UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
Case No. 17-10137-AA

BENJAMIN VAN RAALTE, et al.,

Relators/Appellants,

v.

HEALOGICS, INC.,

Defendant/Appellee.

Appeal from the United States District Court
for the Middle District of Florida
Case No. 6:14-cv-283-Orl-31KRS

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

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Circuit Rules 26.1, 28-1(b), and 29-2, *Amicus Curiae* Taxpayers Against Fraud Education Fund through the undersigned counsel of record certifies that, in addition to the individuals and entities identified in the Appellant's opening brief, the following listed individuals and entities have an interest in the outcome of this case.

DeMar, Jacklyn (counsel for *Amicus Curiae*)

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Taxpayers Against Fraud Education Fund is a non-profit entity that does not have parent corporations. No publicly held corporation owns 10 percent or more of any stake or stock in *Amicus Curiae*.

/s/ Ryon M. McCabe
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Taxpayers Against Fraud Education Fund ("TAFEF") 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, 31 U.S.C. §§ 3729-3733 *et seq.* (the "FCA"). The organization has an interest in ensuring that the FCA is effectively utilized. The issues in this case involve the correct application of Federal Rule of Civil Procedure 9(b) to FCA *qui tam* suits. The decision below undermines the efficacy of the FCA in policing fraud on the federal Government, because the District Court's application of Rule 9(b) erroneously required the Relators to plead specific, representative samples of false claims submitted to the Government. This is contrary to Eleventh Circuit precedent, and such a rule would prevent sufficiently-pled, meritorious FCA *qui tam* suits from going forward.

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), TAFEF certifies that no party in this case authored this *Amicus Curiae* brief, in whole or in part; and no party, party's counsel or other person contributed money that was intended to fund preparing or submitting this brief. Additionally, pursuant to Federal Rule of Appellate Procedure 29(a)(2), all parties to this case have consented to the filing of this brief.

STATEMENT OF THE ISSUES

Whether the District Court erred in dismissing the Relators' Third Amended Complaint for failure to plead with particularity under Federal Rule of Civil Procedure 9(b) when it interpreted this Circuit's decision in *United States ex rel. Clausen v. Laboratory Corp. of America, Inc.*, 290 F.3d 1301, 1308 (11th Cir. 2002) to require the Relators to plead specific false claims, notwithstanding the complaint's substantial indicia of reliability that false claims were submitted.

SUMMARY OF THE ARGUMENT

TAFEF submits this *Amicus Curiae* brief to address two narrow, but significant, aspects of the District Court's opinion that have broader implications for enforcement of the FCA.

First, the District Court mistakenly read this Circuit's Rule 9(b) standard, as articulated in *United States ex rel. Clausen v. Laboratory Corp. of America, Inc.*, 290 F.3d 1301, 1308 (11th Cir. 2002), as though that standard required the Relators to plead specific, representative false claims submitted to the Government. But *Clausen* and its progeny make clear that the pleading of specific, representative false claims provides one way, but not the only way, to satisfy Rule 9(b). *Clausen* does not impose a *per se* rule that requires a relator to plead specific claims, but rather requires sufficient indicia of reliability that false claims were submitted. As this Circuit and the majority of other circuits have recognized, that test can be met without specific examples of false claims.

Second, the District Court erred by applying Rule 9(b) in an overly restrictive manner that crossed the line from "testing the pleading" to "testing the evidence." The type of Rule 9(b) analysis applied by the District Court in this case, if allowed to stand, would frustrate the purposes of the FCA and bar meritorious claims of fraud against Government programs and taxpayers.

ARGUMENT

I. The District Court Mistakenly Interpreted Rule 9(b) to Require Mandatory Pleading of Specific, Representative False Claims Submitted to the Government

The False Claims Act is an anti-fraud statute, subject to the pleading requirements of Federal Rule of Civil Procedure 9(b), which provides that "the circumstances constituting fraud . . . shall be stated with particularity." Fed. R. Civ. P. 9(b); *see United States ex rel. Clausen v. Laboratory Corp. of America, Inc.*, 290 F.3d 1301, 1308 (11th Cir. 2002). The purpose underlying Rule 9(b) is to "alert[ ] Defendants to the precise misconduct with which they are charged and protect[ ] Defendants against spurious charges." *United States ex rel. Matheny v. Medco Health Solutions, Inc.*, 671 F.3d 1217, 1222 (11th Cir. 2012). However, the "[t]he application of Rule 9(b) . . . must not abrogate the concept of notice pleading." *Tello v. Dean Witter Reynolds, Inc.*, 494 F.3d 956, 972 (11th Cir. 2007) (citation and quotation marks omitted).

A. Application of Rule 9(b) in the Eleventh Circuit

In applying Rule 9(b) to FCA cases, the Eleventh Circuit has never mandated that relators plead specific, representative false claims in order to satisfy the rule. To be sure, in this Court's 2002 decision in *Clausen*, the Court affirmed dismissal of an FCA complaint, holding that "some indicia of reliability must be given in the complaint to support the allegation of an *actual* false claim for

payment being made to the Government." 290 F.3d at 1311 (emphasis in original). In describing the deficiencies of the complaint in that case, the Court highlighted its failure to identify "actual dates," "policies about billing," "information about billing practices," or a "copy of a single bill." *Id.* at 1312.

Significantly, however, the *Clausen* Court recognized that these examples are not the *only* way to demonstrate sufficient "indicia of reliability" to satisfy the rule. Footnote 21 of the Court's opinion made the point:

> The dissent suggests we ask for all of this information, and thus "ask[ ] for the impossible." To the contrary, this discussion merely lists **some** of the types of information that might have helped Clausen state an essential element of his claim with particularity **but does not mandate all of this information for any of the alleged claims**. Although Clausen has provided none of these items of information here, some of this information for at least some of the claims must be pleaded in order to satisfy Rule 9(b).

Id. at 1312 n.21 (emphasis added). In short, *Clausen* never drew a "line in the sand" that mandated the one-and-only way to satisfy Rule 9(b) for FCA cases.

In later decisions, this Court reaffirmed that specific, representative samples provide one way, but not the only way, to satisfy Rule 9(b). In the absence of specific claims, a Relator may point to other facts showing "indicia of reliability" that false claims were actually submitted to the Government. Thus, in *United States ex rel. Walker v. R&F Properties of Lake County, Inc.*, 433 F.3d 1349 (11th Cir. 2005), this Court affirmed a district court's decision to deny dismissal of an FCA complaint that failed to allege specific, representative claims. In that case,

the relator worked as a nurse in a healthcare clinic that billed Medicare for services as though a physician had been present, when in fact no physician had been present. *Id.* at 1352–54.

Despite the absence of specific, representative false claims, this Court found that other facts alleged in the complaint showed sufficient "indicia of reliability" that false claims had actually been submitted. Among other facts, the relator alleged that she had personal knowledge of the unlawful billing, that her co-workers had discussed the unlawful practices with her, and that she had been instructed by co-workers to submit bills using another person's Medicare billing number. *Id.* at 1360. Under these circumstances, the Court found her allegations "sufficient to explain why [she] believed [the defendant] submitted false or fraudulent claims for services." *Id.*

This Court reached a similar conclusion in *Hill v. Morehouse Medical Associates, Inc.*, No. 02-14429, 2003 WL 22019936 (11th Cir. Aug. 15, 2003). In that unpublished case, the Court recognized that a relator who worked in the billing department of the defendant company could satisfy Rule 9(b) without alleging specific, representative false claims. *Id.* at *3. The Court noted that the relator worked in "the very department where the fraudulent billing scheme occurred," that she had "firsthand" information about the unlawful scheme, and that she named many of the employees and physicians who had committed the fraud. *Id.* at

*4. The Court also recognized that "Rule 9(b)'s heightened pleading standard may be applied less stringently . . . when specific 'factual information [about the fraud] is peculiarly within the defendant's knowledge or control.'" *Id.* at *3 (citation omitted).

Most recently, in 2014, this Court decided *United States ex rel. Mastej v. Health Management Associates*, 591 F. App'x 693, 704 (11th Cir. 2014), an unpublished opinion involving a relator who had served as Chief Executive Officer for one the companies participating in the fraud. This Court found the relator's complaint satisfied Rule 9(b) despite the absence of specific claims. This Court stated plainly:

> [T]here is no *per se* rule that an FCA complaint must provide exact billing data or attach a representative sample claim.
>
> . . . .
>
> Under this Court's nuanced, case-by-case approach, other means are available to present the required indicia of reliability that a false claim was actually submitted. Although there are no bright-line rules, our case law has indicated that a relator with direct, first-hand knowledge of the defendants' submission of false claims gained through her employment with the defendants may have a sufficient basis for asserting that the defendants actually submitted false claims.
>
> . . . .
>
> At minimum, a plaintiff-relator must explain the basis for her assertion that fraudulent claims were actually submitted.

Id. (citations omitted).

The Court also cited its previous holding in *Durham v. Business Management Associates*, 847 F.2d 1505, 1512 (11th Cir. 1998), a non-FCA case that recognized:

> Allegations of date, time or place to satisfy the Rule 9(b) requirement that the *circumstances* of the alleged fraud must be pleaded with particularity, but alternative means are also available to satisfy the rule.

Id. at 704 (emphasis in original). In *Mastej*, this Court found that the relator's complaint provided sufficient "indicia of reliability" based on, among other factors, the relator's personal knowledge of the company and its billing practices, his personal interactions with those who committed the fraud, and his presence at meetings where the fraud was discussed. 591 F. App'x at 707-09.

District courts within the Eleventh Circuit have likewise recognized that *Clausen* did not announce a strict, *per se* rule that requires the pleading of specific, representative false claims to satisfy Rule 9(b). *See, e.g. United States ex rel. Osheroff v. Tenet Healthcare Corp.*, No. 09-22253, 2012 WL 2871264, at *5 (S.D. Fla. July 12, 2012) ("As the Eleventh Circuit clarified in *Hill*, the identification of specific claims is not necessary where there is reliable indication that claims were actually submitted."); *United States ex rel. Napoli v. Premier Hospitalists PL*, No. 8:14-cv-2952-T-33TBM, 2017 WL 119773, at *6 (M.D. Fla. Jan 12, 2017) (analyzing the Eleventh Circuit's Rule 9(b) cases and concluding that "the Court does not find *Hill* and *Walker* inconsistent with *Clausen*"); *see also* C. Gaitlin

Giles, Note, *Neither Strict Nor Nuanced: The Balanced Standard for False Claims Act Pleading in the Eleventh Circuit*, 70 U. Miami L. Rev. 1212 (2016) (collecting cases and discussing application of Rule 9(b) to FCA cases in the Eleventh Circuit).

The Eleventh Circuit's view follows the majority of other circuits to consider this issue. The Fifth Circuit, for example, takes the view that FCA complaints satisfy Rule 9(b) so long as they allege "particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted." *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 190 (5th Cir. 2009); *see also United States ex rel. Heath v. AT&T, Inc.*, 791 F.3d 112, 126 (D.C. Cir. 2015) (same); *United States ex rel. Foglia v. Renal Ventures Mgmt., LLC*, 754 F.3d 153, 156-57 (3d Cir. 2014) (same) *United States ex rel. Ebeid v. Lungwitz*, 616 F.3d 993, 998-999 (9th Cir. 2010) (same); *United States ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849, 854 (7th Cir. 2009) (same); *United States ex rel. Duxbury v. Ortho Biotech Prods.*, L.P., 579 F.3d 13, 29 (1st Cir. 2009) (same).

This view likewise satisfies the plausibility standards announced in *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 555 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009). To meet this standard, a relator must plead allegations that are "enough to raise a right to relief above the speculative level" such that a

claim to relief "is plausible on its face." *Twombly*, 550 U.S. at 555, 570. "Plausible" means "plead[ing] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. While pleading specific, representative false claims can provide one way to support plausibility, it is not the *only* way.

A minority of circuits, on the other hand, still take the view that FCA complaints must allege specific, representative samples of false claims in order to satisfy Rule 9(b). *See, e.g. United States ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, 707 F.3d 451, 456-57 (4th Cir. 2013) (requiring a relator to plead specific examples of false claims); *United States ex rel. Sikkenga v. Regence BlueCross BlueShield*, 472 F.3d 702, 727-728 (10th Cir. 2006) (same). In the view of these courts, "when a defendant's actions . . . could have led, but *need not necessarily* have led, to the submission of false claims, a relator must allege with particularity that specific false claims actually were presented to the government for payment." *Takeda*, 707 F.3d at 457.

This view has receded in recent years. The Sixth Circuit, for example, once imposed a more rigid view, requiring that specific false claims must be pled unless a relator established that he could not "allege the specifics of actual false claims that in all likelihood exist," resulting from circumstances "not attributable to the conduct of the relator." *See, e.g., United States ex rel. Bledsoe v. Cmty. Health*

Sys., Inc., 501 F.3d 493, 504 n.12 (6th Cir. 2007). Although the Sixth Circuit had not "foreclose[d] the possibility" of this relaxed rule, *see id.*, the court never had occasion to apply it until last year. In *United States ex rel. Prather v. Brookdale Senior Living Communities, Inc.*, 838 F.3d 750, 769 (6th Cir. 2016), the Sixth Circuit acknowledged that it had previously only "hypothesized" that circumstances might exist where a relator could satisfy Rule 9(b) without pleading specific claims. In *Prather*, the court extended this hypothesis into reality and found that the complaint satisfied Rule 9(b), pointing to facts in the complaint that gave rise to a "strong" inference that false claims had been submitted. Those facts included the relator's detailed overview of the fraudulent scheme, specific dates of fraudulent medical care, and emails sent to the relator from co-workers which confirmed that Medicare claims had indeed been submitted. *Id.* at 769-70.

Likewise, the Eighth Circuit had previously taken a more rigid view in cases such as *United States ex rel. Joshi v. St. Luke's Hospital, Inc.*, 441 F.3d 552, 560 (8th Cir. 2006). More recently, the Eight Circuit has moved to a more nuanced approach, reasoning:

> Accordingly, we conclude that a relator can satisfy Rule 9(b) without pleading representative examples of false claims if the relator can otherwise plead the "particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted." To satisfy the "particular details" requirement of our holding, however, the relator must provide sufficient details "to enable the defendant to respond specifically and quickly to the potentially damaging allegations."

United States ex rel. Thayer v. Planned Parenthood of the Heartland, 765 F.3d 914, 918-19 (8th Cir. 2014)f (citations omitted).

The clear trend, in the Eleventh Circuit and elsewhere, has been to reject a *per se* rule in favor of a more nuanced approach.[1] Without question, this Court has affirmed many dismissals of FCA complaints on the grounds that those complaints failed to allege specific, representative false claims. *See, e.g. United States ex rel. Sanchez v. Lymphtax, Inc.*, 596 F.3d 1300, 1302, n.4 (11th Cir. 2010) (affirming dismissal where relator failed to identify specific claims); *Hopper v. Solvay Pharm., Inc.*, 588 F.3d 1318 (11th Cir. 2009) (affirming dismissal for failure to plead specific claims); *United States ex rel. Atkins v. McInteer*, 470 F.3d 1350 (11th Cir. 2006) (affirming dismissal where relator alleged only conclusory allegations that claims had been submitted).

However, these cases do not announce a *per se* rule in the Eleventh Circuit that FCA complaints must plead specific false claims in order to satisfy Rule 9(b). To the contrary, many of these cases acknowledge that alternative means exist to satisfy the rule – but simply find those means not to have been satisfied. In

[1] Some courts, in surveying this issue, have aligned the Eleventh Circuit with those courts that mandate the pleading of specific false claims. *See, e.g. Foglia v. Renal Ventures Mgmt.*, LLC 754 F.3d 153, 155 (3d Cir. 2014) (grouping the Eleventh Circuit with the minority view). A close reading of Eleventh Circuit cases shows that has never been the case; this Circuit has always followed a nuanced approach, beginning with footnote 21 of *Clausen*.

Hopper, 588 F.3d at 1318, for example, this Court acknowledged the relator's argument that he could satisfy Rule 9(b) with alternative means:

> This is not a case like *Walker* [], in which a relator alleged personal knowledge of the defendant's billing practices that gave rise to a well-founded belief that the defendant submitted actual false or fraudulent claims. The relator in *Walker* pled a claim with particularity because the complaint included allegations grounded in first-hand knowledge that explained why she believed a specific defendant submitted false or fraudulent claims to the government. Here, unlike in *Walker*, the relators do not allege personal knowledge of the billing practices of any person or entity. The complaint does little more than hazard a guess that unknown third-party submitted false claims for Medicare reimbursement.

588 F.3d at 1326 (citations omitted). The Court did not reject the relator's assertion that he could satisfy Rule 9(b) with alternative means; instead, the Court simply found that he had not done so. *See also Sanchez*, 596 F.3d at 1303 n.4 (acknowledging the holding in *Walker*, but finding the relator's allegations "vague" as compared to those in *Walker*).

Finally, the United States, which is the real party in interest in FCA cases, has consistently taken the position that Rule 9(b) does not require mandatory pleading of specific, representative false claims. In recent years, the United States has twice submitted *Amicus Curiae* briefs to the Supreme Court on petitions for writs of *certiorari* that have involved the question of Rule 9(b) as applied to the FCA. *See* Brief for the United States as Amicus Curiae, *Ortho Biotech Prods., L.P. v. United States ex rel. Duxbury*, No. 09–654 (May 19, 2010) [hereinafter,

"*Duxbury* Brief"][2]; Brief for the United States as Amicus Curiae, *United States ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, No. 12–1349 (Feb. 25, 2014) [hereinafter, "*Nathan* Brief"].[3] In both cases, the Solicitor General recommended against granting *certiorari* to the specific cases at hand, but nevertheless gave the Court its views on Rule 9(b).

In the *Duxbury* Brief, for example, the Solicitor General took the view that, "Rule 9(b) does not impose an absolute requirement that a relator identify a specific false claim submitted to the government in order to avoid dismissal of his complaint." *See Duxbury* Brief, at 15. In the *Nathan* Brief, the Solicitor General likewise took the view that a "per se rule [requiring the pleading of specific, false claims] is unsupported by Rule 9(b) and undermines the FCA's effectiveness as a tool to combat fraud against the United States." *See Nathan* Brief, at 10.

In sum, the Eleventh Circuit has never adopted or abided by a rigid, *per se* rule that requires the pleading of specific, representative false claims. Rather, from the time of this Court's decision in *Clausen* until today, the Eleventh Circuit has followed a nuanced, case-by-case approach that imposes no bright line test for

[2] Available at https://www.justice.gov/sites/default/files/osg/briefs/2009/01/01/2009-0654.pet.ami.inv.pdf.
[3] Available at https://www.justice.gov/sites/default/files/osg/briefs/2013/01/01/2012-1349.pet.ami.inv.pdf.

satisfying Rule 9(b) in FCA cases. Pleading specific false claims provides one way, but not the only way, to satisfy the rule. District Courts should not employ a rigid litmus test, scanning each complaint for the existence or non-existence of specific, representative false claims. Instead, District Courts should evaluate each complaint as a whole, on a case-by-case basis, to determine whether it provides reliable indicia that false claims were submitted to the Government.

B. The District Court's Application of Rule 9(b) in This Case

The District Court erred in applying a rigid view of Rule 9(b) to the Third Amended Complaint in this case. The Relators, who worked as insiders at wound care clinics owned by the Defendant, alleged a nationwide scheme to perform medically unnecessary procedures and to submit false claims for those procedures to state and federal healthcare programs. R78, ¶¶ 1-8. The Relators set forth extensive factual allegations, including the details of twelve specific, representative patients for whom false claims were submitted. R78, ¶¶ 262-303. Though not bound to do so, Relators even attached redacted Medicare billing records for one of these patients to the Third Amended Complaint, thereby showing that Defendant actually submitted false claims to the Government for at least one of these patients. R78, Exhibit 14.[4]

[4] The Government declined to intervene in Relators' case "at this time" after being denied a request to extend the seal period. The declination should not be viewed as

In conducting its Rule 9(b) analysis, the District Court focused primarily on whether Relators had alleged specific, representative false claims to the Government. The Order begins with an analysis of Relators' claims of medically unnecessary procedures for transcutaneous oxygen measurement or "TCOM"

> The relators have made no attempt to repair their defective allegations related to unnecessary TCOM testing. **Not one of their patient examples include an allegation that the government was fraudulently billed for TCOM testing.** Quite the opposite, the complaint shows the test was performed even when it was not reimbursable by Medicare. (Doc 78 ¶ 233). Thus, any FCA claim based on fraudulent billing for TCOM testing cannot survive Rule 9(b).

R112, at 7-8 (emphasis added).

The District Court erred by limiting its analysis solely to whether the TCOM claims could be supported by specific, representative samples. As set forth above, *Clausen* and its progeny do not allow the District Court to rely upon so narrow a focus. Specific samples provide one way, but not the only way, to satisfy Rule 9(b). The other way, as recognized in *Mastej*, *Walker* and other cases, is to allege

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a reflection on the merits of Relators' case, as the Government "may have a host of reasons for not pursuing a claim." *United States ex rel. Atkins v. McInteer,* 470 F.3d 1350, 1360 n. 17 (11th Cir.2006). Indeed, in 2015, qui tam relators recovered more than $1 billion for the Government in FCA cases that were declined. *See* DOJ Fraud Statistics Overview (Nov. 23, 2015), available at http://www.justice.gov/opa/file/796866/download.

other facts sufficient to show "indicia of reliability" that false claims were actually submitted to the Government.[5]

The District Court next analyzed, in turn, the twelve patient examples alleged in the Third Amended Complaint. These examples included specific, representative samples of medically unnecessary surgical debridements and hyperbaric oxygen therapy or "HBOT" treatments. R78, ¶¶ 262-303. The District Court addressed, one after another, Relator Cassio's "Patient Two," Relator Murtaugh's "Patients One, Eleven and Twelve," and Relator Van Raalte's "Patients Three through Ten." R112, at 8-12.

The District Court proceeded, in mechanical fashion, to find flaws with each example. Despite the specificity of these allegations and exhibits showing *actual* Medicare billing, the District Court nevertheless found problems or missing facts for each example. After successfully "knocking out" each of the twelve specific,

[5] In addition, the District Court appears to misread paragraph 233 of the Third Amended Complaint to the extent it believed that paragraph to be self-defeating. Paragraph 233 alleged that TCOM testing is not appropriate for every patient and therefore "not reimbursable nor medically necessary." R78, ¶ 233. This accords with federal law, which provides that Medicare payments cannot be made for services that "are not reasonable and necessary for the diagnosis or treatment of illness or injury." *See* 42 U.S.C. § 1395y(a)(1). Paragraph 233 goes on to allege that Defendants treated TCOM as a "required test" for *every* patient, thereby resulting in medically unnecessary, and hence fraudulent, tests for those patients for whom the test was not necessary. *See United States ex rel. Riley v. St. Luke's Episcopal Hosp.*, 355 F.3d 370, 376 (5th Cir. 2004) (noting that "claims for medically unnecessary treatment are actionable under the FCA").

representative samples, the District Court concluded that Relators had failed to satisfy Rule 9(b) and dismissed the complaint with prejudice.

The net effect of District Court's analysis was to impose a rigid, *per se* rule that mandated the pleading of specific claims. So long as no specific, representative claims survived the analysis, the District Court was satisfied the case should be dismissed. In reaching this conclusion, the District Court disregarded its obligation to view the Third Amended Complaint as a whole and to review other allegations showing "indicia of reliability" that false claims had actually been submitted to the Government.

In this regard, the District Court failed to credit, or even analyze, significant factual allegations that bear striking similarity to factors previously relied upon by this Court in Rule 9(b) opinions to support the indicia of reliability that false claims were actually submitted to the Government, including the following:

- The Relators were company insiders, not outsiders. *See, e.g.*, R78, ¶¶ 11-18; *see also Walker*, 433 F.3d at 1349 (contrasting *Clausen* because the *Clausen* involved a relator not employed by the defendant company).
- Relator Murtaugh worked as a "Program Director" for the Defendant, and his duties involved oversight of "day-to-day program operations," including "billing." *See, e.g.*, R78 ¶¶ 18, 88-89; *see also Mastej*, 591

F. App'x at 707 (noting relator's personal knowledge of billing operations); *Hill*, 2003 WL 22019936, at *3 (noting that relator worked in the billing department).

- Likewise, Relator Cascio, a physician, worked as a Medical Director for one of Defendant's facilities in Florida, and Relator Van Raalte, also a physician, worked in Defendant's facilities in Iowa and Illinois. *See, e.g.*, R78, ¶¶ 11-12, 14-15. These positions gave the Relator's the opportunity to witness the frauds first-hand. *See Hill*, 2003 WL 22019936, at *3 (noting that relator had first-hand knowledge of the fraud).
- The Relators had personal interactions with other co-workers concerning the fraudulent activity. *See, e.g.*, R78 ¶¶ 110, 121, 123-31, 173, 178-84; *see Mastej*, 591 F.App'x at 705 (noting that relator had described personal interactions with co-workers concerning the fraud).
- The Relators attended meetings where employees of the Defendant imposed quotas for certain medical procedures, reviewed revenue targets and discussed the financial incentives for the fraudulent activity. *See, e.g.*, R78, ¶¶ 106-08, 124-58. Relators even attached Power Point presentations from these meetings to the Third Amended Complaint. R78, Exhibits 5, 8; *see Mastej*, 591 F. App'x at 705

(noting that relator had described the defendants' financial incentives for the fraud).

- Relators described very specific instructions given to them by superiors as to when and how to commit the fraud. One of the Power Point presentations even instructed physicians to increase the number of surgical debridements, stating "Debridement does not seem as aggressive as should be." R78, Exhibit 8, at 9; *Walker*, 433 F.3d at 1349 (noting that relator had described the instructions given to her by superiors as to how to commit the fraud).
- Although the District Court faulted Relators for not providing enough names in the Third Amended Complaint, the Relators nevertheless identified the names as many as ten (10) company employees involved in the fraud, along with their roles and activities. *See*, *e.g.*, R78, ¶¶ 99, 106-08, 110, 124-25, 131, 134-35, 146, 173, 177-81 & Exhibits 5, 8; *see Mastej*, 591 F. App'x at 707 (noting that relator had provided names of persons involved in the fraud).
- The Relators had personally observed and sometimes participated in the conduct alleged to be fraudulent. R78, ¶¶ 270-78; *see Walker*, 433 F.3d at 1349 (noting the relator's personal involvement in the unlawful conduct).

- Relators alleged a nationwide scheme, with specific allegations covering four states – Florida, Iowa, Illinois and South Carolina. R78 ¶¶ 262-303; s*ee Hill*, 2003 WL 22019936, at *3 n.6 (noting that Rule 9(b) standard may be relaxed in certain circumstances).

The District Court committed error by focusing solely on the existence of specific, representative false claims and failing to consider these and other facts showing "indicia of reliability." Moreover, it cannot be overlooked that Relators attached to their Third Amended Complaint *actual* Medicare billing statements for one of the patients at issue, with several hundred pages of claims. R78, Ex. 14. This was not a case, like *Clausen*, where the court was "left wondering" whether claims had actually been submitted to the Government. 290 F.3d at 1313. The Defendant unquestionably submitted claims to the Government. The existence of these Medicare billing records, especially when taken in context with the other facts alleged in the Third Amended Complaint, provided reliable indicia that that Defendants submitted other Medicare bills as well.

Finally, the District Court erred by making the following alternative finding:

> Even if Dr. Van Raalte's allegations were credited with sufficient precision to satisfy Rule 9(b), the provision of unnecessary HBOT to eight patients in a single wound care center in Bettendorf, Iowa over a one-year period does not adequately support the claim alleged by the Relators – a widespread, complex national scheme to defraud the government using various procedures over a ten-year period. Therefore, Counts I –III will be dismissed.

R112, at 12.

Contrary to the District Court's conclusions, allegations of specific claims in one state or region can be used to satisfy Rule 9(b)'s requirements for a nationwide inference of fraud. As recognized by the Sixth Circuit, "[w]here the allegations in a relator's complaint are 'complex and far-reaching, pleading every instance of fraud would be extremely ungainly, if not impossible.'" *United States. ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 501 F.3d 493, 509 (6th Cir 2007) (citation omitted). "For this reason, we hold that where a relator pleads a complex and far-reaching fraudulent scheme with particularity, and provides examples of specific false claims submitted to the government pursuant to that scheme, a relator may proceed to discovery on the entire fraudulent scheme." *Id.* at 510; *see also United States ex rel. Duxbury v. Ortho Biotech Prods., L.P.*, 579 F.3d 13, 31 (1st Cir. 2009) ("Duxbury has alleged facts that false claims were in fact filed by the medical providers he identified, which further supports a strong inference that such claims were also filed nationwide.").

Many district courts, including some in this circuit, have followed the same rule. *See United States ex rel. Bibby v. Wells Fargo Bank, N.A.*, 165 F. Supp. 3d 1340, 1347 (N.D. Ga. 2015) ("[C]ourts have found that allegations of specific claims in one state or region satisfy 9(b) requirements by establishing a nationwide inference of fraud.") (citation omitted); *United States ex rel. Carpenter v. Abbott*

Labs., Inc., 723 F. Supp. 2d 395, 409–410 (D. Mass. 2010) (concluding that allegation that false claims were submitted in one state sufficient to support claims in twelve other states); *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc.*, 238 F. Supp. 2d 258, 268 (D.D.C. 2002) (finding that allegations that a fraudulent scheme was nationwide and occurred over twelve years were sufficient, despite the fact that "the only specific place mentioned is [a single hospital]").

The rule applied here because Relators alleged wrongdoing in multiple locations across the country including Florida, South Carolina, Iowa, and Illinois. R78, ¶¶ 262-303. For this reason as well, the District Court decision should be reversed.

II. The Pleading Standard the District Court Imposed Will Frustrate the Purposes of the FCA

As this Court has recognized, Rule 9(b) "must not abrogate the concept of notice pleading." *Tello v. Dean Witter Reynolds, Inc.*, 494 F.3d 956, 972 (11th Cir. 2007) (citation omitted). Instead, a District Court must harmonize Rules 8(a) and 9(b), ultimately ensuring that the complaint provides the defendant with "enough information to formulate a defense to the charges." *Clausen,* 290 F.3d at 1313 n.24.

In this case, the District Court crossed the line from "testing the pleading" to "testing the evidence." A court cannot demand more at the pleading stage than it demands at trial. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308,

328 (2007) (noting that "a plaintiff is not forced to plead more than she would be required to prove at trial"). As the D.C. Circuit explained:

> Moreover, to require relators to plead representative samples of claims actually submitted to the government would require relators, before discovery, to prove more than the law requires to be established at trial. To win his case, a relator does not need to identify "exact dollar amounts, billing numbers, or dates to prove to a preponderance that fraudulent bills were actually submitted." We decline to read Rule 9(b) as requiring more factual proof at the pleading stage than is required to win on the merits.

United States ex rel. Heath v. AT&T, Inc., 791 F.3d 112, 126-27 (D.C. Cir. 2015) (citations and footnote omitted); *see also United States ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849, 854 (7th Cir. 2009) ("To say that fraud has been *pleaded* with particularity is not to say that it has been *proved* (nor is proof part of the pleading requirement)."); *United States ex rel. Kunz v. Halifax Hosp. Med. Ctr.*, No. 6:09-cv-1002-Orl-31DAB, 2011 WL 2269968, at *8 (M.D. Fla. June 6, 2011) ("Rule 9(b) exists to prevent spurious charges and provide notice to the defendants of their alleged misconduct, not to require plaintiffs to meet a summary judgment standard before proceeding to discovery.").

In the instant case, the Third Amended Complaint lodged 170 pages of allegations, made by "insider" Relators, one of whom held a management position and two of whom were physicians who personally observed the frauds. The Relators provided the names of numerous employees involved in the fraud, as well as dates of meetings where the fraud was discussed, along with PowerPoint

presentations from those meetings. Though not bound to do so, Relators alleged twelve specific, representative samples of patients for whom false claims were submitted and submitted several hundred pages of actual Medicare billing records for one of those patients. If the Relators in this case were to introduce all of the evidence alleged in their Third Amended Complaint at trial, their claims would easily survive a motion for directed verdict and go to the jury.

The United States has warned of the adverse effects of over-stretching the bounds of Rule 9(b) in FCA cases:

> That uncertainty [in application of Rule 9(b)] hinders the ability of *qui tam* relators to perform the role that Congress intended them to play in the detection and remediation of fraud against the United States. *Qui tam* complaints under the FCA are often filed by the defendants' employees and former employees. Such relators may know that their employers are receiving funds from the United States, and they may be privy to detailed information indicating that the employers' actual practices differ markedly from their representations to the federal government. Under the reading of Rule 9(b) that petitioner advocates, however, those relators would be disabled from filing suit under the FCA unless they were also familiar with the minutiae of their employers' billing practices.
>
> . . . .
>
> Requiring *qui tam* complaints to identify specific false claims would not meaningfully assist the government's enforcement efforts. To the contrary, the likely effect of such a requirement would be to discourage the filing of *qui tam* suits by relators who would otherwise have both the means and the incentive to expose acts of fraud against the United States.

Duxbury Brief, at 16-17.

This concern applies with even more force to this case, where the Relators alleged specific, representative false claims but still found themselves barred by Rule 9(b). The level of scrutiny employed by the District Court, if allowed to stand, would frustrate the FCA without upholding any legitimate purposes of Rule 9(b), the goal of which is to provide "enough information to formulate a defense to the charges." *Clausen*, 290 F.3d at 1313 n.24.

CONCLUSION

For all the foregoing reasons, the final judgment of the District Court dismissing Relators' Third Amended Complaint should be reversed.

Dated: May 1, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitations of Rule 29(a)(5) and 32(a)(7)(B) of the Federal Rules of Appellate Procedure. According to the word-processing system used to prepare the brief, excluding sections exempted by Fed. R. App. P. 32(f) and 11th Cir. R. 32-4, the brief contains a total of 6,028 words.

This brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and 32(a)(6) because it has been prepared using a proportionally-spaced typeface in 14-point font.

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