NOS. 08-16243, 08-16305
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA ex rel. JERRE FRAZIER,

Plaintiff-Appellant,

v.

IASIS HEALTHCARE CORPORATION,
Defendant-Appellee

AND

UNITED STATES OF AMERICA ex rel. JERRE FRAZIER,

Plaintiff-Appellee,

v.
IASIS HEALTHCARE CORPORATION,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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

Mike Bothwell, Esq.
Julie K. Bracker, Esq.
Bothwell Bracker & Vann, P.C.
304 Macy Drive
Roswell, GA 30076
(770) 643-1606

Mark A. Kleiman, Esq.
Counsel of Record
Cleveland Lawrence III, Esq.
Taxpayers Against Fraud Education Fund
1220 19th St., N.W., Suite 501
Washington, D.C. 20036
(202) 296-4826

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Taxpayers Against Fraud Education Fund states that it is a corporation organized under § 501(c)(3) of the Internal Revenue Code. It has no parent corporation and no stock owned by a publicly owned company. TAFEF represents no parties in this matter and has no pecuniary interest in its outcome. However, TAFEF has an institutional interest in the effectiveness and correct interpretation of the Medicare Act and the federal False Claims Act.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Taxpayers Against Fraud Education Fund is a nonprofit public interest organization dedicated to combating fraud against the federal government through the promotion of the *qui tam* provisions of the False Claims Act. It has a profound interest in ensuring that the Act is appropriately utilized. The issue here is the correct application of Federal Rules of Civil Procedure 9(b) to False Claims Act *qui tam* suits. The decision below gravely undermines the efficacy of the Act in policing fraud on the federal government, because it derails meritorious suits by incorrectly demanding evidentiary proof of actual claims at the pleading stage of litigation.

I. STATEMENT OF THE ISSUES

Whether the district court erred in holding that Federal Rule of Civil Procedure 9(b) requires Relator in a False Claims Act *qui tam* suit to plead details about specific false claims, even when Relator alleged that Defendant submitted false certifications of compliance on cost reports, and that each claim was submitted to federal health care programs and originated from illegal referrals from physicians, which rendered all claims false or fraudulent.

Whether the district court abused its discretion in holding that granting leave to amend would be futile, and dismissing complaint with prejudice, when the court agreed that the complaint could state a claim, that this was the first challenge to the sufficiency of the pleadings under Rule 9(b), that the amendments described by the district court's opinion were not required by precedent, and that Relator offered to amend.

II. ARGUMENT

A. The District Court Erred In Its Application Of Rule 9(b).

It is an important rule of statutory construction that, "in interpreting a statute, the court should look to the old law, the mischief and the remedy." *Comm'r of Internal Revenue v. Kohn*, 158 F.2d 32, 34 (4th Cir. 1946); *see also U.S. v. St. Paul, M. & M. R. Co.*, 247 U.S. 310, 318 (1918). "A recognized rule of construction of statutes is to look to the law when the statute was enacted in order to see for what it was intended as a

substitute, and the defects in the old law sought to be remedied by the new statute." *Century Wrecker Corp. v. Vulcan Equip. Co.*, 733 F. Supp. 1170, 1172 (E.D. Tenn. 1989). In converting Federal Rule of Civil Procedure ("FRCP") 9(b) into a substantive rule, the district court has reasserted the very "mischief" identified by Congress in amending the FCA in 1986 and has eviscerated Congress's attempted remedy.

The False Claims Act ("FCA") is "the government's primary litigative tool for the recovery of losses sustained as the result of fraud against the government." *Avco Corp. v. U.S. Dep't of Justice*, 884 F.2d 621, 622, (D.C. Cir. 1989) (citing S. Rep. at 5266); *see also McNutt ex rel. United States v. Haleyville Med. Supplies, Inc.*, 423 F.3d 1256, 1259 (11th Cir. 2005) (citing *Avco*). The FCA's modern incarnation resulted from amendments in 1986. At that time, "fraud against [the] government [was] so rampant and difficult to identify [that the] government needed all [the] help it could get from private citizens." *Cooper v. Blue Cross and Blue Shield of Florida, Inc.*, 19 F.3d 562, 566 (11th Cir. 1994) (citation omitted). Accordingly, in an attempt to encourage the filing of more *qui tam* suits and to "make the FCA a 'more useful tool against fraud in modern times,'" Congress extensively overhauled the statute. *Cook County v. U.S. ex rel. Chandler*, 538 U.S. 119, 133 (2003) (citation omitted). The renewed *raison d'être* of the Act is the filing of suits just like the case at bar, in which citizens avail themselves of its *qui tam* provisions and, where appropriate, continue forward when the

United States lacks the time or resources to intervene.[1]

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

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

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

The interpretation of the FCA that **is** favored by Congress is the broad reading

[1] In the hearing on June 19, 2008 in front of the Subcommittee on Commercial and Administrative Law and the House Subcommittee on Courts, the Internet, and Intellectual Property, *Joint Hearing on H.R. 4854, the "False Claims Act Correction Act*", Chairman Berman (author of the 1986 amendments) favorably considered testimony showing that settlements in the hundreds of millions of dollars were prosecuted by *qui tam* relators without the assistance of the DOJ, as well as other testimony showing that the DOJ does not have the manpower or budget to prosecute all meritorious FCA cases. Representative Berman and other committee members seemed convinced that courts had once again overly narrowed the FCA's reach with restrictive rulings such as the substantive use of Rule 9(b). *See* Note 2, *infra*.

given in *U.S. v. Neifert-White Co*., 390 U.S. 228, 232 (1968).

> The original False Claims Act was passed in 1863 as a result of investigations of the fraudulent use of government funds during the Civil War. Debates at the time suggest that the Act was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government. In its present form the Act is broadly phrased to reach any person who makes or causes to be made "any claim upon or against" the United States, or who makes a false "bill, receipt, . . . claim, . . . affidavit, or deposition" for the purpose of "obtaining or aiding to obtain the payment or approval of" such a false claim. In the various contexts in which questions of the proper construction of the Act have been presented, the Court has consistently refused to accept a rigid restrictive reading, even at the time when the statute imposed criminal sanctions as well as civil.

Id. (citations and footnotes omitted) (emphasis added).

> The Supreme Court's opinion in *U.S. v. Neifert-White Co.* . . . indicated that the False Claims Act "was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government." The Committee strongly endorses this interpretation of the act and, to remove any ambiguity, has included this amendment to resolve the current split in the case law relating to such material misrepresentations.

S. Rep. at 5284.

Congress made many changes in 1986, all with the purpose of achieving these goals. It eliminated the "government knowledge" bar, which precluded suits if related information was already in the government's possession; provided relators with a guaranteed share of any recovery; expanded relators' participation in the litigation even where the government elects to intervene; clarified the burden of proof; and increased damages available under the Act. 31 U.S.C. §§ 3729(a)-(b), 3730(d). The amendments also explicitly stated that specific intent to defraud need not be shown, clarifying that a

defendant is liable if it acts with deliberate ignorance or reckless disregard of the truth or falsity of information. *Id.* § 3729(b). "Every change made in 1986 made it more likely for FCA claims to be filed and to succeed." *U.S. ex rel. Chandler v. Cook County*, 277 F.3d 969, 975 (7th Cir. 2002), *aff'd* 538 U.S. 119 (2003). Indeed, "Congress purposefully intended the litigation structure under the FCA to be uniquely pro-plaintiff." *United States ex rel. Longhi v. Lithium Power Techs.*, 2007 U.S. Dist. Lexis 21273, slip op. at 24 (S.D. Tx. Mar. 23, 2007).

Although Congress did not expressly address application of a restrictive or narrow approach to Rule 9(b) as a potential hurdle in FCA actions in 1986, that is only because, at that time, courts had not yet applied restrictive Rule 9(b) rulings to the FCA.[2] Throughout its legislative history and consideration of amendments, Congress

[2] The first time Rule 9(b) was mentioned in conjunction with an FCA case in this Circuit was *Bly-Magee v. California*, 236 F.3d 1014 (9th Cir. 2001), fifteen years after the FCA amendments were passed. The difficulty of requiring Rule 9(b) pleading under a statute that does not require proof of fraud at trial was discussed in *U.S. ex rel. Bledsoe v. Community Health Sys.*, 342 F.3d 634, 642 (6th Cir. 2003) (relator identified that FCA actions do not require proof of intent, damages, or reliance). The danger of applying Rule 9(b) at all is that courts will accidentally add in many of those elements Congress took out and then make relators plead them with specificity. *See e.g., U.S. ex rel. Clausen v. Laboratory Corp. of America*, 290 F.3d 1301, 1310 (11th Cir. 2002) (appearing to require pleading of reliance and damages). The largest problem with the application of Rule 9(b) to FCA cases is the unregulated creeping into court opinions of stricter and stricter pleading requirements and narrower and narrower interpretations to the point that Rule 9(b) is transmogrified from a procedural rule to a substantive rule. Problems with the "evolution" of Rule 9(b) are well-articulated in a recent academic essay on point. C. Fairman, "An Invitation to the Rulemakers—Strike Rule 9(b)", 38 U.C. Davis L. Rev. 281, 282-83, 307 (2004)

was thorough in addressing every narrow or restrictive lower court decision it found. *See generally,* S. Rep. 5266 *et seq.* There can be no mistake that the Rule 9(b) standard applied by the district court is uniquely anti-plaintiff and emphatically discourages "individual[s] knowing of Government fraud [from] bring[ing] that information forward." *Id*. at 5267. This standard resurrects the very "mischief" Congress sought to remedy and should be rejected.

The Supreme Court has twice unanimously rejected efforts by courts to "clear their dockets" of cases they do not believe will ultimately win by using procedural rules for substantive determinations and applying Rule 9(b) or other heightened pleading standards, pre-discovery. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) (employment discrimination); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993) (civil rights). The Court rejected the notion that heightened pleading was intended as a mechanism under the Federal Rules to dispose of meritless claims, stating that the notice pleading standard "relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious

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(academia joins the Supreme Court in condemning the use of Rule 9(b) "by ad hoc judicial fiat" as a substantive rule.). Congress has seemingly had enough of the courts' continued narrowing decisions (post-1986) and has determined to once again clean up what it determines are incorrect and overly narrow FCA rulings, including the lower court's determination that claims have to be pled with specificity. *See* the FCA Corrections Act of 2008, HR 4854 (addressing the interplay between Rule 9(b) and the FCA with large bi-partisan sponsorship).

claims." *Swierkiewicz, supra,* at 512.[3] The Supreme Court has never deviated from its view that "'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits'." *Id.* at 514 (citation omitted).

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

[3] This holding and analysis is particularly helpful in highlighting the potential abuse of heightened pleading standards often requiring pleading elements that are not necessary for proof at trial. *See e.g.* Note 2, *supra* (*Clausen* requiring elements plead with specificity that were expressly removed from the FCA). Just this year, the Supreme Court held that while a claim under Section 3729(a)(1) requires a false claim to be presented to the government, no such requirement exists for (a)(2) or (a)(3). *Allison Engine Co. v. U.S. ex rel. Sanders*, 128 S.Ct. 2123, 2129-30 (2008). Subsequently, this Court extended that statutory interpretation to clarify that no claim is required to be presented under Section 3729(a)(7). *U.S. ex rel. Bourseau v. RIB Medical Management Services, Inc.*, 531 F.3d 1159, 1169 (9th Cir. 2008) (cost reports support an (a)(7) cause of action which requires no submission of a claim). Therefore, for all claims under 3729(a)(2), (a)(3) and (a)(7), it is not required to prove at trial that defendant presented a claim to the government. The Ninth Circuit standard cannot be, as articulated by the lower court, that Rule 9(b) requires specificity of claims submitted, because in three out of seven FCA causes of action (two more of which are subsumed and never used making it really three out of four), proof of a claim is not even required at trial. According to *Swierkiewicz*, it is "incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits …." *Swierkiewicz*, 534 U.S. at 511-12. In similar fashion, the lower court not only improperly relies on *Aflatooni v. Kitsap Physicians Service*, 314 F.3d 995 (9th Cir. 2002) because it is a summary judgment case—a completely different standard than a motion to dismiss—but also, because *Aflatooni* only applies to litigation under Section 3729(a)(1).

and analysis.

> Rotella has presented no case in which Rule 9(b) has effectively barred a claim like his, and he ignores the flexibility provided by Rule 11(b)(3), allowing pleadings based on evidence reasonably anticipated after further investigation or discovery. *See, e.g., Corley v. Rosewood Care Center, Inc. of Peoria*, 142 F.3d 1041, 1050-1051 (CA7 1998) (relaxing particularity requirements of Rule 9(b) where RICO plaintiff lacks access to all facts necessary to detail claim).

Id. at 560 (emphasis added). Necessary to the Court's holding was its understanding that Rule 9(b) is "flexible" and has to be read in concert with Rule 11, which allows pleadings based on evidence anticipated after further investigation or discovery. The Court also emphasized that plaintiffs meet Rule 9(b) when they lack "access to all facts necessary to detail [a] claim." *Id.* Significantly, the case the Court cited on this point, *Corley*, relied on concerns that are directly applicable to FCA cases. In *Corley*, the Seventh Circuit stated that:

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

Corley, 142 F.3d at 1051. The exact same situation exists in FCA cases, since the relator is bringing an action for fraud committed, not against herself, but against a third party—the government. Thus, *Rotella*, reading Rules 8, 9, and 11 together would allow a relator to pass Rule 9(b) where evidence was reasonably anticipated after further investigation or discovery, where plaintiff lacked access to all facts necessary to detail the claim, **or** where the allegation of fraud is against third parties. Rule 9(b) is intended to dismiss cases where none of the elements are plead with sufficient specificity not just one of the elements, because only then is the complaint insufficient to put defendant on

notice.[4] *See Michaels Building Co. v. Ameritrust Co., N.A.*, 848 F.2d 674, 679-81 (6th Cir. 1988) (in determining whether a complaint satisfies Rule 9(b) look not at what is missing, but rather what is there; the standard is whether the defendant has fair notice of the substance of plaintiff's claim sufficient to prepare a responsive pleading).[5]

This Court's Rule 9(b) analysis is consistent with the Supreme Court's view. In *Fecht v. Price Co.*, 70 F.3d 1078, 1083 n.5 & n.6 (9th Cir. 1995), the complaint alleged that sales volumes in newly opened stores were below levels usually experienced and it identified three such stores by state. *Id.* (this was sufficient to pass Rule 9(b)). The Court expressly did not require "a specific number or a precise time frame." *Cooper v.*

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[4] The flexible Rule 9(b) is also consistent with the Rules Committee's intent. "Official Form 13 demonstrates that even fraud may be pleaded without long or highly detailed particularity." 5 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE, § 1298 (1990) (Rule 9(b) applies to Official Form 13); *U.S. v. Gelb*, 783 F. Supp. 748, 757 (E.D.N.Y. 1991). "Official Form 13 demonstrates that even fraud may be pleaded without long or highly detailed particularity." *Guidry v. U.S. Tobacco Co. Inc.*, 188 F.3d 619, 632 (5th Cir. 1999); *see also Swierkiewicz*, 534 U.S. at 513 n.4 (FRCP forms exemplify pleading requirements and "'are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate.' Fed. Rule Civ. Proc. 84."). Form 13 states a fraudulent conveyance claim by alleging that "Defendant C. D. on or about _____ conveyed all his property, real and personal [or specify and describe] to defendant E. F. for the purpose of defrauding plaintiff and hindering and delaying collection of the indebtedness evidenced by the note above referred to." FRCP Form 13. This form is declared by Rule 84, Fed. R. Civ. P., to be "sufficient under the rules and [is] intended to indicate the simplicity and brevity of statement which the rules contemplate." Wright & Miller, § 1298 (1990).

[5] The rule that the entirety of the pleadings and all appropriate resources outside the pleadings are read together to find sufficient detail is again supported by the Supreme Court. "[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss …." *Tellabs, Inc. v. Makor Issues & Rights, LTD.*, 127 S.Ct. 2499, 2509 (2007) (specifying the inquiry required a review of "*all* of the facts alleged, taken collectively" rather than whether "any individual allegation, scrutinized in isolation meets the standard.").

Pickett, 137 F.3d 616, 627 (9th Cir. 1997). In *In re Glenfed, Inc. Sec. Litig*., 42 F.3d 1541, 1551 (9th Cir. 1994), the complaint identified some exemplary problem loans and alleged the scheme in general, which was sufficient to pass Rule 9(b). Likewise, in *In re Wells Fargo Sec. Litig*., 12 F.3d 922, 926-28 (9th Cir. 1993), merely pointing to exemplary loans was sufficient without more. In *Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993), this Court held that Rule 9(b) is relaxed where the specific facts are exclusively within the defendant's knowledge and are readily available to it.

Indeed, any Rule 9(b) standard that demands specificity of each and every element of the claim or the specifics of the claims ("transactions") at issue is irreconcilable with binding precedent.[6] *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997); *Lee v. Smith Klein Beecham*, 245 F.3d 1048, 1051 (9th Cir. 2001) ("Rule 9(b) may not require Lee to allege, in detail, all facts supporting each and every instance of false testing over a multi-year period.") (citing *Cooper* allowing some customers, type

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[6] *Stare decisis* starts with the United States Supreme Court and then is founded in the first panel decision in the Circuit.

> [T]he doctrine of *stare decisis* applies to other courts owing obedience to that court. State and federal courts owe obedience to the decisions of the Supreme Court of the United States on questions of federal law, and a judgment of the Supreme Court provides the rule to be followed in all such courts. Similarly, the district courts in a circuit owe obedience to a decision of the court of appeals in that circuit ….

MOORE'S FEDERAL PRACTICE § 134.02[2] (3d ed. 2007). Even if a subsequent panel decision appears to adopt a different standard, it must be read consistently with the prior panel decision because "[i]n this circuit, a panel cannot overturn a decision of a previous panel except by *en banc* review, unless there has been an intervening statutory change or Supreme Court decision." *Gee v. Southwest Airlines*, 110 F.3d 1400, 1406 (9th Cir. 1997). Of course, an unpublished decision is not entitled to stare decisis effect. MOORE'S FEDERAL PRACTICE § 134.04[4][a].

of conduct and general time frame as sufficient).[7] In *Cooper*, the Court held: "It is not fatal to the complaint that it does not describe in detail a single specific transaction (i.e. shipment) in which Merisel transgressed as above, by customer, amount, and precise method…. We hold that the complaint meets the particularity requirement of Rule 9(b). Overall, the complaint 'identifies the circumstances of the alleged fraud so that defendants can prepare an adequate answer.'" *Cooper*, 137 F.3d at 627. The Court continued: "We decline to require that a complaint must allege specific shipments to specific customers at specific times with a specific dollar amount of improperly recognized revenue; 'we cannot make Rule 9(b) carry more weight than it was meant to bear.'" *Id*. (citation omitted). Finally, essentially adopting the theme of the argument above, this Court wrote: "If the shareholders cannot prove any specific instances of excessive revenue recognition with specific customers, they will not prevail on that claim at summary judgment or trial. Because 'we do not test the evidence at this stage,' the complaint should go forward." *Id*. (citation omitted).

In another case, the District of Arizona followed the Supreme Court and the Ninth Circuit in rejecting the specific identification of claims and reading Rules 8 and 9 together. *U.S. ex rel. Sallade v. Orbital Sciences Corp.*, 2008 U.S. Dist. Lexis 4332 (D.

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

Az. Jan. 4, 2008). In *Sallade*, the Court allowed a count that "Orbital used IR&D projects to fraudulently bill the U.S. Government" to pass without any hint of the "name [of] the IR&D projects used" or the "dates the Orbital submitted the charges." *Id*. at 11-12. Similarly, the Court found allegations "that Orbital invoiced the U.S. Government, through Boeing, for costs incurred by ATK to acquire additional production capacity" sufficient without the need to "specify the exact equipment that ATK purchased, the exact date that Orbital allegedly passed ATK's costs to Boeing, or the exact date Boeing passed the costs to the U.S. Government." *Id*. at 12-13. All that is required by Rule 9(b) is that there is sufficient circumstantial detail for defendant to defend against the charge. *Id*. at 13. Essentially, the circumstantial information must allow the defendant to identify the contract that is at issue. *Id*. at 16 (rejecting two counts that explained the fraud, but did not provide any circumstantial allegations from which either the contract(s), the people, or the time frame could be divined; "Count VII similarly does not link the spare or excess material to any specific contract, person, or time frame.").[8]

Similarly, in *U.S. ex rel. McCarthy v. Straub Clinic & Hosp., Inc.*, 140 F. Supp. 2d 1062, 1067-69 (D. Haw. 2001), the court held that the Ninth Circuit did not require specificity as to the claims. McCarthy's allegations describing the scheme, identifying some of the employees involved and statement that the claims were submitted to Medicare "daily" was sufficient to pass Rule 9(b). *Id*. "The court does not expect two

[8] This is essentially identical to the holding in *Yuhasz v. Brush Wellman, Inc*., 341 F.3d 559, 564 (6th Cir. 2003) (complaint could not meet Rule 9(b) without identifying either "specific parties, contracts, or fraudulent acts[.]"); s*ee also U.S. ex rel. Roby v. Boeing Co*., 184 F.R.D. 107 (S.D. Ohio 1998) (the identification of the contract at issue and the form "DD-250" that was used to submit claims was sufficient); *Cf Yuhasz*, 341 F.3d at 565 (dismissing on Rule 9(b) because, unlike *Roby*, "*Yuhasz* provides no such information.").

former employees, whose employment was terminated almost two years ago, to remember each date. The Ninth Circuit agrees." *Id.* (citing *Lee v. Smith Klein Beecham,* 245 F.3d 1048, 1051 (9th Cir. 2001)). In *U.S. ex rel. Lincoln v. Med-Data, Inc.*, U.S. Dist. Lexis 642882006, slip op. at 7 (W.D. Wash. Sept. 8, 2006), the court rejected the nearly identically worded (and cited) argument because it was inconsistent with the precedent in *Lee v. SmithKline Beecham*, 245 F.3d 1048, 1051 (9th Cir. 2001). The court held "that the relator did not have to supply the level of detail that the defendant sought where the information supplied was 'adequate for [the defendant] to both identify the transaction in question and to challenge the basis for Plaintiff's allegation that claims were fraudulently submitted[.]'" *Sallade, supra*, at 12 (quoting *Lincoln,* at 8). The court further held that while the defendant may have a different view or even an absolute defense, "Plaintiff is required at this time to do no more than she has done in order to meet the pleadings requirements of Fed. R. Civ. P. 9(b) and the Court is required to dismiss a claim only if it is clear that no relief could be granted under any set of facts consistent with Plaintiff's allegations." *Lincoln*, *supra*, at 8-9 (citing *Swierkiewicz*). Likewise rejecting an argument for more detail on the claims, the court in *U.S. ex rel. Manion v. St. Luke's Regional Medical Center, Ltd.*, 2008 U.S. Dist. Lexis 25719, slip op. at 7 (D. Id. March 31, 2008) wrote: "The Ninth Circuit has determined that Rule 9(b) may not require a plaintiff to allege, in detail, all facts supporting each and every instance of fraud that occurred over a multi-year period." (citing *Lee* and *Cooper*).[9]

[9] Of course, the "particularity demanded by Rule 9(b) necessarily differs with the facts of each case." Courts generally relax the Rule 9(b) standard when the factual information needed is within the defendant's knowledge or control, the fraud alleged was complex and occurred over a period of time, or the conduct alleged was routine to the defendants. *Eaby v. Richmond*, 561 F. Supp. 131, 137 (E.D. Pa. 1983)(courts have granted limited discovery on issues which the plaintiffs could not have

The lower court's decision to transmogrify procedural Rule 9(b) into substantive Rule 9(b) cannot be reconciled with the Rules Committee's intent or Congress's intent in last amending the FCA. Moreover, this standard improperly injects judicial review of the merits of a case at the very outset and assumes, contrary to all prior jurisprudence, that a complaint lacking in any detail must also be lacking in any merit. The continued lack of judicial analysis in this area of the law (simply borrowing words from extrajurisdictional opinions without analysis of the statute, the Rule, or the particular facts) has led courts, such as the lower court here, to embrace a rule requiring specificity for each and every element of a cause of action, which is irreconcilable with prior rulings of the Supreme Court, this Circuit, and the rule of *stare decisis*. The ultimate entropic decline of this area of the law will lead back eerily close to the field code pleading rules—the inspiration for the liberalization of the pleadings rules 50 years ago. The lower court rule is not the proper standard for the application of Rule 9(b) to FCA cases in the Ninth Circuit and must be rejected in order to prevent further

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reasonably had access to prior to filing the complaint); *U.S. ex rel. Butler v. Magellan Health Servs.*, 74 F. Supp. 2d 1201, 1215 (M.D. Fla. 1999) (specificity requirements less stringent where "the alleged fraud occurred over an extended period of time and consisted of numerous acts"); *Cincinnati Gas & Electric Co. v. General Electric Co.*, 656 F. Supp. 49, 76 (S.D. Ohio 1986) (documents routinely prepared by defendants). While Rule 9(b) generally requires that a plaintiff set forth the "who, what, when, where, and how" of the fraud, it "does not require the setting out of 'detailed evidentiary matter.'" *Georgia Gulf Corp. v. Ward*, 701 F. Supp. 1556, 1560 (N.D. Ga. 1987) (intermal cite omitted). Indeed, a fraud complaint is not "required to … set forth the specific details of any particular transaction underlying the alleged accounting fraud." *In re: World Access, Inc. Securities Litigation*, 119 F. Supp.2d 1348, 1354 (N.D. Ga. 2000). Another court emphasized that Rule 9(b) does not require unreasonable detail: "Failure to state the dates and times of receipt of kickbacks is not fatal to the complaint, as the defendants have been apprised of the nature of the action against them, and are therefore on notice of sufficient allegations upon which to mount a defense." *Georgia Gulf*, *supra*, at 1560.

confusion and disparate application.[10]

B. The District Court Abused Its Discretion In Denying Leave To Amend

Even under a substantive Rule 9(b) analysis, Relator should certainly have been given leave to address any perceived deficiencies. "Leave to amend should be granted if it appears at all possible that the plaintiff can correct the defect." *Balisteri v. Pacifica Police Dep't*, 901 F.2d 696, 701 (9th Cir. 1990). The Court further explained:

> The standard for granting leave to amend is generous. In *Scott v. Eversole Mortuary*, 522 F.2d at 1116 we reversed the district court's dismissal of plaintiff's count insofar as it denied leave to amend because we could "conceive of facts" that would render plaintiff's claim viable and could "discern from the record no reason why leave to amend should be denied."

Id.; see also Polich v. Burlington N., Inc., 942 F.2d 1467, 1472 (9th Cir. 1991) ("Dismissal without leave to amend is improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment"); *Lee v. SmithKline Beecham*, 245 F.3d 1048, 1052 (9th Cir. 2001) ("Leave to amend should be granted unless the district court determines that the pleading could not possibly be cured by the allegation of other facts").

[10] It is amazing how prescient the dissent was in *Clausen* as it predicted that making Rule 9(b) a substantive rule might reduce the number of meritless FCA cases, but it would also reduce the number of legitimate cases—and would do so indiscriminately. *Clausen, supra,* 290 F.3d at 1317 (Barkett, J., dissenting). Indeed, if the lower court's standard were adopted, the successful prosecution of fraud on the government may depend upon which district judge were assigned the case rather than whether, in an absolute sense, the fraud occurred.

Eminence Capital, L.L.C. v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003) explained that the policy of granting leave to amend "freely" is "to be applied with extreme liberality." (citations omitted). Where the lower court had denied leave to amend where it was the Plaintiff's third filed complaint, the Court reversed, explaining:

> This is not a case where plaintiffs took "three bites at the apple" by alleging and re-alleging the same theories in an attempt to cure pre-existing deficiencies. Instead, plaintiffs' First Amended Consolidated Complaint included additional theories not previously alleged. Consequently, it is not accurate to imply that plaintiffs had filed multiple pleadings in an attempt to cure pre-existing deficiencies. In addition, nothing suggests that plaintiffs' proffer that additional evidence was forthcoming which would enable them to add necessary details to their complaint was false or made in bad faith or for an improper purpose. Indeed, the opposite seems to be the case.

Id. at 1052-1053.

The normal judicial response in this case, therefore, is to grant leave to amend and, further, to give Relator an opportunity to continue to flesh out the extensive evidence which clearly exists. Moreover, the length of time that the suit has been pending should have no bearing on the requested leave to amend. "The lengthy nature of litigation, without any other evidence of prejudice to the defendants or bad faith on the part of the plaintiffs, does not justify denying the plaintiffs the opportunity to amend their complaint." *Bryant v. Dupree*, 252 F.3d 1161, 1164 (11th Cir. 2001).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be vacated and the case remanded to the district court.

Respectfully submitted,

/s/ Mark A. Kleiman /s/_____
Mark A. Kleiman
Cleveland Lawrence III
Taxpayers Against Fraud Education Fund
1220 19th Street, N.W., Suite 501
Washington, D.C. 20036
(202) 296-4826
October 27, 2008

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1 for Case Nos. 08-16243 and 08-16305, the undersigned certifies that the attached brief complies with the type-volume limitation set forth in the Rule. Excluding the portions exempted by Rule 32(a)(7)(B)(iii), the brief contains 5,443 words as reported by the word count function of Microsoft Word. The brief was prepared in Microsoft Word in Times New Roman font, 14-point type for both text and footnotes.

/s/ Cleveland Lawrence III /s/
Cleveland Lawrence III
Taxpayers Against Fraud Education Fund
October 28, 2008

CERTIFICATE OF SERVICE

I, Cleveland Lawrence III, hereby certify that I caused a true and correct copy of the above Brief of Taxpayers Against Fraud Education Fund as *Amicus Curiae* in Support of Appellant Jerre Frazier and Seeking Reversal to be served on October 28, 2008 via first class U.S. Mail, upon the following:

Ashley Adams-Feldman
RYAN RAPP & UNDERWOOD, PLC
3101 N. Central Avenue
Phoenix, AZ 85012

Helen Perry Grimwood
THE GRIMWOOD LAW FIRM PLC
Suite A-205
301 E. Bethany Home
Phoenix, AZ 82012

Stuart M. Rennert
c/o PHILLIPS & COHEN LLP
2000 Massachusetts Avenue NW
Washington, DC 20036

Larry A. Hammond
Debra A. Hill
Mark I. Harrison
OSBORN MALEDON, P.A.
2929 N. Central Avenue, Suite 2100
Phoenix, AZ 85012-2793

Joan McPhee; Michael K. Fee; Michael G. McGovern
Kristen V. Mayer
ROPES & GRAY LLP
One International Place
Boston, MA 02110-7000

Michael L. Dagley
Matthew M. Curley
BASS, BERRY & SIMS PLC
315 Deadrick Street, Suite 2700
Nashville, TN 37238-3001

Andrew D. Skowronek,
U.S. Department of Justice
Commercial Litigation Frauds
PO Box 878
Ben Franklin Station
Washington, DC 20044

Lon. R. Leavitt, U.S. Attorney's Office
Two Renaissance Square, Suite 1200
40 N. Central Avenue

Phoenix, Arizona 85004

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 28, 2008, in Washington DC.

/s/ Cleveland Lawrence III
Cleveland Lawrence III