint for failure to state a claim under Rule 12(b)(6); the relator failed to answer. Five relators who were not parties to this suit but who claimed to have suffered the same injury moved to intervene.

Holding: The U.S. District Court for the Northern District of California granted the defendant's motion to dismiss without prejudice and denied the non-party relators' motion to intervene.

The court noted that the relator's counsel had "done his client and the Court a disservice" by failing to respond to the defendant's motion; but that rather than close the case, the court granted the motion to dismiss without prejudice and allowed the relator one additional chance to file. The court denied the defendant's motion to dismiss with prejudice on the grounds of futility, holding that there was "no indication at this stage that [the relator would] not be able to remedy the deficiencies in her amended complaint." Further, the court denied the non-party relators' motion to intervene, explaining that the FCA bars non-government intervenors.

· Opinion

VI. LITIGATION DEVELOPMENTS

A. Bankruptcy Proceedings

U.S. ex rel. Fabula v. American Med. Response, Inc., 2015 WL 927548 (D. Conn. Mar. 4, 2015)

The relator brought a *qui tam* action against a nationwide ambulance transport service, where he was employed as an EMT. He alleged that the defendant knowingly submitted false claims for payments for medically unnecessary ambulance transports in violation of the False Claims Act. Medicare reimburses providers for ambulance trips only in the event that the use of other means of transportation would endanger the patient's health or no other transportation was available. The relator alleged that he witnessed the defendant directing ambulance personnel at multiple facilities to alter forms and to certify on Patient Care Reports ("PCR") submitted to Medicare for reimbursement, that ambulance trips were medically necessary even when patients did not require an ambulance. He also alleged that he was terminated in retaliation for his whistleblowing activities, in violation of the FCA; he asserted that when he refused to recreate a PCR for an ambulance run that had occurred several months earlier because he did not feel comfortable with the request, he was suspended indefinitely and effectively terminated. The defendant moved to dismiss the relator's *qui tam* claims for lack of subject matter jurisdiction, arguing that the relator did not have standing to sue because he had filed for bankruptcy and therefore his claims belonged to the trustee. The defendant also moved to dismiss the relator's retaliation claim for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).

Holding: The U.S. District Court for the District of Connecticut held that the bankruptcy trustee was the proper party to prosecute the relator's *qui tam* claims, and stayed the action to allow the trustee to join the case. The court granted the defendant's motion to dismiss the retaliation claims.

Bankruptcy Proceedings

The court observed that the relator failed to list his FCA case among the "contingency and unliquidated claims" in his bankruptcy petition and that the bankruptcy case was closed without any mention of the case. Regardless of whether or not he listed his FCA claims as assets in his bankruptcy proceedings, the court held, the claims belonged to his bankruptcy estate and he lacked standing to bring them himself. The court, however, also noted that the relator reopened his bankruptcy case to add the FCA claims as assets and that the trustee employed the relator's counsel to litigate the *qui tam* action on behalf of the estate shortly before the court's ruling on the defendant's motion to dismiss. Thus, because the trustee of the estate had not shown any intent to abandon the relator's claims, the court stayed the *qui tam* action to allow the relator to file a motion to substitute the trustee in his place or for the trustee to file a motion to join as a plaintiff.

Retaliation

The court granted the defendant's motion to dismiss the relator's retaliation claim, finding that the relator failed to allege that he was engaged in protected conduct or that the defendant knew of such conduct. The court explained that the relator failed to show that his refusal to fill out the PCR was an action in furtherance of an effort to stop a FCA violation. He did not, the court noted, allege that his refusal to fill out the form was "accompanied by a protest or complaint to his employer, the Government, or anyone else that doing so would violate the FCA or any other law." The court further noted that the relator did not allege that his refusal to sign the PCR was the first step in his own fraud investigation. The court held that his "mere refusal" to fill out the PCR, without any other affirmative actions, was not protected activity under the FCA and thus, granted the defendant's motion to dismiss.

- Opinion

B. Costs and Attorneys' Fees

U.S. ex rel. Doe v. Acupath Lab., Inc., 2015 WL 1293019 (E.D.N.Y. Mar. 19, 2015)

The relator alleged that the defendant violated the False Claims Act by submitting fraudulent claims to Medicare. The parties eventually settled the relator's claims for $165,000. The relator then moved for attorney's fees and costs. The defendants opposed the motion and cross-moved for attorney's fees. The Magistrate Judge issued a Report and Recommendation granting the relator $95,000 in fees and costs and denying the defendant's cross-motion.

Holding: The U.S. District Court for the Eastern District of New York adopted the Magistrate's Report and Recommendation in its entirety.

The relator requested $121,260 in attorney's fees and $1,890 in costs. He also moved for $48,800 in fees and $161 in costs incurred in preparing and litigating the motion for fees and costs. The defendant argued that the relator's attorneys' hourly rates were excessive and the corresponding fees were unreasonable given the relator's limited success. Specifically the defendant argued that no exception to the forum rule was warranted, the relator's attorneys did not rise to the level of skill or expertise to warrant such high fees, and that the relator's attorneys failed to provide adequate justification for the requested rates. Additionally, the defendant argued that the court should reduce the amount of fees requested for what the defendant characterized as excessive and unnecessary billing, including block billing and vague entries. The defendant further argued that the requested fee amount was unreasonable, considering the relatively low amount that the parties settled for.

The court observed that in order to determine reasonable hourly rates, it followed the forum rule, which looked to the prevailing hourly rates in the district where the court sits. In the Eastern District of New York, the court explained that the rate was $300-$400 per hour. The relator provided declarations outlining the qualifications of the four attorneys who worked on his case, and argued that his attorneys' hourly rates were justified because they had a high level of expertise and since the FCA is a narrow area of practice. The court agreed to some extent, but lowered the hourly rates for some of the attorneys to levels below those requested but still above the forum rate, while lowering the rates of some other attorneys to a level within the forum rate range. The court examined the work and experience level of each attorney and set the rate accordingly.

The court also reviewed the attorneys' time records and found that two of the relator's attorneys provided complete and specific time entries such that no reduction in hours billed was warranted for block-billing or vagueness. However, the court found that the other two attorneys had some entries that were vague, and as a result, the court reduced the number of hours for those attorneys.

The court explained that the portion of the motion seeking $48,000 in fees incurred in litigating the instant motion "push[ed] beyond the bounds of reasonableness," and held that a 10% reduction in legal fees for the underlying litigation was warranted and that a 20% reduction for the fee application was appropriate.

The court rejected the defendant's argument that the relator's fees should be reduced because he only achieved limited success. The court noted that while the parties settled for less than what the relator claimed in damages, the successful settlement returned $165,000 to the government. While the amount was "not huge," the court explained, "it [was] significant." The court also denied the defendant's cross-motion for fees, explaining that the relator's motion for fees was not unreasonable and was warranted by the victory in the *qui tam* action.

- Def. Opposition to Rel. Motion for Attys' Fees
- Rel. Motion for Attys' Fees
- Reply Supporting Rel. Motion for Attys' Fees
- Magistrate Report and Recommendation
- Opinion

U.S. ex rel. Assoc. Against Outlier Fraud v. Huron Consulting Group, Inc., 2015 WL 539672 (S.D.N.Y. Feb. 3, 2015)

The U.S. District Court for the Southern District of New York granted the defendants' summary judgment motion in a *qui tam* suit. The judgment was affirmed on appeal and the defendants, Huron Consulting Group and Empire Health Choice Assurance, moved for costs against the relator. The court awarded Huron $7,886.95 and Empire $5,839.80. The relator appealed the award.

Holding: The court affirmed the award of costs to the defendants.

The relator conceded that Federal Rule of Civil Procedure 56(d)(1) allows prevailing defendants to recover their costs, unless a federal statute prohibits such an award. The relator argued that the FCA prohibited the award of costs to the defendant in his case, because defendants are only entitled to fee-shifting under the FCA when the court finds that the relator's suit was "clearly frivolous, clearly vexatious, or brought primarily for the purposes of harassment," and the court made no such finding against him. While the relator acknowledged that the FCA references awards of attorneys' fees and expenses to prevailing defendants—and not "costs"—he contended that "expenses" and "costs" were synonymous, and therefore the FCA should be read to preclude an award of costs in his case. The court disagreed, noting that the FCA refers to distinct categories of fees, expenses, and costs throughout, and that it would be contrary to the rules of statutory construction to conflate terms under the FCA with terms under Rule 56. The court also rejected the relator's argument that the defendants were required to share certain costs related to the litigation, observing that no rules of civil procedure required the sharing of those costs. The court denied the appeal of the cost award.

- Opinion

C. False Certifications of Compliance

U.S. ex rel. Marshall v. Woodward, Inc., 2015 WL 1506048 (N.D. Ill. Mar. 27, 2015)

Two relators brought a *qui tam* action against their former employer, a manufacturer of the T2 sensor—a device that regulates fuel flow in military helicopters pursuant to contracts with the Department of Defense (DoD). The relators alleged that the defendant fraudulently sold the government faulty T2 sensors in violation of the False Claims Act. Both relators worked on the T2 sensor, and they claimed that they witnessed the defendant using faulty equipment and manufacturing processes that did not comply with the company's internal procedures or the procedures agreed to in the defendant's contracts with the government; they claimed that the defendant's misconduct resulted in unsafe and defective T2 sensors.

The relators also alleged that they voiced these concerns to their supervisors, who told them that it would take "too much time and cost too much money" to fix the problems. Still, the defendant investigated the issue and concluded that the parts were fine. The relators were unconvinced that the parts were safe and asked the defendant to run more tests. The defendant performed additional tests and confirmed that the T2 sensors were satisfactory. Still unconvinced, the relators entered the defendant's premises without authorization and took several scrap parts, cut and examined them, and took them home. They maintained that they found evidence that the T2 sensors were faulty and refused to work on them, despite the defendant's assurances that everything was fine. The relators were subsequently suspended for refusing to work on the parts.

After she was suspended, one of the relators, Debra Marshall, called a hotline established to report suspected violations of the defendant's ethics policies, and reported that the T2 sensor did not comply with the relevant safety requirements. The defendant completed an additional investigation into the relators' assertions in response to the ethics hotline call and concluded that the parts were in good shape and that the relators had acted unreasonably in refusing to work on the T2 sensor in the face of the prior investigations that turned up nothing wrong with the manufacturing procedures. The defendant concluded that the relators' suspensions were warranted under the circumstances. The defendant informed the relators about the results of the additional investigation, but they still refused to work on the T2 sensor. As a result, they were terminated.

During the time the relators were suspended, Marshall retained an attorney who shared the relators' allegations with the DoD. The relators also provided the DoD with the scrap parts they took from the defendant's premises, as well as documents they believed proved their allegations. The DoD conducted an investigation and concluded that there were "no imminent safety concerns," that an audit of the sensors found nothing wrong with the manufacturing procedures, and that the relators' allegations were not supported by any evidence. The DoD continued to purchase the T2 sensors without requesting any changes and continued to certify that the sensors conformed to specifications.

The relators filed a *qui tam* action alleging that the defendant violated the False Claims Act by falsely certifying in certificates of conformance to the government that its parts were of the quality called for in the contracts and that the parts were manufactured in accordance with the relevant specifications. They also alleged that they were fired in retaliation for their whistleblowing activities. The defendant moved for summary judgment.

Holding: The U.S. District Court for the Northern District of Illinois granted the defendant's motion for summary judgment.

The relators argued that the defendant knew that its certifications to the government were false because it changed the quality assurance tests that were necessary to confirm that the T2 sensors were safe to sell prior to shipment. The court found that the evidence did not show that the previous test was necessary to avoid faulty sensors, and that even if it was, there was no evidence that the defendant knew that changing the test would result in defective parts, particularly in the face of substantial evidence to the contrary. At most, the court explained, the defendant may have been incorrect in its decision to change the testing, but that decision was not made with knowledge or reckless disregard, as the defendant was not aware of any problems. Further, the court rejected the relators' argument that the statement by their supervisors that it would take too much time and money to fix the problems established the defendant's knowledge of the potential defects. The court indicated that the fact that the defendant may have at one point believed that the parts may have been defective did not allow for an inference that it knew the parts were defective when they were actually shipped. The court observed that the evidence showed that the defendant investigated the relators' claims and found that the parts were fine.

Even if the relators could prove knowledge, the court noted, their claims failed because no reasonable jury could find that the defendant's allegedly false statements were material. The court explained that the government investigated the relators' claims and found nothing wrong; and with full knowledge of the relators' allegations, the government continued to purchase the T2 sensors from the defendant. The court held that a "defendant's allegedly fraudulent certifications to the government are immaterial when the government is aware of the allegations of falsehood, looks into them, and proceeds to do business with the defendant." The court acknowledged that materiality was an "objective, not subjective, element," thus, the government's decision to keep purchasing the sensors was not in itself dispositive. However, since the government also had full knowledge of the relators' allegations and investigated them

independently and continued to purchase the parts, the court determined that no reasonable jury could have concluded that the government would have terminated the defendant's contract or demanded a refund based on the relators' claims.

The court also rejected the relators' claims that they were terminated as a result of the questions they raised about the issues with the T2 sensor, explaining that the evidence did not show that the relators were terminated because of their concerns about the sensors, but rather for their refusal to do their assigned work. The court indicated that even if the relators refused to work on the sensors due to a sincere belief that the defendant was violating the relevant safety standards, that belief did not protect them from being fired for refusing to do their work, particularly in light of the extensive investigations that turn up nothing wrong with the sensors. Further, the court noted that there was no evidence that the defendant actually believed there was anything wrong with the sensors, so it could not have terminated the relators with the intent of covering up any wrongdoing. Thus the court granted the defendant's motion for summary judgment.

- First Amended Qui Tam Complaint
- Opinion

U.S. ex rel. Escobar v. Universal Health Svcs., Inc., 780 F.3d 504 (1st Cir. Mar. 17, 2015)

The relators alleged that their daughter, Yarushka Rivera, was treated by unlicensed and unsupervised staff by the defendant. Moreover, the relators claimed that the defendant billed the government for those services, in violation of the False Claims Act. According to the relators, Rivera died as a result of a seizure that resulted from a bad reaction to medication prescribed by the unlicensed staff members. The defendant was a mental-health provider where Rivera was sent to receive help after experiencing behavioral problems at school. The relators met with the defendant's clinical director after Rivera complained that she was not benefitting from the treatment. They became concerned during that meeting that the director was not properly supervising the counselors and that the members of the staff who were treating Rivera were not properly licensed. Rivera was transferred to another counselor who was also unlicensed, and then to yet another counselor after she complained about the effectiveness of the therapy she was receiving. The new therapist held herself out as a psychologist with a Ph.D., but she had only trained at an unaccredited online school and her application for a license had been rejected. The new therapist diagnosed Rivera with bipolar disorder and Rivera was prescribed Trileptal by another staff member who claimed to be a doctor but who was actually a nurse who was neither board certified nor supervised by anyone who was.

Rivera's condition worsened after she began taking the medication and the relators could not reach anyone at the defendant's facility. She eventually stopped taking the medication, had a seizure, and was hospitalized. She resumed treatment but suffered another seizure and died. The Department of Public Health ("DPH"), a state agency, investigated the incident and found that the defendant had violated fourteen distinct regulations. The clinical director also entered into a consent agreement with the Board of Registration of Social Workers, which stated that he had authorized the unlicensed practice of social work at the clinic in violation of Massachusetts law.

The U.S. District Court for the District of Massachusetts granted the defendant's motion to dismiss, drawing a distinction between conditions of payment and conditions of participation in government healthcare plans. Ultimately, the court found that compliance with the relevant regulations was only a condition of participation, and dismissed the relators' claims. The relators appealed the dismissal to the U.S. Court of Appeals for the First Circuit.

Holding: The First Circuit reversed the decision of the district court.

The appellate court explained that while the district court acknowledged the First Circuit's rejection of "judicially created formal categories," it still held that distinctions between conditions of payment and conditions of participation survived and concluded that only false certifications of compliance with conditions of payment can establish FCA liability. The circuit court disagreed, finding that the payment/participation distinction was not relevant because the regulations at issue in the relators' *qui tam* action were clearly conditions of payment. The court explained that the applicable language in the regulations governing government healthcare plans expressly provided that services were reimbursable *only* if the provider met the standards set out in the regulations, which included proper licensure and supervision. The circuit court then held that the relators adequately pled that the defendant's claims for reimbursement in connection with Rivera's treatment were false because the defendants misrepresented their compliance with the supervision and licensing requirements; the court noted that the defendant's clinical director acknowledged to DPH that he was unaware that supervision was required on a regular basis or that it needed to be documented and determined that those statements demonstrated the defendant's reckless disregard for the truth of its certifications to the government. Further, the appeals court noted that the relators provided examples of 27 separate dates on which claims were submitted to the government in connection with Rivera's care, and that these examples included the billing codes used, the amounts invoiced, and the names of the staff members who provided the treatment. The court held that these examples, coupled with the directors' admission that the staff was unsupervised, were

sufficient to support the allegation that all of the defendant's claims for the six-year period in which the various staff members treated Rivera were false.

The court also held that the relators properly pled that the defendant violated the FCA by falsely certifying that it had a board-certified psychiatrist on staff at all times. The court explained that the defendant's failure to realize that the staff member who claimed to be a psychiatrist was not board-certified was at least deliberately ignorant, in light of the relators' ability to discover that information by simply checking a state licensing database.

Finally, the court held that the relators' claims related to additional unnamed staff members were sufficient to satisfy Rule 9(b) because the information was in the sole possession of the defendant, and the relators provided an exhaustive list of the known staff members. Thus the First Circuit reversed the district court's decision.

- Relator-Appellant Brief
- TAFEF Amicus Curiae Brief
- Defendant-Appellee Brief
- Relator-Appellant Reply Brief
- Opinion (1st Cir.)

U.S. ex rel. Urquilla-Diaz v. Kaplan Univ., 2015 WL 1037084 (11th Cir. Mar. 11, 2015)

Three relators brought a consolidated *qui tam* action against an educational institution, alleging that the defendant violated the False Claims Act by falsely certifying to the government that it was in compliance with multiple federal statutes and regulations in a Title IV participation agreement, in order to receive federal financial aid funds. The U.S. District Court for the Southern District of Florida dismissed their claims and two of the relators, Carlos Urquilla-Diaz and Jude Gillespie, appealed to the U.S. Court of Appeals for the Eleventh Circuit.

Relator Urquilla-Diaz worked for the defendant as a professor of paralegal studies. He alleged that he witnessed the defendant violating several provisions of the Higher Education Act and its implementing regulations, which rendered the defendant ineligible to receive Title IV funds from the federal government. Specifically, he alleged that the defendant improperly based recruiter compensation on the number of students recruited; violated the Higher Education Act's "90/10" rule (which mandated that the defendant derive no less than ten percent of its revenue from sources other than Title IV funds for two consecutive fiscal years); inflated student grades (by falsely certifying to the government that students had made satisfactory progress when they had not done so); and falsified documents to obtain accreditation.

Relator Gillespie was also employed by the defendant as a professor of paralegal studies. He alleged that the defendant made false statements in the Title IV program participation agreement when it certified that it would comply with the Rehabilitation Act and implementing regulations. Shortly after Gillespie was promoted to department head, he informed the defendant that he had a medical disorder and requested several accommodations—which were granted. Nonetheless, he complained to the institution's associate general counsel that its grievance policies violated the Rehabilitation Act and that he planned to file an administrative complaint with the U.S. Department of Education's Office of Civil Rights ("OCR")—which he did. The OCR rejected his claims and found that the defendant did not discriminate or retaliate against him, but noted that the defendant should have better policies in place for requesting accommodations based on disability and for handling disability and harassment claims. Soon after, the defendant voluntarily entered into a resolution with the OCR to change its policies. Eventually, the OCR sent the defendant a compliance letter stating that no more monitoring was needed because it had fulfilled its obligations.

The Florida district court dismissed Urquilla-Diaz's claims with prejudice, for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) and for failure to plead fraud with particularity under Rule 9(b). The district court found that Gillespie had not raised an issue of material fact regarding the defendant's scienter, to counter the fact that the defendant had policies and procedures in place to ensure compliance and there was no evidence that those policies were not followed. Consequently, Gillespie's claims were also dismissed with prejudice. The relators appealed the district court's rulings to the Eleventh Circuit.

Holding: The Eleventh Circuit reversed the district court's dismissal of Urquilla-Diaz's incentive compensation allegations, but upheld the dismissal of all of the relators' additional claims.

The Eleventh Circuit first reversed the district court's ruling that Urquilla-Diaz's allegations regarding the defendant's improper incentive compensation failed because he did not present evidence that showed that the defendant based its recruiter compensation solely on recruitment numbers and not on any other factors. The circuit court explained that the relevant question was how the defendant implemented its compensation policy—not the terms of its policy. The court rejected the defendant's argument that the relator's claims failed because he did not offer specific facts supporting his claim that the non-recruitment factors for recruiters' pay offered by the defendant were pre-textual. Instead, the appeals court noted that Urquilla-Diaz did, in fact, plead specific facts about four former employees whose salaries were increased or decreased based on the number of enrollments they recorded. Further, the court found the fact that the

defendant's compensation policy listed factors other than recruitment numbers as the basis for compensation decisions was not dispositive of whether or not the compensation was actually based on any non-recruitment factors, noting that the policy had not been in place during the entire period covered by Urquilla-Diaz's allegations. Thus, the circuit court reversed the district court's dismissal of Urquilla-Diaz's incentive-compensation allegations.

However, the Eleventh Circuit affirmed the district court's dismissal of Urquilla-Diaz's grade inflation allegations. The court held that the grade inflation allegations failed to meet the particularity standards of Rule 9(b) because Urquilla-Diaz did not adequately allege how the defendant's grade-inflation scheme resulted in the school falsely certifying that students were maintaining satisfactory progress. The circuit court explained the relator did not allege that any specific students were not actually making satisfactory progress. Therefore, the circuit court upheld the district court's dismissal of the grade inflation allegations.

The circuit court also upheld the district court's dismissal of Urquilla-Diaz's "90/10" rule allegations. The relator claimed that the defendant created a scholarship program for its employees with money from its students' tuition payments—including Title IV funds—and that tuition was paid from that program in order for the defendant to create the appearance of tuition money coming in from sources other than Title IV funds. The court explained that Urquilla-Diaz's allegations were too general and were unsupported by any specific factual allegations. Similarly, the circuit court affirmed the district court's dismissal of Urquilla-Diaz's claims that the defendant submitted backdated studies and budgets to the agency in charge of accreditation. The court explained that the relator failed to allege what false statements were made, when they were made, or who made them. Further, the court found that Urquilla-Diaz failed to plead facts to show a plausible connection between the defendant's alleged false statements and the agency's accreditation decisions.

The circuit court clarified that the district court's judgment of dismissal of Urquilla-Diaz's allegations was without prejudice to the government; however, the dismissal was with prejudice to Diaz, who, the circuit court observed, had been given three opportunities to plead his claims properly.

Next, the circuit court addressed the district court's rulings regarding Gillespie's allegations. The district court held that "nothing in the record supported his contention that [the defendant] knew or should have known" that its policies violated the Rehabilitation Act and its implementing regulations when the program participation agreement was first executed. On appeal, Gillespie argued that he told the associate general counsel that the company's policies did not comply; that the associate general counsel drafted the policy based on language that she had used at a previous employer who was not subject to the Rehabilitation Act; that the defendant's president signed the program participation agreement without independently verifying that the defendant's policies were in compliance with the Rehabilitation Act; and that the defendant could not have entered into a voluntary restoration agreement with the OCR unless it had been noncompliant in the first place. The court found that there was no evidence in the record that would allow a jury to conclude that the defendant entered into the program participation agreement with actual knowledge that its policies violation the Rehabilitation Act. The court explained that Gillespie informed the associate general counsel of his opinion that the policies violated the Act just before he filed his OCR complaint—but not before the defendant entered into the program participation agreement. Therefore, the court held, Gillespie failed to allege that the defendant had actual knowledge that its policies violated the Rehabilitation Act when it certified to the government that it was in compliance.

Additionally, the circuit court rejected Gillespie's allegations that the defendant acted with reckless disregard for the truth or falsity of its certification to the government. Gillespie contended that the associate general counsel was not up to date on the Rehabilitation Act and therefore did not have the skill or experience necessary to draft the defendant's nondiscrimination and grievance policies. The court determined that the attorney's knowledge of the Title IV eligibility requirements was not material to whether the defendant acted with reckless disregard, explaining that while the policy on which the attorney based the defendant's policy was from a previous employer who was not subject to the Rehabilitation Act, that company was subject to the Americans with Disabilities Act, which Congress looked to in drafting the Rehabilitation Act. Thus, because the laws were very similar, the court concluded that the attorney's use of the previous employer's policy was not unreasonable, and was certainly not grossly negligent such that she should have known that relying on the previous policy would have led to the defendant violating the Rehabilitation Act. Thus, the court found that the attorney's reliance on the previous policy was also immaterial. The circuit court also rejected Gillespie's argument that the defendant acted with reckless disregard because the president of the company signed the program participation agreement without verifying that the defendant's policies complied with the Rehabilitation Act. The court explained that the president did not sign the agreement "willy-nilly;" rather, the evidence showed that he relied on the heads of departments within the organization and subordinates who were experts in compliance before he signed the agreement. The court determined that such reliance was not unreasonable under the circumstances. Finally, the Eleventh Circuit rejected Gillespie's argument that the defendant would never have had to enter into an agreement with the OCR if it had not been in violation of the regulations in the first place, observing that the OCR began its investigation after the defendant signed the participation agreement.

- Opinion

***U.S. ex rel. Skinner v. Armet Armored Vehicles, Inc.,* 2015 WL 540156 (W.D. Va. Feb. 10, 2015)**

The relator brought a *qui tam* action against an armored vehicle manufacturer, Armet, and its owner and CEO, William Whyte. The relator was Armet's former president. He alleged that the defendants violated the False Claims Act by making false statements to the government in order to receive a contract to build armored vehicles for personal security forces in Iraq. In the defendants' bid to receive the contract, they asserted that the 24 requested vehicles would meet certain ballistic standards that were eventually adopted into the contract; date of delivery expectations were also incorporated. Shortly after the award of the initial contract, Armet was awarded a contract for 8 more armored vehicles with similar ballistic standards requirements and delivery expectations. The defendants failed to deliver any vehicles by the deadline, and only shipped four vehicles several months later. The defendants submitted a "Material Inspection and Receiving Report" with each vehicle, certifying that the trucks met the ballistics standards. The government paid approximately $199,000 for each.

Several months after the award of the contracts, the defendants requested a cash advance for a "progress payment," despite failing to deliver even a small portion of the promised trucks. The government granted the request in the amount of $824,531. The defendants delivered only three additional vehicles after receiving this payment. The government accepted and paid for two of the trucks, but declined the third. Thus, of the 32 vehicles the government contracted for, it received only six. The defendants billed the government a total of $1,194,923.36 and actually received $2,019,454.36 in federal funds, with the advance payment. None of the trucks met the ballistic standards required by the contracts.

The relator alleged that the defendants committed fraud in the inducement by entering into contracts with the government knowing that they knew they could not perform, in violation of the FCA. In addition, the relator alleged that the defendants falsely certified that the vehicles complied with the contract specifications each time they invoiced the government. Whyte moved to dismiss for lack of personal jurisdiction and Armet moved to dismiss for failure to state a claim pursuant to Rule 12(b)(6) and failure to plead fraud with particularity as required by Rule 9(b).

The U.S. District Court for the Western District of Virginia granted the defendants' motion to dismiss in part, holding that the relator did not properly plead fraud in the inducement; the court also denied the motion in part, allowing the relator's other fraud claims to proceed. The court also dismissed all claims against Whyte in his individual capacity.

The relator filed an amended complaint in an attempt to correct the deficiencies the court found in the initial complaint. The defendants again moved to dismiss. The amended complaint alleged that: 1) Whyte designed the vehicles in question and knew that they would not meet the required ballistic standards when he submitted the bids for the contracts, 2) the defendants represented to the government that the vehicles would meet the standards anyway, and 3) the government awarded the contracts based on those representations. The amended complaint also included allegations regarding gaps in the vehicles' armor and other specific ways the vehicles did not meet the standards—and alleged that Whyte knew of those deficiencies when he submitted bids to the government. In addition to the fraud in the inducement claim, the relator alleged that the invoices submitted to the government constituted false certifications of compliance with the contracts. The defendants again moved to dismiss. The court denied the motion to dismiss the fraud in the inducement claims, but granted the defendants' motion to dismiss the false certification claims.

Shortly after the false certification claims were dismissed, the U.S. Court of Appeals for the Fourth Circuit decided *U.S. ex rel. Badr v. Triple Canopy*, and held that the implied certification theory of FCA liability was viable in the circuit. The relator then moved the district court to reconsider the dismissal of his false certification claims, in light of the Fourth Circuit's ruling.

Holding: The court granted the motion for reconsideration, and upon reconsideration, denied the defendants' motion to dismiss in its entirety.

Upon re-examining the relator's false certification allegations, the court held that he set forth sufficient facts to state an implied false certification claim. The court observed that the relator alleged that the defendants made a request for payment to the government and knowingly withheld information about noncompliance with material provisions of the contracts. Specifically, the court recognized that the relator alleged that the defendants knew that the vehicles sold to the government did not meet the ballistic requirements listed in the contracts, but billed the government for them anyway. The court held that "[u]nder the guidance of *Triple Canopy,* the allegations [made] out a claim for an 'implied certification' claim under the FCA."

The court rejected the defendants' argument that *Triple Canopy* should be limited to its facts, concluding that the Fourth Circuit's language was inclusive and "set forth the elements of an implied certification claim generally." The court further rejected the defendants' argument that this case differed completely from *Triple Canopy* because the contracts at issue here stipulated that a representative was required to certify compliance prior to the government's acceptance of the vehicles. The court, though, found that that fact did "not lessen the falsity of [the d]efendnats' alleged representations to the government." The court further explained that that fact could be relevant to materiality, but not at the pleadings stage. The court held that because there had been a "change in the law," it was appropriate to grant the relator's motion for reconsideration and deny the defendants' motion to dismiss in its entirety.

- Opinion

See *U.S. ex rel. Solis v. Millennium Pharms., Inc.*, 2015 WL 1405459 (E.D. Cal. Mar. 30, 2015); 1469166 (E.D. Cal. Mar. 26, 2015).

See *U.S. ex rel. Bailey v. Gatan, Inc.*, 2015 WL 1291384 (E.D. Cal. Mar. 20, 2015).

See *U.S. ex rel. Sheldon v. Kettering Health Network*, 2015 WL 74950 (S.D. Ohio Jan. 6, 2015).

See *U.S. ex rel. Campie v. Gilead Sci., Inc.*, 2015 WL 106255 (N.D. Cal. Jan. 7, 2015).

D. FCA Seal/Service Issues

U.S. ex rel. Bibby v. Wells Fargo Home Mortgage, Inc., 2015 WL 82037 (N.D. Ga. Jan. 5, 2015)

The relators brought a *qui tam* action alleging that a group of lenders, including Wells Fargo, violated the False Claims Act by overcharging veterans on closing costs for loans under the U.S. Department of Veterans Affairs loan refinancing program. The relators complied with all *qui tam* procedural requirements and filed a sealed complaint in March 2006. The government requested and obtained 17 extensions of the seal in order to determine whether to intervene in the relators' case. In September 2011, the relators' finally objected to the government's 18th seal extension request; the court granted the extension over the relators' objection. The government elected not to intervene shortly after the extension was granted. The relators litigated the case independently from that point on and reached a settlement with several of the lenders for more than $161,000,000. The relators received a reward of $43,161,500.

In March 2014, counsel for the relators informed the U.S. District Court for the Northern District of Georgia that the relators had disclosed the existence of the sealed *qui tam* case to third parties members of the news media beginning in 2009, which violated the FCA's seal requirement. In addition to disclosing the existence of the case, the relators updated the journalists on developments in the case, exposed details about the government's investigation, shared documents and memoranda prepared by counsel, and described meetings with the government regarding the case. The relators contended that they began speaking to journalists due to frustration with the length of the seal and in an effort to prevent further harm to veterans applying for loans under the refinancing program. They claimed that the journalists agreed to maintain complete confidentiality of the information until the seal was lifted, and there was no evidence that the journalists disclosed any of the information provided by the relators before the seal was lifted.

Based on the new information, Wells Fargo moved to dismiss the relators from the case. The government responded to the motion, noting that while the relators' misconduct was serious, dismissal was not warranted because the government's investigation was not harmed and dismissing the relators would grant Wells Fargo an unnecessary windfall, to the detriment of the American taxpayers. The government suggested that the court impose a sanction of $2.7 million. The relators similarly argued that dismissal of the case was not required, and suggested a monetary sanction of $500,000.

Holding: The court denied the defendant's motion to dismiss and sanctioned the relators $1.6 million.

The court noted that the purpose of the FCA's seal requirement is to "balance the *qui tam* relator's interest in initiating the lawsuit with the Government's interest in investigating the relator's claim and intervening or alternatively pursuing a possible criminal case." Further, the court observed that the FCA does not provide an explicit sanction for violating the seal requirement, but that a majority of courts considered whether the seal violation hampered the government's interest in investigating the allegations when deciding how to sanction relators who violated the seal. The court held that a rule mandating dismissal for every seal violation would not always further the statutory purpose of the FCA "to reinvigorate the private bar to take on False Claims Act cases." In addition, the court explained that the sanction for the seal violation had to be decided in consideration of fact that the violation occurred years after the mandatory minimum 60-day seal period.

The court likened its discretion over a potential sanction for an FCA seal violation to that of a sanction for a violation of any court order and noted that Rule 41(b) allows courts to dismiss any case upon a finding that the plaintiff failed to comply with a court order. But the court rejected Wells Fargo's argument that dismissal was warranted here, as it did not agree that the relators' seal violations were "deliberate and protracted" and that dismissal would have a deterrent effect on other relators. Instead, the court held that the "ultimate sanction" was not appropriate here, and that monetary sanctions were sufficient to "vindicate the authority and integrity of the judicial process." In so ruling, the court also declined to dismiss the relators based on its inherent authority to sanction bad faith litigation misconduct.

The government estimated that it had paid the relators between 26 and 27 percent as an award for successfully litigating the case. Because the relators violated the seal, the government argued that they

should only have received the statutory minimum of 25 percent for a non-intervened case, and correspondingly proposed a monetary sanction of $2,736,500. The relators argued that the government's proposal did not account for the taxes and attorneys' fees they paid out of their original award. Taking all of the arguments into account, the court decided that a $1.61 million sanction was appropriate, explaining that the amount represented a consequence for relators' violation of the seal and was also sufficient to deter future relators from violating the seal. The court took into account the reasons that the relators violated the seal and the fact that the relators received assurances from the journalists that they would keep the information confidential in deciding to impose a lower sanction than that proposed by the government. In addition, the court considered the relators' ability to pay a larger sanction, especially in light of the taxes they had already paid on their award.

- Motion to Dismiss Relators
- Rel. Opposition to Motion to Dismiss Relators
- U.S. Statement of Interest
- Rel. Response to U.S. Statement of Interest
- Rel. Surreply in Opposition to Motion to Dismiss Relators
- Opinion

See *U.S. ex rel. Calilung v. Ormat Indus., Ltd.*, 2015 WL 1321029 (D. Nev. Mar. 24, 2015).

See *U.S. ex rel. Urquilla-Diaz v. Kaplan Univ.*, 2015 WL 1037084 (11th Cir. Mar. 11, 2015).

See *U.S. ex rel. Cairns v. D.S. Med. LLC*, 2015 WL 590325 (E.D. Mo. Feb. 11, 2015); 2015 WL 6300992 (E.D. Mo. Feb. 12, 2015).

See *U.S. ex rel. Petras v. Simparel, Inc.*, 2015 WL 337472 (D.N.J. Jan. 26, 2015).

E. Vicarious Liability

See *U.S. ex rel. Calilung v. Ormat Indus., Ltd.*, 2015 WL 1321029 (D. Nev. Mar. 24, 2015).

See *U.S. ex rel. Bailey v. Gatan, Inc.*, 2015 WL 1291384 (E.D. Cal. Mar. 20, 2015).

RECENT JUDGMENTS & SETTLEMENTS

January 1, 2015-March 31, 2015

Robinson Health System Inc. (N.D. Ohio Mar. 31, 2015)

Robinson Health System Inc., a non-profit corporation that operate multiple health care facilities in Ohio, has agreed to pay the United States $10 million after disclosing to the government that it had engaged in improper financial relationships with physicians in exchange for referrals, in violation of the Anti-Kickback Statute, the Stark Law, and the False Claims Act.

Miami-Dade County (S.D. Fla. Mar. 30, 2015)

Miami-Dade County (Florida) and the county's transit department have agreed to pay a total of $9.95 million to resolve fraud and retaliation claims brought by a former employee, Marjan Mazza, who alleged that the county committed fraud when applying for federal grants and subsequently used grant funds for improper expenses, and then fired her after she helped the government uncover the misconduct. As part of the settlement, the United States will receive more than $6 million, while Mazza will receive $1.6 million to resolve her retaliation claim. In addition, the county will pay Mazza's attorneys—Michael Josephs and Adam Josephs of the Josephs Law Firm; Jim McCarthy, Arley Finley III and Ben Garry of Diamond McCarthy and TAFEF members Robert Sadowski, Andrea Fischer, Raphael Katz, and Audrey Schechter of Sadowski Fischer PLLC—$2.25 million in attorneys' fees.

Portage Hospital, LLC (W.D. Mich. Mar. 24, 2015)

Portage Hospital LLC, now operating as UP Health System Portage, will pay more than $4.4 million after self-disclosing that for nearly eight years, it violated the False Claims Act by submitting fraudulent claims to Medicare—including claims for services that were not medically necessary, lacked adequate documentation, and/or did not qualify for Medicare reimbursement.

Fireman's Fund Insurance Company (W.D. N.C. Mar. 23, 2015)

Fireman's Fund Insurance Company has agreed to pay $44 million to resolve allegations of falsifying documents and engaging in other schemes to defraud the U.S. Department of Agriculture's federal crop insurance program over a four-year period.

British Petroleum North America (Cal. Mar. 20, 2015)

BP North America (BP) will pay the State of California $7.9 million to resolve *qui tam* allegations that the company violated the California False Claims Act by defrauding the California Underground Storage Tank Cleanup Fund. The State had agreed to reimburse the company for a portion of its costs associated with cleaning up petroleum from leaking underground storage tanks. A corporate whistleblower alleged that the company fraudulently billed the State for ineligible costs that had already been covered by insurance claims and other sources. In addition to the payment, the settlement permanently disqualifies 90 of BP's cleanup sites throughout the State from participating in the program, which will likely save the State an additional $135 million. The relator, American Cost Recovery Management, LLC, will receive a $1.38 million reward and BP will pay the relator's attorneys' fees of $250,000.

Adventist Health System Sunbelt Healthcare Corporation (M.D. Fla. Mar. 20, 2015)

Adventist Health System Sunbelt Healthcare Corporation (Adventist), a nonprofit healthcare company that operates a large network of hospitals throughout the South and the Midwest, has agreed to pay more than $5.4 million to resolve allegations brought by a relator in a lawsuit under the False Claims Act. Dr. Michael Montejo, a radiation oncologist who formerly worked in one of Adventist's facilities in Florida, filed a *qui tam* suit alleging that the company billed Medicare and TRICARE for radiation oncology services that were not directly supervised by radiation oncologists as required. Dr. Montejo, who was represented by TAFEF members John Yanchunis and James Young, of Morgan & Morgan, PA, will receive a reward of more than $1 million.

BioTelemetry Inc. (W.D. Wash. Mar. 19, 2015)

Cardiac monitoring company BioTelemetry Inc. will pay the United States $6.4 million to settle FCA allegations that its subsidiary, CardioNet, engaged in upcoding or otherwise overbilled Medicare and other government healthcare programs for Mobile Cardiac Outpatient Telemetry (MCOT) services that were not reasonable or were not medically necessary.

Gilbane Building Company and W.G. Mills Incorporated (M.D. Fla. Mar. 18, 2015)

Qui tam relators, Michael Jeske and Samuel McIntosh alleged that W.G. Mills Incorporated violated the False Claims Act by creating a front company, Veterans Constructors Incorporated (VCI), in order to receive a Coast Guard contract that was designated for Service Disabled Veteran Owned Small Businesses. Gilbane Building Company later merged with W.G. Mills and the companies agreed to pay the United States $1.1 million to settle the lawsuit. In addition, VCI will pay the government $50,000 plus five annual contingency payments equal to one percent of its total annual revenues.

Coastal Dermatology and Dr. Sanjiva Goyal (M.D. Fla. Mar. 18, 2015)

After proactively mining healthcare reimbursement data, the United States alleged that Jacksonville, Florida-based Coastal Dermatology, and its owner, Dr. Sanjiva Goyal, routinely billed Medicare and TRICARE for non-reimbursable procedures—including cosmetic procedures—and billed for services at a higher rate than allowed. Coastal Dermatology and Dr. Goyal have agreed to pay the government more than $787,000 to resolve those claims.

Lend Lease Construction, Inc. and Cindell Construction Company (E.D. Va. Mar. 13, 2015)

Lend Lease Construction, Inc. and Cindell Construction Company, two Maryland-based construction companies, agreed to pay a total of $400,000 to resolve allegations that they violated the False Claims Act with respect to a contract to renovate property for the federal government. Pursuant to the contract, the

companies were required to comply with the Davis-Bacon Act and the Contract Work Hours and Safety Standards Act—which mandated that certain workers receive the prevailing wage set by the Secretary of Labor and that those workers receive time and a half for overtime work. According to a *qui tam* lawsuit, the two companies underpaid workers on the contract, and falsely certified to the government that they had complied with the law. The whistleblower, who was represented by TAFEF member Brian Markovitz of Joseph Greenwald & Laake, PA, will receive a $72,000 reward.

Hencorp Becstone Capital L.C. (D.D.C. Mar. 13, 2015)

Miami-based financial services company Hencorp Becstone Capital L.C. has agreed to pay $3.8 million to resolve allegations that the company falsified documents and made false statements to the Export-Import Bank of the United States in order to obtain loan guarantees on fictitious transactions. The allegations were first raised in a *qui tam* lawsuit; the relators will receive $608,000 from the settlement.

Recovery Home Care Inc., Recovery Home Care Services Inc., and National Home Care Holdings LLC (M.D. Fla. Mar. 9, 2015)

Home care entities Recovery Home Care Inc. and Recovery Home Care Services Inc., (Recovery) along with National Home Care Holdings LLC—which purchased Recovery in 2012—have agreed to pay $1.1 million to resolve allegations of making improper payments to doctors for referrals of Medicare patients over a three-year period, in violation of the Stark Law and the Anti-Kickback Statute. The allegations were first raised in a *qui tam* lawsuit filed by Gregory Simony, a former Recovery employee. Simony, who was represented by TAFEF member Shauni Itri of Berger & Montague, will receive a reward of $198,000.

Mental Health Association of Rockland County, Inc. (N.Y. Mar. 9, 2015)

Mental Health Association of Rockland County, Inc. has agreed to pay the State of New York $304,000 to resolve claims under the federal and the New York State False Claims Acts that the company made changes to records in advance of a government audit to mislead the auditors into believing that the documents supported claims submitted to New York's Medicaid program. The claims were originally brought in a whistleblower lawsuit filed by two former Rockland employees.

Tangible Software, Inc. (D. Md. Mar. 4, 2015)

Defense contractor Tangible Software, Inc. will pay the United States between $500,000 and $1.05 million to settle *qui tam* allegations that the company submitted false reimbursement claims under contracts with the General Services Administration and the Defense Information Systems Agency. Any amounts above the initial $500,000 payment will be determined by the company's performance over the next five years and the outcome of a shareholder lawsuit against the company's prior management during the period of the misconduct. The *qui tam* suit was filed by Michael Bradle, who will receive an $80,000 reward.

Dr. Charles Denham, Health Care Concepts Inc., and Texas Medical Institute of Technology (D. Kan. Mar. 3, 2015)

Patient safety consultant Dr. Charles Denham, as well as two of his companies—Health Care Concepts Inc. and Texas Medical Institute of Technology—agreed to pay the United States $1 million to settle allegations that Denham solicited and accepted bribes in exchange for exploiting his position as co-chair of the Safe Practices Committee of the National Quality Forum. According to government, Denham's actions caused false claims to be submitted to federal government healthcare programs.

Baptist Health Medical Center—North Little Rock (E.D. Ark. Mar. 2, 2015)

To resolve allegations of improper Medicare billing, Baptist Health Medicare Center—North Little Rock has agreed to pay the United States $2.7 million and to enter into a five-year corporate integrity agreement that subjects the company to independent annual claims reviews.

Acadiana Cardiology, Acadiana Cardiovascular Center, and Dr. Mehmood Patel (W.D. La. Feb. 26, 2015)

Years after being convicted of 51 counts of healthcare fraud, Dr. Mehmood Patel, as well as Acadiana Cardiology, and Acadiana Cardiovascular Center have agreed to a $650,000 settlement with the United States to settle allegations of submitting Medicare claims for unnecessary procedures. The settlement resolves a *qui tam* lawsuit filed by a doctor who formerly practiced with Patel.

Agility Health, LLC (W.D. Mich. Feb. 25, 2015)

Grand Rapids, Michigan-based Agility Health, LLC—which provides inpatient, outpatient, and health management services to care networks in more than 20 states—and Oceana County Medical Care Facility—a facility managed by Agility—will pay $1 million to resolve False Claims Act allegations brought in a *qui tam* lawsuit filed by three whistleblowers and joined by the United States. Agility provided staffing support and insurance and billing services, and the government alleged that between 2009 and 2013, Agility encouraged Oceana to engage in unlawful upcoding when submitting claims to Medicare for its therapy services—claims were submitted for services that were supposed to have been offered to patients who were too mentally or physically incapable of engaging in therapy. The settlement also resolves allegations that Agility submitted Medicare claims for durable medical equipment that was never actually provided to patients. Agility will pay $850,000, while Oceana will pay $150,000. The whistleblowers were represented by TAFEF member Alan Konigsberg of Levy Konigsberp LLP.

MetLife Inc. (D. Colo. Feb. 25, 2015)

Following a two-year investigation by the U.S. Department of Housing and Urban Development, banking services company MetLife Inc.—successor to MetLife Bank N.A.—has admitted liability and agreed to pay $123.5 million to settle allegations of knowingly originating and underwriting more than 1,000 FHA loans that did not meet applicable guidelines over a four-year period.

Dr. Prabhjit Purewal (E.D. Cal. Feb. 24, 2015)

Dr. Prabhjit Purewal will pay the United States $550,000 to settle allegations of Medicare, Medicaid, and TRICARE fraud; Purewal was accused of purchasing non-FDA approved chemotherapy drugs from unlicensed distributors and then receiving reimbursement from the government.

Dr. Alan Buhler, Lynn Buhler, Dr. Craig Prokos and Cynthia Prokos (S.D. Fla. Feb. 24, 2015)

Dr. Alan Buhler and his wife, Lynn Buhler, as well as Dr. Craig Prokos and his wife, Cynthia Prokos have agreed to pay $1.13 million to resolve allegations that they accepted illegal kickbacks in exchange for patient referrals to A Plus Home Health Care Inc. According to the government, A Plus paid the doctors' spouses salaries for sham marketing positions in order to induce referrals of Medicare patients. The claims against the four individuals were included in a *qui tam* lawsuit filed by William Guthrie, a former director of development at A Plus.

Compassionate Care Hospice Group of New York, LLC (N.Y. Feb. 19, 2015)

For-profit hospice provider Compassionate Care Hospice Group of New York, LLC admitted liability and will pay $6 million to the United States and the State of New York to resolve allegations of submitting false claims to Medicare and Medicaid for services that were not adequately rendered or note rendered at all. $1.68 million of the settlement proceeds will be returned to Medicaid—with $1.08 million of that amount going to the State—while the remainder will go to Medicare.

Dr. Michael Reinstein (N.D. Ill. Feb. 18, 2015)

Illinois physician, Michael Reinstein pled guilty to federal charges of accepting nearly $600,000 in illegal kickbacks and benefits from Teva Pharmaceuticals and its subsidiary, IVAX, LLC, in exchange for prescribing the anti-psychotic drug, clozapine, to his Medicare and Medicaid patients. He will also pay the United States and the State of Illinois $3.79 million to settle parallel federal and state civil False Claims Act allegations. Last year, Teva and IVAX paid the United States and Illinois $27.6 million to settle their FCA allegations associated with the scheme.

C.R. Laurence Co. Inc., Southeastern Aluminum Products Inc., and Waterfall Group LLC (M.D. Fla. Feb. 13, 2015)

Aluminum importers C.R. Laurence Co. Inc.; Southeastern Aluminum Products Inc.; and Waterfall Group LLC have agreed to pay the United States $3 million to resolve claims that they illegally avoided antidumping and countervailing duties on aluminum extrusions by misrepresenting the "country of origin" of the extrusions as Malaysia when in fact the extrusions originated in China. The companies were also accused of conspiring with additional domestic companies to engage in the same behavior. The claims were originally included in a *qui tam* lawsuit filed by James Valenti, who will receive a reward of more than $550,000.

AstraZeneca LP (D. Del. Feb. 11, 2015)

Drug manufacturer, AstraZeneca LP will pay $7.9 million to resolve *qui tam* allegations of providing illegal kickbacks to Medco Health Solutions, a pharmacy benefit manager—in the form of price concessions on

certain drugs—in exchange for Medco agreeing to maintain AstraZeneca's drug, Nexium's, "sole and exclusive" status on various Medco Health formularies. According to the complaint filed by former AstraZeneca employees Paul DiMattia and F. Folger Tuggle, the kickback arrangement violated the Anti-Kickback Statute and rendered all corresponding claims for Nexium submitted to the federally-funded Retiree Drug Subsidy Program false, for purposes of the False Claims Act. DiMattia and Tuggle will share a $1,422,000 reward.

ResCare Iowa Inc. (N.D. Iowa. Feb. 10, 2015)

ResCare Iowa Inc. has agreed to pay the United States and the State of Iowa a total of $5.63 million to settle claims that it submitted false claims to Medicare and Medicaid for home healthcare services over a five-year period; the State will receive $2.32 million of the payment. According to the government, the healthcare claims were false because the company did not have the necessary documentation to show that it had complied with various program requirements, including certifications that the services were medically necessary and that a physician performed an in-person face-to-face assessment of each patient.

Good Shepherd Hospice Inc.; Good Shepherd Hospice of Mid America Inc.; Good Shepherd Hospice, Wichita, L.L.C.; Good Shepherd Hospice, Springfield, L.L.C.; and Good Shepherd Hospice—Dallas L.L.C. (W.D. Mo. Feb. 9, 2015)

Several hospice providers from the Good Shepherd Hospice chain have agreed to pay a combined $4 million to resolve a *qui tam* lawsuit that claimed that the companies submitted false Medicare hospice benefit claims for patients who were not terminally ill, and encouraged staff to engage in the scheme by linking bonus payments to the number of patients enrolled and by hiring medical directors who had ties to nursing homes that could be used to generate patient referrals. In addition to the payment, each of the entities has agreed to enter into a corporate integrity agreement with the U.S. Department of Health and Human Services Office of the Inspector General. Kathi Cordingley and Tracy Jones, the relators who brought these claims against the companies, will receive a reward of about $680,000; they were represented by TAFEF members Ross Brooks of Sanford Heisler Kimpell LLP; Kirk Chapman of Milberg, LLP; and Anthony DeWitt of Bartimus Frickleton Robertson Goza.

eV3 Inc. (W.D.N.Y. Feb. 6, 2015)

Medical device manufacturer Fox Hollow Technologies, now known as eV3 Inc., was sued by a *qui tam* relator who alleged that the company advised hospitals to bill Medicare for unnecessary, higher-cost patient admissions related to minimally-invasive procedures, thereby causing the submission of false claims, in violation of the False Claims Act. The suit was filed by Amanda Cashi, a former Fox sales representative. Cashi, who was represented by TAFEF members Larry Zoglin and Timothy McCormack of Phillips & Cohen LLP. eV3 Inc. will pay $1.25 million to resolve the suit; Cashi will receive a reward of $250,000.

Medtronic Inc. (W.D.N.Y. Feb. 6, 2015)

Medtronic Inc., a medical device manufacturer, will pay the United States $2.8 million to resolve allegations that the company promoted its SubQ stimulation procedure to physicians even though the safety and efficacy of the treatment had not been established by the FDA. The allegations were included in a *qui tam* lawsuit filed by Jason Nickel, a former Medtronic sales representative. Nickel, who was represented by TAFEF Member Wm. Paul Lawrence, II of Waters & Kraus, LLP, will receive a $602,000 reward.

Ageless Men's Health, LLC (W.D. Tenn. Feb. 4, 2015)

Memphis-based Ageless Men's Health, LLC, a testosterone replacement clinic with 22 locations across the U.S., will pay the United States $1.6 million and abide by enhanced accountability measures to be supervised by the U.S. Department of Health and Human Services Office of Inspector General to resolve allegations that the company submitted false claims to Medicare and TRICARE for medically unnecessary evaluations and office visits—including requiring patients to receive one shot per week for a year, which resulted in 52 office visits annually that were reimbursed by the government at $40/visit. Moreover, the relators claimed that the facility was not properly equipped and thus, the treatments were not eligible for reimbursement by the federal ealthcare programs.as "there were no stethoscopes, thermometers, blood pressure cuffs, otoscopes, or similar diagnostic devices in treatment rooms. There was one of each of these devices in a supply closet in the back of the office."

Associates in Eye Care, P.S.C. (E.D. Ky. Feb. 4, 2015)

Associates in Eye Care P.S.C. (AEC), an optometry practice in Pulaski County, Kentucky, has agreed to pay the United States $800,000 and to enter into a corporate integrity agreement with the U.S. Department of

Health and Human Services Office of Inspector General to settle claims that one of the company's doctors—Dr. Philip Robinson—fraudulently billed federal healthcare programs for medically unnecessary and/or worthless eye examinations to nursing home residents over a 6-year period. According to the government, Robinson provided routine, monthly eye exams to nearly all of his nursing home patients, regardless of need, and billed for so many patients each day that he could not have given each patient a legitimate examination. Robinson is also defending FCA claims the government brought against him; those claims are not resolved as part of the settlement with AEC.

Community Health Systems Professional Services Corp.; Eastern New Mexico Medical Center; Mimbres Memorial Hospital and Nursing Home; and Alta Vista Regional Medical Center (D.N.M. Feb. 3, 2015)

Tennessee-based Community Health System Professional Services Corp. and three New Mexico county hospitals—Eastern New Mexico Medical Center; Mimbres Memorial Hospital and Nursing Home; and Alta Vista Regional Medical Center—will pay a total of $75 million to resolve a *qui tam* lawsuit alleging that the companies engaged in a fraud scheme over a ten-year period whereby Community Health made monetary donations to the county governments, which then used those funds to obtain matching payments from the federal government under a now-discontinued program that supplemented Medicaid funds to hospitals in rural New Mexico. Applicable regulations require states to use their own funds when seeking matching payments from the federal government. The lawsuit contended that for every dollar the company donated, it received three dollars in return from its corresponding Medicaid billing, and that the federal government paid for more than its share of those expenses. The relator who alleged these FCA violations, Robert Baker, was a former Community Health employee. He was represented by TAFEF members Peter Chatfield and Stephen Hasegawa of Phillips & Cohen LLP, and will receive an $18,671,561 reward.

Associates in Dermatology and Dr. Michael Steppie (M.D. Fla. Jan. 29, 2015)

Dr. Michael Steppie and the practice he owned in Central Florida, Associates in Dermatology, will pay the United States $3 million to settle a *qui tam* suit that alleged that for a nearly five-year period the defendants billed government healthcare programs—including Medicare and TRICARE—for radiation treatments performed by an unlicensed medical assistant without supervision; for unnecessary destruction of skin lesions; and for destructions that lacked proper documentation. The suit was filed by three former employees of the practice, Katherine Brown, Amber Bradshaw, and Vanessa Santos; collectively, they will receive a reward of more than $500,000.

Composite Engineering Inc. (E.D. Cal. Jan. 27, 2015)

Composite Engineering Inc., which manufactures parts for remote-controlled aircraft for the U.S. military, will pay $2 million to the United States to resolve allegations that it violated the False Claims Act by submitting inflated costs when negotiating a contract with the Air Force.

Green Bag Co. (N.D. Cal. Jan. 27, 2015)

Green Bag, Co., which manufactures environmentally-friendly reusable shopping bags, will pay $500,000 to settle a *qui tam* suit alleging that the company underreported the cost of imports from China in order to pay less in customs duties. The relator who brought these claims to light—and who was represented by TAFEF members Thomas Greene, Michael Tabb, and Ryan Morrison of Greene LLP; and TAFEF member Kathleen Scanlan of Keller Grover LLP—will receive a $100,000 reward.

Lafferty Enterprises (E.D. Ky. Jan. 27, 2015)

Lafferty Enterprises dba Trans-Star Ambulance Services will pay the United States $948,000 to settle a *qui tam* suit alleging that over a six-year period the company transported Medicare patients to dialysis appointments by ambulance even though there was no medical necessity. The relator, Kevin Fairlie, will receive a reward of $189,000; he was represented by TAFEF members Frederick Morgan, Jennifer Verkamp, and Chandra Napora of Morgan Verkamp, LLC.

Dr. Mark Heinicke (W.D. Ky. Jan. 27, 2015)

Louisville, Kentucky physician, Mark Heinicke pleaded guilty to federal charges of providing Medicare patients—without their knowledge or consent—with misbranded, non-FDA approved medications he purchased from foreign distributors, and then billing the government for the drugs as if they were FDA-approved. Heinicke was sentenced to one year probation and ordered to pay more than $176,000 in restitution. In addition to the criminal proceedings, Dr. Heinicke has agreed to pay more than $338,000 in restitution to settle related civil claims brought by the U.S. Department of Health and Human Services, Office of the Inspector General.

Sea Mar Community Health Centers (Wash. Jan. 20, 2015)

Dental practice Sea Mar Community Health Centers will pay $3.35 million to the United States and the State of Washington to resolve the State's allegations that the company overbilled Medicaid for dental services over a ten-year period, by billing fluoride treatments at ten times the proper rate; billing for more exams per patient than permitted; and billing for exams without proper documentation.

Nason Medical Centers, Dr. Baron Nason, and Robert Hamilton (D.S.C. Jan. 15, 2015)

Nason Medical Centers and two of its owners, Dr. Baron Nason and Robert Hamilton, will pay the United States $1 million to settle allegations of Medicare, Medicaid and TRICARE fraud, including billing for services provided by physician assistants as if they were provided by physicians; billing for tests that were not medically necessary; billing for services provided by non-licensed personnel; billing for an expensive drug even though a less expensive drug was actually administered. The allegations arose from a *qui tam* suit filed by two relators—who will share a reward of nearly $184,000. In addition to the payment, the company will enter into a five-year corporate integrity agreement with the government.

Office Depot (Cal. Jan. 14, 2015)

Office Depot will pay $68.5 million to resolve a whistleblower suit under the California False Claims Act alleging that the company failed to give most of its California customers—including more than 1,000 cities, counties, school districts and other government entities—its best price as outlined by its contracts' "Most Favored Public Entity" provisions. David Sherwin, the former Office Depot employee who filed the *qui tam* suit, was represented by TAFEF members Eric Havian and Stephen Hasegawa of Phillips & Cohen LLP. Mr. Shewrin passed away from cancer only one month after testifying in the case; his estate will receive his reward of approximately $23 million.

Arbon Equipment Corporation and Rite-Hite Holding Corporation (C.D. Cal. Jan. 12, 2015)

Government contractor Arbon Equipment Corporation and its parent company, Rite-Hite Holding Corporation will pay $4 million to resolve allegations that Arbon failed to comply with various prevailing wage laws, including provisions of the federal Davis-Bacon Act and Service Contract Act, and of the California Labor Code, in connection with various installation and services contracts at facilities owned by the federal government and the State. The companies will also pay $1500 to current or former employees who are identified as having worked on the projects at issue, and $600,000 of the settlement funds will be held in reserve by the U.S. Department of Labor for two years, to cover $1500 payments to additional current or former employees who might come forward. The *qui tam* suit was filed by Mark Brooks, who was represented by TAFEF member John Tycko of Tycko & Zavareei LLP, as well as Schonbrun DeSimone Seplow Harris & Hoffman. He will receive a reward of $1,164,000.

Medical College of Wisconsin (E.D. Wis. Jan. 12, 2015)

The Medical College of Wisconsin will pay the United States $840,000 to resolve a *qui tam* lawsuit that contended that the college submitted false claims to Medicare and TRICARE for neurosurgeries performed by residents but billed for at the higher rate reserved for neurosurgeries performed by teaching physicians.

Daiichi Sankyo (D. Mass. Jan. 9, 2015)

New Jersey-based pharmaceutical company Daiichi Sankyo will pay $39 million to federal and state Medicaid programs to resolve a *qui tam* lawsuit filed by a former Daiichi sales representative. The company will also enter into a five-year corporate integrity agreement with the U.S. Department of Health and Human Services Office of Inspector General. According to the suit filed by Kathy Fragoules, for six years Daiichi paid illegal kickbacks to physicians in the form of sham speaker fees period to induce the doctors to prescribe the company's drugs, which rendered false resulting reimbursement claims for the prescriptions to the federal healthcare programs. Fragoules, who was represented by TAFEF members Kenneth Nolan, Marcella Auerbach and Joseph White of Nolan Auerbach & White, P.A., will receive a reward of $6.1 million.

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