UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

United States, *ex rel.* Marc Osheroff, et al. Case No. **09-22253-HUCK**

Plaintiff-Relator,

v.

Tenet Healthcare Corporation, *et al*.

Defendants.

PLAINTIFF/RELATOR MARC OSHEROFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT

Plaintiff-Relator Marc Osheroff ("Relator") files this response in opposition to Defendants' Motion to Dismiss Second Amended Complaint (hereinafter "MTD").

Relator's Second Amended Complaint ("SAC") alleges that Tenet and its subsidiaries provided remuneration and covert kickbacks to physician-tenants who lease space in their medical office buildings with the intent to induce patient referrals. This scheme is consistent with a pattern of fraudulent behavior now into its second decade.

The SAC particularizes remuneration in the form of many and varied benefits given to physicians with office space in Tenet's buildings. It includes factual support for allegations that patients were referred to Tenet's hospitals by those same tenants; that claims were submitted to the U.S. government based on these referrals; and that Tenet certified compliance with all applicable laws when it submitted these claims for reimbursement. As discussed below, these allegations are not simply conclusions but are based on reliable fact and plausibly support Relator's claims for relief.

Tenet's arguments have no merit and this Court should deny Tenet's Motion.

UNITED STATES' STATEMENT

At the August 2, 2012 hearing, the Court requested that Relator and the United States confer and submit only one filing with the Court. See August 2, 1012 Hearing Transcript at 19-20. In accordance with the Court's order, the United States requested that Relator include the following statements in his response to Defendant's Motion to Dismiss Second Amended Complaint (Docket No. 124).

The United States believes that its prior Statement of Interests filed on June 22, 2012 (Docket No. 83), July 7, 2012 (Docket No. 94), and August 1, 2012 (Docket No. 115), sufficiently set forth its position regarding certain issues in Defendant's recent motion to dismiss. In particular, the United States refers the Court to its June 22, 2012 and July 10, 2012 Statement of Interests for the proposition that no certification of compliance with the Anti-kickback Statute (AKS) or the Stark Law is required for asserting a False Claims Act violation. *See* Docket Nos. 83, at 4-7, 94, at 2-4 *See* also July 12, 2012 Order, n. 10 (Docket No. 111) (noting holding in *United States ex rel. McNutt v. Haleyville Med. Supplies*, 423 F.3d 1256, 1259 (11th Cir. 2005)). And, even if such certification was required, it has clearly been met here in light of Defendants' provider agreements, cost reports, and Corporate Integrity Agreement, s*ee* Docket Nos. 83 at 2-3, 94 at 5-8, as set forth in Relator's Second Amended Complaint. Moreover, as the United States previously submitted, the First Amended Complaint adequately pled a Stark Law and an AKS violation, *see* Docket No. 115 at 2-5, and the United States agrees that the Second Amended Complaint also survives the Rule 9(b) hurdle with respect to Relator's amended claims based on the Stark Law and AKS (again the United States expresses no view as to whether Relator can ultimately prove these allegations).

Finally, the United States notes that Defendants have requested dismissal of the entire complaint with prejudice. *See* Docket No. 124, at 18. Should this Court grant defendants' motion to dismiss, there should be no dismissal with prejudice to the United States. Although the United States remains the real party in interest after it has declined to intervene, it is a non-litigant in the matter. *See United States ex rel. Eisenstein v. City of New York, New York*, 129 S. Ct. 2230, 2231 (2009) ("The United States . . . is a 'party' to a privately filed FCA action only if it intervenes . . . ."). The United States did not prepare Relator's complaints and should not be prejudiced if Relator has failed to meet the requirements of Rule 9(b). The United States should not be precluded from bringing a future civil action based on new or different evidence.

CONTENTS

I. INTRODUCTION

The Second Amended Complaint (SAC) alleges with plausibility and specificity that:

- There is a prohibited financial relationship between Tenet and its physician-tenants (necessary for a Stark violation);
- A reasonable inference can be made that Tenet paid remuneration to physician-tenants with the intent to induce or reward referrals (necessary for an AKS violation);
- Tainted claims were made to the United States arising out of this prohibited financial relationship (a violation under Stark) and arising out of payment of remuneration made with the intent to induce referrals (a violation of the AKS);
- AKS and Stark compliance are conditions of payment, violation of which are the basis for a claim under the False Claims Act, and that Tenet made false certifications of compliance to the U.S. government.

These alleged facts plausibly support Relator's legal conclusions that Tenet violated Stark, the AKS, and the FCA.

II. The SAC States a Plausible Claim

Tenet contends "[i]t is inconceivable that Tenet would engage in such a massive scheme – while being heavily regulated and supervised by the government…" MTD, p.16. [1] But the facts belie this protestation: government supervision and scrutiny have never prevented Tenet from malfeasance. A portion of the 2006 agreement (DE-124-1) that Tenet chose to redact from the version filed for this Court states: "Between January 1, 1992 and December 31, 1998 Tenet annually certified compliance with its obligations under its corporate integrity agreement notwithstanding its alleged knowledge of claims of the type described above." Relator's Exhibit B, p. 3, attached hereto. Or to put it another way, Tenet engaged in a massive scheme (involving over $900 million) while being heavily regulated and supervised by the government. SAC at ¶ 27.

With respect to a complaint's "plausibility", the Eleventh Circuit has stated:

[1] With respect to "massive," Defendants acknowledge at p. 1 that their scheme potentially involves "millions of false claims" although the quantity is not alleged in the SAC.

> The Supreme Court's most recent formulation of the pleading specificity standard is that "stating such a claim requires a complaint with enough factual matter (taken as true) to suggest" the required element. [*Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1965, 167 L. Ed. 2d 929 (2007)]. The standard is one of "plausible grounds to infer." *Id*. The Court has instructed us that the rule "does not impose a probability requirement at the pleading stage," but instead "simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of" the necessary element. *Id*. It is sufficient if the complaint succeeds in "identifying facts that are suggestive enough to render [the element] plausible." *Id*.

Watts v. Fla. Int'l Univ., 495 F.3d 1289, 1295-96 (11th Cir. 2007).

Here, Relator contends that the SAC not only gives the Court reasonable grounds to infer that Tenet violated both Stark and AKS by providing benefits to physician-tenants, but supplies sufficient facts to raise an expectation that discovery will reveal more evidence of these violations. The SAC's allegations identify facts to suggest remuneration was given to tenants and, arguably, far exceed the minimum pleading requirements required by the Supreme Court. If, as the Supreme Court has stated, a well-pleaded complaint may be allowed to proceed even where recovery is "remote" and "unlikely," this Court should find that Relator has more than adequately alleged the possibility of recovery and allow him to proceed to discovery. *Twombly*, 550 U.S. at 555-556.

It should be underscored that the Court is not dealing with a motion for summary judgment, where it must consider evidence. Indeed, a plaintiff is not required to present evidence in his complaint, but must simply state a plausible claim for relief. *See Twombly*, 550 U.S. at 555 (complaint "does not need detailed factual allegations*"); United States ex rel. Clausen v. Lab. Corp. of Am.*, 290 F.3d 1301, 1313 (11th Cir. 2002) ("a plaintiff is not expected to actually prove his allegations").

Here, the SAC has clearly identified remuneration offered and paid to referring physician tenants. This remuneration is not nominal, but substantial, amounting to millions of dollars. For the AKS allegations, the only question is the intent behind such remuneration – was it intended, at least in part, to induce or reward referrals?

For purposes of a motion to dismiss, therefore, where all reasonable inferences are to be drawn in the plaintiff's favor, it is simply impossible to say that the allegations exclude as a

plausible conclusion that Tenet paid "remuneration" (all that is necessary for Stark) and that it acted with the requisite intent to induce or reward referrals.

A. The SAC Plausibly Alleges Remuneration

As discussed above, the judicial threshold for "plausibility" in a motion to dismiss is a bar set quite low. A plaintiff merely needs to provide "enough factual matter (taken as true) to suggest the required element." *Watts*, 495 F.3d at 1295, *quoting Twombly*, 550 U.S. at 556.

Relator has alleged that Tenet violated the Stark Law and AKS by providing benefits to physician-tenants with the intent to induce patient referrals. Relator provided detailed facts to show that hundreds of Tenet's physician-tenants leased office space on a square foot basis but were charged for less space than was actually provided. This occurred at office buildings all over the country and over many years. SAC ¶ 150, exh. B2. While mismeasurement can occasionally occur in leases and usually benefits the landlord, commonsense (and Relator's expert) suggests a landlord, who consistently and habitually under-measures its own leaseholds, over many years, in over 30 buildings located in five states has some purpose in mind other than maximizing lease profits.

Relator's expert concluded a plausible explanation for the consistent mismeasurement of Tenet's office leases was to provide a benefit to physician-tenants so as to induce referrals:

> 151. Stephen Page, an expert in BOMA . . . states in his affidavit:
>
> 11. ... **There is no good faith reason to account for consistent RSF understatement in a portfolio of buildings**.
>
> 12. This is especially true given the geographic dispersion of these buildings and the many years over which the leases were entered into. Mistakes in measurement in one building complex in one rental period may happen but given the industry-wide use of a consistent BOMA standard**, the likelihood of mistakes of measurement in many buildings in several states over the course of many leasing periods is so unusual as to suggest a conscious decision by Tenet to understate RSF. The understatement cannot have been accidental.** The only possible explanation for an across-the-board understatement of office space in as many buildings as shown in the Tenet portfolio is an intentional RSF reduction in order to reduce rent while maintaining the appearance of market value rates per RSF.

SAC ¶ 151 [emphasis supplied.], excerpt from Exhibit T, D.E. 122-27.

Consequently, Relator contends that Tenet's under-measurement was done to provide free space to its physician-tenants, which it intended as remuneration to induce (or reward) those tenants to refer patients to its hospitals. SAC ¶ 84, citing Exh B1-B5, Exh. 2. This is a plausible explanation.

Relator has alleged that Tenet required potential purchasers of all of its buildings not to raise physician-tenants' submarket rents to market rate for two years following the purchase of its buildings. SAC ¶169[2] (limiting to a maximum of 3% rental increase for below-market renewals. *Id.*). It is plausible that a seller who safeguards favorable below-market leases of its *former* referring physician tenants has some purpose in doing so. In this case, Relator contends that Tenet sought to preserve its former tenants' below-market leases in all of Tenet's office buildings so as to continue inducing or rewarding referrals by these physician-tenants for as long as possible after the sale of the buildings. SAC ¶¶169-172. This adds greater plausibility to the allegations that Tenet provided benefits and remuneration to these physician tenants before the anticipated sale.

Relator has alleged facts to show that Tenet was operating its office buildings at a loss while providing costly benefits to its physician-tenants. SAC ¶¶304-310. It is plausible that a commercial landlord who offers costly, not customary, perks to its tenants, while operating its real estate business at a loss, has reasons to do so other than maximizing profits on its real estate. In this case, Relator alleged that Tenet focused on referrals rather than rental revenue because patient admission generated over $11,000 per patient. SAC ¶311. This is a plausible explanation.

Relator has alleged that Tenet explicitly acknowledged the existence of other motivations aside from making a profit from its medical office buildings. SAC ¶312. Mr. Bonrepos, Tenet's Vice President of Real Estate, stated that "getting the highest price for the property is not the main priority." *Id.* As Mr. Bonrepos explained, "We want what happens because of the real estate." *Id.* In the context of hospitals' on-campus medical-office real estate, this remark is understood to mean referrals provided as a consequence of physicians leasing office space on

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[2] Even after a sale Tenet controls rents charged by on-campus medical office buildings. SAC, p.2 ("We're going to have to control with a ground lease or deed restrictions." Although Relator owns a building on Tenet's Palmetto hospital campus, Tenet's ground lease requires that it approve all of his tenants, and further requires that they not compete (take away referrals).

Tenet's hospitals' campuses. Mr. Bonrepos acknowledged the Stark risk for Tenet that could result from this business model: "Everybody talks about the Stark Laws, and by being in the real estate landlord business, there are pitfalls in which **Stark will come back to bite you"** *Id.* (emphasis supplied).

Relator has alleged facts to show that the few non-referring tenants in Tenet's buildings were overcharged in their leases based on an overstatement of square footage and compares this to leases given to referring tenants, who were provided free space (intentional understatement of floor space). SAC ¶¶ 238-246. Elsewhere, Relator has alleged facts to show that Tenet charged non-referring tenants higher rates at their office buildings than referring tenants. SAC ¶¶ 231-237. The Court may plausibly infer that physician-tenants in Tenet's buildings were given benefits not available to non-referring tenants with the intent to induce or reward referrals.

Relator has alleged that Tenet has been sanctioned by the United States for repeated violations of both Stark and the AKS. SAC ¶¶ 22-27. Within this context, it is certainly "plausible" that Tenet, would have the audacity to engage in "such a massive scheme while being heavily regulated and supervised by the government." MTD, p. 11. In fact, Tenet's in-house counsel was sued for falsely certifying Stark law compliance. SAC ¶ 27, *U.S. v. Sulzbach*, 07-cv-61329-KAM, DE-91-1 (2007).

In short, Relator has alleged sufficient facts to allow the Court to reasonably infer that Tenet conducted a covert scheme to provide remuneration and inducements to physician-tenants. Tainted claims were submitted to the United States government as a result of this scheme and, as such, payments received by Tenet by virtue of these tainted claims should be recovered under the FCA.

B. Specific Allegations Support Plausible Causes of Action

The SAC alleges, in part, that Tenet provides benefits and therefore "remuneration" to its physician-tenants by providing office space at no charge *from the inception of the lease* and that this is a benefit to all physicians who receive free office space. SAC ¶¶ 142 - 151, 183 - 185.

Tenet did not contest the provision of free space and did not contest that Tenet provides this valuable benefit to its physician-tenants. Relator alleged that this benefit, and several others, form the basis of an illegal "financial relationship" between Tenet and its physicians. SAC ¶¶46,

47, 76 (among others). Thus, Relator has adequately alleged the existence of an illegal "financial relationship"—for purposes of the Stark claim.

The SAC also alleges that Tenet offered remuneration to physician-tenants through provision of below-market leases:

- From the lease inception, SAC ¶¶ 152 - 156 (uncontested in Tenet's Motion), and
- At the date when Tenet placed its properties up for sale, SAC ¶¶ 157 – 167.

Relator has alleged facts to show that Tenet intended to provide additional benefits even after the anticipated sale of its buildings, thereby tainting future referrals. [3] Tenet told prospective purchasers it would contractually require that physicians' leases remain below market for two years after sale. SAC ¶¶ 168 – 172.

Specific allegations show that physician-tenants received valuable remuneration. These factual allegations are based on documents such as:

- Tenet's own explicit benchmark values in the "comparable FMV" attachment to its leases that showed lease rentals below fair market value. Exhibit V, D.E. 122-29 discussed at SAC ¶¶ 174 - 186 (uncontested in MTD).
- Leases containing Tenet's market rate per RSF exceeding the rate per RSF actually charged. D.E. 122- SAC ¶¶ 187- 199 discussing Exhibits Q, U, and X, D.E. 122-23, -30, and -32 (uncontested in MTD).
- Tenet's and Relator's joint fair market value analysis. SAC ¶¶ 200 – 212 discussing Exhibit K, D.E. 122-14 (uncontested in MTD).
- Relator's benchmark fair market value analysis. SAC ¶¶ 213 – 229 discussing Exhibits B1, B3, B4, and B5, D.E. 122-2, -4, -5 ,and -6 (*partially* contested in MTD*, see discussion below*).
- Comparison of rates showing Tenet's buildings with lower rates than Relator charged in his comparable building. SAC ¶¶ 135 - 140, Exhibit K (uncontested in MTD).

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[3] The Complaint does not allege violations as results of the anticipated benefits provided to referring physicians through unrelated third-party purchasers of the office buildings. However, even after the sale Tenet might enhance these benefits by amending the terms of the ground leases to extend the three-year 3% cost-of-living cap, or even prohibit any cost-of-living increases.

The SAC further alleges specific facts to show valuable remuneration given by Tenet to its physician-tenants through a comparison of rental rates charged to referring- and non-referring tenants. The comparison showed:

- Higher rates charged to non-referring tenants. SAC ¶¶ 230 – 242 (uncontested in MTD), and
- Less under-measurement for non-referring tenants (they receive less free space and in some cases paid for space they did not receive). SAC ¶¶ 243 – 246 (uncontested in MTD).

The SAC specifically alleges additional remuneration provided by Tenet to its physician-tenants in the form of:

- Benefits characterized as "improvement allowances" and that these lucrative allowances exceeded Tenet's benchmark. SAC ¶¶ 247 – 272.
- Benefits by failure to enforce nonstandard lease terms. SAC ¶¶ 274 – 285.
- Off-lease benefits and bartered rent for physicians' services. SAC ¶¶ 286 – 293.

Finally, the SAC specifically alleges this scheme to provide remuneration to referring physicians is plausible given the corporate lack of concern for its real estate profitability. SAC ¶¶ 294 – 311. The SAC details support for the explanation given by Tenet's VP that Tenet didn't own its office buildings to make money but because of "what happens because of the real estate" (*i.e.* referrals), SAC ¶ 312 and p. 2, and that Tenet was well aware of the risks of this scheme: "**Everybody** talks about the Stark Laws, and by being in the real estate landlord business, there are pitfalls in which **Stark will come back to bite you.**" *Id.* [Emphasis supplied.]

C. Relator's Benchmarks are Plausible

Tenet argues that Relator's benchmark exhibits cannot be used to support his allegation of remuneration because the buildings are not from the same zip codes. MTD, p. 14. However, this argument is undermined by the fact that Tenet and Relator jointly hired an appraiser, and the appraiser determined a joint fair market value for an office in Relator's building on Tenet's Palmetto Hospital Campus based upon comparable buildings from multiple zip codes. D.E. 122-14, SAC Exhibit K discussed at SAC ¶¶ 200 – 212. Three of the four buildings used in the

appraiser's analysis are in different zip codes.[4] Tenet's MTD did not address their joint appraiser's use of comparables from multiple zip codes.[5]

Tenet also asks the Court to ignore Relator's data for buildings further than 10 miles from Tenet's buildings. MTD, p. 14. Tenet does not explain the significance of its 10-mile rule; this seems to be an arbitrary number that has no basis in law or fact. Indeed, a review of the buildings used in this analysis by Tenet's and Relator's joint appraiser shows that three of the four buildings were located 11, 14.2 and 15.2 miles from the target property, respectively. *See* note 4.

Relator agrees with Tenet's contention that mean and median rental rates are not necessarily fair market values. But it's not necessary to allege fair market values—only that a benefit was conferred on the referring tenants. *See* Remuneration at p. 11 below, and D.E. 111, Order at p. 13. The discrepancy in rates "raise[s] a reasonable expectation that discovery will reveal evidence" that Tenet provides a valuable benefit to its tenants. *Watts v. Fla. Int'l Univ.*, 495 F.3d 1289, 1295-96 (11th Cir. 2007) citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1965, 167 L. Ed. 2d 929 (2007). In fact, a detailed analysis of that data shows that Tenet's leases are mostly two standard deviations below these benchmark mean and medians – signifying that Tenet's leases tend to have lower rates than about 95% of the benchmarks. These allegations raise a reasonable expectation that discovery may reveal that a savvy corporate landlord, like Tenet, who charges less than 95% of the medical office buildings in the area, has other motives besides lease profits for renting office space it its buildings. Relator contends that this was done to gain referrals from its physician-tenants. Inducing referrals through these financial incentives violates the Stark and the Anti-Kickback Statues. The SAC's benchmark and other exhibits support a finding by this Court that Relator's allegations of illegal remuneration are plausible.

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[4] The addresses are in Exhibit K, D.E. 122-14, pp. 6 - 8, Relator found the zip codes at tools.usps.com and determined distance at maps.google.com.

Rental 3: 100 N.W. 170 Street, North Miami Beach 33169 (11 miles),
Rental 4: 8940 N. Kendall Dr., 33176 (15.2 miles), and
Rental 5: 6200 Sunset Dr., South Miami, 33143 (14.2 miles).

[5] Significantly, the same zip code building (adjoining ground-floor leases) charges about double the rate Tenet charges its ground-floor leases just down the hall from the office appraised in SAC exhibit K.

Tenet also seeks to require that the SAC prove Relator's case rather than simply state a claim that is plausible on its face.[6] But Relator is not required to actually prove his allegations to withstand a motion to dismiss. *Clausen v. Lab. Corp*., 290 F.3d 1301, 1313 (11th Cir. 2002).

Tenet bases much of its argument on evidentiary standards. MTD at 15 – 17. Nonetheless, these cases all support Relator since the pleadings were allowed to stand.[7] The 29-page complaint in *Goodstein* for example is far less detailed that in the instant case, and nonetheless, that case went to trial. *See* Exhibit C hereto.

All of these cases cited by Tenet show that its Motion should be denied since in all of these cases the pleadings were allowed to stand. The cases were resolved on summary judgment or at trial. *Id.*

III. RELATOR SUFFICIENTLY ALLEGED STARK AND AKS CERTIFICATION

A. Tenet's Certifications Are Sufficient to Support Relator's FCA Case

Tenet attempts to persuade the Court that certificates of compliance submitted to the U.S. government have no legal significance despite the fact that they form the basis for participating in the Medicare program (Provider Applications), are a condition to continuing in the Medicare program after corporate misconduct (Corporate Integrity Agreements), and allow the government to discern whether the amounts paid out to providers were correct (Cost Reports). MTD pp. 8 – 13. From both a legal and policy perspective, Tenet's arguments are without merit.

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[6] The Court earlier noted Tenet's obfuscation between that which is necessary to prove at trial and that which is necessary at the pleading stage. Hearing transcript, Exhibit A hereto, page 8 lines 14 – 17, page 9 lines 12 – 16.

[7] *See, e.g. United States ex el. Goodstein v. McLaren Reg'l Med. Ct.,* 202 F. Supp. 2d 671, 674 (E.D. Mich. 2002) (involving issues of proof during a six-day bench trial); *Klaczak ex rel. United States v. Consol. Med. Transp*., 458 F. Supp. 2d 622, 626 (N.D. Ill. 2006) (pleadings allowed to stand and later resolved on summary judgment); *United States ex rel. Perales v. St. Magaret's Hosp.*, 243 F. Supp. 2d 843 (C.D. Ill. 2003) (pleadings allowed to stand, and resolved on summary judgment).

Klaczak is further distinguished since that court imposed a heightened circumstantial evidentiary threshold because the relator had produced no evidence showing that the defendant was familiar with the AKS and knew it might be violating the statute. *See* Klaczak, 458 F. Supp. 2d at 681.

B. Relator Alleged Certifications

Relator alleged that Tenet certified compliance with Stark and AKS to the U.S. government through the signing of certifications at SAC ¶¶ 88 – 121, including Tenet's Corporate Integrity Agreements, SAC ¶¶ 93 - 98; Provider Applications and Agreements, SAC ¶¶ 99-103; Hospital Cost Reports, SAC ¶¶ 104 – 113; States' Medicaid Certifications SAC ¶¶ 114 -116; and Federal Tricare Certifications SAC ¶¶ 117 – 121.

These certifications support allegations that Tenet knowingly submitted false claims. Additionally, certifications in Tenet's Corporate Integrity Agreement support Relator's Reverse False Claims Count. *See* discussion at RELATOR ALLEGED A REVERSE FALSE CLAIM, on page 17.

In essence, Tenet asks this Court to rule, as a matter of law, that its many certifications acknowledging its legal obligation not to pay kickbacks were too vague to inform Tenet's executives of their responsibilities under the AKS and Stark law.[8] But even Tenet's Real Estate V.P. acknowledges "*Everybody* talks about the Stark Laws . . . . ." SAC p. 1 (emphasis supplied).

This Court has previously found that a reasonable inference can be made based on these certifications that Tenet had actual knowledge of the requirements of AKS and Stark statutes. *See* Order, D.E. 111 at 16.[9] The United States reached the same conclusion: "Tenet has expressly certified compliance with the healthcare laws at issue in this case, specifically the Anti-kickback Statute and the Stark Law." D.E. 83, p. 2 United States' Statement of Interest D.E. 83 (detailing Tenet's certifications in its Corporate Integrity Agreement).

Tenet confuses the FCA requirement that a defendant must "knowingly" submit a *false claim* by arguing that the FCA requires a knowing submission of a *false certificate of compliance* with Stark or AKS. Evidence of a "knowing" submission of a false claim may take many forms, and Relator argues (supported by several courts, including the 11th Circuit) that certifications of

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[8] Tenet's argument relies on a partial and misleading quote from *U.S. v. Medina*. MTD, at p. 9, *citing U.S. v. Medina*, 485 F.3d 1291, 1298 (11th Cir. 2007). But Defendants omitted a critical portion of the quote that clarifies the sole statue under consideration: the *criminal Health Care Fraud* statute, 18 U.S.C. §1347. S*ee* United States' Statement of Interest, D.E. 94, pp. 7 – 8.

[9] The FAC's allegations were reiterated in the SAC. *See* SAC, ¶¶ 22, 23, 24, 25, 26, 27, 28, 29, 30, 31.

compliance are not required for an FCA claim, but only one manner of proof. *United States ex rel. Matheny v. Medco Health Solutions*, 671 F.3d 1217, 1224 and 1228 (11th Cir. 2012).

As this Court noted, "the Eleventh Circuit appears to have recognized that a mere violation of AKS is legally sufficient to deem claims false under the FCA." Order at p. 12, note 10, D.E. 111. The United States also takes the majority position that no certifications are required for a False Claims Act case based on violations of Stark and the AKS. United States' Statement of Interest, D.E. 94, pp. 4 – 5. *See* SAC, ¶¶ 41, 88, 89 (same).

If, as Tenet contends, its numerous signed certifications submitted to the U.S. government in its Corporate Integrity Agreements, Provider Applications, Hospital Cost Reports, and for reimbursement in the Federal Tricare program cannot support an FCA claim, Relator is left wondering what type of certification document Tenet imagines would suffice. Is Tenet seriously maintaining that there is no type of existing certification document sufficient to support an FCA claim? Accepting Tenet's argument would essentially eliminate all FCA claims based on violations of Stark and AKS.

C. Relator Alleged Scienter

Under the FCA, "the term 'knowingly' means that a person '(1) has actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information.'" Order at p. 16, *citing* 32 U.S.C. § 3729(b)(1). Despite Tenet's argument that Relator failed to allege that anyone at Tenet "knew" of the alleged Stark or AKS violations when they signed certifications (MTD, p. 12), this is not the correct standard for knowledge of falsity under the FCA. This Court determined that Relator's allegations in the First Amended Complaint regarding Tenet's "long-history of paying fines, civil damages, and other penalties on account of past kickbacks and self–referrals under both AKS and Stark" allow it to "reasonably infer that Defendants have actual knowledge of the requirements of both statutes." Order at p. 16, D.E 111.

IV. RELATOR SUFFICIENTLY ALLEGED TENET VIOLATED THE AKS

A. Relator Adequately Alleged "Remuneration"

"Remuneration" is defined to "include [] any remuneration, directly or indirectly, overtly or covertly, in cash or in kind." D.E. 111, Order at p. 13, *citing* 42 U.S.C. § 1395nn(h)(1)(B).

This Court rejected Tenet's definition of remuneration and instead defined the term as "any payment or other benefit made directly or indirectly…" 42 C.F.R. § 411.351, Order, D.E. 121. The United States further clarifies this definition as it pertains to rentals:

> [U]nder the interpretation of the Office of the Inspector General for the Department of Health and Human Services, remuneration under the AKS means "anything of value in any form whatsoever." OIG Anti-Kickback Provisions, 56 Fed. Reg. 35952, 35958 (1991). **This broad definition certainly can include a reduced rent (even if still within the range of fair market value),** the forgiveness of late fees or uncollected rent, as well as concessions like free or reduced-cost renovations to the rental space, if at least one purpose of such benefits was to induce the physician-tenants to make referrals to Tenet.

United States' Statement of Interest, D.E. 115, at 4. [emphasis supplied].

Despite these opinions, Tenet continues to argue that Relator must allege that the leases were below fair market value to constitute remuneration. But the Court clarified that proof of fair market value is an affirmative defense for purposes of a Stark Law claim so that the burden of pleading fair market value shifts to the defendant. Exhibit A hereto, Transcript of Telephonic Hearing (8/2/12), p. 8. *See*, *United States ex rel. Baklid-Kunz v. Halifax Hosp. Med. Ctr.*, 2012 U.S. Dist. LEXIS 36304, 15-16 (M.D. Fla. 2012) (same).

Further, the "remuneration" took many different forms (*i.e.* various types of benefits), not just the provision of below-market leases. *See* discussion at Specific Allegations Support Plausible Causes of Action, p. 5 above.

Tenet places mistaken support on *United States ex rel. Obert-Hong v. Advocate Health Care*, 211 F. Supp. 2d 1045, 1049 (N.D. Ill. 2002), which made conclusory allegations about referrals from physician-employees, rather than physician-tenants. But the SAC makes detailed allegations, stating the "who, where, when, how much." *See e.g.* Exhibit B2, D.E. 122-3 detailing free space in hundreds of leases. Further, that court specifically limited its holding to *employee* referrals, stating, "In a non-employee context, *any compensation* could be considered an inducement." *Id.* at 1049 (emphasis supplied). That case also held, consistent with this Court's August 3 Order on Motion for Reconsideration, D.E. 121, that the AKS "prohibits payment or receipt *of any remuneration* to induce referral." *Obert-Hong* at 1048 (emphasis supplied).

B. Physician Inducement Is Not Required to Allege an Offer or Payment

Tenet argues that Relator failed to allege that physicians were actually induced to alter their referral decisions. MTD, p. 17. The Court considered and rejected that argument during the August 2 hearing. During that hearing, the Court held:

> The actual acceptance does not have to be made for it to be a technical violation of the Anti Kickback Law.

Exhibit A hereto, p. 11 lines 10 -15

> Well, here's the bottom line. If you, as the Government suggests, want to go solely on the basis that once there is an offer and a technical violation of the Anti Kickback Law, and that's as far as you want to go, and make the argument that ipso facto it is now a tainted claim, and any claim submitted is a violation of the False Claims Act, that's fine.

Exhibit A hereto, p. 17 lines 19-25

Thereafter, Relator amended his complaint in conformance with this Court's correct "bottom line" ruling that, without regard to acceptance by the physicians, a defendant's acts and intent can taint claims and such claims submitted for payment violate the False Claims Act. *See* SAC ¶¶ 1, 47, 49, 50, 85, 129, 130, 141, 230 – 246, 257. [10]

In offering further guidance, the Court stated (and Tenet agreed) that the critical element was Tenet's intent, rather than the physicians' behaviors:

> THE COURT: I think everyone agrees in order to be a violation of the Anti Kickback Law that the remuneration had to be for the purpose of inducing physicians and other healthcare providers to make referrals to Tenant [sic] Group.
>
> MS. LAUER[for Tenet]: I'm sorry, Your Honor, I think we all agree to that.

Exhibit A hereto, p. 10 lines 18 – 23.

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[10] None of the cases cited by Tenet at pp. 17 – 18 support its arguments. *United States ex rel. Gonzalez v. Fresenius Med. Care N. Am.*, 2012 WL 3065314, *4 (5th Cir. July 30, 2012) involved the payor's "criminal intent to induce referrals," not the payees' intent or actions. Similarly, at p. 17 Tenet cites *Carpenter* for the 3729(a)(2) claim that was dismissed, but fails to apprise the Court of the 3729(a)(1) claim that survived. *United States ex rel. Carpenter v. Abbott Labs., Inc.*, 723 F. Supp. 2d 395, 409 (D. Mass. 2010).

The government then clarified that intent to induce referrals need be only *one* purpose of the offer of remuneration. *Id.* p. 11.

The SAC sufficiently alleges throughout Tenet's intent to induce referrals. [11]

* * * *

The SAC's benchmark data and other exhibits support a finding by this Court that Relator's allegations of illegal remuneration and of an illegal "financial arrangement" are plausible. [12]

V. RELATOR SUFFICIENTLY ALLEGED A STARK "FINANCIAL ARRANGEMENT"

Under Stark, Relator has to prove three prima facie elements: (1) a financial relationship between a physician and a medical entity; (2) a referral from such physician to the medical entity

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[11] Intent is typically a jury question. *See Chanel, Inc. v. Italian Activewear of Florida, Inc*., 931 F.2d 1472, 1476 (11th Cir. 1991) ("As a general rule, a party's state of mind (such as knowledge or intent) is a question of fact for the factfinder, to be determined after trial."); *see also* 56 Fed. Reg. 35952, 35955 ("the gravamen of a violation of the statute is 'inducement'" and "case by case inquiries must necessarily focus on the intent of the parties"). Further, intent is generally proven by circumstantial evidence. *See Natarajan v. Paul Revere Life Ins. Co*., 720 F. Supp. 2d 1321, 1331 (M.D. Fla. 2010) ("intent is generally an issue to be decided by the factfinder, often based upon circumstantial evidence"); *United States v. Macko*, 994 F.2d 1526, 1533 (11th Cir. 1993) ("Circumstantial evidence may prove knowledge and intent").

[12] Tenet's MTD also attempts to reargue its position that to state a claim Relator "must identify claims from actual patients . . . . " MTD at p. 18. The Court has already considered and rejected Tenet's arguments. Order Granting in Part and Denying in Part Defendants Motion to Dismiss First Amended Complaint, D.E. 111, pp. 9 – 16. "Accordingly, the Court finds that Relator has sufficiently alleged that claims were presented to an agent of the United States." *Id.* at 16. Tenet did not contest the Court's ruling in a motion for reconsideration.

The United States also found the FAC sufficiently pled:

> Here, Relator has alleged that Tenet hospitals offered specific, significant benefits to tenants who were referring physicians, as compared to tenants in the same or comparable space who were not referral sources. Relator has also identified specific instances in which he claims that Tenet hospitals charged significantly lower rents to referring physicians than non-hospital property owners in the same location charged for equivalent space. These allegations should be sufficient to get Relator over the Rule 9(b) threshold.

United States Statement of Interest, D.E. 115, at 5.

Further, the SAC is far more detailed that the First Amended Complaint, detailing the submission of many additional claims at SAC ¶¶ 80 to 87, Exhibits F (D.E. 122-9), M1, M2, P1, and P2 (D.E. 122-19 through 122-22).

for a designated health service; and (3) a claim presented or caused to be presented by such medical entity to an individual, third party payor, or other entity for designated health services furnished pursuant to a referral under subparagraph (A). 42 U.S.C. § 1395nn(a)(1). This Court concluded in its prior Order that Relator had adequately pled the second and third elements in its First Amended Complaint but had insufficiently pled a prohibited financial relationship that derived from a "compensation arrangement." D.E. 111, Order at p. 13.

The subsequent Order on Reconsideration, D.E. 121, and hearing transcript, Exhibit A hereto, pp. 6 - 9, clarified what sort of "remuneration" may be considered for a "compensation relationship."

The SAC alleges leases directly between a Tenet hospital and a referring physician or physician practice group. SAC ¶¶ 131, 134, 135, 141; *see* 42 C.F.R. § 411.354(c)(2). The Government agrees.

> The term "compensation arrangement," as correctly explained by the Court, means "any arrangement involving any remuneration between a physician . . . and [a designated health services] entity." D.E. #111, at 13. That "remuneration" can be direct or indirect, overt or covert, in cash or in kind. *Id*., citing 42 U.S.C. § 1395nn(h)(1). The "remuneration" can also be in the form of a "benefit." 42 C.F.R. § 411.351.
>
> In the instant case, the FAC adequately alleges that the lease arrangements fall within the broad definition of "compensation arrangements" because it asserts that named referring physicians were making rental payments to Tenet hospitals under written leases, e.g., FAC ¶¶ 61-69, 96-108, and in some cases were receiving benefits from Tenet hospitals in the form of substantial improvements to the leased space, *id*. at ¶¶ 109-121. Thus, Relator has plainly alleged the existence of remuneration "between" at least some referring physicians and certain Tenet hospitals. These allegations, if true, would establish the existence of a "financial relationship" prohibited by the Stark Law.

United States' Statement of Interest, D.E. 115, p. 2 - 3

Relator also alleges that the lease arrangements fall within the broad definition of "compensation arrangements" because the named referring physicians were making rental payments to Tenet hospitals under written leases, *e.g.,* SAC ¶¶ 71-84, 175-185, 189 – 196, 207, 233- 241, 289, and in some cases also received benefits from Tenet hospitals in the form of substantial improvements to the leased space. SAC ¶¶ 256-271. As Tenet itself points out,

remuneration is *any* benefit conferred by a provider on a physician. MTD, p. 15; *See* 42 C.F.R. § 411.351; 42 U.S.C. § 1395nn(h)(1)(B). But elsewhere, Tenet incorrectly argues that a complaint must allege leases were below fair market value. MTD, p. 15 - 16. This is mistaken: the law defines remuneration as "any payment or other benefit made directly or indirectly . . . ." D.E. 121, Order Granting in Part and Denying in Part Relator's Motion for Reconsideration. The SAC details the benefits enjoyed by Tenet's physician-tenants who made referrals to Tenet's hospitals.

Tenet also contends that the SAC failed to sufficiently allege whether the financial relationship was direct or indirect. MTD, p. 21.[13] But that argument was considered and rejected by a Florida district court in *Baklid-Kunz*, which held that a FCA case alleging Stark violations does not require allegations as to whether a financial relationship is direct or indirect. *United States ex rel. Baklid-Kunz v. Halifax Hosp. Med. Ctr.*, 2012 U.S. Dist. LEXIS 36304 (M.D. Fla. Mar. 19, 2012), *Id* at *12 -13, D.E. 75-14, Exhibit N to Relator's Opposition to Tenet's [first] Motion to Dismiss.

Similarly, Tenet ignores the principle that a physician stands in the shoes of his practice. 42 C.F.R. § 411.354(c)(1). Thus, for the majority of the leases, Tenet (and one or more of the subsidiary defendants) would be deemed to have a direct financial relationship with the physicians themselves.[14]

Based on these facts, Relator's allegations of illegal remuneration are plausible and an illegal "financial arrangement" exists.

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[13] Defendants rely on *Ebeid v. Lungwitz*, 616 F.3d 993, 1000 (9th Cir. Ariz. 2010) but the SAC in this case is in no way comparable to *Ebeid's* deficient bare-bones complaint.

[14] Further, the 18 pages of Texas referrers at Exhibit P2, D.E. 122-22, shows referrals from both individuals and from medical practices. *See* col. 4, "Provider Type," *Id.*

VI. RELATOR ALLEGED A REVERSE FALSE CLAIM

Tenet is wrong when it asserts that Corporate Integrity Agreement ["CIA"] certifications cannot form the basis of a cause of action under the FCA.[15] MTD, p. 22-23. The failure to satisfy a CIA's repayment or reporting obligation paired with a CIA's mandatory Certification of Compliance can form the basis for FCA liability. *United States ex rel. Matheny v. Medco Health Solutions*, 671 F.3d 1217, 1224 (11th Cir. 2012).

The SAC alleged Tenet's obligations. SAC, ¶¶ 93 – 98. For example:

> 96. Defendants CIA obligations included the requirement that it submit specific reports on their leases (focus arrangements) so that the terms of the leases were disclosed and open to review. Exhibit R, CIA, Appendix D, p. 60 (pdf p. 27), Focus Arrangements Reviews.
> SAC, ¶¶ 96.

Appendix D to the CIA (Exhibit R to the SAC) details Tenet's specific reporting obligations. D.E. 122-25. Failure to submit reports is material to Count III's allegation that Tenet "knowingly concealed, avoided, or decreased an obligation to pay or transmit money to the United States." SAC ¶ 327.

Further, the Settlement Agreement between Tenet and the United States also imposed similar reporting requirements. D.E. 124-1, ¶ 12, pp. 37-38. In the event the Court finds Count III fails to state a claim with the requisite specificity, Relator seeks leave to amend to further detail the Complaint.

VII. RELEASE IS AN AFFIRMATIVE DEFENSE

Based on a redacted exhibit, Tenet now asserts that one of their previous settlements with the United States released all claims up to October 12, 2005. MTD, p. 24, and Defendants' Exh. 1, "Civil Settlement Agreement," D.E. 124-1. [16] Whether or not the redacted exhibit released claims is an affirmative defense, the facts of which are not fully before this Court. For example, Relator would want to discover whether any other settlement since 2005 also considered the pre-2005 issues.

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[15] Defendants are correct that the SAC at ¶ 327 mistakenly references 31 U.S.C. § 3729(a)(1)(B) rather than 3729(a)(1)(G).

[16] Relator was able to find a version of this document that discloses some of the redactions Tenet chose to hide from this Court. Nonetheless, Tenet should produce the full document, or explain the basis for the redactions, for any purported affirmative defense.

VIII. CONCLUSION

Under the prevailing standard set forth in *Iqbal v. Ashcroft*, 129 S. Ct. 1937 (2009), "a claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1949. Moreover, "[d]etermining whether a complaint states a plausible claim for relief . . . [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 1950.

Here, the Second Amended Complaint contains allegations that are factually supported by lease documents, names of referring doctors with office space in Tenet's buildings, graphs and tables, expert opinion, reference to industry standards and customs in commercial lease arrangements, and samples of submitted claims.

In order to grant Tenet's MTD, the prevailing legal standard requires this Court to conclude that Relator's allegations of remuneration and benefits, worth millions of dollars[17] to Tenet, are not only "improbable," but they do not even "suggest" the possibility that a jury could believe them to be true. *Twombly*, 550 U.S. at 555-556. To properly consider this question, one would have to ask whether Tenet would have provided these same benefits and inducements for all tenants, even those who never made any referrals. The answer to that question is not speculative, it is "No, it would not have," as supported by the SAC's allegations and detailed exhibits.[18]

Indeed, to grant Tenets' MTD, the Court would have to conclude that the Relator's allegations of illegal remuneration are beyond "very remote and unlikely" and fall somewhere within the realm of fairy tale or delusion. And the Court would have to arrive at this conclusion within the context of Tenet's long history of paying fines, civil damages, and other penalties for much the same type of illegal activity (most recently in April 2012 for $43 million), while viewing the complaint broadly and drawing all reasonable inferences in Relator's favor. *Watts*,

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17 *See e.g.* SAC ¶¶ 192 – 196.

18 E.*g.* SAC ¶¶ 230 – 242.

495 F.3d at 1295; *FindWhat Investor Group v. FindWhat.com*, 2011 U.S. App. LEXIS 19887, *54 (11th Cir. Sept. 30, 2011).

PRAYER

Relator urges this Court to find that the Second Amended Complaint plausibly supports Relator's claims for relief.[19] Based on the foregoing, Relator respectfully requests that this Court deny Defendants' Motion to Dismiss.

Respectfully submitted,

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[19] Relator seeks leave to amend to further detail the Complaint should the Court find the SAC deficient.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the date stamped above I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified below in the Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Jonathan Kroner

Via CM/ECF only

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