False Claims Act & Qui Tam

Quarterly Review

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The *False Claims Act and Qui Tam Quarterly Review* is published by the Taxpayers Against Fraud Education Fund. This publication provides an overview of major False Claims Act and *qui tam* developments including case decisions, DOJ interventions, and settlements.

The TAF Education Fund is a nonprofit charitable organization dedicated to combating fraud against the Federal Government through the promotion and use of the *qui tam* provisions of the False Claims Act (FCA). The TAF Education Fund serves to inform and educate the general public, the legal community, and other interested groups about the FCA and its *qui tam* provisions.

The TAF Education Fund is based in Washington, D.C., where it maintains a comprehensive FCA library for public use and a staff of lawyers and other professionals who are available to assist anyone interested in the False Claims Act and *qui tam*.

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FROM THE EDITOR

HAPPY NEW YEAR!

The year 2015 marks an interesting time for the False Claims Act. Last Fall, Eric Holder announced his resignation as U.S. Attorney General last September, but noted that he will remain in office until a successor is appointed. Soon after, President Obama nominated Loretta Lynch, the United States Attorney for the Eastern District of New York and a noted fraud-fighter and proponent of the FCA, to replace Holder; Lynch is currently in the midst of the confirmation process. Certainly, our next Attorney General will be heavily involved in crafting federal FCA policies and practices, and Lynch's track record seems to bode well for the FCA community if she is confirmed. In addition, campaign season is just around the corner, reminding us that a new President and administration will be in place soon, prepared to put its own stamp on FCA protocol. Also, in the next few months, the U.S. Supreme Court is expected to determine the parameters of the FCA's "first-to-file" provision as well as resolve questions about the law's statute of limitations. Moreover, the 1986 amendments to the law are now entering their 30th year, and during that time the FCA has achieved unparalleled success—recovering some $40 billion for the federal government. That trend continues into this year, as nearly $1 billion has already been recovered under the FCA in just the first month of 2015! Regardless of what happens this year in the FCA arena, you can rest assured that Taxpayers Against Fraud Education Fund will be at the forefront and will report back to you.

TAFEF remains resolute in our mission to combat fraud against public funds by promoting and protecting the FCA and its *qui tam* provisions, as well as other whistleblower laws and programs. And this publication—which recently celebrated its 20th anniversary—remains a testament to the tireless efforts of government officials, in partnership with private whistleblowers and their attorneys, to return America's stolen tax dollars. We hope you enjoy the January 2015 issue.

Best regards,
Cleveland Lawrence III

Recent False Claims Act & *Qui Tam* Decisions

OCTOBER 1, 2014–DECEMBER 31, 2014

FALSE CLAIMS ACT LIABILITY

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

U.S. ex rel. Schaengold v. Memorial Health, Inc., 2014 WL 7272598 (S.D. Ga. Dec. 18, 2014)

The relator filed a *qui tam* action alleging that a group of affiliated healthcare companies violated the False Claims Act by falsely certifying to the government that they were complying with all relevant laws and regulations—including the Anti-Kickback Statute and the Stark law—while submitting claims to the government for payment for services provided to patients who were referred by doctors the defendants illegally paid at above-market-value-rates as kickbacks. The relator, the former President and CEO for the defendants' health care facility, also brought a retaliation claim under the FCA, alleging that he was terminated as a result of his whistleblowing activities. He claimed that he advised the defendants' board members that paying the physicians excessive bonus payments and above-market compensation would result in liability under the AKS, the Stark law, and the FCA. The relator allegedly proposed that the defendants cease their practice of overpaying the physicians, but the Board rejected his proposal for fear of losing the patient referrals. The relator alleged that the defendants removed him from oversight of the physician contract negotiations and subsequently terminated his employment. The defendants moved to dismiss all of the relator's claims, arguing that he failed to state a claim under Rule 12(b)(6) and that failed to plead the fraud claims with particularity under Rule 9(b). The defendants also argued that the relator was required to arbitrate his retaliation claim pursuant to his employment contract.

Holding: The U.S. District Court for the Southern District of Georgia denied the defendants' motion to dismiss in part and granted it in part. The relator was given leave to amend his complaint.

Anti-Kickback Statute and Stark Law

The court partially rejected the defendants' argument that the relator's fraud claims failed because he did not sufficiently allege that the defendants' financial relationship with the physicians violated the Stark Law's prohibition on improper financial relationships. The court held that the relator properly alleged that the physicians received above-market-value compensation by including in the complaint allegations that the physicians received compensation at or above the 90th percentile of the Medical Group Management Association calculation, as opposed to the 75th percentile that is generally considered fair market value. However, the court held that the relator failed

to sufficiently allege that the physicians' bonuses were above fair market value, because he did not allege any benchmark from which to court could measure the bonuses.

The court also rejected the defendants' argument that the relator's allegations were insufficient because he failed to allege that the defendants actually asked the physicians for referrals in exchange for the alleged overcompensation. The court held that because the relator pled with particularity that the defendants knowingly paid kickbacks with the intent of inducing referrals, he had sufficiently pled a violation of the AKS. The court explained that the *qui tam* complaint was "replete with allegations that Defendants structured the compensation arrangements to induce referrals," such that the relator's complaint provided sufficient indicia of reliability that the defendants intended that the compensation arrangements induce referrals.

Failure to Plead Fraud with Particularity

The court rejected the defendants' initial argument that the relator's claims failed because he failed to identify which provisions of the FCA the defendants violated. The court held that while the relator did not include the specific provisions under which he sought relief, the structure of the complaint and the nature of the claims made it "quite clear which facts and statutes pertain to the False Claims Counts."

The court further rejected the defendants' argument that the relator's allegations failed because they did not detail referrals of particular patients as a result of allegedly improper relationships between physicians and the defendants; or the corresponding submission of a false claim for payment for services rendered to patients as a result of those referrals. The court explained that the relator was not required to plead examples of prohibited referrals, representative claims, or cost reports submitted to the government falsely certifying compliance with the AKS and Stark Law, because the relator satisfied Rule 9(b) by providing other indicia of reliability to support his claim that the false claims were actually submitted. Specifically, the relator provided first-hand information and personal knowledge gained in his position as President and CEO about the defendants' billing practices and the submission of tainted claims. The court explained that the relator set forth in detail how the defendants obtained payments from the government for their Medicare services, as well as the certifications that the defendants submitted certifying their compliance with applicable laws and regulations.

The court also rejected the defendants' argument that the relator should not be given the benefit of allowing personal knowledge to provide indicia of reliability with respect to claims arising prior to the start of the relator's employment. The court explained that as CEO, the relator had access to financial records that pre-dated his employment and he alleged that he reviewed those records in detail while attempting to address the defendants' financial issues. However, while the court found that the relator adequately alleged that the compensation arrangements violated the AKS and Stark Law, it noted that the *qui tam* complaint did not provide factual allegations that the defendants made any claim or certification to the government that had been tainted by referrals made pursuant to the allegedly unlawful compensation arrangements. Therefore, the court dismissed these claims without prejudice.

Leave to Amend

The court granted the relator's request to amend his complaint to address the pleading deficiencies. The court explained that along with his response to the defendants' motion to dismiss, the relator submitted an affidavit identifying the specific physicians the relator alleged received the improper compensation and identified the charges to Medicare that the relator believed those physicians generated. The court held that those additional allegations would have "pushed Relator's Complaint over the goal line in terms of the requisite indicia of reliability necessary for the FCA counts in his Complaint to weather Defendants' motion to dismiss."

Retaliation

Finally, the court addressed the defendants' argument that the relator was required to pursue his retaliatory discharge claim in arbitration because there was a provision in his employment agreement stating that "any controversy or claim arising out of or relating to [the employment agreement] or any alleged breach thereof shall be settled by arbitration…" The defendants argued that because the relator referenced the employment agreement in his complaint and attached a copy as an exhibit, their challenge to the district court's subject-matter jurisdiction over the retaliatory discharge count was a facial challenge and thus, no information from outside of the complaint could be considered in deciding whether to allow the relator to pursue the matter in district court. The court rejected this argument, explaining that reference to a document in a complaint does not make that document part of the pleadings; rather, the document had to be "central to the [relator's] claims." The court further explained that the relator did not bring his retaliation claim pursuant to the terms of the employment agreement, but pursuant to the FCA. Therefore, the court held that because the defendants' jurisdictional challenge relied on facts extrinsic to the pleadings, the challenge was properly classified as a factual challenge and the court would decide whether the retaliation claim was properly before it by considering matters outside of the pleadings.

The court held that the parties did originally agree to arbitrate the relator's retaliation claims in the employment agreement; however, the defendants waived their right to arbitration by responding to the relator's original Demand for Arbitration by arguing that the arbitrator did not have jurisdiction or authority over the relator's claim for retaliatory discharge. The court held that the defendants were aware that the relator was pursuing an FCA-based retaliation claim in his arbitration proceeding and that they objected to the arbitrator's jurisdiction over that claim. Therefore, the defendants waived their right to arbitration. Further, the court held that the relator would be prejudiced by the defendants' inconsistent actions, as he spent significant time and money in reliance in the defendants' objection to the arbitrator's jurisdiction over his claim. The court denied the defendants' motion to dismiss the retaliation claim.

U.S. ex rel. Schaengold v. Memorial Health, Inc., 2014 WL 6908856 (S.D. Ga. Dec. 8, 2014)

In this intervened case, the plaintiffs alleged that the defendants paid kickbacks to physicians in violation of the Social Security Act and violated the "reverse false claims" provision of the False Claims Act by knowingly submitting claims for reimbursement based on referrals from those physicians. The defendants included a unitary healthcare system comprised of a hospital, a physician group, healthcare providers, and related entities. The relator was a former Chief Executive Officer and President of the parent company and hospital.

The Social Security Act established the Medicare program through which the defendants received payment for patients sixty-five and older. Under the Medicare program, the defendants were required to submit cost reports to the government containing certifications that they would comply with applicable laws and regulations, including the Stark law, and that any misrepresentation or violation of any applicable law would result in civil, criminal, or administrative punishment. The plaintiffs alleged that the defendants received $6,749,591.30 in Medicare payments as a result of illegal patient referrals. They claimed that despite the defendants' knowledge that the referrals violated the Stark law, the defendants submitted claims for payment to Medicare, and certified on each cost report that they had complied with all applicable laws and regulations. The plaintiffs alleged that the defendants subsequently kept those payments, in violation of the reverse false claims provision of the FCA. The defendants moved to dismiss the claims for failure to state a claim under Rule 12(b)(6) and failure to plead fraud with particularity under Rule 9(b). The defendants argued that the plaintiffs had not alleged that they owed a clear and established obligation to repay the government, or that they used a false claim to avoid an obligation owed to the government.

Holding: The U.S. District Court for the Southern District of Georgia granted the defendants' motion to dismiss the reverse false claims allegations with respect to all defendants except for the hospital, because the plaintiffs only alleged that the hospital was enrolled in the Medicare program or presented any claims to the government for payment.

The court explained that "merely being a parent, or an associated corporation, of a subsidiary that commits an FCA violation" is insufficient to maintain an FCA action against that parent or associated corporation. The court further explained that in order to hold the other entities liable, the plaintiffs were required to show that there was 1) such a unity of interest that the separate entities no longer existed, and 2) if the acts are treated as those of the hospital alone, then an inequitable result would follow. The court held that the plaintiffs failed to meet those requirements, as they only alleged that the entities "operated as a unitary health system" and that the parent company controlled the business decisions for the entire

healthcare system. The court explained that this type of structure was not unusual and that courts routinely refuse to pierce the corporate veil based on such allegations. Further, the court held that the plaintiffs did not plead any facts that would show that an injustice would result if the hospital alone was held liable for the misconduct giving rise to the alleged false claims act violations. The court further rejected the plaintiffs' argument that the additional entities were directly involved in submitting false claims or caused false claims to be submitted and should thus be held liable for the alleged violations. Rather, the court explained that "mere participation in a scheme that results in an eventual submission of a false claim [was] not sufficient for FCA liability to lie." As a result, the court dismissed the claims against the related entities without prejudice and gave the plaintiffs leave to amend.

The court then turned to the merits of the claims against the hospital. The court held that the plaintiffs developed a theory of concealment of an alleged obligation to make a payment under the reverse false claims provision of the FCA, noting that they asserted that the hospital engaged in illegal compensation agreements with physicians; that the defendant submitted claims for payment for patients referred under the illegal kickback scheme to Medicare despite the existence of those agreements; that the defendant knew the compensation arrangements were illegal; and that despite that knowledge the defendant continued to bill Medicare in violation of the Stark law and to certify in its cost reports that it complied with all applicable laws and regulations. Most significantly, the plaintiffs alleged that by law the hospital was obligated to refund reimbursements received from the government as a result of Stark Law violations. The court rejected the defendant's counter-argument that an obligation to repay the government under the FCA only arises where an entity had and breached a contractual relationship with the government, was liable to the government for a judgment or fine, or had acknowledged indebtedness to the government. Instead, the court explained that repayment obligations can also arise by statute or regulation. Consequently, the court found that the plaintiffs properly alleged a claim under the FCA's reverse false claims provision.

The court also rejected the hospital's argument that the plaintiffs failed to plead with particularity that it made or used a false record because they did not allege the "who, what, when, where, and how" of the alleged submissions. The court explained that the defendant's view of Rule 9(b) was "too narrow" and that the plaintiffs were only required to show "some indicia of reliability" to support the allegation of actual false claims being submitted to the government. Because the plaintiffs' allegations were based on the relator's personal knowledge, gained from his access to financial information and other corporate documents he was privy to during his time as CEO and President, the court held that the allegations included the requisite indicia of reliability. The court further acknowledged that the plain-

tiffs also included a list of claims and procedures that they alleged were charged to Medicare based on the referrals from the physicians receiving payments.

Finally, the court rejected the defendant's argument that the reverse false claims action "merely recast[] the Government's affirmative false claims allegations." The court explained that the reverse false claim allegation was a basis for liability independent of the plaintiffs' affirmative false statement claims because the plaintiffs alleged that there was a clear obligation to return overpayments from Medicare. Therefore, the court denied the hospital's motion to dismiss.

U.S. ex rel. Grenadyor v. Ukrainian Village Pharm., Inc., 2014 WL 6783033 (7th Cir. Dec. 3, 2014)

The relator, a pharmacist formerly employed by the defendant pharmacy, brought a *qui tam* action alleging that the defendant violated the False Claims Act by giving small gifts to customers and not charging them the required co-pay in order to induce them to fill their prescriptions—which the government paid for—with the defendant. Additionally, the relator alleged that the defendant sought reimbursement from the government for prescriptions that were never delivered to customers. The defendant was a pharmacy that served the Ukrainian community in Chicago and was enrolled in a network of similar pharmacies around the country. The relator alleged that the defendant made knowingly false certifications to the government, including agreeing to comply with applicable laws and regulations, such as the Anti-Kickback Statute, in order to enroll in the Medicare program and receive reimbursement for the drugs it sold. The relator also alleged that he was terminated from his job in retaliation for his whistleblowing activities. The U.S. District Court for the District of Illinois granted the defendant's motion to dismiss, holding that the defendant's alleged false certifications did not amount to false claims under the FCA because they were made prior to the submission of any claims to Medicare. The relator appealed the district court's ruling to the U.S. Court of Appeals for the Seventh Circuit.

Holding: The Seventh Circuit reversed the district court's ruling in part and affirmed it in part. While the appellate court affirmed the dismissal of the fraud claims, it denied the defendant's motion to dismiss the retaliation claim.

The circuit court explained that the district court was incorrect when it held that the defendant's certification was not a false claim, and instead was "merely a promise that the pharmacy failed to keep." The circuit court further explained that the defendant's certifications to Medicare induced the government to improperly pay healthcare claims, noting that "[m]aking a false promise in order to obtain something of value is fraud." However, the appeals court ultimately held that the relator's claims failed because he did not allege that the claims made to the

government were knowingly false when they were made. The relator alleged that the defendant knew when it made its certification to the government that other pharmacies in its network were paying illegal kickbacks and that as a member of the network it would do so as well, but the appellate court held that those allegations were too conclusory to satisfy Rule 9(b)'s heightened pleading requirements. Similarly, the court rejected the relator's implied false certification theory of FCA liability, holding that the relator did not plead the defendant's alleged misconduct with sufficient particularity under Rule 9(b). The circuit court explained that the relator did not allege that the gifts given to customers or co-pays that were waived were of sufficient value to violate the AKS, nor did he allege that the waivers or gifts were advertised in violation of the AKS. Further, the Seventh Circuit held that the relator failed to allege that the defendant submitted a claim to Medicare on behalf of a specific patient who had received a kickback.

In addition, the appeals court rejected the relator's argument that the defendant violated the FCA by charging for prescriptions that were never delivered to customers. The relator alleged that the defendant engaged in a scheme whereby its pharmacist would request refills on prescriptions from doctors of customers who did not actually need the drugs, and then charge Medicare for the prescription. The circuit court held that the relator's claims failed to the extent that he alleged a scheme involving other pharmacies in the network, as he only worked at one pharmacy and did not have personal knowledge of the practices at other pharmacies. To the extent that the defendant pled personal knowledge of this practice at his pharmacy, he failed to allege that the defendant knowingly failed to reverse the charges to government.

Based on the above findings, the Seventh Circuit affirmed the district court's dismissal of the relator's fraud claims. The fraud claims were dismissed with prejudice, as the circuit court noted that the relator had received several opportunities to amend his complaint and had not cured the deficiencies.

Finally, the Seventh Circuit addressed the relator's retaliation claim. The relator alleged that he was fired after voicing his concerns to his supervisors over the alleged kickbacks and other unlawful acts that he claims to have observed at the pharmacy. The circuit court held that the relator properly pled a claim for retaliation under the FCA, explaining that retaliation for filing an internal complaint with one's employer violated the FCA. Thus, the appeals court denied the defendant's motion to dismiss the retaliation claim.

U.S. ex rel. Fox Rx, Inc. v. Dr. Reddy's Inc., 2014 WL 6750786 (S.D.N.Y. Dec. 1, 2014)

A "serial" *qui tam* relator and former Medicare Part D sponsor brought a *qui tam* action against defendants, Dr. Reddy's Laboratories, a drug manufacturer; Omnicare, a healthcare manager and its subsidiary; and a long term care facility. The relator alleged that the drug rebates Dr. Reddy's provided to Omnicare violated the Anti-Kickback Statute and that Omnicare improperly billed the government for certain dispensing fees, causing false claims to be submitted to the government and paid by Medicare in violation of the False Claims Act. The relator alleged that Omnicare's purchase of 90% of its supply of a certain drug from Dr. Reddy's while other manufacturers sold the drug for less showed that there was a kickback scheme in play. The relator also alleged that "either Omnicare double-billed, because it also billed the long term care facility for a dispensing fee [as well as Medicare Part D], or that it must have engaged in an illegal 'swapping' kickback scheme by agreeing to to charge the fee 'in exchange for those facilities providing Omnicare access to the facilities' patients and the opportunity to submit Part D claims.'" 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 Southern District of New York granted the defendants' motion to dismiss.

The court held that the relator's claims regarding the defendants' rebates failed because the rebates allegedly accepted by Omnicare fell within the regulatory safe harbor for discounts and did not violate the AKS. Thus, the claims submitted by the defendants were not false under the FCA. The court further held that the relator's claims regarding the dispensing fees failed because the conduct that the relator alleged did not render any claims false; the court explained that the relator did not allege any behavior that was improper within the Medicare Part A or D context. Specifically, the court determined that the definition of "dispensing fee" in the Medicare regulations did not suggest that it would be improper to split the fee between the long term care facility and Part D, nor did the applicable regulations prohibit Omnicare from charging the full dispensing fee to Part D. Therefore, the court rejected the relator's argument that the defendants' allocation was illegal. Finally, the court rejected the relator's argument that Omnicare "may" have double-billed its dispensing fee in some circumstances, charging the full fee to both the long term care facility and Part D, explaining that the allegations were conclusory and insufficient to meet the requirements of Rule 9(b). Based on the above findings, the court granted the defendants' motion to dismiss.

U.S. v. Reliance Med. Sys., LLC, 2014 WL 5791113 (C.D. Cal. Nov. 5, 2014)

The U.S. government brought an action against a group of defendants for violations of the False Claims Act. The defendants included Reliance, a company that sold spinal implants for use during spinal stabilization surgery; Reliance's founders and owners; several device distributors for Reliance's products; and several physicians who were also investors in the distributor companies. The government alleged that Reliance's owners offered investment opportunities to physicians who agreed to use Reliance's products. The government alleged that the physicians were made sham investors, resulting in large payouts on their "investments;" according to the relator, the payouts were actually payments made to the physicians in exchange for using Reliance's products. The government claimed that the more products the physicians used, the more money they received as purported returns on investments, If physicians stopped using the Reliance's products or reduced the amount of products used, the government alleged that they would be "pushed-out" by other investors controlled by Reliance. The government contended that the defendants violated the False Claims Act, by knowingly engaging in violations of the Anti-Kickback statute and then submitting to the government healthcare programs claims that were "tainted by the kickbacks." The government also alleged that the physician-investors performed surgeries that were not medically necessary in order to increase the amount of Reliance products they were using. Finally, the government alleged a conspiracy to violate the FCA between the defendants. The defendants moved to dismiss the government's claims for failure to state a claim under Rule 12(b)(6).

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

The court held that the submission of a claim to the healthcare programs impliedly certifies that the claim complies with all express requirements under the law, and that the government properly alleged that the defendants violated the AKS with their kickback scheme and then implicitly certified that it had not done so. The court explained that the government alleged facts that strongly supported its contention that the defendants were engaged in a conspiracy to pay the physician-investors in exchange for their use of Reliance products. The government alleged that the physicians invested almost no actual capital but were still paid large sums of money, and that the defendants knew that healthcare claims submitted as a result of this scheme would be fraudulent—and even ignored legal advice that specifically informed them that the scheme was illegal. The defendants argued that only bills for actual products should be considered as a possible basis for FCA liability, and not the bills for physicians' services. The court rejected that argument and explained that physicians' services were integral to the alleged scheme, and

that claims for reimbursement for the physicians' services constituted false claims to the same extent that claims for reimbursement for the devices did.

The court also held that the government properly pled its claims that the physician-investors submitted claims for payment for procedures that were not medically necessary, noting that the government detailed five specific surgeries with sufficient detail to support its theory. The court also held that while the question of Reliance's knowledge of the medical necessity of the surgeries was not clear, the government sufficiently alleged that Reliance may have known that its scheme would induce physicians to perform more surgeries than necessary in order to satisfy the quotas Reliance set for them. Thus, the court held that the government alleged sufficient facts to survive the motion to dismiss these claims.

U.S. ex rel. Mastej v. Health Mgmt. Assocs., Inc., 2014 WL 5471925 (11th Cir. Oct. 30, 2014)

The relator brought a *qui tam* action against Health Management Associates, Inc. ("HMA") and its subsidiary, Naples HMA, LLC. HMA operated approximately 56 hospitals nationwide and Naples HMA ran 2 medical centers in Florida—the Pine Ridge facility and the Collier Boulevard facility. The relator was a former Vice President for HMA and the CEO of the Collier Boulevard facility. The relator alleged that the defendants violated the False Claims Act by seeking Medicare reimbursement for patients referred to HMA by doctors who were paid kickbacks in violation of the Anti-Kickback Statute ("AKS") and Stark Law, and by subsequently falsely certifying to the government that they provided the referred medical services in compliance with all applicable laws, including the AKS and Stark Law. The alleged kickback scheme involved the defendants paying certain neurosurgeons a fee of $1000-$2000 per day for "on-call" services in medical centers that did not offer emergency or un-planned neurosurgery services, and therefore had no need for "on-call" neurosurgeons. The relator alleged that this supposed "on-call" fee was paid to induce the neurosurgeons to refer patients to the defendants' hospitals. The relator alleged that the CEO of the Pine Ridge facility requested that the Collier Boulevard facility and the Pine Ridge facility split the cost of the "on-call" contracts in order to encourage the doctors to continue to refer patients to Pine Ridge and begin referring patients to Collier Boulevard, but the relator refused. In addition to the "on-call" scheme, the relator alleged that the defendants induced several doctors to refer patients to their hospitals by paying for them to participate in a golf tournament, which included allowing the doctors to fly on the defendants' private jet and providing them with rental cars, tickets, meals, and drinks.

In order to receive reimbursements from Medicare, the defendants submitted "interim claim forms" and the government reimbursed the defendants based on the information provided in those forms. In addition, the defendants submitted

annual cost reports, each of which contained a certification that the Medicare services in the report were provided in compliance with all health care laws and regulations. The relator did not identify any of the defendants' specific Medicare claims by date, type of service, or amount paid. Rather, he alleged that taken together, the interim claim forms and the cost reports were false, arguing that due to the alleged AKS and Stark law violations, all claims for reimbursement for the defendants' services arising from referrals from doctors who were allegedly paid kickbacks were fraudulent , and because the cost reports totaled all of the amounts due for all interim claims made by the hospital, the total amounts shown in each cost report necessarily included the amounts received for the referred patients.

The U.S. District Court for the Middle District of Florida granted the defendants' motion to dismiss for failure to plead fraud with particularity under Rule 9(b). The defendants argued that the relator failed to allege that the defendants actually submitted any false claims for a referred patient or that the government paid such a claim. The relator appealed the district court's ruling to the U.S. Court of Appeals for the Eleventh Circuit.

Holding: The Eleventh Circuit reversed the district court's ruling in part and affirmed it in part. The circuit court held that the relator properly pled details of the kickback scheme and that he had personal knowledge to support the allegations of fraud related to the time period that he was employed by the defendants. However, the court held that the relator failed to plead fraud with particularity regarding his allegations of fraud committed after he left HMA, and affirmed the district court's dismissal of those claims.

Failure to Plead Fraud with Particularity

The appellate court held that the relator pled the alleged financial schemes in detail, providing the names of the doctors and defendants' employees involved, what the kickbacks were and when they were provided, and why the scheme was unlawful. Therefore, the relator sufficiently pled the fraud schemes under Rule 9(b). Further, the court held that while the relator did not allege any specifics regarding the actual referrals; treatment of referred patients; or dates, frequency, or amounts of any actual claim for such referred patients, he was not required to plead such detailed information about a representative claim because he provided the "indicia of reliability" required to satisfy Rule 9(b)'s standard by alleging that he had actual personal knowledge that false claims were submitted to the government. Specifically, the court explained that through the relator's position as Vice President of HMA and CEO of the Collier Boulevard branch, he became familiar with the defendants' patients and services, as well as how those services were billed for each patient. In addition, he alleged that he negotiated contracts for on-call coverage and was asked to participate in the kickback scheme himself, but declined. However, because the relator did not provide indicia of

reliability beyond his personal knowledge, the court dismissed his claims based on alleged conduct that occurred after he left the defendants' employ.

The court explained that its conclusion was based on "the fact that the type of fraud alleged here [did] not depend as much on the particularized medical or billing content of any given claim." The court noted that in other types of FCA cases, the allegations might involve, for example, a false statement contained in a claim for reimbursement for medical services that were not rendered and thus, the particularized medical and billing content are more important because the falsity of the claim depends on the details. In this case however, the allegations simply relied on the defendants' submission of claims for services provided to unlawfully referred patients, and therefore, the circuit court held, the particularized medical and billing details were not necessary.

U.S. ex rel. Cestra v. Cephalon, Inc., 2014 WL 5038393 (E.D. Pa. Oct. 9, 2014); *U.S. ex rel. Boise v. Cephalon, Inc.*, 2014 WL 5089671; 2014 WL 5089717 (E.D. Pa. Oct. 9, 2014)

Relator Boise filed a *qui tam* complaint in 2008 alleging off-label promotion of Fentora, but did not provide any background or details on the FDA's approval of the drug, the defendants' marketing efforts for off-label use, the speaker programs through which the defendants allegedly promoted the drug off-label, or specific facts regarding the alleged kickback scheme used to promote Fentora off-label.

The Boise relators brought a *qui tam* action against the defendants—Cephalon, a drug manufacturer, and John Does #1-100—alleging that the defendants violated the False Claims Act by engaging in off-label marketing for the drug Fentora, which was approved by the Food and Drug Administration for the treatment of breakthrough cancer pain.

In June 2009, another relator, "Doe," commenced a separate *qui tam* action against Cephalon, alleging off-label marketing of Fentora and another drug, Provigil. In January 2010, Boise filed a first amended complaint and included allegations of off-label promotion of Provigil. In September 2013, Doe voluntarily dismissed his complaint.

In the meantime, in June 2013, another relator, Cestra, filed a second amended complaint against Cephalon alleging off-label promotion of Fentora. This complaint contained a detailed history of the FDA's approval and monitoring of Fentora; specific allegations of how the defendants promoted the drug off-label, including specific names of doctors involved in the speaker programs and the nature of the payments made to them; details regarding the alleged kickback scheme; and additional an additional allegation that the defendants' conduct violated Cephalon's Corporate Integrity Agreement ("CIA") and that the defendants concealed those violations from the government.

In February 2014, Boise filed a second amended complaint, which supplemented his previous claims regarding Fentora; retained the claims regarding Provigil; added two additional relators, Dufour and Augustine; and included new allegations regarding Fontera and another drug, Nuvigil, as well as assertions that the defendant violated the CIA. The second amended complaint contained a detailed history of FDA monitoring of Fentora and the new claims included much of the same content (and in some cases, word-for-word copying) as the allegations in the Cestra complaint.

The defendants moved to dismiss Boise's original claims regarding Fentora, arguing that those allegations were based on prior public disclosures made in the Cestra complaint. The defendants also moved to dismiss the Boise relators' new allegations regarding Fentora, as well as the claims regarding Provigil and Nuvigil, under the FCA's first-to-file provision. Finally, the defendants moved to dismiss the *Cestra* complaint under the first-to-file provision.

Holding: The U.S. District Court for the Eastern District of Pennsylvania granted the defendants' motion to dismiss the Boise complaint on public disclosure grounds. The court denied the defendants' first-to-file motion to dismiss the Boise relators' new claims related to Fentora and Nuvigil; the court stayed the defendants' motion to dismiss the Provigil claims. The court granted the defendants' motion to dismiss the Cestra complaint.

Public Disclosure Bar

As an initial matter, the court held that the pre-2010 version of the public disclosure bar applied to the Boise case because the original complaint was filed prior to the 2010 amendments. The court then determined that the Boise complaint was based on information in the Cestra complaint, observing that the two complaints contained 33 pages of identical language. The Boise relators did not argue that their complaint was not based on information in the Cestra complaint; they argued that the public disclosure bar did not apply, since Boise's first amended complaint—which included allegations regarding Fentora—was filed before Cestra's complaint and that any information copied from Cestra's complaint "merely added details to the core allegation of fraud." The court rejected these arguments, explaining that the public disclosure bar applied to amended pleadings that relied on publicly disclosed information discovered after the original complaint but before the amended pleading. In addition, the court held that the Boise relators had not simply added details to their second amended complaint, but included entirely new allegations; moreover, they filed the second amended complaint in anticipation of, rather than in response to, their first amended complaint being dismissed under Rule 12(b)(6) and/or Rule 9(b). Next, the court held that none of the Boise relators was an original source of the information underlying their claims. The court determined that Boise could not have had firsthand knowledge of the Fen-

tora claims because he was not employed by Cephalon during the relevant time period when Fentora was introduced and marketed. The court also held that Dufour and Augustine did not qualify as original sources of the Fentora claims. The defendant's motion to dismiss the Boise relator's Fentora claims was granted.

While the court held that the Boise relators' Fentora claims were barred by the public disclosure rule, it concluded that the Boise relators' claims regarding Provigil and Nuvigil were not barred by the public disclosure bar, as the Cestra complaint did not include allegations regarding those drugs.

First-to-File Bar

The defendants argued that the FCA's first-to-file bar prohibits additional relators from joining a related pending *qui tam* suit, and therefore, relators Dufour and Augustine's new allegations regarding Fentora and Nuvigil were barred. The court, though, agreed with the relators and held that the first-to-file bar does "not apply to the voluntary addition of relators by amended complaint in a pending action where relators have entered into a private agreement regarding the division of potential proceeds from the action." The court explained that this interpretation best serves the purpose of the FCA and first-to-file bar—encouraging all interested parties to resolve their claims in a single lawsuit rather than allowing for the duplicative expenditure of time and resources in separate actions. The court further explained that claims were not "parasitic," where relators agreed to join together due to the "real or perceived advantage the additional relators bring to the complaint." The court denied the defendant's motion to dismiss the additional claims related to Fentora and Nuvigil under the first-to-file bar.

The defendant also argued that the claims in the Boise relators' allegations in their second amended complaint related to Provigil were barred by the first-to-file provision because those claims were first filed in Boise's first amended complaint, while the "Doe" action (which included related claims) was still pending. The Boise relators contended that the timing of their second amended complaint—the complaint that first included their Provigil claims—should control the first-to-file determination. Since the Boise relators' second amended complaint was filed in February 2014, after the Doe complaint was dismissed, the Boise relators contended that there was no action pending to bar their Provigil claims. The court stayed consideration of the defendant's motion to dismiss the Provigil claims, noting that the U.S. Supreme Court will soon decide the issue of whether the first-to-file bar applies to subsequent complaints filed after the first-filed case was dismissed in *U.S. ex rel. Carter v. Halliburton*.

Finally, the court considered the defendant's argument that the Cestra complaint should be dismissed because it was barred by Boise's original complaint under the first-to-file provision. The court rejected Cestra's contention that his Fentora allegations were sufficiently distinct from Boise's original claims to overcome the first-to-file provision. The court held that Cestra pled claims that were in some ways identical to, and based on the same essential elements as, the claims in Boise's original complaint. While noting that some of Boise's allegations were general and that Cestra provided

more detailed allegations, the court held that Cestra's complaint did "not allege a different fraudulent scheme distinguishing it" from Boise's case, such that it would put the government on notice of the need to investigate a separate scheme. Consequently, the court granted the defendant's motion to dismiss the Cestra complaint.

See *U.S. ex rel. Parikh v. Brown,* 2014 WL 4854217 (5th Cir. Oct. 1, 2014), at page 55.

JURISDICTIONAL ISSUES

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

U.S. ex rel. Ven-A-Care of the Fla. Keys, Inc. v. Baxter Healthcare Corp., 2014 WL 6737102 (1st Cir. Dec. 1, 2014)

The relator, Ven-A-Care brought a *qui tam* action alleging that a pharmaceutical company violated the False Claims Act by fraudulently inflating the prices of its drugs to secure higher reimbursements from Medicare and Medicaid than they deserved. Ven-A-Care filed its complaint under seal in 1995 and it remained under seal until 2010, when the government declined to intervene. Ven-A-Care settled its claims with the defendant for a payment of "tens of millions of dollars," and a release of all civil or criminal liability with regard to the conduct at issue in Ven-A-Care's suit. In accordance with the settlement, the U.S. District Court for the District of Massachusetts entered a judgment dismissing Ven-A-Care's action against the defendant.

Several years prior to the settlement and dismissal of Ven-A-Care's suit, a former employee of the defendant, Sun, and a former long-time customer of the defendant, Hamilton, filed a separate *qui tam* action against the defendant—which was pending when the defendant settled with Ven-A-Care. The defendant moved for summary judgment in Sun and Hamilton's case after the district court dismissed Ven-A-Care's action, arguing that the Ven-A-Care settlement released Sun and Hamilton's claims as well. The district court agreed and granted summary judgment. However, Sun and Hamilton filed a motion for reconsideration, arguing that even if the Ven-A-Care settlement covered their claims, the agreement could not release those claims until Sun and Hamilton got a hearing on whether the settlement was "fair, adequate, and reasonable." The district court agreed that the settlement was an "alternate remedy" under the FCA and that Sun and Hamilton were entitled to a fairness hearing, however, the court determined that in order to receive that hearing, Sun and Hamilton had to file a motion in Ven-A-Care's case in order to reopen the judgment and grant the hearing. During the fairness hearing, the defendant argued for the first time that not only were Sun and Hamilton's claims covered by the Ven-A-Care settlement, but that those claims were also barred by the FCA's first-to-file doctrine because Ven-A-Care's suit was a related, pending action at the time Sun and Hamilton filed their case. The district court agreed and dismissed Sun and Hamilton's suit. They appealed to the First Circuit.

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

Sun and Hamilton argued that only their complaint provided the type of information necessary to put the government on notice of the alleged fraud, because the

Ven-A-Care complaint was "so vague and conclusory…that it was as if the complaint alleged no fraud at all." The circuit court rejected this argument, explaining that while Sun and Hamilton set forth additional details that the Ven-A-Care complaint did not, the Ven-A-Care complaint was "not bereft of facts specific to [the defendant's] allegedly fraudulent conduct." Specifically, the court explained that while Ven-A-Care's original complaint contained multiple defendants, there was a separate section devoted to the defendant in Sun and Hamilton's action which described the alleged fraud in detail. The court also rejected Sun and Hamilton's argument that their complaint provided necessary additional details regarding the alleged scheme because it was based on their collective personal knowledge acquired through their positions as insiders in the company. The court explained that for first-to-file purposes, the first complaint only needed to set forth the "essential facts of the fraud" in order to bar a subsequent related complaint. The circuit court held that Ven-A-Care's complaint included the key allegations regarding how the defendant carried out the fraud.

The First Circuit also rejected Sun and Hamilton's argument that only their complaint "sketched out the inner workings of [the defendant's] fraudulent scheme after the year 2000," and that their allegations of the defendant's post-2000 conduct resulted in a separate fraudulent scheme from the one alleged by Ven-A-Care. The court explained that the scheme alleged by Sun and Hamilton after 2000 was largely unchanged from the pre-2000 allegations and did not distinguish it from the fraud alleged in Ven-A-Care's complaint. While Sun and Hamilton provided additional details about the mechanisms of the post-2000 fraud that they alleged, the court held that Ven-A-Care described the same fraud in its complaint.

Finally, the appeals court addressed Sun and Hamilton's public policy argument that applying the first-to-file bar to their *qui tam* action would discourage insiders from coming forward with valuable information because less knowledgeable relators may have already won the race to the courthouse. Rejecting that argument, the court stated that following Sun and Hamilton's approach would disrupt the balance between encouraging whistleblowers to come forward and providing incentives for promptly alerting the government of fraud. Thus, the First Circuit affirmed the district court's decision.

U.S. ex rel. De Souza v. AstraZeneca PLC, 2014 WL 5780816 (D. Del. Nov. 5, 2014)

The relator, a former sales representative for AstraZeneca, a drug manufacturer and distributor, brought a *qui tam* action alleging that the company violated the False Claims Act by promoting the drug Crestor for off-label use, thereby causing claims to be submitted to the government for reimbursement for medically unnecessary treatment. The relator described several studies that were touted by the de-

fendant as proving that Crestor was effective in reducing mortality rates in certain patients and reducing the risk of cardiovascular problems such as heart attacks and strokes. However, Crestor was not approved by the Food and Drug Administration for those uses. The relator alleged that she and other sales representatives were directed to use the studies when discussing the drugs with physicians and to give the physicians copies of the studies so that they could use them in their practices. In addition, the relator claimed that the defendant subsequently engaged in a cover up of its use of the studies when it believed it was going to be caught. The defendant had previously settled several cases involving off-label marketing and entered into Corporate Integrity Agreements (CIAs) with the government in which it promised to stop the off-label promotion of all its drugs. The relator alleged that the defendant also violated the FCA by certifying its compliance with the prior CIAs while knowingly off-label marketing Crestor. The defendant moved to dismiss, arguing that the relator's claims were barred by the first-to-file provision of the FCA.

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

The court held that the relator's claims were barred by another *qui tam* complaint alleging the same fraud scheme, but which was filed ten days prior. The court rejected the relator's attempts to differentiate her complaint from the first-filed complaint, holding that while the relator offered details that were not included in the first-filed complaint, the material elements of her claims were the same as those in the first-filed complaint. The court also rejected the relator's assertion that she was the only one to allege a reverse false claim by describing the defendant's cover up of its use of the studies as part of its off-label marketing scheme. The court explained that the relator did not actually allege a reverse false claim in any of the counts and that regardless, the underlying facts of such a claim had been sufficiently alleged in the first-filed complaint.

U.S. ex rel. LaPorte v. Premier Educ. Group, L.P., 2014 WL 5449745 (D.N.J. Oct. 27, 2014)

A group of relators brought a *qui tam* action against the defendants, Premier Education Group, a provider of post-secondary school education, and its numerous campuses. The relators had all been employed in different capacities by one of the campuses. They alleged that the defendants violated the False Claims Act by falsely representing eligibility to participate in federal student loan financial aid programs. The defendants were eligible for federal funding in the form of student financial aid so long as they did not make any misrepresentations about the nature of the institution's educational programs or the employability of its graduates, and as long as they abided by all regulations, requirements, and laws as stated in their

contract with Department of Education. In order for schools to participate in federal student loan and grant programs and enter into these contracts with DOE, they had to ensure student eligibility for enrollment, including a requirement that students have a high school diploma or equivalent, and that they maintain "Satisfactory Academic Progress" in their chosen course of study. The defendants signed annual contracts with the DOE certifying their eligibility to participate in the program, and thus, their compliance with the required regulations and laws.

The relators alleged that the defendants violated the FCA by making false statements to the DOE in order to maintain the school's eligibility. Specifically, the defendants allegedly fabricated job placement statistics and engaged in false advertising in an attempt to induce students to enroll, including misrepresenting the accreditation status of certain educational programs, and the nature and success of various courses of study and career placement services. In addition, the relators alleged that the defendants falsified attendance records and changed students' grades so that they would appear eligible for federal aid when they were not. Finally, the relators alleged that the defendants' unlawfully compensated their employees based on student enrollment numbers. Two of the relators also alleged that they were terminated in retaliation for their whistleblowing activities. Those relators alleged that they provided their superiors with information about the directives and activities that were taking place in violation policies the defendants "drafted to create the appearance of compliance with Federal law."

The defendants moved to dismiss all of the relators' claims, arguing that the relators' *qui tam* claim was barred under the FCA's first-to-file rule. In the alternative, the defendants argued that the claims were time-barred and that the relators failed to plead fraud with the particularity required under Rule 9(b) and failed to state a claim under Rule 12(b)(6).

Holding: The U.S. District Court for the District of New Jersey held that the relators' fraud claims were barred by the first-to-file rule and that the relators had failed to state a claim for retaliation, and granted the defendants' motion to dismiss without prejudice.

First-to-File Bar

The court held that an earlier-filed case, *Bumgarner*, was a related action within the meaning of the FCA. That case was commenced in February of 2010 and dismissed in September of 2013. The relators' original complaint was filed in 2011 and their Fourth Amended Complaint was filed in February of 2014. The court explained that the relators in *Bumgarner* alleged substantially similar claims to those in the present case, as both cases alleged that the defendants violated the FCA by making false statements to the government in order to maintain eligibility for federal student loan aid, and both cases relied on the same factual allegations, including misrepresentations

regarding career placement, admission of ineligible students and alterations of attendance records and grades, and unlawful compensation methodologies.

The court explained that though there were allegations in the present relators' complaint that were not included in *Bumgarner*, the two complaints remained related. The court rejected the relators' argument that the two cases were not related because the relator in *Bumgarner* only worked at one of the defendant campuses, and therefore that case was much narrower in scope than their case. The court explained that although the relator in *Bumgarner* only had personal knowledge as to one campus, his allegations extended beyond that campus to the same extent as the allegations in the present case. The court held that *Bumgarner* put the government on notice of the allegations against the defendants, and that both complaints alleged the same material elements.

The court went on to explain that the reasons for *Bumgarner's* dismissal were not pertinent to determining whether that action precluded the current action on first-to-file grounds, and that even if *Bumgarner* had been dismissed for failure to plead fraud with particularity under Rule 9(b), it was sufficient to put the government on notice, and thus barred the present relators' action. The court went on to hold that although *Bumgarner* was dismissed by the time the fourth amended complaint was filed in the present case, the first-to-file bar still applied because it applies even if the initial action is no longer pending. The court explained that reading the first-to-file bar otherwise would allow for infinite related duplicative suits which would do nothing to contribute to the government's knowledge of the fraud. The court declined to decide whether a prior complaint that was dismissed as jurisdictionally deficient would similarly bar subsequent *qui tam* suits.

Retaliation

The court rejected the realtors' contentions that their actions in informing the defendants about the alleged misconduct were "protected activities" under the FCA. The relators argued that they outlined all of the material elements of the fraud and put the defendants on notice of a possible *qui tam* action. However, the court explained that because the relators did not allege that they were investigating or assisting with an FCA action when they informed their superiors of the alleged violations, or threatened to report the activities to the government, they were not engaged in protected activity. The court dismissed the retaliation claims.

See *U.S. ex rel. Cestra v. Cephalon, Inc.*, 2014 WL 5038393 (E.D. Pa. Oct. 9, 2014); *U.S. ex rel. Boise v. Cephalon, Inc.*, 2014 WL 5089671; 2014 WL 5089717 (E.D. Pa. Oct. 9, 2014), at page 14.

B. Section 3730(e)(3) Proceedings in which the Government is Already a Party

U.S. ex rel. Wichansky v. Zoel Holding Co. Inc., 2014 WL 6633513 (D. Ariz. Nov. 24, 2014)

The relator brought a *qui tam* action alleging that both the employee placement company he formerly co-owned and his former partner violated the False Claims Act by submitting false claims to Arizona's Division of Developmental Disabilities (DDD). The relator alleged that the defendants overbilled the DDD and purposely improperly coded healthcare services in order to receive higher reimbursements from the state. The defendants self-disclosed certain billing problems to the Arizona Health Care Cost Containment System (AHCCCS), which investigated the problems and subsequently suspended payments due to "credible allegations of fraud." The defendants and AHCCCS eventually entered into a settlement agreement—the suspension was lifted and the defendants paid $1,250,000 to compensate AHCCCS for overpayments. The agreement "settl[ed] and compromise[ed] all disputes arising from or related in any way to the services provided by [the defendants] and claims submitted to AHCCCS…" The agreement also stated that AHCCCS found no evidence that the defendants committed fraud or acted with intent to defraud.

The defendants moved to dismiss the relator's claims, arguing that the claims were barred by the FCA's prohibition against *qui tam* suits when the government is already a party to an administrative proceeding involving the same allegations. The defendants also claimed that the suit was barred under the FCA's public disclosure provision.

Holding: The U.S. District Court for the District of Arizona granted the defendants' motion to dismiss on public disclosure grounds.

Defendant Already Subject of Government Proceeding

The court rejected the defendants' argument that the relator's claims were barred because they were already resolved by an administrative hearing, explaining that the AHCCCS was a state agency, and the FCA's language only references proceedings and investigations by the U.S. government. The court further explained that the FCA specifically authorizes the U.S. Attorney General to bring FCA actions, and that state agencies have no authority to settle such cases. The court rejected the defendants' assertion that where federal law delegates responsibility for the investigation and collection of overpaid funds to the states, a state qualifies as "the government" for the purposes of the FCA; the defendants argued that to hold otherwise would deprive service providers finality when resolving billing disputes. The court explained that in order to achieve finality, service providers need to involve the U.S. government in the state's

investigation or lawsuit. The court noted that cases brought by states are often limited in scope, and held that permitting state proceedings to bar federal FCA actions would improperly limit the FCA. Finally, the court explained that the federal and state governments are separate sovereigns with different enforcement mechanisms for investigating and prosecuting fraud.

Public Disclosure Bar

With regard to the public disclosure bar, the court first held that because the alleged fraud occurred the FCA's public disclosure provision was amended in 2010, the prior version of the rule applied, and consequently, the "public disclosure bar remain[ed] jurisdictional." Next, the court addressed the defendants' argument that the allegations contained in the relator's suit had been previously publicly disclosed by a newspaper article that described the defendants' alleged fraudulent billing practices. The article detailed a separate civil case the relator filed against the defendants involving the same allegations of fraud as alleged in the present action. The court agreed with the defendants, and held that for FCA purposes, the news article qualified as a public disclosure in the "news media." Moreover, the court found that the provision applied to the relator's claims, since substantially the same allegations or transactions as alleged in the *qui tam* complaint had been publicly disclosed in the article. The court then rejected the relator's argument that he was an original source of the information disclosed in the article, finding that the relator failed to disclose his fraud allegations to the government prior to the publication of the newspaper article. The court explained that the filing of the prior civil suit to which the government was not a party did not constitute a disclosure to the government for the purposes of the FCA. The court also held that just as the AHCCCS investigation and settlement could not bar a federal FCA claim because it was a state rather than federal proceeding, the relator's reports of the alleged fraud to AHCCCS could not constitute a proper disclosure to the federal government for the purposes of the federal FCA's public disclosure bar. Finally, the court rejected the relator's argument that he self-reported the billing fraud to the FBI and IRS prior to the newspaper article's publication, finding that he did not offer sufficient evidence to support those assertions. The court granted the defendants' motion to dismiss with prejudice on public disclosure grounds, explaining that granting the relator leave to amend would be futile.

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

U.S. ex rel. Doe v. Staples, Inc., 2014 WL 6765033 (D.C. Cir. Dec. 2, 2014)

An anonymous relator brought a *qui tam* action against three major office-supply retailers, alleging that the defendants violated the False Claims Act by importing pencils they knew were made in China and then falsely declaring to U.S. Customs officials that the pencils were made somewhere else in Asia, in order to avoid paying antidumping duties. The relator claimed that he learned of the defendants' alleged false representations by reading the manifest data submitted to Customs on the online database, PIERS Global Intelligence Solutions, and then noting that the defendants listed their pencil imports as coming from Indonesia, Vietnam, or Hong Kong. The relator alleged that one can identify a Chinese-made pencil by its appearance and quality. The relator allegedly confirmed the pencils' actual point of origin through his investigation of the defendants' suppliers, which he alleged did not manufacture pencils that were sold to the U.S. The defendants moved to dismiss the claims pursuant to the FCA's public disclosure bar, arguing that the material facts of the alleged scheme were already in the public domain when the *qui tam* complaint was filed. The U.S. District Court for the District of Columbia agreed that the relator's allegations had been previously publicly disclosed, and granted the defendants' motion to dismiss. The relator appealed that ruling to the U.S. Court of Appeals for the District of Columbia Circuit.

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

The District of Columbia Circuit court held that the PIERS database was a form of publicly available news media within the meaning of the FCA, noting that the database itself collects publicly-available shipping information from the Customs manifest system. Further, the court explained, the relator based his claims that the pencils were actually made in China on the pencils' physical appearance, which had already been described in publicly-accessible reports produced by the U.S. International Trade Commission. The court rejected the relator's argument that the ITC reports disclosed insufficient information to show that the pencils were made in China, explaining that both the relator's complaint and the ITC reports describe the physical characteristics that made the pencils identifiable, such as low-quality wood, inferior paint and erasers, and off-center leads. While the relator described some characteristics of Chinese pencils that the ITC reports did not include, the court held that the additional detail was not necessary to put the government on notice of the alleged fraud. The court also rejected the relator's argument that while the ITC reports disclosed the common traits of Chinese-made pencils, they did not reveal that the defendants' particular pencils were made in

China. The court explained that the public disclosure bar prohibits claims "based upon the public disclosure of allegations or transactions," and held that the relator's allegations against the defendants were based upon the physical characteristics disclosed in the public reports. The court also rejected the relator's argument that he was an original source of the information on which his fraud allegations were based, explaining that because the relator did not raise this argument in the district court, he had forfeited it.

U.S. ex rel. Malhotra v. Steinberg, 2014 WL 5462307 (9th Cir. Oct. 29, 2014)

The relators were a couple who brought a *qui tam* action against their court-appointed bankruptcy trustee and the real estate agent he employed to sell the relators' house. The relators had suspicions that the trustee and the real estate agent were involved in a scheme by which the defendants would personally profit from the liquidation of the relators' house. The relators proceeded to review bankruptcy court and county assessor's office records and discovered that the same real estate agent had been employed by the trustee in many cases, and that the properties involved had been sold for less than fair value. After further investigation, the relators discovered what they believed to be "straw man" transactions in which the trustee sold properties at below-market prices to his associates, who then resold the properties shortly afterwards for a profit and paid the trustee a percentage. The relators brought this information to the Office of the U.S. Trustee, which encouraged the relators to continue their investigation. The relators performed a thorough investigation and reported their additional findings to the Trustee's Office, but the office did not take any action until it received a letter from an anonymous real estate agent who explained that he had paid the trustee a "referral fee" in exchange for hiring the agent to sell a property in bankruptcy.

Subsequently, the Trustee's Office conducted an investigation and deposed the real estate agent involved in the transaction in the relators' bankruptcy proceeding. The deposition was noticed in the relators' case because it was the only case still open involving the trustee and real estate agent. During the deposition, the real estate agent admitted to paying the trustee a percentage of his commissions on each house he sold. The relators subsequently filed this *qui tam* suit alleging that the trustee violated the False Claims Act when he presented fraudulent claims to the bankruptcy court which failed to disclose the fees he received from the real estate agent, and which failed to disclose his role in the "straw man" transactions.

The defendants moved to dismiss, arguing that the transactions were publicly disclosed as part of the administrative investigation conducted by the Trustee's Office. The U.S. District Court for the Western District of Washington agreed and held that the transactions had been publicly disclosed and that the relators were

not original sources. The court dismissed the relators' case. The relators appealed that ruling to the U.S. Court of Appeals for the Ninth Circuit.

Holding: The Ninth Circuit affirmed the district court's ruling and held that the relators' claims were barred under the FCA's public disclosure provision.

The court rejected the relators' argument that they qualified as "original sources" under the FCA because they were "insiders" for the purposes of the real estate agent's deposition, as that deposition occurred in their own bankruptcy case. The court explained that a disclosure made only to one person can constitute a public disclosure as to that individual for FCA purposes. The circuit court held that, regardless of whether the deposition was open to the public or not, it constituted a disclosure in an administrative investigation. In addition because the relators were outsiders to the Trustee Office's investigation, the court held that the deposition was a public disclosure as to them. The court also rejected the relators' argument that because they did not know anything about the FCA or intend to file a *qui tam* action when they heard the deposition testimony, the disclosures were not public as to them. The court explained that all that was required in order for the information gleaned from the deposition to amount to a public disclosure was that the realtors were outsiders to the investigation and sought to profit from the information by filing a *qui tam* suit.

The court also held that the relators were not original sources of the information that was publicly disclosed because although they had suspicions regarding the alleged fraud scheme and reported those suspicions to the Trustee's Office, they did not have any actual knowledge of the kickbacks until after the deposition of the real estate agent.

U.S. ex rel. Schumann v. Astrazeneca Pharms. L.P., 2014 WL 5315251 (3d Cir. Oct. 20, 2014)

The relator brought a *qui tam* action against two pharmaceutical companies—Astrazeneca and Bristol Myers-Squib—alleging that the defendants violated the False Claims Act by failing to offer Medicaid the best prices for prescription drugs and by failing to include rebates and other payments when calculating the best price, in violation of the Medicaid Drug Rebate Program and the Anti-Kickback Statute. The relator was the former vice president of Medco, a pharmacy benefit manager that distributed the defendants' drugs. Medco was retained by health plans to manage benefit plans in order to receive the maximum cost savings by negotiating prices with manufacturers. As the manager of the health plans' pharmaceutical purchasing and distribution, Medco determined which of the defendants' products would be available to patients and negotiated the prices on those products. The relator alleged that Bristol Myers-Squib induced Medco to make one

of its drugs, Coumadin, the exclusive anticoagulant in its mail-order pharmacies by paying sham fees and rebates of up to 63% off the wholesale price. The relator also alleged that Astrazeneca paid Medco approximately $100 million under two agreements to induce Medco to "push" two other drugs, Prilosec and Nexium. The relator indicated that as part of his employment, he learned of the alleged fraud by reviewing confidential agreements between the defendants and Medco that detailed the fees and rebates. He also negotiated extensions of those agreements himself. He alleged that the defendants omitted these payments when calculating Medco's cost for the drugs—thus avoiding setting a new "best price" for the drugs—and inaccurately reported their best prices to the government, causing the government to overpay for the drugs in violation of the FCA.

Both defendants moved to dismiss, arguing that the relator failed to state a claim under the FCA and that his fraud allegations were not pled with particularity. Bristol Myers-Squib also argued that the relator's claims were precluded under the FCA's public disclosure bar, and that the relator was not an original source of the information on which the claims were based. The U.S. District Court for the Eastern District of Pennsylvania granted Bristol Myers-Squib's motion to dismiss on public disclosure grounds, but denied Astrazeneca's motion, holding that the relator had pled fraud with sufficient particularity. The relator moved for reconsideration of the court's decision as to Bristol Myers-Squib, and supplemented the record with an affidavit alleging that he reviewed a wealth of internal documents and discussed the allegedly fraudulent agreements with other Medco colleagues and "deduced based on his 'cumulative knowledge'" that based on the "irrationality of the terms" of the agreements, Bristol Myers-Squib was illegally paying kickbacks to Medco and misrepresenting the price of Coumadin to the government. The district court declined to consider the relator's supplemental declaration, and denied his motion for reconsideration.

Astrazeneca then moved to dismiss the relator's allegations because the claims were publicly disclosed. In response, the relator submitted another, similar supplemental declaration detailing his personal knowledge of the alleged fraud. This time, the district court granted Astrazeneca's motion to dismiss, holding that the realtor's allegations had been publicly disclosed and the relator was not an original source of the information. The relator appealed both dismissals; the relator did not appeal the district court's finding that his allegations were based on prior public disclosures, but instead argued that he qualified as an original source.

Holding: The Third Circuit affirmed the dismissal of the relator's claims against both defendants on public disclosure grounds.

The court held that even considering the realtor's supplemental declarations, he failed to show that he was an original source of the publicly disclosed information. The court explained that "knowledge of a scheme is not direct when it is gained by

reviewing files and discussing the documents therein with individuals who actually participated in the memorialized events." In addition, the court held that the relator's description of his involvement in the negotiations between the defendants and Medco, and his allegations that the defendants knew about their best price obligations, did not demonstrate direct and independent knowledge of any kickback or inaccurate best-price report; how the allegedly inaccurate price was calculated; or any actual improper payments made to Medco or false claims submitted to the government. The court also held that the district court did not abuse its discretion in denying the relator's motion for reconsideration as to Bristol Myers-Squib, explaining that the motion was not based on a "change in law, newly available evidence, or manifest injustice." The court also affirmed the district court's dismissal with prejudice, finding that the relator was given ample opportunities to amend his complaint to plead facts indicating that he was an original source, but he had not done so.

U.S. ex rel. Cause of Action v. Chicago Transit Auth., 2014 WL 5333399 (N.D. Ill. Oct. 20, 2014)

The relator, a nonprofit organization, brought a *qui tam* suit against the Chicago Transit Authority alleging that the defendant intentionally caused the Federal Transportation Authority to allocate unauthorized transportation funds. The defendant's funding is determined by a grant formula that includes the number of bus "revenue" vehicle miles that are reported to the National Transit Database. "Revenue" miles are defined as those miles driven when the bus is available to the public and "there is an expectation of carrying passengers." "Deadhead miles" are those in which the vehicle is out of revenue service. The relator alleged that the defendant misrepresented "deadhead" miles as "revenue" miles in its reports to the Transit Database, causing the FTA to give it funds to which it was not entitled.

The defendant's practice of overstating miles was uncovered in an audit for the Illinois Attorney General. The auditor presented his findings to the Illinois Attorney General and the defendant, informing them that the defendant was misclassifying miles in its reports and recommending that the defendant notify the FTA of the issue, send the report to the FTA, and revise its methodologies so that it was compliant with the regulations. After the defendant failed to inform the FTA of the issue or give them the auditor's report, the auditor brought the report to the state's Department of Transportation Office of the Inspector General. Subsequently, a final audit report was released by the Illinois Attorney General that included a short section indicating that the defendant may have been misclassifying miles.

The relator subsequently filed this *qui tam* suit, relying on and attaching both audit reports and a letter from the FTA to the defendant stating that the FTA had conducted a thorough review of the reporting practices and that the defendant

should revise its report for the previous year. The defendant moved to dismiss the relator's action, arguing that the claims were barred by the public disclosure rule.

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

The court held that the relator's allegations were publicly disclosed in a federal investigation when the FTA sent its letter to the defendant. The court explained that the letter made clear that the FTA had already conducted an active investigation, had notified the defendant of the alleged fraud, and had determined that the defendant should revise its previous report. In addition, the court held that the two audit reports also qualified as public disclosures, as the auditor told the Office of the Inspector General about the misclassification of miles and showed the office a copy of the audit report. Therefore, both the Attorney General, who furnished its own publicly-available audit report to the FTA, and the Inspector General were put on notice of the alleged fraud. Because those offices had authority to act on the allegations, the court explained that the allegations had been publicly disclosed.

The relator argued that the court should "construe an effectiveness requirement from the public disclosure bar" and find that without an "effective public disclosure…the public disclosure bar is rendered inert." The relator further argued that the government's failure to take action was "unwise" and may reflect "improprieties or bad faith on the part of government officials." The court rejected these arguments, explaining that it would not import additional requirements into the public disclosure bar that were not present in the statute.

U.S. ex rel. Guardiola v. Renown Health, 2014 WL 5307955 (D. Nev. Oct. 16, 2014)

The relator filed a *qui tam* action against the defendants, Renown Health and its related entities, which included two hospitals that provided acute health care services. The relator was hired by the defendants as the Director of Clinical Documentation. Her role was to improve medical documentation and billing. The relator alleged that the defendants violated the False Claims Act by submitting short-stay inpatient claims that should have been billed as outpatient claims, thereby overcharging the government for those claims. The relator produced a list of over 600 inpatient claims in which the patient was dismissed on the same day. She alleged that she brought this to the attention of management multiple times, but they failed to take any action. The relator eventually resigned her position because she believed her efforts at improving billing were being stifled by the defendants. The defendants were audited by Recovery Audit Contractors, which also reported improperly-recorded short-stay inpatient claims. The results of the audits were shared internally with management, as well as with the defendants' physicians and staff, including non-employee physicians and their staff.

The defendants moved to the dismiss the relator's claims on public disclosure grounds, arguing that because the audit reports were shared with employees and non-employee physicians and staff, the allegations had been publicly disclosed.

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

First, the court held that the 2010 amendments to the FCA's public disclosure bar applied to the relator's claims, because the relevant date for determining retroactivity was the date that the relator disclosed the fraudulent activity, not when the conduct occurred. The court noted that the applicability of the public disclosure bar had no impact on the defendants' liability, but only on the relator's *qui tam* rights. Because the relator disclosed her allegations to the government and filed her complaint after the 2010 amendments became effective, the court held that the post-2010 version of the bar applied.

Next, the court held that disclosing the results of the audit internally to employees did not constitute a public disclosure. The court explained that employees of an organization named in a *qui tam* action are not members of the public for purposes of the public disclosure bar, because "the employee has a strong economic incentive to protect the information from outsiders." The court also rejected the defendants' argument that the public disclosure bar applied because the results of the audit were shared with non-employee physicians and staff, finding that those individuals shared the same incentive to protect the information.

Further, the court held that even if the audits were public disclosures, the relator qualified as an original source, explaining that the relator detailed her direct and independent knowledge of the alleged fraudulent billing practices—information she "learned from conferring with colleagues and reviewing patient charts that poor documentation led [the defendants] to submit short-stay inpatient claims that should have been billed on an outpatient basis." The court also noted that the relator offered specific details regarding over 600 patients for whom she believed were improperly classified and billed. Most importantly, the court explained, the relator reported the improper billing to her supervisors on multiple occasions. The court denied the defendants' motion to dismiss.

See *U.S. ex rel. Wichansky v. Zoel Holding Co. Inc.*, 2014 WL 6633513 (D. Ariz. Nov. 24, 2014), at page 24.

See *U.S. ex rel. Cestra v. Cephalon, Inc.*, 2014 WL 5038393 (E.D. Pa. Oct. 9, 2014); *U.S. ex rel. Boise v. Cephalon, Inc.*, 2014 WL 5089671; 2014 WL 5089717 (E.D. Pa. Oct. 9, 2014), at page 14.

FALSE CLAIMS ACT RETALIATION CLAIMS

Townsend v. Bayer Corp., 2014 WL 7172031 (8th Cir. Dec. 17, 2014)

The plaintiff brought a retaliation claim under the False Claims Act against his former employer, a pharmaceutical company, alleging that he was terminated as a result of his whistleblowing activities. The plaintiff worked as a sales representative for the defendant and was primarily responsible for selling a contraceptive device manufactured by the defendant called Mirena. The plaintiff discovered that a physician he visited regularly for sales calls had been importing a cheaper version of Mirena from Canada that was not approved by the Food and Drug Administration and prescribing it for his patients, while billing Medicaid for the full price of the FDA-approved Mirena. The plaintiff presented evidence that showed that his superiors were aware of this practice and that physicians who engaged in this practice were committing fraud. He claimed that when he voiced his concerns about the overbilling to his superiors, he was told to "focus on selling Mirena, and not to get caught up with issues involving the non-FDA approved version of Mirena." According to the plaintiff, the defendant continued to ignore his concerns about the physician he discovered was selling the Mirena from Canada, and so he eventually contacted the Arkansas Attorney General's office, requesting anonymity because he was afraid he would lose his job. The A.G. investigated the matter and subsequently charged and convicted the physician in question of Medicaid fraud and submitting false claims to the government. The plaintiff fully cooperated with the government during its investigation and eventually his identity had to be disclosed. After his name was disclosed, the plaintiff informed his superiors that he had be involved in the investigation, and co-workers indicated to him that he should be concerned for his job.

During this time, the defendant changed its practices with respect to expenses incurred by its sales representatives. The defendant began requiring the sales representatives to maintain a credit card to pay for expenses and the defendant would reimburse the representatives directly so that they could pay their credit card bills. The plaintiff got behind on his payments and his card was closed by the bank. Several months later, the plaintiff was able to pay off his outstanding balance and his card was reopened by the bank at the defendant's request. Shortly thereafter however, the defendant terminated the plaintiff, claiming that he was being terminated because he could not perform his job duties due to his canceled credit card.

The plaintiff subsequently brought a suit under the FCA for retaliation. At trial, the plaintiff testified that his former employer had an "unwritten rule that its sales force should not report crimes of [the defendant's] physician customers to law en-

forcement." A co-worker of the plaintiff's testified that she would not have reported a customer for breaking the law because she would likely lose her job. In addition, two other employees who also knew about the physician's practice of overbilling for Canadian Mirena did not report him to the authorities. The plaintiff's supervisor also testified at trial that sales representatives were trained to report suspected misconduct to the defendant only, and not to authorities outside of the company.

The district court allowed the plaintiff to present evidence of a similarly-situated employee who had not been fired, though her credit card had also been deactivated and later reinstated. However, the court refused to allow the testimony of a witness the defendant claimed was similarly situated and who was fired for having a closed credit card, explaining that the witness was not similarly situated because her credit card account had never been reactivated.

A jury found in the plaintiff's favor, and awarded him $321,373 in back pay, which was doubled to $672,746 pursuant to the FCA. In addition, the jury awarded $568,000 in emotional distress damages. The U.S. District Court for the Eastern District of Arkansas denied the plaintiff's request for front pay and instead ordered the defendant to reinstate him. The defendant appealed to the Eighth Circuit, arguing that the evidence presented at trial was insufficient, that the suit was time-barred, that the district court committed evidentiary errors and erred in ordering that the plaintiff be reinstated, that the award of back pay was contrary to the evidence, and that the emotional distress damages were excessive.

Holding: The Eighth Circuit reversed in part, holding that the emotional distress damages were excessive and awarding a reduced amount; the circuit court affirmed the remaining findings by the district court.

Statute of Limitations

The defendant argued that the plaintiff's suit was barred by the 180-day statute of limitations set forth in the Arkansas code for public employee whistleblowers. The Eighth Circuit rejected that argument. The court explained that at the time that the plaintiff was terminated, the FCA contained no statute of limitations on retaliation claims, and that the 2010 amendment providing for a three-year statute of limitations did not apply to acts that occurred before the amendment's effective date. Before the FCA was amended, the Supreme Court instructed courts to look to the most closely analogous statute of limitations under state law to determine the time period for bringing retaliation claims under the FCA. The circuit court upheld the district court's ruling that the plaintiff's claims were not barred by the 180-day period applicable to public employees because public employees were not the most closely analogous plaintiffs to a private sector whistleblower under the FCA. Ultimately, the court held that regardless of which of the more closely analogous statutes it looked to—all of which included one-year limitations periods—the plaintiff's claim was timely.

Retaliation

The Eighth Circuit held that the district court did not err in denying the defendant's post-trial motion for judgment as a matter of law on the plaintiff's retaliation claim. The court rejected the defendant's argument that there was insufficient evidence to rule in favor of the plaintiff, on several grounds. Specifically, the court held that, based on the testimony from other employees for the defendant, as well as the evidence that showed that the defendant did not take any action after the plaintiff reported his concerns to his superiors, the jury could have inferred that the defendant had a "rule" against reporting customer fraud and that employees were at risk of termination if they reported such practices. The court noted that there was sufficient evidence to "prove a causal connection between [the plaintiff's] termination and (1) his act of reporting [the physician's] fraud to the authorities, or (2) his act of cooperating with the government's subsequent investigation and prosecution."

Additionally, the court rejected the defendant's argument that by the time the plaintiff reported the fraud to the authorities, "he no longer had an objectively reasonable belief that [the physician] was still defrauding the government at that time," and therefore he was not engaged in protected activity because he was not acting to stop an ongoing violation of the FCA. The circuit court explained that even if it were to accept the defendant's position that the FCA required the fraud to be ongoing at the time a whistleblower reported it, the evidence showed that the plaintiff had an objectively reasonable belief that the physician's fraud was still ongoing, as the physician was still not purchasing any Mirena from the plaintiff. The court further held that the defendant's argument failed because, where a whistleblower participates in the investigation and prosecution of a wrongdoer, his conduct is said to be "in furtherance of efforts to stop" violations of the FCA.

The court also rejected the defendant's contention that the plaintiff did not provide sufficient evidence to prove that the defendant knew that he was engaged in protected activity. The court held that the evidence of the plaintiff's internal reporting of the fraud and his participation in the investigation and prosecution of the physician were sufficient to support a jury finding that the defendant was aware of the plaintiff's protected activity.

Further, the court rejected the defendant's argument that the plaintiff's claims failed because in order to be engaged in protected activity under the retaliation provision of the FCA, an employee must report his own employer's fraud rather than a customer's fraud. The court noted that because the FCA was remedial in nature, and "construed its provisions broadly to effectuate its purpose." The court held that the FCA limited the "class of persons" who could bring an FCA retaliation suit to "employees," but did not similarly limit the persons who may have violated the FCA to "employers." Rather, the statute broadly protects any lawful acts done by an employee in order to stop violations of the FCA, and broadly prohibits acts of retaliation by an employer against an employee for engaging in activity designed to stop FCA violations.

Finally, the court found that the district court properly ruled that the plaintiff should be reinstated. The court rejected the defendant's argument that the plaintiff would have been laid off regardless of his whistleblowing activities. The court explained that the FCA did not require reinstatement to the employee's exact position, but rather "shall include reinstatement with the same seniority status that employee… would have had but for the discrimination." While the appellate court noted that the use of the word "shall" in the FCA is open to interpretation, and other relief such as front pay may have been available to the district court, it held that the district court did not abuse its discretion in ordering reinstatement.

Tibor v. Mich. Orthopedic Inst., 2014 WL 6871320 (E.D. Mich. Dec. 5, 2014)

The plaintiff, formally employed as a physician by the defendants, brought claims under the False Claims Act as well as Michigan employment law, alleging that she was terminated from her job in retaliation for her whistleblowing activities. The defendants consistent of two hospitals: Michigan Orthopedic Institute ("MOI"), and Beaumont, a hospital in California. According to the plaintiff, the defendants joined other hospitals and formed an orthopedic "super group" to gain more power in the market, negotiate more favorable terms with other service providers, and fix prices for services to patients. The plaintiff was employed by MOI and agreed to transfer to Beaumont and began treating patients there. Approximately one month after she began to practice at Beaumont, the defendants allegedly sent her a proposed recruitment agreement which she believed included a referral agreement whereby MOI would forgo competition in its market and refer patients to Beaumont exclusively. In addition, the agreement was presented to the plaintiff over thirty days after the she began her employment with Beaumont, but it was backdated. The plaintiff explained to the defendants that she believed the agreement violated the Stark Law and she refused to sign the recruitment agreement. Her employment was subsequently terminated, which led to her lawsuit. The defendants moved to dismiss for failure to state a claim under Rule 12(b)(6) and for failing to comply with the procedural requirements for filing a FCA action.

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

First, the court held that the claims would not be dismissed because of any failure to comply with the procedural requirements under the FCA, because those requirements do not apply to retaliation claims. Next, the court turned to the merits of the plaintiff's retaliation clams. Beaumont argued that the retaliation provision of the FCA only applied to actions taken by an employer and Beaumont was not actually the plaintiff's employer and did not control the terms and conditions of the plaintiff's employment with MOI. The court rejected that argument,

explaining that under the current version of the FCA, the term "employees" was broadened to include contractors and agents who suffered retaliation. Because Beaumont admitted that that the plaintiff was a contractor, and the recruitment agreement stated that the plaintiff was acting as an independent contractor, the court explained that the FCA's retaliation provision applied, despite Beaumont not being the plaintiff's actual employer.

In addition, MOI argued that the plaintiff had not alleged that she was engaged in any protected activity under the FCA or that MOI knew about any such protected activity. The court, though, noted that the current version of the FCA protects employees from being terminated for undertaking "other efforts to stop" violations of the FCA, such as reporting alleged misconduct to internal supervisors. The court held that the plaintiff specifically alleged a violation of the Stark Law that gave rise to an FCA action and that she made the defendants aware of her concerns. The court found this sufficient to properly allege that she was engaged in protected activity under the FCA and that the defendants were aware of the activity. The court denied the defendants' motion to dismiss the retaliation claims, but dismissed the plaintiff's state law claims, holding that she could not proceed with those claims since the FCA provided for an exclusive remedy for her alleged retaliatory discharge.

Rangarajan v. Johns Hopkins Health Sys. Corp., 2014 WL 6666308 (D. Md. Nov. 21, 2014)

The plaintiff, a former nurse practitioner at Johns Hopkins Hospital, brought, among other claims, an action for retaliatory discharge under the False Claims Act against the hospital, multiple related entities, and the plaintiff's former supervisor. The plaintiff alleged that the defendants' illegally billed Medicare for physician time for services actually performed by nurse practitioners. She claimed that she discussed this problem with her supervisors many times and was told to stop complaining or risk jeopardizing her job. However, the plaintiff alleged that she continued to discuss the issue with members of management, human resources, and billing, and was eventually constructively terminated. She also claimed that she attempted to secure employment with two other hospitals, but that her former supervisor gave false and defamatory information to her potential employers, which thwarted her efforts. The former supervisor moved to dismiss the FCA retaliation claim for failure to state a claim.

Holding: The U.S. District Court for the District of Maryland granted the supervisor's motion to dismiss the FCA retaliation claim.

The court held that individual supervisors cannot be held liable for retaliatory actions under the FCA because the retaliation provision does not extend liability to supervisors. The court explained that while Congress expanded protection for

whistleblowers when it amended the FCA's retaliation provision in 2009, it did not expand the universe of potential defendants to include supervisors; rather, Congress only expanded the universe of potential plaintiffs to include contractors and agents, in addition to employees.

Boegh v. EnergySolutions, Inc., 2014 WL 6435099 (6th Cir. Nov. 18, 2014)

The plaintiff brought a retaliation claim under the False Claims Act against a prospective employer, alleging that the defendant did not hire him because he had engaged in whistleblower activity at a prior job. The U.S. District Court for the Western District of Kentucky granted summary judgment to the defendant, holding the defendant lacked standing to bring a retaliation suit under the FCA as an applicant, not an employee. The plaintiff appealed to the U.S. Court of Appeals for the Sixth Circuit, arguing that the FCA's definition of "employee" extends to job applicants.

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

The circuit court rejected the plaintiff's argument that "employee," as used in the FCA, was ambiguous and thus, *Chevron* deference should be given to the U.S. Department of Labor's interpretation of "employee"—which, under the Energy Reorganization Act, expanded the meaning of the term to include "applicant." The Sixth Circuit explained that *Chevron* deference is only appropriate if the apparent statutory ambiguity cannot be resolved using "traditional tools of statutory construction," and held that the common-law plain meaning of "employee" was appropriate because the statutory text does not dictate otherwise.

Further, the appeals court explained, the FCA's legislative history and case law reinforce its interpretation of "employee" not to include applicants. While Congress expanded the scope of whistleblower protection under the FCA with the 2009 amendments, the court explained that the term "employee" did not extend to persons outside the employer-employee relationship. Instead, Congress intended to close a loophole that existed prior to the amendments that did not afford those in other employment-like positions—such as contractors—whistleblower protections under the FCA.

The circuit court also rejected the plaintiff's argument that it should look to the Fair Labor Standards Act (FLSA)—which interprets "employee" to mean applicant—finding that there was no indication that Congress intended that courts should use the FLSA as a model, as Congress did not include the FLSA in the list of statutes on which it modeled the FCA retaliation provisions, the court had only ever extended FLSA protection to a former employee who was not "techni-

cally employed" at the time of the alleged discrimination. Thus, the Sixth Circuit affirmed the district court's decision.

Ingle v. Janick Med. Group, 2014 WL 6469412 (M.D. Fla. Nov. 17, 2014)

The plaintiff brought a False Claims Act retaliation suit against her former employer, Janick Medical Group, and the company's owner, alleging that she was subjected to a hostile work environment in retaliation for her complaints about the defendants' improper billing. The plaintiff alleged that she complained to her supervisors about what she perceived as violations of the FCA involving billing Medicare for ultrasound services which were not performed by credentialed ultrasound technicians, in violation of Medicare regulations and federal and state law. She claimed that after she complained to her supervisors about the practices, she was discriminated against and harassed, leading to medical and emotional complications that required her to take sick leave. She claimed that she informed the defendants that she was ready to return but would only do so if they changed their illegal billing practices. Since the defendants never responded, the plaintiff alleged that she was constructively discharged and subsequently, she brought the retaliation claim, under both the federal and Florida False Claims Act laws. The defendants moved to dismiss the claims for failure to state a claim 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 defendants' motion to dismiss.

The court rejected the defendants' argument that the plaintiff failed to allege facts that established a "proper *qui tam* action under the FCA." The court explained that in order to maintain her retaliation claim, the plaintiff was not required to plead all of the elements of an FCA fraud claim; she only need to allege that she was engaged in protected conduct and that the defendants retaliated against her because of that conduct. Since the plaintiff did not file a *qui tam* action alleging fraud against the defendants, the court explained that she was required to allege that there was "a distinct possibility" of litigation under the FCA at the time of her actions. The court found that although the plaintiff did not specifically warn the defendants that they could be subject to civil or criminal liability, she made clear to them that their actions were contrary to the law and she stated that she would not come back to work until they stopped their allegedly illegal billing practices. The court held that it was reasonable to conclude that the defendants were aware of the possibility of a FCA action being brought against them. Thus, the court denied the defendants' motion to dismiss the FCA claims.

Wichansky v. Zowine, 2014 WL 5594086 (D. Ariz. Nov. 4, 2014)

The plaintiff brought a retaliation claim under the False Claims Act against his former partner and co-founder of their company, Zoel, which specialized in employee placement services. The plaintiff owned 50% of the company and was Zoel's chairman and president. He alleged that after continued disputes with the defendant, Zoel's employees fractured into two camps—one that supported the plaintiff and one that supported the defendant. The plaintiff asserted that the defendant and his followers were abusive and threatening to him and the employees in his camp, and that the defendant stole information, computers, and servers from Zoel in an effort to splinter the company into two separate entities. Finally the situation became so tense that the plaintiff agreed to sell his half of the company to the defendant. During the valuation process, the plaintiff alleged that he exposed a fraudulent billing scheme being perpetrated by the defendant at one of Zoel's subsidiaries. He alleged that one of the reasons that the defendant became so abusive was to force the company to dissolve so that the defendant could buy the plaintiff's stock and ensure that no one outside of the company would discover the fraudulent billing scheme. The plaintiff brought several common law claims against the defendant, as well as a retaliation claim under the FCA. The defendant moved to dismiss the plaintiff's retaliation claim for failure to state a claim under Rule 12(b)(6).

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

The court held that the FCA's anti-retaliation provision protects employees from retaliation by employers, but not by other employees. Because the court found that the plaintiff was not in an employment relationship with the defendant, it held that he failed to state a claim for retaliation under the FCA. The court rejected the plaintiff's argument that the defendant was his "de facto" employer, finding that "employer" under the FCA does not include de facto employers. In addition, the court held that Zoel did not take any retaliatory action against the plaintiff, as all of the defendant's actions were taken on his own behalf and not on behalf of the company. Thus, the court dismissed the plaintiff's retaliation claim.

McShea v. Sch. Bd. of Collier County, 2014 WL 5590816 (M.D. Fla. Nov. 3, 2014)

The plaintiff was the former reading coach at Lorenzo Walker Technical High School (LWTHS), which was overseen by the School Board of Collier County. The plaintiff brought a retaliation claim under the False Claims Act against the the School Board and several administrators and human resources professionals at LWTHS, alleging that the principal and other school administrators directed the plaintiff to perform other functions at the school rather than fulfill her role

as the reading instructor. Specifically, the plaintiff alleged that she was forced to provide tutoring for students who were not enrolled at LWTHS and that she was instructed to teach other classes and to proctor exams instead of providing the required reading instruction. Because the reading instructor position was funded with federal money, the plaintiff alleged that the school was misusing federal funds and prevented the students from benefitting from the reading instructor services. The plaintiff argued that after she complained about the misuse of resources, the defendants engaged in a "systematic effort to retaliate against [her]." She stated that she was denied the opportunity for coaching and evaluations from the administration, denied the chance to apply for and receive other reading coach positions at the school, and that the ability to perform her job was hampered by the School Board's instruction to the administrators at LWTHS to disengage and not to speak to her. She claimed that the school's Human Resources department also launched a lengthy investigation against her, which included interviews of her coworkers designed to "undermine and destroy [her] reputation and ability to work with the staff." The plaintiff complained of the alleged misuse of the funds many times over the course of her employment, and sent a "whistleblower letter" to the superintendent of the school district which detailed the events that had taken place at the school and the subsequent retaliation against her. Eventually, the principal of the school informed the plaintiff that she would be reassigned to a classroom instructor position, which in effect, was a demotion. Shortly thereafter, the plaintiff alleged that she could no longer work in the abusive environment at LWTHS and she resigned "under protest and duress…"

The plaintiff brought a retaliation claim under the FCA against the School Board, in addition to several common law claims. The School Board 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 School Board's motion to dismiss.

The court rejected the School Board's arguments that the plaintiff failed to allege that the School Board made any claim to the government to obtain funds; that she failed to allege any facts to show that she was retaliated against or constructively discharged; and that she did not allege facts to illustrate that anyone at the School Board was put on notice of a potential False Claims Act action. The court held that the plaintiff pled sufficient details of an FCA retaliation claim, and determined that although she did not bring a *qui tam* action alleging fraud, her actions constituted "protected conduct" for the purposes of the FCA because she put the School Board on notice that there was "a distinct possibility" of litigation under the FCA: she complained to the administration on multiple occasions about the "illegal misuse of federal funding" and made clear to the School Board that the administration's actions violated state and federal law. The court found this sufficient to state a claim under the FCA and thus, denied the defendant's motion to dismiss.

Kem v. Bering Straits Info. Tech., 2014 WL 5448402 (S.D. Ohio Oct. 22, 2014)

The plaintiff was a former employee of the defendant, a defense contractor who was contracted by the Department of Homeland Security to manage a federal contract to supply U.S. troops overseas with aircraft parts by overseeing the supply chain flow from warehouses controlled by the government located in Columbus, Ohio, where the defendant was based. The plaintiff was employed as a Senior Program Analyst, and his duties included ensuring that the defendant and its sub-contractors were not violating the False Claims Act. Following a meeting held shortly after the plaintiff began working for the defendant in preparation for a government inspection, the plaintiff told his supervisor that he previously conducted an audit of a different defense contractor and "blew the whistle on overcharging." The plaintiff volunteered to help the defendant prepare for the upcoming inspection. Following that conversation, the defendant revoked the plaintiff's security clearance and then terminated him. The plaintiff alleged that he was terminated out of fear that he would discover that the defendant was engaged in fraudulent billing activity and would report it to the government. The plaintiff brought an action for retaliatory discharge 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 Southern District of Ohio granted the defendant's motion to dismiss with prejudice.

The court held that the plaintiff was not engaged in any protected activity while employed by the defendant. The court explained that the plaintiff did not allege that he was taking action in furtherance of a *qui tam* action or assisting an FCA action brought by the government. Simply informing an employer that its practices might be illegal does not constitute protected activity, the court acknowledged, especially because the plaintiff's job duties included ensuring that the defendant did not violate the FCA. The court also held that the plaintiff's actions did not amount to other efforts to stop a violation of the FCA, explaining that in order to be engaged in protected activity under the FCA, the plaintiff had to be pursuing an effort to stop a specific violation or potential violation by the defendant. The plaintiff did not allege that he was involved in any investigation of an actual FCA violation or that he had confronted the defendant with any concerns about fraudulent activity.

Ferrare v. Morton Plant Mease Health Care, Inc., 2014 WL 5336481 (M.D. Fla. Oct. 20, 2014)

The plaintiff brought an action under the False Claims Act, alleging that the defendant, a hospital in Florida, terminated her employment in retaliation for her

whistleblowing activities. The plaintiff was the former Director of Health Management at the hospital, and her duties included ensuring that patients were properly statused in accordance with the Medicare regulations, as well as keeping abreast of any changes in the rules and notifying management of those changes.

The plaintiff alleged that shortly after she began working for the defendant, she became aware that the defendant was automatically classifying outpatient catheterization patients as inpatient without considering the clinical information. The plaintiff informed several superiors of the practice, which she believed violated Medicare regulations. The supervisors informed the plaintiff that they had vetted the process and determined that it was in accordance with the regulations. The plaintiff claimed that her direct supervisor also believed the classifications were improper and had attempted to make a change to the policy prior to the plaintiff being hired, but that the change was not implemented due to the supervisor going on medical leave shortly afterward. Concurrent with her complaints regarding the classifications of Medicare patients, the plaintiff exhibited behavioral problems and well as personality clashes with those in her department. Several members of the team complained to management that the plaintiff was "emotionally abusive, hostile, profane, and demeaning."

Approximately a year after the plaintiff began complaining to her supervisors about the allegedly improper patient classifications, the defendant supposedly changed its practice and informed the staff that all catheterization patients should be statused according to Medicare guidelines. Shortly thereafter, the plaintiff alleged that she was asked by a supervisor if she believed the defendant was committing fraud, to which she replied "[i]f you are intentionally doing what you're doing, then it is fraud." The plaintiff maintained that she did not know if the defendant ever actually changed its classification practices.

Soon after, several team members informed the plaintiff's direct supervisor that they were going to quit unless "something was done" about the plaintiff, as the conflicts and environment had grown too hostile for them to continue to work with her. The plaintiff was subsequently terminated. While she was not given an official reason for her termination, she alleged that it was because she uncovered and reported the defendant's fraudulent activity. The defendant moved for summary judgment on the plaintiff's FCA retaliation claim.

Holding: The U.S. District Court for the Middle District of Florida granted summary judgment in favor of the defendant.

The court rejected the plaintiff's argument that the reasons the defendant gave for her termination were pretextual, as shown by the fact that the defendant changed its policy in response to her complaints. Instead, the court explained that the plaintiff had not shown that the change in policy influenced the decision to terminate

her employment. Furthermore, the court noted, the plaintiff's supervisor agreed with the plaintiff and attempted to make a change in policy before the plaintiff was even employed by the defendant, knowing that the change would potentially cost the defendant millions of dollars. The court also rejected the plaintiff's argument that her conversation with another supervisor in which she informed the supervisor that the defendant was committing fraud was evidence of that supervisor's desire to fire the plaintiff, and use the other team member's complaints about the plaintiff as an excuse. The court explained that there was no evidence to support this theory, and this supervisor did not have any input as to the plaintiff's employment status. The court held that the evidence showed that the plaintiff was terminated for her behavioral problems and extreme personality clashes with team members, and that there was no evidence to show that there was any other reason for her termination. Because the plaintiff failed to rebut the defendant's legitimate, non-retaliatory reason for her termination, summary judgment was granted in favor of the defendant.

See *U.S. ex rel. Schaengold v. Memorial Health, Inc.*, 2014 WL 7272598 (S.D. Ga. Dec. 18, 2014), at page 3.

See *U.S. ex rel. Grenadyor v. Ukrainian Village Pharm., Inc.*, 2014 WL 6783033 (7th Cir. Dec. 3, 2014), at page 8.

See *U.S. ex rel. Simoneaux v. E.I. du Pont de Nemours & Co.*, 2014 WL 5819982 (M.D. La. Nov. 10, 2014), at page 48.

See *U.S. ex rel. Turner v. KForce Gov't Solutions, Inc.*, 2014 WL 5823460 (M.D. Fla. Nov. 10, 2014), at page 61.

See *U.S. ex rel. LaPorte v. Premier Educ. Group, L.P.*, 2014 WL 5449745 (D.N.J. Oct. 27, 2014), at page 21.

See *U.S. ex rel. Smith v. Boeing Co.*, 2014 WL 5025782 (D. Kan. Oct. 8, 2014), at page 98.

COMMON DEFENSES TO FCA ALLEGATIONS

A. Breach of Contract/Fiduciary Duty

U.S. ex rel. Notorfransesco v. Surgical Monitoring Assoc., Inc., 2014 WL 7008561 (E.D. Pa. Dec. 12, 2014)

The relator brought a *qui tam* action against her former employer, Surgical Monitoring Associates ("SMA"), alleging that the defendant/counterclaimant submitted fraudulent claims for healthcare reimbursements to the government. SMA brought counterclaims against the relator for breach of contract, implied contract, and promissory estoppel, alleging that the relator disclosed confidential materials that were illegally taken from SMA. The relator was the former Billing Manager for SMA and entered into a confidentiality agreement that prevented her from disclosing any confidential or proprietary documents—including patient health care records and other internal business documents—to anyone outside the company. SMA alleged that during the course of the relator's employment, she removed a variety of confidential documents from the company and threatened to disclose the information to SMA's competitors. SMA obtained a preliminary injunction against the relator, prohibiting her from communicating with the defendant's employees or patients, and from taking any action that could "impair, limit, restrict, or hinder [SMA's] contracts" or business operations. The injunction did not prohibit "any other legal remedies or rights, which [the relator] ha[d] or wish[ed] to pursue against [SMA]." The relator subsequently filed her *qui tam* action and disclosed the documents she acquired from the company to the U.S. government, which declined to intervene in the case. SMA filed counterclaims for breach of contract, implied contract, and promissory estoppel, alleging that the relator violated her duties to the company and placed its confidential and proprietary information "in the public record" by sharing the information with her attorneys and filing her *qui tam* complaint;" SMA claimed that the disclosure of its "commercially-valuable information" could lead to irreparable harm. The relator moved to dismiss the counterclaims for failure to state a claim; specifically, she argued that the information and documents that she used in preparing and filing her *qui tam* action were not confidential, that SMA's claims of damages were "bald boiler plate assertions" that failed to satisfy the pleading standard, and that public policy disallowed the counterclaims.

Holding: The U.S. District Court for the Eastern District of Pennsylvania denied the relator's motion to dismiss.

The court held that the documents and patient information disclosed in the realtor's *qui tam* action were clearly covered by the confidentiality agreement signed by the relator, and thus, SMA adequately pled its breach of contract claim. The court further held that SMA adequately pled that the information disclosed could plausibly be used by competitors to put SMA at a competitive disadvantage, and that the company's allegation, "taken as true, suggest[ed] the required element of damages." Finally, the court rejected the relator's public policy argument that the purposes of the FCA would be frustrated if SMA was allowed to proceed on its counterclaims, explaining that while some courts have held that allowing such counterclaims discouraged relators from bringing FCA cases, counterclaims should be allowed where "the success of the FCA defendant's claim does not *require* a finding that the defendant is liable in the FCA case." The court held that SMA's counterclaims were claims for independent damages because SMA would have viable claims for breach of contract, implied contract, and promissory estoppel regardless of the outcome of the FCA action. The court held that injunctive relief was appropriate because the relator may have had information in her possession that was not related to proving her FCA. However, the court declined to grant SMA injunctive relief as to any confidential documents that were "reasonably necessary" to the pursuit of the relator's FCA case.

B. Not Knowingly False

U.S. v. Aleff, 2014 WL 6477359 (8th Cir. Nov. 20, 2014)

The United States brought a False Claims Act suit against two individuals and their business, alleging a conspiracy to defraud the government in violation of the False Claims Act. According to the government, the defendants submitted false applications for loan-deficiency payments to the government. After the individual defendants pled guilty to criminal charges involving the same conduct, the government moved for summary judgment on the civil FCA claims. The U.S. District Court for the District of South Dakota granted the motion, holding that the defendants' guilty pleas established the essential elements of the FCA claim. The court also held that while one of the defendants, Slominski, acted with "significantly reduced mental capacity," the effect of her guilty plea was not negated. The district court ordered the three FCA defendants to pay damages and civil penalties of more than $1.3 million. The defendants appealed the district court's ruling to the U.S. Court of Appeals for the Eighth Circuit, arguing that their guilty pleas did not resolve their FCA liability and that the civil monetary award to the government violated the Double Jeopardy Clause and the Excessive Fines Clause of the Constitution.

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

The circuit court held that the individual defendants' guilty pleas estopped them from denying the essential elements of the government's FCA claims, explaining that collateral estoppel applied equally whether the defendants received a guilty verdict at trial or pled guilty. The court also held that defendant Slominski's diminished capacity did not raise any issue of material fact regarding her "knowledge," for FCA purposes. The court explained that Slominski was found competent to proceed during the criminal trial and had the opportunity to litigate her knowledge during that proceeding. By pleading guilty, the circuit court held, Slominski admitted knowledge of the conspiracy, her role in defrauding the government, and of the falsity of the claims.

The appellate court also rejected the defendants' double jeopardy argument, finding that the FCA is a civil statute, and that penalties under the FCA are not so punitive that it is transformed into a criminal sanction for double jeopardy purposes. Rather, the court explained that the FCA's treble damages and civil penalties provisions are compensatory.

Finally, the circuit court held that the $1.3 million award to the government was not unconstitutional under the Excessive Fines Clause. The court explained that while the FCA's treble damages in combination with the per-claim penalties could be considered punitive for purposes of the Excessive Fines Clause, there was no dispute about the number of false claims the defendants submitted (each of which

was assessed the statutory minimum penalty of $5000) or the amount of actual damages the government suffered. The circuit court also held that the civil penalty imposed was not grossly disproportional to the damage the defendants caused, noting that the fraud scheme spanned two states and more than six years, and that the government had to bear the cost of investigating the fraud as well as suffer damage to the integrity of one of its programs. The circuit court affirmed the district court's ruling.

U.S. ex rel. Simoneaux v. E.I. du Pont de Nemours & Co., 2014 WL 5819982 (M.D. La. Nov. 10, 2014)

The relator, a former employee of the chemical manufacturer, DuPont, brought a *qui tam* action alleging that the company violated the False Claims Act by failing to comply with its obligations under the Toxic Substances and Control Act (TSCA), which mandated that if the defendant received information that "reasonably support[ed] the conclusion that … a substance or mixture present[ed] a substantial risk of injury to health or the environment, [the manufacturer] shall immediately inform the [EPA] Administrator of such information…" The relator alleged that there were several toxic gas leaks at the facility where he was employed and that the defendant disregarded its duty to report the leaks and instead "knowingly concealed and acted in deliberate ignorance of and in reckless disregard of the truth or falsity of the "Substantial Risk Information" for over two years, thereby avoiding or decreasing its monetary penalties…" The relator alleged that the defendant violated the "reverse false claims" provision of the FCA. He also asserted a claim under the FCA's anti-retaliation provision, contending that he was retaliated against for his whistleblowing activities. Both parties moved for summary judgment on the issue of whether the defendant had "substantial risk information" such that it was obligated to report the leaks to the EPA. In addition, the defendant moved for summary judgment on the relator's retaliation claim.

Holding: The U.S. District Court for the Middle District of Louisiana denied both parties' motions for summary judgment.

In support of his contention that the defendant possessed the "substantial risk information" and ignored it, the relator presented evidence that the defendant had been operating with continuous leaks over the previous two years, that the defendant's employees and neighboring citizens complained about the leaks to the defendant, and that people working in and around the facility sustained injuries related to the leaks. The defendant argued that there was no evidence that the leaks contained the "necessary dosage, or existed for the necessary duration of time" to cause any negative health effects, and thus, it did not have the "substantial risk information" required to trigger the reporting obligation. The court held that

there was a genuine issue of material fact regarding the information the defendant possessed and whether it acted with deliberate ignorance or reckless disregard of the truth.

The court also held that a reasonable trier of fact could determine from the evidence presented that the relator put the defendant on notice of his concerns about the failure to report the leaks and his belief that the defendant was defrauding the government. The court denied summary judgment on the relator's retaliation claim.

See *U.S. v. Bollinger Shipyards, Inc.*, 2014 WL 7335007 (5th Cir. Dec. 23, 2014), at page 85.

See *U.S. ex rel. Johnson v. Kaner Med. Group, P.A.*, 2014 WL 7239537 (N.D. Tex. Dec. 19, 2014), at page 69.

See *U.S. ex rel. Paradies v. Aseracare, Inc.*, 2014 WL 6879254 (N.D. Ala. Dec. 4, 2014), at page 70.

See *U.S. ex rel. Siebert v. Gene Security Network, Inc.*, 2014 WL 6765835 (N.D. Cal. Dec. 1, 2014), at page 91.

C. *Pro Se* Relator

Walsh v. JPMorgan Chase Bank, NA, 2014 WL 6808629 (D.D.C. Dec. 4, 2014)

The *pro se* relator brought an action under the False Claims Act, as well as several common law claims, alleging that a group of banks that planned to foreclose on his property engaged in improper activities that rendered the foreclosures invalid. Specifically, the relator alleged that the defendants violated the False Claims Act by selling mortgage-backed securities with false signatures and by making false representations to the government that the defendants held good title to notes and mortgages, including the realtor's mortgages. In addition, the relator claimed that the government made payments to the defendants based on their false statements. Furthermore, he alleged that the defendants failed to pay various taxes and that they conspired with each other to violate the FCA and to "further[] an effort to transfer impaired securities to the Treasury, or other government funded entity." 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 District of Columbia granted the defendants' motion to dismiss.

The court explained that a *qui tam* suit may not be brought by a *pro se* realtor under the FCA, and therefore, the relator's FCA claims failed from the start. The court went on to explain that the relator also failed to meet the procedural requirements for filing a *qui tam* action. In addition, even if the relator would have met these threshold requirements, the court held, he failed to plead the circumstances constituting the alleged fraud with particularity. The court explained that it was "difficult to divine from the complaint what exactly [the relator] allege[d] any particular defendant actually did." Finally, the court noted that the relator's claims with regard to tax evasion failed because the FCA does not apply to fraud on the Internal Revenue Service. As a result, the court dismissed the FCA claims.

Stelly v. Peters, 2014 WL 6633198 (D. Neb. Nov. 21, 2014)

The relators brought an action against various members of the City of Omaha Planning Department, alleging that the defendants violated the False Claims Act by receiving federal grant money for community development and diverting those funds to other uses. As the relators brought employment discrimination and other civil claims, the U.S. District Court for the District of Nebraska allowed them proceed *pro se*. The defendants moved to dismiss the relators' FCA claims for failure to state a claim, as required by Federal Rule of Civil Procedure Rule 12(b)(6). The court granted the motion and dismissed the FCA claims, holding that

the plaintiffs did not allege that the defendants submitted any false claims to the government; they merely disagreed with the way the City chose to spend the grant money. Moreover, the court explained that, as *pro se* litigants, the relators could not represent the United States and bring a *qui tam* action under the FCA.

D. Relator Waived/Released Defendant from FCA Claims

U.S. ex rel. Ruscher v. Omnicare Inc., 2014 WL 5364152 (S.D. Tex. Oct 21, 2014)

The relator, a former Collections Manager for Omnicare, brought a *qui tam* action against the pharmaceutical provider and 200 of its affiliates alleging violations of the False Claims Act. The relator alleged that the defendants were engaged in "an ongoing nationwide fraudulent kickback scheme in which Omnicare induce[d] and retain[ed] business from [skilled nursing facilities, or 'SNFs'] that provided services to a high volume of Medicare Part D/Medicaid patients, from whom Omnicare derive[d] most of its revenues, in exchange for which Omnicare forwent its payments for pharmaceuticals dispensed to Medicare Part A patients that the SNFs owed Omnicare." The relator also alleged that he was retaliated against in response to his whistleblowing activities, and filed a claim under the FCA's anti-retaliation provision. The U.S. intervened in the case. The defendants moved to dismiss the complaint. The U.S. District Court for the Southern District of Texas granted the motion in part, but allowed the majority of the plaintiffs' claims to go forward. The relator then moved to strike the defendants' affirmative defenses of unclean hands and waiver.

Unclean Hands/Inequitable Conduct

The relator moved to strike the defendants' affirmative defense alleging that the relator was barred from recovering due to her involvement in the alleged illegal conduct at issue. The relator contended that the defendant could not rely on this theory because she stood in the shoes of the government for the purposes of the *qui tam* action, and that defense would not be available against the government. The court agreed, noting that the FCA provides that a prevailing relator's share may be reduced in the event that he or she was involved in the alleged fraud, strongly suggesting that the relator's unclean hands were not a bar to FCA liability, but to the relator's eventual award. The court struck the affirmative defense as to the relator's fraud claims, but not as to the relator's retaliation claims because the relator did not represent the government on that claim.

Waiver

The relator also moved to strike the defendants' affirmative defense that the relator's claims were barred by the doctrine of waiver. The relator argued that this defense should not be available to the defendants because the government can only waive its rights in very limited circumstances not present here, particularly because the government's rights cannot be waived by an unauthorized agent. However, the court held that because the defendant included the waiver defense in its answer, and the circumstances that could constitute waiver are narrow, the relator had "fair notice" of the defendants' claims and there was no risk of "unfair surprise." Therefore, the court declined to strike the waiver defense.

E. Sovereign Immunity

Rassi v. Fed. Program Integrators, LLC, 2014 WL 6685489 (D. Me. Nov. 25, 2014)

The plaintiff brought a suit for retaliation under the False Claims Act against her former employers, Penobscot Indian Nation Enterprises (PINE), a federally-chartered corporation established by the Indian Reorganization Act, and PINE's subsidiary, Federal Program Integrators (FPI), a Maine limited liability company. PINE formed FPI in order to participate in the Small Business Association's section 8(a) Business Development Program—a program that awarded federal government contracts to small businesses that have socio-economically disadvantaged owners. The plaintiff was the senior accountant for FPI and PINE, and complained to the officers and managers of both entities about alleged violations of the FCA involving FPI's contracts with the government, including FPI misrepresenting the amount of direct labor it was providing under the contracts and the payment of kickbacks to FPI consultants and subcontractors. As a result of her complaints, the plaintiff alleged that she was subjected to harassment and retaliation and was excluded from pay increases. The defendants moved to dismiss the FCA retaliation claim, claiming that they were shielded from liability by sovereign immunity; in the alternative, they argued that the plaintiff's case had to be stayed until the Penobscot Nation Tribal Court determined whether it had jurisdiction over the case. The plaintiff agreed that most of the claims against PINE should be dismissed but argued that FPI did not enjoy sovereign immunity because it was a Maine LLC, and thus a separate legal entity under a different sovereign from the Penobscot Indian Nation.

Holding: The U.S. District Court for the district of Maine determined that both defendants were entitled to sovereign immunity. The claims against PINE were dismissed. However, the court held that FPI waived its immunity by participating in the section 8(a) program. The court, though, granted FPI's motion to stay.

The court explained that where the government "creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government." The court held that because FPI was formed by PINE to "advance its governmental objectives of creating employment opportunities on the Penobscot reservation by participating in the SBA's section 8(a) program," it was entitled to sovereign immunity. However, the court held that FPI waived that immunity by participating in the program because FPI was required to adopt a "sue and be sued" clause as part of its articles of incorporation and that clause designates the U.S. Federal Courts as the proper venue for resolving any matter relating to SBA programs, including related FCA claims.

The court granted FPI's request for a stay pending the decision by the tribal court, in accordance with the tribal exhaustion doctrine which requires that "when a colorable claim of tribal court jurisdiction has been asserted," then federal courts should afford the tribal court an opportunity to determine the extent of its jurisdiction.

U.S. ex rel. Kreipke v. Wayne State Univ., 2014 WL 6085704 (E.D. Mich. Nov. 13, 2014)

The relator brought a *qui tam* action against state-funded Wayne State University (WSU), as well as University Physicians Group (UPG), a closed-group physician practice that handled WSU's billing. WSU received substantial funding—in the form of federal grants and contracts—from the National Institutes of Health, in addition to other research funding from the U.S. government. The relator, a former Assistant Professor at WSU, served on a committee responsible for auditing the research grant procurement process. He alleged that the defendants presented false claims to the government in order to receive payments for government sponsored research in violation of the False Claims Act. The relator alleged that WSU engaged in fraud in order to receive inflated reimbursements from the government for grants and contracts, including inflating the costs, personnel expenses, and researcher salaries associated with grants in budget requests; wrongfully using federal funds to purchase equipment; and inflating the costs for animal care, surgical and histological supplies, and equipment maintenance. The relator alleged that WSU knew of these issues but did not correct them. With respect to UPG, the relator alleged that WSU advised its employees not to report UPG time and income on certain grants, and that UPG submitted bills to Medicare for services rendered by the relator's research, despite the fact that the research did not involve human subjects. The relator also alleged a conspiracy between UPG and WSU to defraud the government. UPG moved to dismiss the relator's claims for failure to plead fraud with the particularity as required by Rule 9(b). WSU also moved to dismiss, arguing that it was not a "person" for the purposes of the FCA and that the *qui tam* claims were barred by Eleventh Amendment immunity. WSU moved in the alternative to dismiss on Rule 9(b) grounds.

Holding: The U.S. District Court for the Eastern District of Michigan granted the defendants' motions to dismiss. The court dismissed the conspiracy claim and the claims against UPG, finding that they were not pled with particularity. The court also dismissed the claims against WSU, finding that the defendant was protected from the *qui tam* action by sovereign immunity.

The court held that the relator did not plead fraud against UPG with the required particularity because he failed to identify the time, place, and content of any allegedly false claim, and because he did not allege that UPG presented any false claims to the government. The court determined that the relator's reference to the

"Defendants" throughout his complaint was not specific enough to allege particular misconduct by UPG, and that any specific allegations against UPG were pled based upon the relator's "information and belief," which the court found insufficient under Rule 9(b). Thus, the court granted UPG's motion to dismiss.

The court held that WSU was not a "person" for the purposes of the FCA, and that the relator's claims were barred by Eleventh Amendment immunity. The court explained that state colleges and universities are generally deemed "arms of the state" and not "persons" under the FCA. The court reasoned that because WSU was created by the Michigan Constitution and maintained under state law; received state funding and was accountable to the state for income and expenditures; and that any judgment against WSU would be paid out of state funds, the university was an "arm of the state," and the relator's FCA claims were therefore barred. Consequently, the court granted WSU's motion to dismiss.

The court also discussed the relator's conspiracy claim and held that this claim was deficient because the realtor did not plead any facts showing the existence of an agreement or plan between UPG and WSU, or any steps taken in furtherance of a conspiracy.

U.S. ex rel. Parikh v. Brown, 2014 WL 4854217 (5th Cir. Oct. 1, 2014)

The relators were former cardiologists at Citizens Medical Center ("CMC"). CMC was owned by the county, and Defendant-Appellant Brown served as CMC's hospital administrator while Defendant-Appellant Campbell was a cardiologist at the center. The relators alleged that the appellants violated the False Claims Act by paying illegal kickbacks—in the form of various bonuses—to emergency room physicians in exchange for referrals of Medicare and Medicaid patients; they alleged that Brown designed and was responsible for implementing the bonus system. The relators also alleged that Brown improperly paid Campbell an excessive salary and discounted his office space rental in exchange for referrals. Finally, relators alleged that Brown implemented an illegal bonus system in which gastroenterologists who participated in CMC's colonoscopy screening program received bonuses for referring patients; these bonuses were in the form of "directorship" fees for each day the doctor participated in the screening program, though they did not perform any additional work. CMC allegedly gave more screening days (and thus more bonuses) to doctors who referred more patients. The defendants argued that because the hospital was owned by the county, they were entitled to qualified immunity for their alleged violations of the FCA, and were not subject to the relators' *qui tam* suit. The U.S. District Court for the Southern District of Texas denied the appellants' motion to dismiss on qualified immunity grounds and the Fifth Circuit affirmed that decision on appeal. However, the appellants moved the circuit court for rehearing.

Holding: The circuit court again affirmed the lower court's decision and held that the appellants were not entitled to qualified immunity.

The appellate court declined to decide whether or not a qualified immunity defense was available to the defendants-appellants. Instead, the court held that, even if qualified immunity was an available defense, the relators' allegations regarding the defendants' conduct were sufficient to overcome the defense. The court explained that the relators "must bear the burden of proving, in two familiar steps," that the defendants were not entitled to qualified immunity. First, the relators were required to "plead facts showing that the official violated a statutory or constitutional right." Second, the relators needed to properly plead that the defendants' actions were "objectively unreasonable in light of the law that was clearly established at the time of the actions complained of." The circuit court held that the relators satisfied both requirements. First, they sufficiently pled a statutory violation, namely that the appellants violated the FCA by submitting claims for reimbursement from Medicare and Medicaid while falsely certifying that they were in compliance with the Anti-Kickback Statute ("AKS") and Stark Law. Second, the relators' allegations of "a simple, brazen kickback scheme" established that the defendants' alleged misconduct was objectively unreasonable in light of clearly established law. The court rejected the appellants' argument that their alleged AKS and Stark Law violations were not clearly established at the time of the offenses alleged by the relators, explaining that the relator's complaint was not filed under the AKS or Stark law, but under the FCA, and that the "contours of the FCA were sufficiently clear at the time such that every reasonable official would have understood that…presenting claims for payment, while knowingly falsely certifying compliance with the AKS and Stark Law, violated the FCA." Based on its findings, the Fifth Circuit again affirmed the district court's denial of the appellants' summary judgment motion.

F. Statute of Limitations

U.S. ex rel. Mitchell v. United Med. Sys., 2014 WL 6632158 (E.D. Mich. Nov. 21, 2014)

The relator sought leave to reopen a *qui tam* action against her former employer, United Medical Systems (UMS), and over fifty urologists the relator alleged received illegal kickbacks from UMS in exchange for patient referrals, in violation of the False Claims Act. The relator originally filed her case in January 2011, but voluntarily dismissed the suit without prejudice in 2012. She then moved to reopen the case in November 2014. The U.S. District Court for the Eastern District of Michigan denied the relator's motion, holding that the motion was futile, as the statute of limitations had run on all of the relator's claims. The court explained that the relator's claims alleged actions taken by the defendants in 2003 and that the suit was subject to the FCA's six-year limitations period since the U.S. government did not join the case. Consequently, the court held, the statute of limitations governing the relator's claims expired in 2009.

See *Townsend v. Bayer Corp.*, 2014 WL 7172031 (8th Cir. Dec. 17, 2014), at page 33.

FEDERAL RULES OF CIVIL PROCEDURE

A. Rule 9(b) and Pleading Fraud with Particularity

U.S. ex rel. Guth v. Roedel Parsons Kock Blache Balhoff & McCollister, 2014 WL 7274913 (E.D. La. Dec. 18, 2014)

The relator brought a *qui tam* action alleging that counsel for the State of Louisiana (through Louisiana State University ("LSU")) violated the False Claims Act by "taking and acting upon indefensible legal positions in order to generate additional fees for which it would bill the government, and by engaging in double-billing practices" in connection with LSU's expropriation and acquisition of property to build a veterans' association medical center in New Orleans and a teaching hospital for LSU. The relator owned property the defendant was attempting to acquire on LSU's behalf pursuant to a grant from the federal government to develop New Orleans, post-Hurricane Katrina. The relator alleged that the defendant refused to negotiate with property owners before filing an expropriation suit in order to generate additional fees from litigation, and thus all of the defendant's legal bills, time sheets, and other documents submitted to the government were false claims under the FCA. In addition, the relator alleged that the defendant engaged in double-billing by unnecessarily assigning and sending multiple attorneys to prepare for, travel to and from, and attend court hearings. The relator also alleged that the double billings resulted in double payments, which the defendant was obligated to pay back to the government but did not, in violation of the reverse false claims provision of the FCA. Finally, the relator alleged conspiracy to violate the FCA. 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 Eastern District of Louisiana granted the defendant's motion to dismiss.

The court held that the relator failed to plausibly allege the existence of a false claim or fraudulent course of conduct. The court found that he relator did not allege that the bills submitted to the government were inaccurate or that the work contained therein was not performed, but instead "conclusorily alleged that the bills were false because they were the product of a design to generate fees by taking an untenable legal position." Because the relator did not provide a basis for his claims that the defendant's actions were designed to "maximize the legal billings," the court held that his claims failed. Further, the relator did not allege that the defendant falsely certified compliance with any federal regulations or laws, or that a certificate of compliance was a requirement for the defendant to receive payment.

Additionally, the relator failed to allege any specific false claims submitted to the government, but instead alleged that every bill the defendant submitted was false. The relator also failed to allege what was false about any of the bills submitted. The court held that this "plainly fail[ed] to meet Rule 9(b)'s particularity requirement." The court further held that the relator failed to provide any reliable indicia that a fraudulent scheme existed in lieu of specifying the "who, what, where, when and how" the fraud was committed. Moreover, the court held that the relator failed to provide any factual basis to support a plausible inference that the defendant's use of multiple attorneys on the matter was unnecessary. The court dismissed the relator's FCA claims.

The court further held that the relator failed to plead a violation of the reverse false claims provision of the FCA because he did not identify any obligation that would require the defendant to pay money to the government within the meaning of the FCA. The court explained that the relator's claims were predicated on "potential or contingent obligations to pay the government which have not been levied or assessed." The court dismissed the relator's reverse false claims allegations.

Finally, the court dismissed the relator's conspiracy claims, holding that the relator failed to allege that an unlawful agreement existed.

U.S. ex rel. United Union of Roofers, Waterproofers and Allied Workers Local Number 11 v. City of Chicago, 2014 WL 6306582 (N.D. Ill. Nov. 12, 2014)

The United Union of Roofers, Waterproofers and Allied Workers Local Number 11, and the Warehouse Workers' Justice Center, a non-profit organization, brought a *qui tam* action against multiple defendants, including the City of Chicago, Mercy Portfolio Service (MSP), and multiple developers and construction companies. The relators alleged that the city received $168 million of federal funding as part of the U.S. Department of Housing and Urban Development's (HUD) Neighborhood Stabilization Plan (NSP), which provided funding to state and local governments to develop communities suffering from large amounts of foreclosures and abandoned homes. The City designated MSP to help coordinate the use of the funds and to ensure that the ultimate recipients of the funds complied with applicable laws and regulations. MSP selected local developers and construction companies to participate in the program, and the City disbursed the funds it received from HUD accordingly. The relators alleged that the defendants violated the False Claims Act by failing to pay their construction workers proper wages as required by the Davis-Bacon Act, while falsely certifying their compliance with the law to the Department of Labor (DOL). They maintained that the defendants' certifications were material conditions of payment for the requested NSP funds. The relators based their allegations on reports from members of their staff who

visited various worksites and spoke with unidentified workers on-site—workers who told the staff members that they were working on an NSP-funded project and were being paid less than the prevailing Davis-Bacon Act wage. The defendants 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 Illinois granted the defendants' motion to dismiss.

With respect to the claims against the local contractor and developer defendants, the court explained that the realtors did not meet Rule 9(b)'s pleading requirements because they did not identify any of the workers or allege whether they actually worked for any of the local contractors involved in the NSP-funded projects. In addition, the court explained, the relators did not allege which employee or manager submitted Davis-Bacon Act compliance certifications to the DOL; what those submissions stated; or when the allegedly false certifications were submitted. The court found the allegations failed to meet the particularity requirements because they were "vague and unsubstantiated," and as a result, granted the local contractors' and developers' motion to dismiss.

The court also held that the allegations against the city and MPS failed because, while the relators alleged that certifications of compliance with the Davis-Bacon Act were a prerequisite to receiving the NSP funding, their assertions "only amout[ed] to allegations that the City of Chicago and MPS broke their promises;" the court found that those allegations may amount to breach of contract, but not rise to an FCA violation. The court further explained that the relators failed to allege that these defendants intended to break their promise at the time of, or prior to receiving the NSP funds. Thus, the court found that the allegations were deficient and dismissed the claims against the city and MPS.

U.S. ex rel. Turner v. KForce Gov't Solutions, Inc., 2014 WL 5823460 (M.D. Fla. Nov. 10, 2014)

The relator was a former employee of the defendant, a staffing company and government contractor that received the majority of its revenue from contracting work with the U.S. government. The relator's main role at the company was to ensure that the defendant was compliant with all federal regulations and requirements. Indirect Cost Formulations are used by Federal Contracting Officers' auditors to approximate contractors' provisional and final rates under government contracts. The defendant was required to monitor its actual costs and compare them to the rates provided by the auditors and then adjust its invoices to the government accordingly. The relator alleged that the defendant violated the False Claims Act by failing to submit revised provisional rates in order to receive additional government contracts, by misappropriating funds paid by the government under their

contracts, and by diverting money paid by the government for work on government contracts toward private commercial uses rather than crediting the funds back to the government. Because all of the defendant's invoices to the government contained incorrect rates, the relator alleged that each of those submissions was a false claim under the FCA.

The relator told the defendant about his concerns related to the incorrect provisional rates many times, but management did not report the inaccuracies to the government. At the relator's insistence, the defendant eventually brought in a third party to conduct an audit, which uncovered numerous serious flaws in the defendant's management of finances and financial controls. However, the defendant continued to hide these issues from the government; the relator alleged that he was instructed to continue to conceal the proper rates and to create backup documentation to support the defendant's purported rates, but he refused to do so. While he had repeatedly received "exemplary" performance evaluations, the relator was subsequently terminated from his job. He alleged that the defendant also told others in the industry that he was fired for performance and compliance issues, in an effort to prevent him from finding employment elsewhere. The defendant moved to dismiss the relator's fraud allegations and his retaliation claim for plead fraud with particularity and failure to state a claim.

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

The court rejected the relator's argument that while the invoices did not contain actual false information, they were still "false claims" for the purposes of the FCA because they were based on false information presented in the prior provisional rate submissions. The court rejected this argument, in accordance with its ruling in a previous case that these types of invoices could not provide a basis for an FCA claim. The court explained that each invoice billed the government at the agreed-upon provisional rate throughout the year, and that the government knew that it was being billed at the provisional rate until an accounting of costs was performed and the rate was "trued-up" in the final invoice for the year. Therefore, the court determined, the provisional invoices could not serve as the basis of a FCA claim. The court also noted that the relator did not have any personal knowledge as to whether allegedly false claims were actually submitted or what information was contained in the final invoices. Consequently, the court granted the defendant's motion to dismiss the fraud allegations, explaining that because the relator did not have knowledge of the final invoices, he could not provide the "indicia of reliability" required to satisfy the Rule 9(b) pleading requirements.

The court also granted the defendant's motion to dismiss the retaliation claim, explaining that the relator's complaints to the defendant fell within the scope of his job duties and therefore, he was under a heightened duty to put the defendant

on notice that he intended to pursue an FCA action. The court determined that, in order to maintain his retaliation claim, the relator was required to go above and beyond simply complaining about the compliance issues. The court concluded that he did not meet this standard and therefore held he was not engaged in protected activity for the purposes of the FCA.

U.S. ex rel. Garbe v. Kmart Corp., 2014 WL 5819374 (S.D. Ill. Nov. 7, 2014)

The relator was a former employee of the defendant, which operated pharmacies at its retail stores across the country. He brought a *qui tam* action alleging that the defendant violated the False Claims Act by submitting inflated claims for prescription drugs to the government healthcare programs for reimbursement. The relator alleged that the defendant misrepresented its "usual and customary" prices for generic prescription drugs, and overcharged Medicare Part D, Medicaid, and other government prescription programs. The relator alleged that he learned of the defendant's fraud through his own experience as a Medicare Part D beneficiary. He explained that when he filled a prescription, he noticed that the defendant was reimbursed at a much higher rate than it should have been. He contended that claims should be adjudicated by a third-party who determines the correct pricing for the drug, but that claims for drugs dispensed under the defendant's generic drug discount program were not submitted for third-party adjudication, resulting in the defendant submitting claims to the government for prescriptions that contained inflated prices, rather than the actual "usual and customary" prices.

The defendant moved for summary judgment, arguing that the relator failed to demonstrate that the relevant definition of "usual and customary" price encompassed its enrollment-based generic drug discount program; that the defendant did not "present" any claims to the government for payment; and that the "usual and customary" prices were not material to the government's payment of the defendant's claims.

Holding: The U.S. District Court for the Southern District of Illinois denied the defendant's motions for summary judgment.

The relator asserted that the National Council for Prescription Drug Programs (NCPDP) defined the "usual and customary" price for all drugs as "the amount charged to cash customers for the prescription exclusive of sales tax or other amounts claimed." Several experts also opined that the "usual and customary" price was defined as the cash price that would be charged to a member of the general public without any insurance. Conversely, the defendant contended that the "usual and customary" price was not defined by the NCPDP, but could only be defined by the applicable statute, regulation, or contract. The defendant further argued that enrollment in its discount plan took its prescription programs "out

of the purview" of "usual and customary" pricing, since customers enrolled in the program were not considered the "general public." The court disagreed, and held that members of the generic drug discount program were indeed part of the "general public" because anyone could join the program. The defendant also argued, that at a minimum, it was entitled to summary judgment for claims submitted under Minnesota, Nevada, and Alabama's Medicaid programs because those three states "exclude[d] discount prices given to certain segments of a pharmacy's customers from their [usual and customary] price definitions." But the court held that those states' programs did not except members of the defendant's discount drug program from the "general public," and therefore the traditional "usual and customary" pricing applied to customers enrolled in the defendant's program.

Next, the court held that the version of the FCA in effect before it was amended by the Fraud Enforcement and Recovery Act in 2009 (FERA) applied to the relator's allegations regarding the presentment of claims to the government prior to May 20, 2009 (the effective date of FERA), but that all other allegations were governed by the post-FERA version of the FCA. The defendant argued that it was entitled to summary judgment on the allegations before May 20, 2009 because it did not actually present any claims to the government—only to intermediaries who subsequently submitted the defendant's claims on its behalf. The court, though, held that for FCA purposes, those intermediaries were considered officers and agents of the government, since they served a public function in the administration of the Medicare Part D program. Therefore, the court denied the defendant's motion for summary judgment on the pre-FERA claims.

The court also rejected the defendant's argument that the purported "usual and customary" prices it used were not material to the government's payment decision. The court acknowledged that the government paid a fixed amount under the Medicare Part D program, and would have paid the same amount of money had the defendant not committed the alleged fraud. However, the court observed that the government would not have paid that amount of money to the defendant. Instead, the court explained, if the defendant had not inflated the price that it claimed it was entitled to, the extra money would have gone back to the government intermediaries. Thus, the court held that defendant's "usual and customary" prices were material, as it drove how much the government paid to the defendant for prescriptions. The court denied the defendant's motion for summary judgment on that basis.

U.S. ex rel. Leysock v. Forest Labs., Inc., 2014 WL 5431356 (D. Mass. Oct. 27, 2014)

The relator brought a *qui tam* action against a drug manufacturer and its subsidiary, alleging that the defendants violated the False Claims Act by unlawfully marketing the drug Namenda for off-label use and causing the submission of false

claims for payment to Medicare by. The relator was a former sales representative for the defendants. Namenda was approved by the Food and Drug Administration for the treatment of moderate to severe Alzheimer's disease, but was not approved for the treatment of mild Alzheimer's because the research showed that the drug was not effective for that use. Several years after approving Namenda, the FDA approved the drug Aricept, which was manufactured by the defendants' competitor for the treatment of all stages of Alzheimer's disease—including mild. After the approval of Aricept, the relator alleged that the defendants began a "nationwide scheme" to promote Namenda for use in the treatment of mild Alzheimer's disease. The relator alleged that the defendants taught their sales representatives to tell doctors that Namenda was effective for all stages of Alzheimer's and that it had fewer side-effects than Aricept and increased benefits.

The relator gave eight specific examples of instances in which a false claim was submitted to Medicare for the off-label use of Namenda. The examples detailed the statements made to specific doctors by individual sales representatives promoting Namenda for off-label use, and the subsequent prescriptions written for Namenda by those doctors for the treatment of mild Alzheimer's disease, as well as the submission of the claims for payment to Medicare.

In 2010, the defendants entered into a settlement agreement with the government to address violations of the FCA related to claims that they promoted the off-label use of a different drug, Celexa. In that agreement, the defendants agreed to change their policies and procedures to ensure proper drug marketing, and to submit annual reports certifying their compliance with those requirements and federal regulations.

The relator alleged that the defendants violated the FCA by causing doctors to prescribe and seek reimbursement from the government for off-label prescriptions of Namenda. The relator also alleged that the defendants made false certifications of compliance with federal healthcare program requirements in the annual reports submitted to the government pursuant to the settlement agreement. Finally, the relator alleged that the defendants conspired with the doctors who prescribed Namenda to submit false claims to the government.

The defendants moved to dismiss the fraud and conspiracy claims for failure to plead with the particularity required under Rule 9(b); they also moved to dismiss the claims alleging that they failed to comply with the settlement agreement, arguing that those claims were not actionable.

Holding: The U.S. District Court for the District of Massachusetts denied the defendants' motion to dismiss the fraud claims. The court held that the relator's claims regarding non-compliance with the settlement agreement failed, but did not strike the allegations, as those allegations were relevant to defendants' scienter. The court granted the motion to dismiss the conspiracy claims.

The court rejected the defendants' argument that the relator did not present sufficient factual or statistical evidence showing that they caused the submission of false claims. The court held that the eight specific examples along with the allegations of the fraudulent scheme were enough to satisfy the requirements of Rule 9(b). The court explained that the relator identified the "who"—the eight doctors and sales representatives; the "what"—specific misrepresentations made by the defendants; the "where" and "when"—the time periods and locations; as well as the filing of the claims themselves. The court also rejected the defendants' contention that the relator failed to allege that the defendants knowingly caused the submission of any false claims. The court explained that state of mind only needed to be alleged generally, and that the relator satisfied that requirement by alleging that the defendants "vigorously promoted" the off-label use of Namenda despite the medical research and literature showing that it was not effective for the treatment of mild Alzheimer's, and that doctors only prescribed Namenda for that off-label use because of the defendants' false statements.

The court rejected the relator's argument that because the defendants could have been excluded from participation in government healthcare programs if they did not annually certify that they were complying with healthcare regulations pursuant to the settlement agreement, those certifications were a precondition to payment, and violations gave rise to FCA liability. The court explained that although the settlement agreement permits the government to exclude the defendants from government healthcare programs, it does not require it, and therefore payment was not conditioned on the defendants' compliance with the agreement. However, the court did not strike the allegations regarding the prior settlement, holding that those allegations could be relevant to the defendants' scienter.

Finally, the court held that because the relator failed to allege who the specific co-conspirators were, when or where they entered into an agreement to violate the FCA, or what acts they took in furtherance of the conspiracy, the relator's conspiracy claims were not pled with the required particularity. The court dismissed those claims.

U.S. ex rel. Graves v. Plaza Med. Ctrs. Corp., 2014 WL 5040284 (S.D. Fla. Oct. 8, 2014)

The relator brought a *qui tam* action alleging fraud and conspiracy under the False Claims Act against several defendants: Plaza Medical Centers ("PMC"); a doctor employed by PMC (Cavanaugh); PMC's president (Angel); and Humana—the plan administrator for PMC's Medicare patients. The relator alleged that defendant Cavanaugh improperly diagnosed 28 patients with a greater number of illnesses and complications than necessary in order to induce additional payments from Medicare—the practice led to an increase in the monthly "capitation" pay-

ments to Humana. According to the relator, a portion of the increased payments would then flow to PMC, Cavanaugh, and Angel. The defendants each moved to dismiss for failure to plead fraud with particularity under Rule 9(b).

Holding: The U.S. District Court for the Southern District of Florida granted the defendants' motions to dismiss without prejudice.

The defendants argued that the court should limit the relator's claims to those patients that she identified in her complaint. The court agreed, and held that to the extent the relator challenged conduct beyond the diagnoses of the 28 patients identified in her complaint, those claims were dismissed. The court explained that the relator did not offer any basis to infer that other patients were improperly diagnosed. In addition, the court dismissed all claims against defendant Angel, holding that the relator failed to plead any particularized facts that would allow for a viable FCA claim against him. The court explained that the relator broadly alleged claims against the "Defendants," and did not put defendant Angel on notice of the claims against him. The court similarly dismissed all claims against defendant PMC, explaining that the complaint was "devoid of specific factual allegations with respect to the separate [d]efendants," and that relator failed to allege commission of or conspiracy to engage in fraudulent conduct with a description of each defendant's role. Simply alleging that Cavanaugh saw the patients at PMC or that "improper coding took place" there was insufficient, the court explained, to put PMC on notice of its role in the alleged fraud.

The court held that while the relator provided substantial detail of the alleged fraud scheme with respect to Cavanaugh and Humana, she failed to provide details regarding the actual submission of false claims to the government. The court recognized that "absent specific evidence of the submission of false claims, the primary requirement is that there be some indicia of reliability in the complaint to support the allegation of an actual false claim having actually been made to the government." However, the court held that the relator's allegations were too conclusory to meet the "indicia of reliability" standard and dismissed the claims against these defendants without prejudice. The court rejected the relator's argument that she should be subject to a relaxed pleading standard for the allegations regarding the submission of claims because she was an "insider." But the court noted that the relator was never employed by Humana and did not allege any personal knowledge of its billing practices. The court also held that the relator failed to properly plead scienter, because she did not distinguish between causes of action based on alleged false claims before the effective date of the 2009 FCA amendments and those submitted after. The court determined that the pre-2009 version of the FCA required the relator to allege that Humana and Cavanaugh knowingly made or caused to be made material false statements in order to induce the government to pay false claims. The court granted the relator leave to amend her complaint to cure the deficiency.

See *U.S. ex rel. Schaengold v. Memorial Health, Inc.*, 2014 WL 7272598 (S.D. Ga. Dec. 18, 2014), at page 3.

See *U.S. ex rel. Schaengold v. Memorial Health, Inc.*, 2014 WL 6908856 (S.D. Ga. Dec. 8, 2014), at page 6.

See *U.S. ex rel. Fox Rx, Inc. v. Dr. Reddy's Inc.*, 2014 WL 6750786 (S.D.N.Y. Dec. 1, 2014), at page 10.

See *U.S. ex rel. Kreipke v. Wayne State Univ.*, 2014 WL 6085704 (E.D. Mich. Nov. 13, 2014), at page 54.

See *U.S. ex rel. Mastej v. Health Mgmt. Assocs., Inc.*, 2014 WL 5471925 (11th Cir. Oct. 30, 2014), at page 12.

B. Rule 12(b)(6) Failure to State a Claim upon Which Relief can be Granted

U.S. ex rel. Johnson v. Kaner Med. Group, P.A., 2014 WL 7239537 (N.D. Tex. Dec. 19, 2014)

The relator alleged that the defendants, a 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 her position gave her access to insurance and medical records, which she also reviewed regularly as part of her job duties. The realtor alleged that the defendants submitted claims for medical services provided by unlicensed medical assistants, but claimed that the services were provided by licensed doctors when billing the government. In addition, the relator 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, the relator 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. When she was terminated, the relator alleged that her supervisor told her "I don't want to lose the company behind you." The relator moved for summary judgment in her favor.

Holding: The U.S. District Court for the Northern District of Texas denied the relator's motion with respect to the fraud and reverse false claims counts, and partially granted the relator's motion with respect to her retaliation claim.

The court held that the relator was not entitled to summary judgment on her FCA and reverse FCA claims because she had not presented sufficient evidence that would support a finding that the defendants acted with the requisite scienter. The court explained that at most, the relator had produced evidence that showed that the defendants were negligent; but the court noted that mere negligence does not equate to liability under the FCA. The court also rejected the relator's allegation that the defendants violated the FCA by following improper internal policies, noting that perceived irregular internal policies would not be sufficient to create FCA liability unless they resulted in the defendants knowingly asking the government for money that it did not owe. Additionally, the court held that while the relator was entitled to summary judgment on the issues that 1) she was employed by the defendants and that 2) the defendants took an "adverse action" against her when they fired her, the relator did not produce sufficient evidence that she was engaged in protected activity under the FCA or that the defendants knew that she was engaged in protected activity when they fired her. Thus, the court declined to grant summary judgment on the relator's retaliation claim. The court explained that the

email the relator sent regarding the defendants' billing practices did not suggest that the relator believed that the defendants were submitting false claims or that she was investigating or making an inquiry into that subject. Rather, that email was directly related to the relator's job duties.

The defendants requested that the court *sua sponte* grant summary judgment in their favor if it did not find in favor of the relator. The court held that "in the interest of judicial economy," it would *sua sponte* consider that the defendants' filed a motion for summary judgment, but allowed for all parties to submit supplemental briefing before deciding the *sua sponte* motion.

U.S. ex rel. Paradies v. Aseracare, Inc., 2014 WL 6879254 (N.D. Ala. Dec. 4, 2014)

In this intervened case, the plaintiffs alleged that a group of defendants—companies that operated hospice care facilities across the country—violated the False Claims Act by falsely certifying to Medicare that certain non-terminally ill patients were eligible for hospice care, despite the fact that the patients' medical records indicated otherwise. The defendants was audited several times and put on "Corrective Action Plans," which reported the findings of the audits and identified deficiencies in the defendants' practices, such as eligibility and documentation problems. The plaintiffs submitted statistical evidence to show that the defendants were liable for 2,181 false claims. The defendants moved for partial summary judgment, arguing that the plaintiffs could not show that they knowingly submitted any false claims and that the statistical evidence was not sufficient to prove that there were any false claims submitted outside of the sample of patients studied.

Holding: The U.S. Court for the Northern District of Alabama denied the defendants' motion for summary judgment.

The court rejected the defendants' argument that the plaintiffs had not provided any evidence that the defendants submitted claims that were actually false. The court explained that testimony from an expert witness as to the falsity of the claims created issues of material fact regarding whether the clinical information and other documentation in the patients' medical records supported the certification of eligibility for hospice care. The court also held that there were genuine issues of material fact as to whether the defendants acted knowingly, explaining that the testimony of former employees and documentary evidence gave rise to an inference from which the jury could have concluded that the defendants' business practices resulted in knowing or recklessly disregarding that they billed the government for patients whose medical records did not contain the clinical information to support a certification that the patients were eligible for hospice care. Finally, the court held that the plaintiffs could use the statistical evidence regarding the universe of claims that they alleged that the defendants had submitted, noting

that "[s]tatistical evidence *is* evidence," and that questions of credibility and fact exist for the jury to determine and decide what weight to give the evidence. The court denied the defendants' motion for summary judgment.

U.S. ex rel. Thomas v. Siemens AG, 2014 WL 6657058 (3d Cir. Nov. 25, 2014)

The relator brought a *qui tam* action against his former employer, Siemens AG, and its subsidiary, Siemens Medical Solutions (SMS), a manufacturer and supplier of medical equipment. According to the relator, the defendants violated the False Claims Act by overcharging the government under several contracts to provide the Department of Veterans Affairs with medical equipment. The relator alleged that the defendants fraudulently induced the government to enter into the contract by submitting pricing forms with their bids that falsely stated that the government was receiving the defendants' largest discount available—even though the defendants gave larger discounts to some private entities. 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). The U.S. District Court for the Eastern District of Pennsylvania granted the defendants' motion to dismiss and denied the relator's motion to amend his complaint. The relator appealed those rulings to the U.S. Court of Appeals for the Third Circuit.

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

The circuit court held that the relator did not produce any evidence that the defendants knowingly made false statements in order to induce the government to enter into the contracts. The court explained that the evidence showed that the pricing forms submitted with the defendants' bids were ambiguous as to what information was required, and noted that the VA accepted different interpretations of how the forms had to be completed and the types of discounts that needed to be disclosed. The evidence also showed that the government was aware before it entered into the contracts that the defendants offered some of their commercial customers higher discounts than they offered to the VA; in fact, during the contract negotiations, the defendants informed the government that larger discounts had been given to some private entities and the government requested and received larger discounts. Based on these findings, the circuit court concluded that the defendants could not have knowingly made false statements to the government in order to secure the contracts, and affirmed the district court's decision.

The circuit court also affirmed the district court's denial of the relator's motion to amend his complaint, explaining that the requested amendment was predicated on a legal theory that had already been rejected by the district court on a summary judgment motion, and finding that granting leave to amend would be futile and prejudicial to the defendants.

U.S. ex rel. Thulin v. Shopko Stores Operating Co., LLC, 2014 WL 5841271 (7th Cir. Nov. 12, 2014)

The relator, a former pharmacist at a Shopko retail pharmacy store, brought a *qui tam* action alleging that Shopko violated Medicaid regulations by submitting inflated Medicaid reimbursement claims for prescription drugs. The defendant was responsible for negotiating drug prices with private insurers and Medicaid, and the relator claimed that, generally, the private insurers emerged from those negotiations with lower drug prices than the prices negotiated by Medicaid. According to the relator, under Medicaid program regulations, patients who were eligible for both private insurance and Medicaid (so-called "dual-eligibles"), were required to assign to the state any rights they had under their private insurance plans, including the right to purchase drugs at a lower price. According to the relator, Shopko exploited the disparity between the prices negotiated by private insurers and those negotiated by Medicaid by billing dual-eligibles' private insurers first, and then adjusting those prices up to the higher prices negotiated by Medicaid, and billing Medicaid for the difference. The relator alleged that Medicaid had a right to pay the same lower prices as private insurers, and that the defendant violated Medicaid regulations each time it sought payment from Medicaid for excess amounts. The relator submitted 31 printouts from the defendant's billing software as evidence of this alleged fraud.

The defendant moved to dismiss the relator's claims, arguing that the relator failed to state a claim and failed to plead fraud with particularity. The U.S. District Court for the Western District of Wisconsin granted the defendant's motion, holding that the relator failed to show that the Medicaid regulation regarding dual-eligibles' assignments of rights applied to the defendant. The court also held that the relator failed to sufficiently allege scienter under the FCA, explaining that the relator did not allege facts to support his claim that the defendant knew that it was bound by the Medicaid regulations cited by the relator. The relator appealed the district court's ruling to the U.S. Court of Appeals for the Seventh Circuit.

Holding: The Seventh Circuit affirmed the district court's ruling, holding that the relator's "legal theory [was] not viable, no matter how detailed his factual allegations."

The circuit court explained that the assignment provision applied only to a beneficiary's right to receive payments, and noted that the Supreme Court had already determined that the regulation's purpose was to ensure that Medicaid was entitled to reimbursement of its medical expenditures if a beneficiary received a settlement or other recovery from a third-party. The court further explained that the printouts from the defendant's billing system submitted by the relator showed that the defendant was not required to report the amount of patient co-pays or other information the relator claimed was omitted from the defendant's bills to Medicaid.

The court also rejected the relator's interpretation of the State Medicaid Manual, which directed state Medicaid agencies to "withhold payment '[w]henever [they were] billed for the difference between the payment received for a third party based on a [preferred provider agreement that it [had] with the pharmacy.'" The court explained that while the relator was correct that the manual supported his contention that Medicaid was only responsible for payments to the extent that a dual-eligible's private insurer did not pay, the manual expressly contemplated that Medicaid would be billed for amounts beyond what it owed; the court held that it was Medicaid's responsibility to not pay excess amounts. While the defendant's actions may have "frustrated" the process, the court held that the claims it submitted to Medicaid were not "false" under the FCA.

The appellate court also held that the relator failed to plead scienter adequately. The court explained that the relator's contention that the defendant "knew" it was submitting false claims because it was a "sophisticated," "multi-regional" business that should have been aware of the applicable Medicaid regulations was too vague to satisfy the pleading requirements. Thus, the circuit court affirmed the district court's decision.

U.S. ex rel. Troxler v. Warren Clinic, Inc., 2014 WL 5704884 (N.D. Okla. Nov. 5, 2014)

The relator was formerly a physician at the defendant, Warren Clinic, a physician group practice affiliated with defendant Saint Francis Health System, a nonprofit healthcare corporation. The relator alleged that the defendants "caused and allowed unqualified personnel to obtain and record patients' History of Present Illness ('HPI') during office visits" and violated the False Claims Act by billing Medicare and Medicaid for obtaining the HPI as if it were performed by physicians, when a nurse usually obtained the information. The relator did not allege that the defendants failed to obtain or properly document the patients' HPI or used the wrong codes to bill Medicare or Medicaid, only that the defendants allowed unqualified people to obtain the HPI. The defendants 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 Oklahoma granted the defendants' motion to dismiss.

The court held that because the relator did not allege that any of the Medicare or Medicaid claim forms required the defendants to identify who performed the HPI, the defendants could not have submitted any "factually false" claims. The court also held that the relator did not properly allege any FCA claims based on false certifications of compliance with any applicable obligations, noting that the relator did not indicate how or when the defendants certified their compliance

with Medicare guidelines, nor did he identify a specific statement made by the defendants certifying such compliance. The court rejected the relator's argument that it was "clear that the recording of HPI cannot be delegated to ancillary staff," because the Evaluation and Management Services Guide from the Department of Health and Human Services did not enumerate HPI as one of the components of a patient history that could be obtained by a non-physician. The court explained that the relator did not allege that the Guide was binding on the defendants, and that the Guide did not include any provisions establishing obtaining of HPI as a prerequisite to payment; the court explained that the relator failed to allege an implied false certification claim because payment for services was not conditioned on "perfect compliance with all requirements."

U.S. ex rel. Danielides v. Northrop Grumman Sys. Corp., 2014 WL 5420271 (N.D. Ill. Oct. 23, 2014)

The relator was a former employee of the defendant Northrop Grumman, a manufacturer of weapons and technology for the military. The defendant was hired by the U.S. government to work on a project aimed at protecting civilian aircraft from missile attacks. The contract required the defendant to design and build the missile-defense system for the government, and then subsequently test the system to identify and correct any failures. The contract was termed a "fixed price best efforts" agreement and payment for the project was tied to the defendant's achievement of certain milestones. The government had the right to terminate the contract if it was not expected to produce beneficial results commensurate with the expenditure of resources. The relator alleged that "both Northrop and the government understood that the 'best efforts' requirement meant that Northrop must either complete the contract objectives or expend budgeted costs in a legitimate effort to do so."

The relator alleged that the defendant did not exert its best efforts in completing the project and in fact, never intended to do so. The government and the defendant agreed to specific budgeted costs, plus a 12% profit to the defendant, however, the relator alleged that the defendant made a 25% profit by not performing work that it was paid to do. The relator gave several examples of instances in which the defendant failed to use budgeted funds for testing, improvements, and modifications during the project, but instead spent only a fraction of the budgeted cost and kept the rest.

The relator alleged that throughout work on the project, the defendant told the government that it was exerting its best efforts to improve system reliability, when it was actually performing no work. He described three specific instances in detail, including a design meeting between the defendant and the military in which the defendant represented that it had performed certain corrective actions required

by the contract when it had not. At that meeting, the defendant allegedly showed the government a chart that represented that the defendant had spent $25.7 million on the project when its actual expenditures were less than $3 million. The meeting was tied to a milestone payment of $3.3 million and the relator alleged that the defendant submitted a claim to the government for that payment, which it received in full. The relator alleged that a similar meeting took place in which the defendant presented the government with its final report, which included similar misrepresentations. That meeting was tied to a $1.3 million milestone, for which the defendant allegedly submitted a claim for payment and was paid in full. In addition, the relator alleged that the defendants folded costs for another project into the budget for the missile-defense system, despite the other project having been rejected by the government. The relator also alleged that the defendant fraudulently induced the government to enter into a new contract called the "Mod 8"—which added $3 million to the missile defense system budget—by representing that it lacked the resources to finish the project without the additional funds, that it had employed a partner to help with the project's completion, and that it would spend some of its own money on the project to finish. The relator contended that the defendant never intended to perform the work that was contracted for.

The relator alleged that due to the defendant's fraudulent inducement and material omissions and misrepresentations, all of the defendant's claims for payment were false. 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 be Rule 9(b).

Holding: The U.S. District Court for the Northern District of Illinois denied the defendant's motion to dismiss the claims related to the original contract, but granted the motion to dismiss the claims related to the "Mod 8" contract.

The court rejected the defendant's argument that because the term "best efforts" was ambiguous, the representations were not objectively false. The court explained that the relator did not simply allege that the defendant failed to exert its "best efforts," but also that there was a specific definition for "best efforts" that was agreed on by the defendant and the government. This definition included spending all of the money that it had budgeted for a given task in a legitimate attempt to complete that task. Because the relator had sufficiently pled that the defendant did not use its "best efforts" according to this fixed definition, the court held that the relator sufficiently alleged that the defendant lied to the government when it represented that it would exert its "best efforts."

The court also rejected the defendant's contention that regardless of whether it exerted its best efforts, the government was required to make the milestone payments and thus, the misrepresentations were not material to payment on the defendant's claims. The court explained that even if the defendant was correct about the government's obligation to pay the milestone payments, the government had

the right under the contract to terminate it at any time. The court held that it could not be said "as a matter of law that at this stage that the government would not have exercised that authority, had it been told…that Northrop was not performing its obligations." In addition, the relator alleged that the defendant lied about its intention to exert its best efforts from the beginning of the contract negotiations, and those statements were "integral to a causal chain leading to payment." The court also held that the relator sufficiently pled scienter, alleging throughout the complaint that the defendant's actions were intentional and knowing. Consequently, the court denied the defendant's motion to dismiss the relator's claims regarding the defendant's original contract with the government. However, the court granted the motion to dismiss the allegations related to the "Mod 8" contract, holding that the relator failed to allege the "who, what, when, where, and how" of the fraud, as he did not allege who made the alleged false representations, what about them was objectively false, or how those representations would have induced the government to enter into the "Mod 8" contract.

U.S. ex rel. Kelly v. Serco, Inc., 2014 WL 4988462 (S.D. Cal. Oct 6, 2014)

The relator brought a *qui tam* action against a company subcontracted by the U.S. Navy, Space and Naval Warfare Systems ("SPAWAR") to upgrade the wireless communications systems in towers and facilities along the U.S./Mexico border pursuant to SPAWAR's contract with the Department of Homeland Security ("DHS"), alleging that the defendant violated the False Claims Act by failing to accurately submit time entries to the government for payment. Specifically, the relator alleged that the defendant collected time "haphazardly," fraudulently reallocated time among various time codes, and failed to track time in an automated system as required.

Government contractors performing on contracts valued at $20 million or more were required to implement an Earned Value Management System ("EVMS") to track their time. Contractors could also be required to implement an EVMS when otherwise directed by the government, even on contracts not valued at $20 million. This requirement was not incorporated into the defendant's contract, but was included in the statement of work on the delivery orders as an "applicable document." The defendant allegedly implemented a multipart process for tracking its employees' time on the contract. Employees would manually track their time in the defendant's internal accounting system and the defendant would then use the accounting system and individual employees' records to compile the monthly hours report that was used to create the EVM report. The defendant then submitted public vouchers to the government for payment.

The relator was hired by the defendant as an EVM analyst to "identify[] and investigate[] deviations from the EVMS with respect to project management" on the

contract. The time-tracking system requirements changed several times under the contract, and at one point the SPAWAR project manager for the defendant's project allegedly informed the defendant that it did not have to comply with the EVMS requirement and could collect the costs manually. The relator contended that the project manager did not have the authority to sanction that practice, and that the defendant's reports to the government were "inherently inaccurate" because the employees could not accurately track hours or task codes using a manual system. The relator also alleged that the defendant and the project manager entered into a conspiracy to violate the FCA when they agreed to the manual tracking method.

The relator alleged that the defendant implicitly certified its compliance with the EVMS and that the certification was a required condition of payment under the contract. The relator contended that the public vouchers the defendant submitted to the government included implied certifications of compliance with the EVMS, noting that the defendant was required by law to comply because the contract was valued at more than $20 million. The relator also asserted that the delivery orders expressly required compliance with the EVMS. Additionally, the relator alleged "reverse false claims" liability, contending that the defendant kept overpayments from the government stemming from the improper timekeeping. The defendant moved for summary judgment on all claims.

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

The defendant argued and the court agreed that the only "claims" it submitted to the government were the public vouchers, and that the relator did not identify anything false about those specific documents or the total amounts billed to the government. The court further held that the law requiring the EVMS to be implemented in contracts over $20 million did not, without incorporation into the contract, expressly require the defendant's compliance with that provision. Therefore, the court concluded that neither any regulation nor the defendant's contract expressly conditioned payment on compliance with the EVMS. The court rejected the relator's argument that the EVMS requirement was an implied condition in the delivery orders because it was referenced as an "applicable document" and implicated the "very purpose" for which the defendant was hired. Rather, the court explained that "an implied condition in a contract cannot form the basis for an implied false certification claim, which requires that the defendant undertake to 'expressly comply with a law, rule, or regulation.'" The court held that the relator failed to present evidence of a false claim.

The defendant also argued that even if it did certify its compliance with the EVMS, any alleged failure to comply was not material to the government because the relator did not present any evidence to suggest that if the defendant had broken down the payments using the electronic method as the relator alleged was required, then the government would have paid less. The court agreed, holding that "[w]ithout a

false claim, a 'false record or statement' [could not], by definition, be 'material to a false or fraudulent claim.'"

The court also rejected the relator's conspiracy claim, explaining that the defendant submitted evidence negating a conspiracy and showing that the project manager at issue informed DHS of the change in time-tracking policy and it was approved. The court held that the relator did not present any evidence that the defendant and the project manager explicitly agreed to submit false claims. Even if they had entered into a conspiracy to modify the requirements of the contract without DHS's approval, the court determined that the lack of evidence of a false claim or intent to submit a false claim negated FCA liability. The court also held that the relator did not present evidence of "reverse false claims" liability, as there was no evidence that the defendant received an overpayment resulting from a false claim.

See *U.S. v. Bollinger Shipyards, Inc.*, 2014 WL 7335007 (5th Cir. Dec. 23, 2014), at page 85.

See *U.S. ex rel. Skinner v. Armet Armored Vehicles, Inc.*, 2014 WL 7045008 (W.D. Va. Dec. 12, 2014), at page 87.

See *U.S. ex rel. Grenadyor v. Ukrainian Village Pharm., Inc.*, 2014 WL 6783033 (7th Cir. Dec. 3, 2014), at page 8.

See *U.S. v. Reliance Med. Sys., LLC*, 2014 WL 5791113 (C.D. Cal. Nov. 5, 2014), at page 11.

LITIGATION DEVELOPMENTS

A. Bankruptcy Proceedings

See *U.S. ex rel. Malhotra v. Steinberg,* 2014 WL 5462307 (9th Cir. Oct. 29, 2014), at page 27.

B. Calculating Damages and Civil Penalties

See *Townsend v. Bayer Corp.*, 2014 WL 7172031 (8th Cir. Dec. 17, 2014), at page 33.

See *U.S. ex rel. Kozak v. Chabad-Lubavitch, Inc.,* 2014 WL 6943944 (Dec. 9, 2014), at page 89.

See *U.S. v. Aleff,* 2014 WL 6477359 (8th Cir. Nov. 20, 2014), at page 47.

See *U.S. v. R.J. Zavoral & Sons, Inc.,* 2014 WL 5361991 (D. Minn. Oct 21, 2014), at page 94.

C. Costs and Attorneys' Fees

U.S. ex rel. Fox Rx, Inc. v. Omnicare, Inc., 2014 WL 6750277 (S.D.N.Y. Dec. 1, 2014)

"Serial" *qui tam* relator and former Medicare Part D sponsor, Fox Rx, Inc. brought a *qui tam* action against a long-term care network, alleging False Claims Act violations. According to the relator, the defendant failed to substitute generic drugs for brand-name drugs, and dispensed drugs after the termination date of a national drug code. The defendant contracted with independent long-term care facilities to negotiate reimbursement rates on their behalf, and had entered into agreements with pharmacy benefits managers on behalf of pharmacies in its network to take over adjudication of Medicare claims. In the agreements, the defendant would sign on behalf of the pharmacies, whose obligations were laid out in the contracts. The contracts listed the pharmacies' obligations to comply with all applicable laws and regulations, and to inform Medicare enrollees of differences in prices between the brand-name drug and generic drugs. The defendant moved to dismiss the relator's claims for failure to state a claim under Rule 12(b)(6). The U.S. District Court for the Southern District of New York dismissed the case against the defendant, rejecting the relator's argument that by signing the contracts on behalf of the pharmacies the defendant had undertaken to supervise and ensure compliance with the obligations in the contracts. Instead, the court explained that the defendant was not involved in submitting any claims, and that the duties described in the contracts were imposed on the pharmacies, not the defendant. Counsel for the defendant arranged a meeting with the relator after the case was dismissed, during which the defendant presented a "detailed PowerPoint presentation" outlining the ways in which the defendant asserted that the relator's claims were meritless and the reasons why the relator should not attempt to amend its complaint and continue with the suit. Notwithstanding this meeting, the relator filed an amended complaint, which was also dismissed. The defendant then moved for an award of its attorneys' fees and costs, arguing that the relator's claims were "clearly frivolous, clearly vexatious, or brought primarily for the purposes of harassment."

Holding: The court granted the defendant's motion for fees for the time period after the meeting between defendant's counsel and the relator. The court held that the defendant was entitled to fees because the relator's claims were "clearly frivolous." The court explained that the relator knew that the defendant did not dispense any drugs and thus, could not have anything to do with the alleged drug dispensing schemes; in fact, the court noted that the defendant did not have any incentive to engage in the alleged schemes. According to the court, the relator "concocted a theory of liability against [the defendant] based wholly on an obvious misreading" of the provider agreements. The court explained that the defendant was objectively not a pharmacy and was clearly acting as an agent for the pharmacies in its network by signing the agreements on their behalf. The court also reject-

ed the relator's argument that the defendant ran up "enormous legal fees towards the now apparent ultimate goal of a 'gotcha'" as disingenuous.

U.S. ex rel. Hernandez v. Therapy Providers of Amer., Inc., 2014 WL 5282436 (N.D. Ill. Oct. 14, 2014)

The relator, a former employee of one of the seventeen healthcare provider defendants, brought a *qui tam* action alleging that the defendants violated the federal False Claims Act's fraud and retaliation provisions; she also alleged violations of the Illinois state FCA. The parties, joined by the United States and the State of Illinois reached settlements on the fraud claims; the relator decided not to pursue the retaliation claims any further. The relator then sought to recover her attorneys' fees and costs, pursuant to the FCAs' fee-shifting provisions. Included in her fee petition was a request to recover attorneys' fees related to the petition. In addition, the relator requested an enhancement of the attorneys' fees by one-third to account for the attorneys' contingent fee agreement. The defendant objected to the fee petition.

Holding: The court granted the petition for fees in part and denied it in part. The court: (1) awarded the relator the amount of the fees requested, minus fifteen percent of the fees requested for her principal attorney; (2) awarded fees related to the prosecution of the fee petition, and (3) declined to enhance the fees.

The relator submitted fifty-five pages of invoices from her three law firms and included total hours and rates. The court rejected the defendants' argument that the hours should be reduced because the government intervened in the *qui tam* claims and thus reduced the amount of work the relator's counsel needed to perform. Instead, the court noted that *qui tam* cases are often complex, involve a large number of parties (particularly in this case), and require detailed investigation. In addition, the court explained, the government does not always represent the relator's interest, and noted that the government did not proceed with the relator's retaliation claim.

The court also rejected the defendants' argument that the requested fees should be reduced because the relator was only partially successful on her fraud claims and the amount awarded was nominal. The court explained that the damages awarded—totaling almost $150,000—were not nominal, and that eight of the seventeen defendants were bound by the settlement agreement, which resolved all the underlying claims for Medicare and Medicaid fraud. The court further rejected the defendants' argument that the relator was only partially successful because she ultimately did not pursue her retaliation claims; the court explained that when a *qui tam* case settles, the question before the court is whether the bill is reasonable, not whether the relator prevailed on all counts.

However, the court reduced by fifteen percent the fees requested for the relator's principal attorney to account for a lapse in "billing judgment," explaining that several of the line-item billing entries were vague and duplicative. The court also declined to increase the lodestar by one-third as requested by the relator, explaining that there was no evidence that her attorneys' representation was exceptional.

D. Default Judgment

U.S. ex rel. McBride v. Makar, 2014 WL 5307469 (M.D. Fla. Oct. 16, 2014)

The relator brought a *qui tam* action against his former supervisor and employer, Dr. Wasfi Makar and American Cancer Treatment Centers, Inc. The relator alleged that Makar instructed him and other therapists to image all patients on a daily basis for certain types of cancer and to bill Medicare for the services, regardless of the size, location, or type of tumor patients had been diagnosed with. The relator alleged that this was impossible for certain types of scans, because the defendants did not even have the required imaging equipment. In addition, the relator alleged that Makar was the only physician capable of properly performing certain kinds of imaging, though the defendants billed for simultaneous imaging in multiple locations. In addition, the relator alleged that Makar instructed therapists to perform imaging after radiation rather than before as required, if the imaging could not be performed prior to the radiation treatment. The relator alleged that all of the defendants' Medicare claims were fraudulent under the FCA.

The relator moved for default judgment against the defendants after the defendants failed to file an answer to his *qui tam* complaint. At the hearing, Makar appeared and conceded that the defendants were properly served but that he believed, erroneously, that the case was stayed pursuant to his bankruptcy proceedings. The relator presented a chart of all of the claims that he alleged were fraudulent with amounts of each claim. This chart included every Medicare claim submitted by the defendants between 2009 and 2012, as the relator contended that the entire prescribed treatment plan for every patient during that time period was false. The court held that because the amount of damages was capable of being mathematically calculated, the realtor's motion for default judgment would be granted.

The defendants moved for a new trial on damages or to alter or vacate the final default judgment. They argued that the evidence submitted in support of the default judgment exceeded the scope of the allegations in the complaint. The defendants argued that the relator's complaint did not allege that every Medicare-paid claim submitted was fraudulent, and thus the damages evidence supporting the default judgment was not linked to the specific allegations in the complaint.

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

The court explained that the relator's theory that every claim for every patient submitted in the relevant time period was false was not pled with the particularity required by Rule 9(b) and could not be extracted from the allegations in the complaint. The court explained that the relator was missing details of and specific

facts related to the submission of the false claims. In addition, the court held that the relator did not allege that the billing was fraudulent for every patient. For instance, while the relator alleged that Makar could not perform the specialty imaging at multiple locations at once, it would have been possible for him to image patients at one of the locations. In addition, the allegation that Makar instructed therapists to image patients after radiation if they could not perform imaging prior to the radiation did not account for the patients who were actually imaged prior to radiation in accordance with the regulations. The court held that, because "some of the procedures billed by [d]efendants were fraudulent [did] not necessarily taint each claim for every patient." Therefore, the court instructed the relator to establish the specific amount of damages for actual alleged false claims. The court granted the defendants motion and ordered an evidentiary hearing on damages.

E. False Certifications of Compliance

U.S. v. Bollinger Shipyards, Inc., 2014 WL 7335007 (5th Cir. Dec. 23, 2014)

The U.S. brought an action under the False Claims Act alleging that a group of defendants (collectively, "Bollinger") violated the FCA by submitting false claims for payment to the government under a contract in which they were to modify boats owned by the U.S. Coast Guard. Under the contract, Bollinger, which was subcontracted by Integrated Coast Guard Ship Systems ("ICGS") and had originally built the boats, was to modify certain ships in order to extend their service life, by adding extensions to the hulls of the boats and making various other changes. The government alleged that in responding to its concerns that the converted vessels would not have adequate structural integrity, Bollinger misrepresented the proposed modified boats' "section modulus"—a measure of longitudinal strength used to measure a vessel's integrity—resulting in a measurement much higher than the converted boats would actually have. ICGS was awarded the contract and Bollinger was awarded the subcontract. The contract required that Bollinger provide the government with a Hull and Load Strength Analysis and to obtain American Bureau of Shipping ("ABS") certification of compliance with ABS standards. However, the government alleged that Bollinger declined to obtain ABS certification—even after representing to the government that it would do so in order to alleviate concerns about the section modulus calculation; in fact, the government alleged that Bollinger avoided obtaining an assessment that was offered by ABS due to concerns that a review would reveal that the design required additional structural support that the defendant was not willing to provide.

The first boat the government received suffered a structural casualty, including the buckling of the hull. By the time the government discovered the deficiencies, it had accepted delivery of three additional boats. The government performed a recalculation of the section modulus and discovered that the actual section modulus was far less than Bollinger represented. Bollinger maintained that it could still increase the section modulus by making some additional modifications. Based on those representations, the government accepted delivery of four more boats. Ultimately, the structural modifications turned out to be inadequate, all eight boats were removed from service, and the government revoked its acceptance of the boats. This lawsuit followed.

The defendant moved to dismiss the government's FCA claims for failure to state a claim under Rule 12(b)(6) and failure to plead fraud with particularity under Rule 9(b). The U.S. District Court for the Eastern District of Louisiana granted the defendant's motion without prejudice and gave the government leave to amend its complaint. However, the court also accepted the defendants' "government knowledge defense" and foreclosed all FCA claims for payments made after the gov-

ernment was made aware that the section modulus calculation was incorrect. The district court subsequently granted the defendants' second motion to dismiss the government's amended complaint as well, holding that the U.S. failed to plead scienter with the required particularity; the court also reaffirmed its dismissal based on the "government knowledge defense." The government appealed to the U.S. Court of Appeals for the Fifth Circuit.

Holding: The Fifth Circuit reversed the district court's rulings and found that the government properly pled scienter and that the "government knowledge defense" could not be applied at the motion to dismiss stage.

The Fifth Circuit held that the district court erred in requiring the government to plead scienter with particularity under Rule 9(b). The court explained that knowledge need only be pled generally under Rule 9(b), and that it could be reasonably inferred from the government's allegations that Bollinger ran three different section modulus calculations and submitted the highest to the government, "that [the defendants] knowingly input false data into the calculation to obtain a false section modulus result high enough to avoid further Coast Guard scrutiny and ABS review of the vessel's structural integrity." The court rejected the defendants' argument that the government failed to properly plead scienter because it did not allege that the defendants actually knew the correct section modulus figure. The court explained that "[t]he FCA does not require the United States to show that [the defendant] knew the correct figure. The FCA is satisfied if the plaintiff alleges that the defendant either knew that the figure was false or acted with reckless disregard of its truth or falsity." The court further explained that the district court, taking all inferences in favor of the government, should have considered the circumstantial evidence and general allegations of the defendants' knowledge proffered by the government, and therefore the district court failed to correctly apply the pleading standards.

The circuit court also held that the district court erred in drawing inferences in favor of the defendants rather than drawing all inferences in favor of the plaintiff—the government—as it was required to do on a motion to dismiss. The appeals court explained that the district court failed to draw inferences in favor of the government with respect to its allegations that the defendants submitted the highest calculated section modulus figure to the government and then rejected the recommendation to have ABS conduct an analysis in order to conceal the inadequate structural integrity of the boats. The circuit court held that, rather than weigh the evidence in favor of the government, the district court improperly weighed evidence in favor of the defendant and focused on the facts that the government did not plead rather than those that it did. The appellate court held that the rules do not "require the United States to present its best case or even a particularly good case, only to state a plausible case."

Finally, the circuit court held that the government's claims were not subject to dismissal under the "government knowledge defense." The court held that evidence of the government's knowledge of the alleged falsity could not be applied at the motion to dismiss phase, because it "serves simply as a factor weighing against the defendant's knowledge, as opposed to a complete negation of the knowledge element." The Fifth Circuit reversed the district court's ruling and remanded for further proceedings.

U.S. ex rel. Skinner v. Armet Armored Vehicles, Inc., 2014 WL 7045008 (W.D. Va. Dec. 12, 2014)

The relator brought a *qui tam* action against an armored vehicle manufacturer, Armet, and its owner and Chief Executive Officer, William Whyte. The relator was the former President of Armet. 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 requested vehicles would meet certain ballistic standards that were eventually adopted into the contract. Date of delivery expectations were also incorporated into the contract. Shortly after Armet was awarded the initial contract for 24 armored vehicles, the company was awarded an additional contract for 8 more vehicles with similar ballistic standards requirements and deadlines. The defendants failed to deliver any vehicles on time, and ultimately only shipped four vehicles, several months after the deadline. The defendants submitted a "Material Inspection and Receiving Report" with each truck they delivered, certifying that the trucks met the required ballistics standards, and the government paid approximately $199,000 for each.

Several months after the contracts were awarded, 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. After delivering the payment, the defendants delivered only three additional armored gun trucks. The government accepted and paid for two of these trucks, but declined the third. Thus, the government only received six of the 32 vehicles it contracted for. Yet, the defendants billed the government a total of $1,194,923.36 and received $2,019,454.36 in federal funds. None of the trucks met the ballistic standards required by the contracts.

The relator alleged that the defendants violated the FCA by fraudulently inducing the government to enter into the contract when the company knew that it could not meet the ballistic standards. In addition, the relator alleged that each of the defendants' invoices to the government falsely certified that the vehicles complied with the contract specifications. Defendant Whyte moved to dismiss the relator's claims 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 Whyte's motion to dismiss the claims against him in his individual capacity. The court granted Armet in part, holding that the relator did not properly plead fraud in the inducement; and denied it in part, allowing the relator's other fraud claims to proceed.

The relator filed an amended complaint in an attempt to correct the deficiencies the court found in the initial complaint with regard to his fraud in the inducement claim. The amended complaint contained allegations that: 1) Whyte designed the vehicles in question, and was therefore aware that they would not meet the ballistic standards that the government required 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) that the government awarded the contracts based on those representations. The relator also added allegations regarding the specific ways in which the vehicles did not meet the standards, such as gaps in the vehicles' armor, and allegations that Whyte knew of those deficiencies when he made the representations to the government. Finally, the realtor alleged that the invoices submitted to the government contained false certifications of compliance with the contracts. The defendants again moved to dismiss.

Holding: The court denied the defendants' motion to dismiss the amended complaint with respect to the fraud in the inducement claims, but granted the defendants' motion to dismiss the false certification claims.

The court held that the relator sufficiently alleged a false statement by asserting that the defendants misrepresented the ballistic capabilities of the vehicles; and that those statements were made with the requisite scienter because Whyte knew what the actual ballistic capabilities of the vehicles were. The court further explained that the relator adequately pled fraud in the inducement, because he alleged that the government relied on the defendants' false representations when it decided to award the contract to the defendants and to pay for the vehicles it received. The court noted that under the fraud in the inducement theory of FCA liability, every invoice submitted under the contracts was false.

The court also held that the relator's allegations that Whyte made false representations about the defendants' ability to deliver the vehicles by the agreed-upon date constituted fraud in the inducement. The relator alleged that due to the "admittedly atrocious" state of the defendants' business, Whyte should have known that Armet could not possibly comply with the contract deliver dates. Even if Whyte did not actually know that the defendants could not produce the vehicles by the delivery date, the court held that he acted in deliberate ignorance or reckless disregard of the truth or falsity of his statements, and was thus liable under the FCA.

The court, though, rejected the relator's false certification of compliance theory of liability. The relator argued that the defendants' invoices to the government included representations that the vehicles complied with the contractual terms. The court explained that because the relator failed to allege which statements in the invoices were false, or to point to any contractual language in which the parties agreed that the submission of an invoice would amount to a certification that the vehicles were in compliance with the contract specifications, the relator was "forced to rely on an implied theory of certification—a theory which [was] not valid in that Circuit." Because the relator was unable to properly allege his false certification theory after two attempts, the court declined to allow him to amend his complaint again and dismissed the false certification claim with prejudice.

U.S. ex rel. Kozak v. Chabad-Lubavitch, Inc., 2014 WL 6943944 (Dec. 9, 2014)

In this intervened case, the plaintiffs alleged that a group of defendants violated the False Claims Act by misappropriating federal grant money designed to pay for security upgrades to the defendants' various facilities. The defendants, Chabad and its subsidiaries, Yeshiva Ohr and Chabad of Marina, provided cultural and educational activities for Hasidic and Orthodox Jews in community centers, synagogues, schools, and camps. The Nonprofit Security Grant Program provided funds for security upgrades eligible nonprofit organizations needed. Chabad applied for and received grants from the program in the amount of $169,750 to install video surveillance and other security equipment at its facilities. Chabad's subsidiaries also applied for grants, and each received $72,750 to install of video surveillance. As a condition of participating in the grant program, the defendants executed grant assurances agreeing to comply with the provisions set forth in the program's directives and other federal and state guidance materials that required the defendants to comply with financial management standards to safeguard the grant payments and required the return of any funds not used for the authorized expenses by certain deadlines. The regulations also stated that in order to receive grant money in advance of the payment to the vendor for the installation of the security equipment, the defendants had to implement financial practices whereby the money was paid out within 90 days of receipt.

Though Yeshiva Ohr and Marina were separate entities, Chabad took over management of all the grant projects at each facility. The plaintiffs alleged that Chabad had no written financial management procedures to regulate the grant funds, despite the fact that it had agreed to implement such procedures when it requested and received grant money from the government. According to the plaintiffs, Chabad did not segregate the grant funds so that they would be used only for approved grant purposes, and Chabad co-mingled the money granted to Yeshiva Ohr and Marina into its general fund and subsequently withdrew $22,000 of that

money for non-grant purposes. In addition, the plaintiffs alleged that the security upgrades were not performed before the mandated deadline and that the contractors were not paid for the work they performed before that deadline. Only two payments totaling $50,000 were ever made to contractors, leaving $272,495 that Chabad was obligated to repay the government. The California Emergency Management Agency, which administered the grants, audited the defendants and issued a demand for repayment of the unpaid grant funds and associated penalties. In addition, a contractor who performed services for the defendants but was never paid sued Chabad and eventually settled the case for $232,137.

The plaintiffs alleged that the defendants violated the FCA by obtaining federal grant funds based on false certifications that they met the eligibility requirements for managing the funds; that the defendants converted those funds for unauthorized uses; and that they failed to repay funds owed to the government once the deadline for their use had passed. The plaintiffs moved for summary judgment.

Holding: The U.S. District Court for the Eastern District of California granted the motion for summary judgment with respect to Chabad, but held that there were remaining questions regarding Yeshiva Ohr's and Marina's liability.

First, the court explained that the defendants' grant assurances were "claims" for purposes of the FCA because the representations the defendants made triggered the payment of government funds. Next, the court rejected the defendants' argument that they had adopted the necessary accounting standards, explaining that the evidence "beli[ed] any assertion that [the defendants] actually complied with the applicable requirements." The court noted that "most tellingly," the defendants failed to respond to a request for admission that they did not have the required financial procedures in place. In addition, the rabbi in charge of managing the grant funds confirmed in his deposition that the defendants never instituted financial policies to manage the funds, that they never planned to safeguard the grant advances and ensure that the funds were only used to pay authorized grant costs, and that he believed it was not important whether the funds were co-mingled or whether grant funds were used for non-grant purposes. The court explained that the defendants claimed that they used accrual-based accounting and properly recorded expenses in their books even if they had not actually been paid out; they failed to institute any procedures to safeguard advance payments and control disbursements in accordance with the performance deadlines; and did not ensure that the grant funds were not converted for non-grant uses. The court also determined that the defendants presented claims for government money when they submitted their requests to the government program. Further, the court held that Chabad was jointly and severally liable for the claims submitted by its affiliates because it submitted the actual requests and took responsibility for managing the funds. Moreover, the court held that the defendants' alleged misrepresentations regarding their financial procedures were material, explaining that the grant applications

specifically required compliance with financial management standards. The court rejected the defendants' argument that they did not act knowingly, noting that they hired an advisor to help them understand and comply with the requirements, but failed to heed his warnings that the deadline for disbursement of the funds was imminent. The court explained that at a minimum, Chabad's actions showed that it acted with reckless disregard in administering the grant program in accordance with its requirements.

With respect to damages, the court explained that in false certification cases, the measure of damages is the difference between what the government paid and what it would have paid had the certifications at issue has been truthful. The plaintiffs claimed that they were entitled to the full amount of the funds granted to the defendants, because the government would not have awarded any grants to the defendants had it known that they were not going to put the proper financial safeguards in place. However, the court held that the government was only entitled to $272,495, which reflected the full grant amount, minus the payments that the defendants actually made before the deadline. The court noted that the defendants made a payment of $136,920 to the government, which they claimed represented the overpaid grant funds in July of 2014, four years after the *qui tam* suit was filed and demands for repayment had been made. The court held that the "belated, post-litigation" repayment did not offset the defendants' FCA liability, nor did their settlement with the contractor hired to perform the security upgrades; the defendants' FCA liability was distinct from those payments. The court then trebled the damages amount and add a civil penalty of $5,000 for each of the defendants' false claims to the government, which totaled $844,985.

The court held that there were still questions of fact to be addressed as to Yeshiva Ohr and Marina's FCA liability, explaining that there was a dispute regarding whether the affiliates acted knowingly, because they claimed that Chabad controlled their grant funds and they had no reason to question that the funds would be paid out properly. Thus, the court granted the plaintiffs' summary judgment motion with respect to Chabad, but denied summary judgment against Yeshiva Ohr and Marina.

U.S. ex rel. Siebert v. Gene Security Network, Inc., 2014 WL 6765835 (N.D. Cal. Dec. 1, 2014)

The relator, the former Chief Operating Officer and Vice President of Research for the defendant—a biotechnology company that studied and conducted embryonic tests for the presence of genetic disorders—alleged that the defendant violated the False Claims Act by falsely certifying compliance with accounting regulations in order to secure grants from the National Institutes of Health. The relator alleged that when the defendant applied for the NIH grants, no one at the company understood the accounting regulations it needed to implement in order to satisfy

the grant requirements. Despite this lack of understanding, the relator alleged that the defendant signed certifications that it was in compliance with the requirements as part of the grant application process. The applications also provided that each drawdown of grant funds constituted a discrete certification of compliance with the applicable regulations. The defendant signed a Financial Questionnaire and a Policy Statement that listed the financial requirements and certified its compliance with those requirements and with applicable laws and regulations. The Policy Statement further provided that a "failure to establish adequate control systems constitute[d] a material violation of the terms of the award." This language was incorporated by reference into each verification of compliance the defendant submitted to NIH during the application process. The relator alleged that the defendant did not implement any of the required financial safeguards. Specifically, he claimed that the defendant certified the existence of accounting systems that did not exist and failed to use project-based accounting as required by the NIH. The relator also alleged that the defendant failed to require its employees to maintain timesheets and improperly co-mingled NIH grant funds with other funds. The defendant moved for partial summary judgment, arguing that the relator had not shown that it acted with the scienter required by the FCA. The relator also moved for summary judgment.

Holding: The U.S. District Court for the Northern District of California denied the defendant's motion for partial summary judgment and granted the relator's motion in part.

The court held that the relator had not provided evidence from which a reasonable jury could find that the defendant acted with actual knowledge or deliberate indifference, particularly since employees for the defendant testified that they did not have any actual knowledge of the accounting requirements. In addition, the court explained that the relator did not provide evidence of deliberate ignorance, as deliberate ignorance requires a willful act to avoid learning the truth, and the relator had not produced any evidence to that effect. However, the court held that the relator did provide sufficient evidence that the defendant acted in reckless disregard of the truth. The court explained that the defendant acted with reckless disregard by failing to familiarize itself with the applicable statutes and regulations, while certifying to the government that it was in compliance with those regulations. The court distinguished this case from cases where the requirements are not clear and the defendant fails to secure a legal interpretation before acting but was found not to have acted with reckless disregard, explaining that this defendant never formed a reasonable belief concerning the requirements and in fact, testified that it did not even read the financial regulations at issue. The court also rejected the defendant's argument that "in the absence of some 'red flag' or aggravating circumstance, the mere failure to review a regulation that is applicable to a government grant, contract or program does not constitute 'reckless disregard.'" The court explained that the defendant could not argue that it had an objectively reasonable, good faith

basis for its actions, because it admitted that it had never had any understanding of the regulations. The court noted that even if there were a "red flag" requirement, the certification requirement for the grant applications would serve as the red flag that compliance with certain regulations was required. The court explained that "at a minimum, the question of knowledge presents a factual issue rife with credibility determinations, all of which are suited to a jury determination."

The defendant also argued that the relator must show that the defendant had knowledge that the false information was material to NIH's decision to approve the defendant's grant application. The court declined to impose that requirement, however, noting that there was no Ninth Circuit precedent mandating it. Even if that were such a requirement, the court observed, there was sufficient evidence for a jury to find materiality, as the defendant signed statements certifying that it understood that compliance with the financial regulations was essential to the "grant relationship." Thus, the court denied the defendant's motion for partial summary judgment on scienter.

The court then turned to the relator's summary judgment motion. The court granted the relator's motion as to the materiality of the underlying regulations, holding that compliance with the regulations had been established as a matter of law because the regulations explicitly conditioned receipt of grant funds on such compliance. But the court denied the relator's summary judgment motion with respect to the ultimate question of the defendant's liability. With respect to the defendant's accounting issues, the relator provided evidence that a third-party had audited the defendant and found that its accounting system was not set up properly and that a project-based system was not being used. The defendant, though, claimed that it was actually using a project-based approach, and that its internal audit did not find deficiencies in its procedures. The court concluded that this conflicting testimony created a genuine dispute of material fact regarding the project-based accounting issue, which negated summary judgment. In addition, the court found that there was a dispute of material fact regarding whether the defendant's certifications about co-mingling of funds were false, as the court explained that there was a disagreement as to whether the regulations actually prohibited the co-mingling of funds, and that the relator had not established as a matter of law that the defendant had co-mingled funds. Moreover, the court explained, the relator had not alleged that the defendant ever misused the grant funds. Finally, the court found that there was a dispute of material fact regarding the relator's allegation that the defendant failed to comply with its requirements by failing to require its employees to use timesheets. Again, the court held that there was a dispute as to whether the regulations required the use of timesheets, notwithstanding the third-party audit's finding that the defendant's accounting procedures were deficient because they did not incorporate the use of timesheets. The court also observed that the defendant claimed that it kept time for the grant work using other records.

Based on the above findings, the court granted the relator's summary judgment motion in part, and denied it in part.

U.S. ex rel. Hill v. City of Chicago, 2014 WL 6065418 (7th Cir. Nov. 14, 2014)

A relator brought a *qui tam* against his former employer, the City of Chicago, alleging the defendant violated the False Claims Act by requesting and receiving grant money from the U.S. government that it was not entitled to. The relator alleged that the defendant represented that it had formulated and implemented an equal opportunity employment plan in order to receive certain grants from government that were dependent on such a plan, but that the city had not actually properly implemented the plan. While the relator agreed that a plan was created and implemented, and that the plan met the federal requirements, she maintained that the plan that was implemented differed significantly from the written plan. Therefore, the relator alleged, the defendant's representations to the government in its requests for grant money were false. The U.S. District Court for the Northern District of Illinois granted summary judgment for the defendant, and the relator appealed to the U.S. Court of Appeals for the Seventh Circuit.

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

The circuit court explained that the city's plan had been implemented in substance and that it was reasonable to allow adaptations to the written plan. The court further explained that "[g]iven the substantial agreement between the written plan and what the City was doing in fact, no federal agency has parted with money under false pretenses." Further, the court determined, those who wrote the grant applications did not know that the defendant was implementing a program that was different from the written plan, and held that "without knowledge of falsity there cannot be a knowingly false claim." The court held that the defendant implemented the equal opportunity employment plan "pragmatically rather than by following all of the written plan's details," but as long as a plan existed and accomplished the defendant's goals, then the defendant was in compliance with the representations made in order to receive the grants.

U.S. v. R.J. Zavoral & Sons, Inc., 2014 WL 5361991 (D. Minn. Oct 21, 2014)

The government alleged the defendants—a construction company and its owners—participated in the Small Business Association's ("SBA") Section 8(a) program in violation of the False Claims Act. The SBA's Section 8(a) program gives preferential treatment in the form of "set aside" contracts and other assistance to small businesses that are owned by individuals who are deemed socially and economically disadvantaged. A non-Section 8(a) company may form a joint venture

with a Section 8(a) eligible company in order to encourage the mentor company to provide managerial, financial, and technical assistance in bidding on government contracts. The joint venture plan must be approved by the SBA, with the Section 8(a) participant in the role of the "managing venture," an 8(a) concern designated as a project manager for contract performance, and the 8(a) concern to complete at least 51% of the work.

The defendants entered into a joint venture with a small business that was Section 8(a) eligible, Ed's Construction, for the purpose of bidding on a government "set aside" contract to construct levees, a diversion channel, and a new highway bridge. The joint venture agreement included terms that complied with the Section 8(a) requirements, and also required the parties to submit quarterly financial statements to the SBA. A representative from Ed's Construction was designated as the project manager. In evaluating the joint venture's bid, the SBA had conversations with the defendants regarding their understanding of the terms of the joint venture agreement and the Section 8(a) requirements, and the government alleged that the defendants assured the SBA that they understood the requirements. The SBA contended that it would not have approved the joint venture if it had not believed that each party understood the requirements.

For the first few months of the project, the participation of Ed's Construction was strong, however, it began to taper off shortly afterwards. The defendants began to record work as being done by Ed's Construction when it was actually done by a subcontractor to the defendants. Ed's Construction complained to the government representative appointed to manage the contract about the lack of work it was receiving on the job, and of being promised work that was then given to the other contractor.

The government subsequently brought an action alleging that the defendants violated the FCA by submitting false claims for payment to the SBA and fraudulently entering into the joint venture with no intention of complying with its terms. First, the government alleged that despite the defendants informing the government that they understood the requirements of Section 8(a) and the joint venture agreement, the defendants later admitted that they did not understand the requirements or even read the joint venture agreement before signing it. Therefore, the government argued, the defendants fraudulently induced the SBA into approving the joint venture. Next, the government alleged that the defendants took steps to prevent Ed's Construction from gaining its required 51% of the profits from the project and to keep it in the dark about the profits earned and money spent by the joint venture. Experts from both the government and the defendants calculated the defendants' net profit from the project as many times that of Ed's Construction. Additionally, the government alleged that the defendants submitted false statements and records in order to lead the SBA to believe that Ed's Construction was continuing to participate in the project and that the joint venture was comply-

ing with the 8(a) requirements. The records submitted to the government showed work being done by Ed's Construction on the project when it was not actually performing that work, and that the reports sent to the government pursuant to the reporting requirements contained false and misleading information about the amount of work being done by Ed's Construction. The defendants also failed to submit the required project-end report, which was to contain the final profit and loss statement.

In total, the government identified 22 requests for payment by the joint venture for work on the project. Each time, the defendants certified that the "amounts requested [were] only for performance in accordance with the specifications, terms, and conditions of the contract." Ed's Construction did not sign any of the requests. The government alleged that each request for payment was a false certification, as payment was conditioned on the joint venture performing in accordance with the specifications, terms, and conditions of the contract, including the Section 8(a) requirements. Both parties moved for summary judgment. The defendants moved for summary judgment on the issue of FCA liability—arguing that government's claims were time barred and that the government failed to present sufficient evidence of fraudulent inducement or false certification—as well as on the issue of damages. The government sought a finding of liability on all counts against the defendant and an overruling of all of the defendants' affirmative defenses.

Holding: The U.S. District Court for the District of Minnesota denied both parties' motions for summary judgment, but granted summary judgment in favor of the government on the statute of limitations issue.

Statute of Limitations

The court rejected the defendants' argument that a portion of the government's claims were time barred. The defendant argued that because the requests for payment were made between 2004 and 2008, and the government's action commenced in 2012, any claims prior to 2006 were barred by the six-year statute of limitations. The defendants further argued that the FCA's tolling provision did not apply because the government official in charge of the project knew or should have known of the alleged violations as early as 2006. The court explained that the limitations period began to run when an official who had authority to initiate litigation under the FCA obtained knowledge of the fraud --not just any government official. The SBA officials did not have that authorization, since only the Department of Justice can bring an FCA case for the government. The court determined that DOJ was made aware of the allegations in 2008 and the defendants signed multiple tolling agreements between 2010 and 2012 that extended the limitations period, and thus, held that the filing of the government's complaint was timely and the claims were not barred by the statute of limitations. The court granted summary judgment in favor of the government on that issue.

Fraudulent Inducement

The government alleged that the defendants made false statements to the SBA in order to receive approval for the joint venture. The defendants allegedly assured the SBA several times that they understood the requirements and would comply with them, but they later admitted that they did not understand the requirements or read to joint venture agreement before signing it. The SBA representative responsible for approving the joint venture testified that he would not have approved the joint venture if he knew that the defendants did not understand the requirements and did not intend to comply with the joint venture agreement. Because the defendants could not have even bid on the project without entering into the joint venture agreement, the government alleged that the false statements made in order to procure the joint venture, and thus, the contract for the project, were material to payment. The court rejected the defendants' argument that their assurances to the SBA were too vague to constitute an objective falsehood under the FCA. The court held that there was sufficient evidence to find that the defendants acted in reckless disregard of the truth when they made assurances to the SBA. However, the court held that because the evidence was in dispute as to whether the defendants actually complied with the terms of the joint venture, the court did not grant summary judgment to either party on that issue.

False Certification of Compliance

The government alleged that the defendants violated the FCA by falsely certifying in the requests for payment that the requests were only for performance in accordance with the specific terms and conditions of the contract, including compliance with the terms of the joint venture and requirements of Section 8(a). The government contended that the conditions were material to payment, as evidenced by the Section 8(a) regulations stating that the requirements were a condition to approval of a joint venture, the terms of the joint venture agreement, and the language in the request for bids stating that only Section 8(a) concerns were eligible to be awarded the contract. The defendants argued that the actual claims for payment were all true, as nothing in the applicable regulations or applications for payment conditioned payment on compliance with the joint venture agreement or the Section 8(a) requirements therein. Instead, the defendants contended that the regulations only mandated that the joint venture be certified by the SBA and meet certain criteria at the time of the submission of the bid, and that the joint venture satisfied those requirements. The court rejected this argument, explaining that the defendants had a continuing duty to comply with the terms of the joint venture agreement and Section 8(a) requirements, as shown by the signature page of the contract, which stated that "the offeror agrees to perform the work required at the prices specified below in strict accordance with the terms of this solicitation."

However, the court held that the evidence was disputed as to whether the defendants made false statements to conceal the fact that the requirements were not being met and that it was disputed whether the government would have paid the defendants if it had known that the requirements were not being met. The court explained

that the defendants made several arguments challenging the government's underlying claims that they were in violation of the joint venture agreement and Section 8(a) requirements, including the claims that the defendants manipulated the joint venture account when writing checks and that defendants misrepresented Ed's Construction's work on the reports to the government. The defendants asserted that they attempted to assist Ed's Construction in performance under the joint venture agreement but that Ed's Construction did not have the proper equipment or manpower for several items it was tasked with. Therefore, the court did not grant summary judgment to either party on that issue.

Damages

The court rejected the defendants' contention that they were entitled to partial summary judgment on the issue of damages because the government conceded that it suffered no actual damages, as the work that it paid for was actually completed. The court explained that in this case, the government was permitted to argue to the jury that it received no value under the contract because the defendants' violations undermined the purposes of the Section 8(a) program, and deprived a disadvantaged business and the economy as a whole of the benefits of that program. Had the government known that the defendants did not intend to comply with the Section 8(a) requirements, it would not have approved the joint venture and awarded the contract, and the defendants would not have earned anything for the project. The court denied the defendants' motion for summary judgment on the damages issue.

U.S. ex rel. Smith v. Boeing Co., 2014 WL 5025782 (D. Kan. Oct. 8, 2014)

The relators, three former Boeing employees, alleged that the defendants—aircraft manufacturer Boeing, and its parts supplier, Ducommun—violated the False Claims Act by selling aircraft to the U.S. government that were assembled with nonconforming parts and then, in connection with claims for payment, falsely certifying to the government that the parts conformed to contract specifications and Federal Aviation Administration ("FAA") regulations. Specifically, the relators alleged that Ducommun produced the parts with manually-controlled machines rather than computerized machines that used statistical control methods, as required by the contracts and regulations. Additionally, the relators alleged that Boeing knew that the parts were nonconforming and misrepresented to the government that the aircraft it delivered complied with the contract requirements. Furthermore, relator Prewitt alleged that Boeing retaliated against her because she engaged in whistleblowing activities. The defendants moved for summary judgment, arguing that they met their contract requirements by delivering aircraft to the government that were certified as airworthy by the FAA. In addition, the defendants contended that the relators did not produce any evidence that the al-

leged contractual violations were material to the government's payment decisions. Finally, the defendants argued that the relators failed to show that they acted with the scienter required for FCA liability.

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

False Certification of Compliance

Boeing's contracts with the government required the company to provide an FAA Airworthiness or Conformity Certificate that certified that its aircraft were manufactured in compliance with various FAA regulations and that quality assurance was performed in accordance with FAA standards. Boeing also warranted that each plane would be free from defects in material, workmanship, and the process of manufacture. Boeing obtained the airworthiness or conformity certificates for each aircraft delivered to the government. The relators alleged that in obtaining the required certificates, "Boeing materially and expressly misrepresented compliance with its substantive contract obligations," resulting in express and implied false certifications of compliance, and therefore, FCA violations.

The court held that the FAA certification was "basically the material fact insofar as the government's purchase decision was concerned," and that Boeing expressly or impliedly represented that the aircraft were airworthy in connection with the contracts with the government. However, the court explained that the relators failed to present evidence that Boeing's certifications were recklessly or knowingly false. The court explained that while the preferred process for manufacturing the aircraft parts was to use the latest technology which employed a computerized process, that method was not required either by the contracts or applicable regulations. The court explained that the defendants implemented quality control and assurance measures as required.

According to the court, "there were, at a minimum, conflicting indications of whether" the computerized process was required, which contradicts the relators' assertion that the defendants acted knowingly. Further, the FAA investigated Boeing and Ducommun's manufacturing process pursuant to the relators' allegations several times and each time it concluded that the process had the "necessary controls in place that would result in a product conforming to type design," that the parts were manufactured in accordance with the contract terms, and that no nonconforming parts were found. The FAA continued to certify the aircraft it received from the defendants even after it was aware of the relators' allegations. Therefore, the court held, the evidence could not support the relators' argument that the defendants' alleged false representations about its compliance were material to the government. The court noted that, while the relators clearly disagreed with the FAA's determinations, an "FCA action is not the appropriate vehicle for challenging a federal agency's construction and application of its regulations." The court granted the defendants' motion for summary judgment related to the fraud claims.

Retaliation

Relator Prewitt was a buyer and materials manager for Boeing and was on the team that audited the tooling at Ducommun—for which she received favorable reviews and a commendation. Unsatisfied with Boeing's response to the audit's findings, Prewitt raised concerns about Ducommun's tooling, manufacturing, and quality standards to others at Boeing. Prewitt alleged that she was told to "drop any further efforts" to report alleged allegations. She continued to voice her concerns, but never specifically mentioned aircraft being sold to the government or fraud. Shortly thereafter, she went on long-term medical leave. When she returned more than two years later, the airline industry had suffered a drastic downturn and Boeing had engaged in several rounds of layoffs. Prewitt's job was no longer available, as it had been outsourced to India. Boeing created a position for Prewitt in another group, but she was eventually laid off in another round of downsizing.

The court evaluated Prewitt's retaliation claim and held that she failed to present any evidence that that she was retaliated against because of whistleblowing activity, or that her managers knew that she had raised complaints about fraud against the government prior to her layoff. Further, the court rejected Prewitt's contention that she was placed in a non-procurement department and that she was not hired for procurement positions in retaliation for voicing her concerns. The court held that she had failed to show that Boeing's proffered reason for their employment decisions were a pretext for retaliation and not based on legitimate business decisions. Thus, the court granted Boeing's motion for summary judgment on Prewitt's retaliation claim.

See *U.S. ex rel. Grenadyor v. Ukrainian Village Pharm., Inc.*, 2014 WL 6783033 (7th Cir. Dec. 3, 2014), at page 8.

F. Government's Dismissal of *Qui Tam* Complaint

U.S. ex rel. Roach v. Obama, 2014 WL 7240520 (D.D.C. Dec. 18, 2014)

The relator brought a *qui tam* action against President Obama, alleging that all of the transactions Obama engaged in in his role as President, and all of his appointees and nominees violated the False Claims Act because Obama was not eligible to hold the office of President. The United States filed a Suggestion of Dismissal and the relator was provided a hearing to attempt to convince the government to allow the relator to pursue the matter. The U.S. District Court for the District of Columbia dismissed the case pursuant to the government's request, explaining that after the relator's hearing, the government "ha[d] virtually unfettered discretion to dismiss this type of claim."

U.S. ex rel. May v. City of Dallas, 2014 WL 5454819 (N.D. Tex. Oct. 27, 2014)

A *pro se* relator brought a *qui tam* action against the City of Dallas, alleging that the defendant violated the False Claims Act by failing to compensate the previous owners of the land on which the Dallas-Fort Worth Airport was located for the value of the mineral rights located beneath the airport when it was purchased in the 1960's. The relator asserted that the defendant had recently entered into a lease agreement with a private company for the development of the mineral reserves and that the "development of these reserves contributes to 'terrorist' activities by Iran and China." The U.S. filed a motion to dismiss the relator's complaint, asserting that the allegations did not establish any claim to the government for payment, the allegations appeared to be based on public disclosures, and the allegations appeared to be time-barred.

Holding: The U.S. District Court for the Western District of Texas granted the motion to dismiss.

The court held that the dismissal of the complaint was required based on the discretion conferred on the government by the FCA. The court explained that the FCA allows the government to dismiss a *qui tam* action notwithstanding the objections of the relator, if the relator has been notified of the motion to dismiss and the court has provided the relator with an opportunity for a hearing. The court noted that other circuits have required that the government provide reasons that are "rationally related to a legitimate government interest" in order to dismiss a relator's complaint. The court rejected the "rational relation" test, but explained that even if it had applied that test, the government had met that standard by stating that the relator's allegations were based on public disclosures, the relator had a history of

bringing frivolous lawsuits, and the claims were time-barred. Thus the government had identified a valid governmental purpose: avoiding a meritless lawsuit.

G. Leave to Amend *Qui Tam* Complaint

U.S. ex rel. Petratos v. Genentech, Inc., 2014 WL 7331945 (D.N.J. Dec. 18, 2014)

The relator brought a *qui tam* action alleging that the defendants, a pharmaceutical manufacturer and its subsidiaries, violated the False Claims Act by misleading regulators and the medical community regarding the appropriateness of their drug for treating certain patients. Specifically, the relator alleged that the defendants underreported the prevalence of the drug's adverse effects, knowingly used databases that lacked the requisite information to identify at-risk subgroups when making disclosures to regulators, and failed to adequately examine and report dose-related effects. The relator alleged that those actions resulted in physicians prescribing the drug when it was not medically necessary or appropriate, causing the submission of false claims to Medicare. The district court granted the defendants' motion to dismiss, and the relator filed a motion to amend his complaint, arguing that his proposed amendments would cure the deficiencies that the court found in the relator's complaint. The defendant argued that the relator's complaint was dismissed with prejudice and the relator was thus barred from amending his complaint, and that alternatively, the relator's amendment would have been futile.

Holding: The U.S. District Court for the District of New Jersey granted the relator's motion to amend.

The court explained that the relator's complaint was not dismissed with prejudice, as the order simply stated that the defendants' motion to dismiss was "granted in part and denied in part." The court went on to address whether the relator's proposed amendments would cure the deficiencies articulated in the district court's opinion and order. The court held that they did, explaining that the additional allegations that the defendants' actions compromised the reliability of the various drug compendia entries that listed the medically acceptable off-label uses of the drug, in addition to the relator's allegations that had the defendants not engaged in the alleged fraud, physicians would not have determined that the drug was "reasonable and necessary," were sufficient to allege causes of action under the FCA. The court granted the relator's motion to amend.

H. Vicarious Liability

See *U.S. ex rel. Schaengold v. Memorial Health, Inc.*, 2014 WL 6908856 (S.D. Ga. Dec. 8, 2014), at page 6.

Judgments & Settlements

OCTOBER 1, 2014–DECEMBER 31, 2014

Verizon (D.D.C. Dec. 30, 2014)

Verizon New England has agreed to pay $1.3 million to settle allegations that it violated the False Claims Act. A *qui tam* suit alleged that Verizon overbilled contract customers in the state of Massachusetts for items and services such as local calling usage, regional toll service, flat rate business lines, flat rate trunks, and business listings at a higher rate than the statewide procurement contract allowed. In addition to the payment to the government, Verizon must issue refunds to the customers and communities affected by the overbilling.

Mark Goldman Associates (D.N.J. Dec. 29, 2014)

Mark Goldman Associates has agreed to pay $105,000 to settle allegations that it violated the False Claims Act by failing to properly account for over $2 million in Justice Department grants, to be used to provide training and technical assistance to Native American tribes in planning and constructing correctional facilities. Although there is no indication that the funds were misused, Goldman Associates failed to properly record that the services required by the grants had been rendered, resulting in the submission of false claims to the United States government.

National Water Main Cleaning Company (Mass. Dec. 25, 2014)

The National Water Main Cleaning Company has agreed to pay $650,000 to settle allegations that it violated the Massachusetts False Claims Act by violating contracts with the Boston Water and Sewer Commission. A whistleblower alleged that the company falsified dye tests for the inspection and repair of Boston sewers and drain pipes, and subsequently overbilled the Commonwealth for the removal of sewage water.

Northampton Hospital Company, LLC (E.D. Pa. Dec. 22, 2014)

Northampton Hospital Company, LLC and Northampton Hospital Corporation have agreed to pay $662,000 to resolve *qui tam* allegations that they violated the False Claims Act. Operating as Easton Hospital, the healthcare centers allegedly billed Medicare for procedures that were not performed, partially performed, or medically unnecessary.

Lockheed Martin Integrated Systems (D.N.J. Dec. 19, 2014)

Lockheed Martin Integrated Systems (LMIS) has agreed to pay $27.5 million to resolve allegations that it violated the False Claims Act by overbilling the government for work completed by unqualified employees.

Iron Mountain (E.D. Cal. Dec. 19, 2014)

Information storage and management company, Iron Mountain, agreed to pay $44.5 million to settle allegations that it violated the False Claims Act. Patrick McKillop and Brent Stanley filed a *qui tam* suit alleging that the company provided the General Services Administration with inaccurate information about its commercial sales practices during contract negotiations, and overbilled federal agencies for record storage services from 2001 to 2014. The relators, who were represented by TAFEF member Paul D. Scott of the Law Offices of Paul D. Scott, will receive a combined $8 million reward.

St. Helena Hospital (N.D. Cal. Dec. 19, 2014)

St. Helena Hospital has agreed to pay $2.25 million to settle allegations that it violated the False Claims Act by submitting false claims to Medicare for medically unnecessary percutaneous coronary interventions from Jan. 1, 2008, through July 31, 2011. Kacie Carroll, a former St. Helena employee, filed a *qui tam* suit that alleged that St. Helena admitted angioplasty patients that should have been treated on a less expensive, outpatient basis. Carroll will receive $450,000 as part of the settlement and was represented by TAFEF members Michael Hirst of the Hirst Law Group; and Mark Kleiman of Law Office of Mark Allen Kleiman; as well Dugan Barr of Barr & Mudford.

Eyak Corporation (D.D.C. Dec. 16, 2014)

The Eyak Corporation has agreed to pay $2.5 million to settle allegations that it violated the False Claims Act and the Anti-Kickback Statute. The government alleged that two of the firm's subsidiaries, Eyak Technology LLC and Eyak Services LLC, submitted false claims to the United States government under a contract to provide healthcare, information technology, and communications support to the U.S. Army Corps of Engineers. From 2007 to 2011, former Eyak employee Harold Babb allegedly accepted kickbacks from several subcontractors of Eyak Tech and Eyak Services in return for using his position to direct subcontracts to them. In March 2012, Mr. Babb pleaded guilty to bribery and kickback charges and was sentenced by the U.S. District Court in the District of Columbia to serve 87 months in prison to be followed by 36 months of supervised release and to pay more than $9 million in restitution for his role in the kickback scheme.

SUNY Research Foundation (N.D.N.Y. Dec. 15, 2014)

The Research Foundation for the State University of New York has agreed to pay $3,750,000 to settle allegations that its Center for Development of Human Services (CDHS) violated the False Claims Act. A *qui tam* suit alleged that CDHS falsified au-

dits of federally-funded healthcare programs in New York—the results of the CDHS's Payment Error Rate Measurement and Medicaid Eligibility Quality Control reviews were manipulated; cases reviewed were altered and not selected at random sample—resulting in the submission of false statements to Medicare and Medicaid. In addition to the payment, SUNY research foundation has entered into a compliance program. The relators will receive $825,000—a 22% share of the government's recovery.

Regents of the University of California (E.D. Cal. Dec. 11, 2014)

The Regents of the University of California will pay the United States $499,700 to resolve False Claims Act allegations. The government alleged that the University of California at Davis submitted fraudulent obtain research grants from the Department of Energy (DOE) and the National Science Foundation (NSF), by failing to disclose that it had submitted duplicate proposals to DOE and NSF. As part of the settlement, for a three-year period UC Davis will supplement its research training programs with an hour-long module covering time and effort reporting, reasonableness of costs and other aspects of federal grants.

Chabad of California (C.D. Cal. Dec. 9, 2014)

Chabad of California has agreed to pay $844,985 to resolve allegations that it violated the False Claims Act. The Jewish religious organization allegedly misused grant funds from the Urban Areas Security Initiative Nonprofit Security Grant Program. Aria Kozak and his wife, Donna Kozak filed a *qui tam* suit alleging that Chabad purposely failed to comply with grant requirements and misused the grant funds for unauthorized expenses. The Kozaks were represented by TAFEF member Michael Hirst of the Hirst Law Group, PC.

Supreme Foodservice (E.D. Pa. Dec. 8, 2014)

Supreme Foodservice GmbH and Supreme Foodservice FZE—which provided food and other items to the Department of Defense and coalition troops in Afghanistan from 2005 until at least 2009—pleaded guilty to criminal charges of major fraud, conspiracy to commit major fraud, and wire fraud. The companies also agreed to pay the United States $389,300,000 to resolve civil claims in a *qui tam* suit that alleged that the corporations inflated the cost to the government of produce served to the troops, illegally increased the cost of bottled water, and obtained kickbacks from vendors. The *qui tam* suit was filed by former Supreme Foodservice employee Michael Epp, who was represented by TAFEF members Jennifer Verkamp and Mary Jones of Morgan Verkamp LLC and TAFEF member Marc S. Raspanti of Pietragallo Gordon Alfano Bosick & Raspanti, LLP.

OtisMed Corporation and Charlie Chi (D.N.J. Dec. 8, 2014)

OtisMed Corporation and its former CEO, Charlie Chi, have agreed to pay $80 million to resolve *qui tam* allegations of False Claims Act violations. OtisMed allegedly knowingly marketed and distributed its OtisKnee cutting guide as a tool to assist surgeons in making accurate bone cuts specific to individual patients' anatomy based on magnetic resonance imaging (MRI) performed prior to surgery, despite the fact that the company's application for marketing clearance had been rejected by the Food and Drug Administration. The company allegedly and sold 18,000 units of the unapproved device between May 2006 and September 2009. In addition to payment of the civil penalty, Mr. Chi will be sentenced to prison in March 2015. The *qui tam* suit was filed by Richard Adrian, who was represented by Joseph Callow of Keating Muething & Klekamp and TAFEF member Joel Hesch of the Hesch Firm LLC.

Deployable Hospital Systems Technologies LLC (M.D. Pa. Dec. 4, 2014)

Deployable Hospital Systems Technologies LLC and its subsidiary, DHS Systems LLC (collectively DHS), have agreed to pay $1.9 million to settle allegations that they violated the False Claims Act by failing to inform the General Services Administration that products offered for sale to the United States and its agencies were offered at lower prices to a commercial company; federal agencies in turn paid more for the products than they would have had the GSA known about the lower prices. The *qui tam* suit was filed by former DHS employee Sharon McKinney, who was represented by TAFEF member Regina Poserina of Begelman, Orlow & Melletz.

Rite Aid Corporation (C.D. Cal. Dec. 3, 2014)

Rite Aid Corporation has agreed to pay $2.99 million to resolve allegations in a *qui tam* suit that it violated the False Claims Act by using gift cards as improper financial incentives. The relator, pharmacist Jack Chin, alleged that from 2008-2010 the retail drugstore chain improperly influenced the decisions of Medicare and Medicaid beneficiaries to transfer their prescriptions to Rite Aid pharmacies by offering them gift cards in exchange for their business. Mr. Chin, who will receive $508,300 as his reward, was represented by TAFEF member Patricia Stamler and Phil Benson of Hertz Schram PC.

Manoa Fire Company (E.D. Pa. Dec. 2, 2014)

Manoa Fire Company has agreed to pay $36,912.46 to settle allegations that it violated the False Claims Act from July 23, 2007 to September 30, 2013 by allowing uncertified attendants to perform medical procedures, in violation of Pennsylvania and federal regulations that required at least two individuals to be present: a licensed

emergency medical technician ("EMT"), and an "ambulance attendant" who had completed an emergency vehicles operation course and who had current certifications in both cardiopulmonary resuscitation (CPR) and advanced first aid class.

Maricopa County Community College District (D. Ariz. Dec. 1, 2014)

Maricopa County Community College District (MCCCD) has agreed to pay $4.08 million to resolve allegations that it violated the False Claims Act by submitting false claims to the Corporation for National and Community Service (CNCS) regarding state and national AmeriCorps funding the district received for Project Ayuda, a program that proposed to engage students in national service. In order to receive an AmeriCorps education award, students had to meet certain service-hour requirements, and MCCCD allegedly improperly certified that students had completed the required number of service hours. The *qui tam* suit was filed by Christine Hunt, a former employee of MCCCD. She will receive $775, 827 as part of the settlement.

North Atlantic Medical Services Inc. (D. Mass. Dec. 1, 2014)

North Atlantic Medical Services Inc. (NAMS) has agreed to pay $852,378 to resolve allegations that it violated the False Claims Act. Doing business as Regional Home Care Inc., the Massachusetts-based medical device company allegedly submitted false claims to Medicare and Medicaid for respiratory therapy services provided by unlicensed personnel. Medicare and Medicaid require suppliers of respiratory therapy equipment and services to comply with state licensing standards. The government alleged that from September 2010 to January 2013, NAMS used unlicensed employees to set up sleep apnea masks and oxygen therapy equipment for patients in Massachusetts even after being notified that the practice was illegal. The *qui tam* suit was filed by former NAMS employees Konstantinos Gakis and Demetri Papageorgiou who will receive $153,428 as part of the settlement.

Dr. Gilbert Lederman (E.D.N.Y. Nov. 24, 2014)

Dr. Gilbert Lederman of Staten Island University Hospital (SIUH) has agreed to pay $2.35 million to settle allegations that he violated the False Claims Act by submitting fraudulent statements to Medicare. A *qui tam* complaint filed by Elizabeth M. Ryan, the widow of one of Dr. Lederman's former patients, alleged that the doctor wrongfully billed Medicare for millions of dollars for radiosurgery cancer treatments that were not eligible for reimbursement. Mrs. Ryan was represented by Richard Reich of Lifflander and Reich LLP and will receive a 15% share of the government's recovery.

Office Depot November 21, 2014

Office Depot will pay $68.5 million to settle allegations that it violated the False Claims Act by overbilling more than 1000 cities, counties, school districts, and other government entities for office supplies through the US Communities purchasing program—a program set up to allow state and local governments across the country to leverage their combined purchasing power by appointing a single public entity to negotiate a contract with a vendor on behalf of all US Communities members. According to a *qui tam* complaint filed by former Office Depot employee, David Sherwin, participants in the contract were guaranteed Office Depot's best available prices for government purchasers, but the company gave some California entities a lower discount rate than other government entities were given. Mr. Sherwin was represented by TAFEF member Stephen Hasegawa of Phillips & Cohen LLP.

Dr. Narinder S. Grewal and Santa Clarita Surgery Center for Advanced Pain Management (C.D. Cal. Nov. 19, 2014)

California-based physician Dr. Narinder S. Grewal has agreed to pay $1.2 million to settle allegations that he violated the False Claims Act by submitting fraudulent bills and obtaining improper reimbursements from federal healthcare programs. Grewal's clinic, the Santa Clarita Surgery Center for Advanced Pain Management, will pay $1,087,176.09 to the United States government and $112, 823.91 to the State of California. Relator Chandana Basu alleged in a *qui tam* suit that Grewal and his clinic obtained improper reimbursements from government-run health insurance programs, including Medicare, Medi-Cal and Tricare, a federal health insurance program for military and related military personnel. Basu will receive a $204,000 reward.

Sevenson Environmental Services Inc. (D.N.J. Nov. 18, 2014)

Sevenson Environmental Services Inc. has agreed to pay $2.72 million to resolve allegations that it violated the False Claims Act and the Anti-Kickback Statute with respect to its contract work on an Environmental Protection Agency facility. The government alleged that the company accepted more than $1.6 million in kickbacks from six subcontractors that were then awarded subcontracts to perform work at the Federal Creosote Superfund site in Manville, N.J., under Sevenson's EPA contract.

CareAll Management LLC (M.D. Tenn. Nov. 12, 2014)

CareAll Management LLC and its affiliates have agreed to pay $25 million to resolve False Claims Act allegations. Toney Gonzales, a registered nurse and former Director of Services for CareAll's Knoxville office, filed a *qui tam* suit alleging that CareAll sub-

mitted false and inflated home healthcare billings to the Medicare and Medicaid programs from 2006 to 2013, including claims that exaggerated the severity of patients' conditions and allowed the company to bill he government for services that were not medically necessary. Mr. Gonzales, who was represented by TAFEF members Anna Dover of Milberg LLP and Michael Hamilton of the Provost Umphrey Law Firm LLP, will receive $3.9 million as part of the settlement.

Biotronik Inc. (E.D. Cal. Nov. 6, 2014)

Biotronik has agreed to pay the United States $4.9 million to resolve allegations that it violated the False Claims Act by making improper payments to induce physicians to use devices that it manufactured and sold. Brian Sant, a former Biotronik employee, alleged in a *qui tam* suit that Biotronik paid kickbacks to physicians and caused hospitals and ambulatory surgery centers to submit false claims to Medicare and Medicaid for the implantation of Biotronik pacemakers, defibrillators and cardiac resynchronization therapy devices. Sant will receive an $840,000 reward. He was represented by C. Brooks Cutter of Kershaw, Cuter & Ratinoff, LLP and TAFEF member Mychal Wilson.

Dignity Health (N.D. Cal. Oct. 30, 2014)

Dignity Health has agreed to pay the United States $37 million to settle allegations that 13 of its healthcare centers, in California, Nevada, and Arizona knowingly submitted false claims to Medicare and TRICARE by admitting patients who could have been treated on a less costly, outpatient basis. The *qui tam* suit was filed by Kathleen Hawkins, a former Dignity Health employee, who will receive $6.25 million. Ms. Hawkins was represented by TAFEF member Marcella Auerbach of Nolan, Auerbach & White.

Dr. Charles L. Bennett (N.D. Ill. Oct. 30, 2014)

Dr. Charles L. Bennett, a former cancer research physician at Northwestern University's Robert H. Lurie Comprehensive Center for Cancer, has agreed to pay $475,000 to settle allegations that he violated the False Claims Act. Melissa Theis, a former employee of Northwestern's Feinberg School of Medicine, filed a *qui tam* suit alleging that Dr. Bennett submitted false claims under grants from the National Institutes of Health. The grant funds were meant for research projects involving adverse drug events, multiple myeloma drugs, the blood disorder thrombotic thrombocytopenic purpura, and quality of care for cancer patients, but the relator alleged that Dr. Bennett spent the grant money on inappropriate items for himself, his family, and his friends, including family trips, meals, hotels, and consulting fees. Ms. Theis was represented by TAFEF member Linda Wyetzner of Behn & Wyetzner, Chartered.

EBI LLC (D. Mass. Oct. 29, 2014)

EBI LLC has agreed to pay $6.07 million to resolve allegations that it violated the False Claims Act. Doing business as Biomet Spine and Bone Healing Technologies, and Biomet Inc., the company allegedly made improper payments to medical staff at various doctors' offices to influence physicians to use its bone growth stimulators, in violation of the Anti-Kickback Act. According to a *qui tam* suit, the resulting bills to the federal health care programs for the devices constituted false claims under the FCA. The relators were represented by Thomas R. Anapol of Anapol Schwartz PC and W. Mark Lanier of the Lanier Law Firm PC.

Columbia University (S.D.N.Y. Oct. 28, 2014)

Columbia University has agreed to pay $9 million to resolve allegations that it violated the False Claims Act. Craig Love, ICAP's director of finance from 2008 to 2011, alleged in a *qui tam* suit that the university submitted false claims regarding grant funds it received for AIDS- and HIV-related work.

First RF Corporation (D. Col. Oct. 24, 2014)

Boulder-based First RF Corporation has agreed to pay $10 million to settle allegations that it violated the False Claims Act. The antenna and radio system company allegedly submitted false data to the Army regarding its manufacturing costs and thereby inflated claims for electronic warfare antennas sold to the U.S. Army to combat Improvised Explosive Devices.

DaVita Healthcare Partners, Inc. (D. Colo. Oct. 22, 2014)

Denver-based DaVita Healthcare Partners, Inc. has agreed to pay $350 million to resolve claims that it violated the False Claims Act by paying kickbacks to induce the referral of patients to its dialysis clinics. David Barbetta, a former DaVita employee, filed a *qui tam* suit alleging that between March 1, 2005 and February 1, 2014, the company identified physicians or physician groups that had significant patient populations suffering renal disease, and offered them lucrative partnership opportunities whereby DaVita would reward physicians who referred patients to its dialysis centers by: selling them shares in the centers for less than fair-market value; buying shares in dialysis centers owned by the physicians for more than fair-market value; giving physicians kickbacks masked as profits from joint ventures; and paying the physicians to refrain from building competing dialysis centers. Barbetta was represented by TAFEF member Eric R. Havian, of Phillips and Cohen.

Dr. Satyabrata Chatterjee and Dr. Ashwini Anand (E.D. Ky. Oct. 21, 2014)

Kentucky-based cardiologists, Dr. Satyabrata Chatterjee and Dr. Ashwini Anand, have agreed to pay $380,000 to resolve allegations that they violated the False Claims Act by entering into fraudulent management agreements with Saint Joseph Hospital in violation of the Stark Law and the Anti-Kickback Statute. Chatterjee and Anand owned the Cumberland Clinic, which provided cardiology services agreed to enter into an exclusive agreement with St. Joseph to refer Cumberland Clinic patients to the hospital for cardiology and other services in exchange for payments for management services Chatterjee and Anand did not provide. The *qui tam* suit was filed by Drs. Michael Jones, Paula Hollingsworth and Michael Rukavina, who will collectively receive a $68,400 reward.

Thermacore, Inc. (E.D. Pa. Oct. 20, 2014)

Thermal management solutions supplier Thermacore Inc. has agreed to pay $965,000 to settle allegations that it submitted false claims to the government's Small Business Innovation Research (SIBR) program. The company submitted duplicate project proposals under the program to both NASA and the Air Force As part of SIBR requirements, both NASA and the Air Force, even though the program's requirements mandate that the same or essentially equivalent research may not be funded by more than one agency. Thermacore will pay $500,000 to the United States, while the remaining $465,000.00 will be allocated and used for the company's ongoing compliance efforts.

Houston Area Diagnostic Centers (S.D. Tex. Oct. 17, 2014)

Two groups of Houston-based diagnostic centers—including: Complete Imaging Solutions LLC doing business as Houston Diagnostics; Deerbrook Diagnostics & Imaging Center LLC; Elite Diagnostic Inc.; Galleria MRI & Diagnostic LLC; Spring Imaging Center Inc.; and West Houston MRI & Diagnostics LLC—have agreed to pay $2.6 million to settle allegations that they violated the False Claims Act. The first group of centers, which is owned by Fuad Rehman Cochinwala, will pay $1.2 million to settle allegations that it violated the Stark Law and False Claims Act by entering into fraudulent consulting and medical director agreements with physicians who referred patients. The second group, owned by Rahul Dhawan, will pay $1.4 million to settle allegations of entering into improper financial relationships with referring physicians and improperly billing Medicare using the provider number of a physician who had not authorized them to do so and had not been involved in the provision of the services being billed.

Organon, Inc. (S.D. Tex.; D. Mass. Oct. 15, 2014)

Netherlands-based pharmaceutical company Organon agreed to pay $34 million to settle *qui tam* allegations that it violated the False Claims Act by promoting off -label uses of antidepressants; providing improper financial incentives to nursing home pharmacy companies; and making false statements about drug pricing to the New York Medicaid program. Organon promoted antidepressants Remeron and Remeron SolTab for uses that were not approved by the FDA and marketed the drugs' side effects as benefits. In addition, Organon failed to provide the government with the best possible price for the drugs, resulting in overpayments. The company then used the inflated drug costs to offset the discounts it offered nursing home pharmacy companies as an incentive to purchase the medications.

Bostwick Laboratories (S.D. Ohio Oct. 14, 2014)

Bostwick Laboratories has agreed to pay $6,048,000 to resolve allegations that it violated the False Claims Act by improperly billing Medicare and Medicaid for tests and services referred in violation of the Anti-Kickback Statute and for tests performed without a doctor's order or consent. The *qui tam* suit was filed by Michael Daugherty, who was represented by TAFEF member Jennifer Verkamp of Morgan Verkamp, LLC.

Boeing (W.D. Tex. Oct. 11, 2014)

Chicago-based aerospace corporation Boeing has agreed to pay $23 million to resolve allegations that it violated the False Claims Act by improperly charging labor costs under contracts with the Air Force for the maintenance and repair of the C-17 Globemaster aircraft—one of the military's major systems for transporting troops and cargo throughout the world. The *qui tam* suit was filed by former Boeing employees Clinton Craddock, Fred Van Shoubrouek, Anthony Rico and Fernando de la Garza, who will receive $6.5 million reward.

Extendicare Health Services Inc. (E.D. Pa. Oct. 10, 2014)

Delaware-based Extendicare Health Services Inc. (Extendicare) and its subsidiary Progressive Step Corporation (ProStep) have agreed to pay $38 million to the United States and eight states to resolve allegations that they violated the False Claims Act. The government alleged that between 2007 and 2013, Extendicare billed Medicare and Medicaid for substandard services and failed to provide care that met federal and state standards of care and regulatory requirements in 33 of its skilled nursing homes in eight states: Indiana, Kentucky, Michigan, Minnesota, Ohio, Pennsylvania, Washington and Wisconsin. Extendicare also allegedly provided medically unreasonable and unnecessary rehabilitation therapy services to its Medicare Part A beneficiaries

during patients' assessment reference periods in order to bill Medicare for those patients at the highest rate possible. According to the DOJ, this is the largest failure-of-care settlement to date.

CareMed (S.D.N.Y. Oct. 9, 2014)

New York-based pharmacy CareMed has agreed to pay $9.5 million to settle allegations that it violated the False Claims Act by making false statements to Medicare Part D sponsors when seeking prior authorization for drug prescriptions; this practice allowed the company to maximize the number of prescriptions it could process and the payments it received each day. The alleged scheme involved CareMed employees posing as physician office employees when placing telephone calls to secure prior authorizations and fabricating the patients' medical information when responding to clinical questions posed by insurance companies. The *qui tam* suit was filed in 2012 by Panna Nahar, a former clinical care coordinator at CareMed. Nahar was represented by TAFEF members David J. Caputo, David C. Williams, Joseph Trautwein and Thomas Richard Kline of Kline & Specter PC of Philadelphia, PA.

DRS Technical Services Inc. (D. Md. Oct. 7, 2014)

DRS Technical Services, Inc. has agreed to pay $13.7 million to settle allegations that it violated the False Claims Act by overbilling the government for work performed by unqualified personnel. From March 2003 and December 31, 2012, DRS and its predecessors were awarded time and materials contracts for services and supplies to be provided to the Army's Communication and Electronics Command (CECOM) in Iraq and Afghanistan, and to the Coast Guard for aircraft maintenance. The government alleged that from 2003 to 2012, DRS billed ECOM for work performed by individuals whose job qualifications did not meet the requirements of the contract, thereby inflating the cost of the services provided.