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

Defendants' Motion to Dismiss contends that Relator is barred from bringing his *qui tam* action against Defendants because the information supporting his allegations was publicly disclosed through a website that constitutes "news media," and that Relator has failed to plead his complaint with particularity as required by Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure. [1] These arguments have no merit and this Court should deny Defendants' Motion.

[1] The United States declined to intervene in the matter. Although Defendants seek to make much of this fact, a declination is not a reflection on the merits of the case. *U.S. ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1359 n.17 (11th Cir. 2006). Indeed, many non-intervened cases have gone to verdict or settled for large sums. *See, e.g., U.S. ex rel. Tyson v. Amerigroup Ill., Inc.*, 488 F. Supp. 2d 719 (N.D. Ill. 2007) (awarding $334 million verdict and judgment in nonintervened *qui tam* case).

CONTENTS

I. **THE COURT HAS SUBJECT MATTER JURISDICTION** 1

A. The JLL Website Was Not a "News Media" Website 1

1. Defendants misstate the legal standard. 1
2. The Confidentiality Agreement precludes characterization as publicly disclosed "News Media." 2
3. Access to JLL's website was not "public" because Relator was denied unlimited access. 3
4. The JLL website's format precluded public disclosure. 4

B. The Disclosed Information Did Not Constitute "Allegations Or Transactions" 5

C. Defendants' Other Disclosures Do Not Form the Basis of Relator's Case 6

D. Relator Qualifies as an Original Source of the Florida Portfolio Violations 6

II. **THE COMPLAINT SATISFIES RULE 9(B)'S PARTICULARITY REQUIREMENT** . 7

A. The Correct Legal Standard for Rule 9(b) 7

B. Relator Alleged with Requisite Specificity the "Circumstances Constituting Fraud" 11

C. Relator Provides Reliable Indicia that False Claims Were Filed 12

III. **RELATOR PROPERLY ALLEGES STARK AND AKS VIOLATIONS** 14

A. Relator Properly Pleads Stark Statute Violations 14

B. Relator Properly Pleads AKS Violations 16

1. Relator plausibly alleges illegal remuneration 17
2. Relator alleges referrals "resulting from" remuneration. 18
3. Relator alleges "knowing" presentment of false claims. 18

IV. **CONCLUSION** 19

Exhibits

A Robert Palacios Affidavit

B Confidentiality Agreement 5-29-08, re. information available from private website.

C JLL 7-2-08 to "Prospective Purchasers" of 31 medical office buildings

D Files Provided to Potential Investors (Florida only), 49 pp.

E Palacios Letter to Bonrepos, Tenet VP, re. exclusion from private website, 6-17-08

F Palacios Letter to Bonrepos, Tenet VP, re. exclusion from private website, 7-7-08

G Osheroff (Relator) -- $63,000,000 Offers to Purchase, 7-17 and 8-13-08

H *United States ex rel. Saldivar v. Fresenius Med. Care Holdings, Inc*., slip opinion (No. 10-CV-01614-AT, N.D. Ga. 3/26/2012)

I *United States ex rel. Drakeford v. Tuomey Healthcare Sys*., 2012 U.S. App. LEXIS 6444 (4th Cir. S.C. Mar. 30, 2012)

J Palmetto General Hospital's $232,705,382 Medicare claims for 3 zip codes, p. 2.

K *U.S. ex rel. Matheny v. Medco Health Solutions, Inc*., --- F.3d ---, 2012 WL 555200, 2012 U.S. App. LEXIS 3508 (11th Cir. Feb. 12, 2012).

L Garden Grove, California, Medicaid Claim / Referral Totals and sample Data from on-campus physician (pre-sale)

M Garden Grove sample Medicaid claims (pre-sale)

N *United States ex rel. Baklid-Kunz v. Halifax Hosp. Med. Ctr.*, 2012 U.S. Dist. LEXIS 36304 (M.D. Fla. Mar. 19, 2012)

P1 Texas Medicaid Referral Samples and Summaries from On-campus Physicians

P2 Texas Medicaid Referring On-campus Physicians

I. THE COURT HAS SUBJECT MATTER JURISDICTION

Defendants sought to sell a portfolio of their medical office buildings. FAC ¶ 71. They invited potential investors to download "due diligence" information from a special website established for that purpose. FAC ¶ 72, Exhibits A and C hereto. In order to access the information contained on the website, Relator's agent was required to execute a Confidentiality Agreement. Exhibits A and B hereto. After allowing brief access to the site, Defendants removed Relator's access to the site as he was "no longer an approved purchaser." Exhibits A and E.

Defendants argue that this website constitutes "news media" and for that reason this Court lacks jurisdiction to reach the merits. The public disclosure bar, Section 3730(e)(4) of the FCA, prevents a *qui tam* plaintiff from basing a lawsuit on "allegations or transactions" in government reports or from the "news media."

A. The JLL Website Was Not a "News Media" Website

Defendants erroneously assert that this Court lacks jurisdiction because Relator's lawsuit is based on information he received from Defendants' website. In their opinion, all websites are "news media" and, therefore, publicly disclosed. There is no authority for application of the jurisdictional bar to information received from their confidential website.

Defendants' confidential website cannot be categorized as "news media."

1. Defendants misstate the legal standard.

Defendants mistakenly rely on *United States ex rel. Radcliffe v. Purdue Pharm. L.P.*, 582 F. Supp. 2d 766, 772 (W.D. Va. 2008), to support their argument that all websites are categorized "news media." The *Radcliffe* case actually supports Relator's position by going to lengths to differentiate "news media" websites from other websites. The court observed that "news media" websites are public sites because "these sources disseminate information *to the public in a periodic manner*" and further explains that an "online news outlet also *identifies to the public that it is a place where news or periodical information on a particular topic can be found*." [emphasis supplied] *Id*. The court identified press releases as examples of internet news media deemed public disclosures, while websites publicizing corporate reports "have been held insufficient to implicate the jurisdictional bar of § 3730(e)(4)(A)." *Id., citing United States ex rel. Rabushka v. Crane Co.*, 40 F.3d 1509, 1514 n.2 (8th Cir. 1994) (holding "Corporate reports, however, are also insufficient as a jurisdictional bar to the action because they are not contemplated by the terms of the statute.").

Nor can Defendants rely on *United States ex rel. Brown v. Walt Disney World Co*., 2008 WL 2561975, at *4, 2008 U.S. Dist. LEXIS 116832 (M.D. Fla. June 24, 2008). Using *Brown*, Defendants analogize a Wikipedia article to the confidential corporate documents on the subject JLL web site. But the analogy fails since Wikipedia is *very* public. It is the second-most visited reference site on the web.[2] In contrast, Defendants' website was password protected and only those select individuals who had executed a confidentiality agreement had access to the information on the site. Palacios Affidavit, Exhibit A hereto, ¶ 4, FAC ¶ 72 (access limited). Further, the allegations in *Brown* were properly considered already within the public domain because they had been "the subject of newspaper articles for many years," and had been disclosed in legal notices published in a newspaper. As such, the multiple disclosures in *Brown* qualified as "news media" public disclosures. § 3730(e)(4)(A).

Defendants also erroneously rely on *United States ex rel. Fried v. W. Indep. Sch. Dist.*, 527 F.3d 439, 442 (5th Cir. 2008) and *Schindler Elevator Corp. v. United States ex rel. Kirk*, 131 S. Ct. 1885 (2011). Those cases case involved government reports, a separate form of public disclosure under § 3730(e)(4)(A). Government reports are not at issue in this case.

2. The Confidentiality Agreement precludes characterization as publicly disclosed "News Media."

Defendants' Ponticiello Affidavit references a "Confidentiality Agreement" mandated by Tenet as a prerequisite to obtaining information ("Due Diligence" or "Evaluation Materials") from the JLL website that Defendants contend was publicly disclosed. Mr. Ponticiello himself asserted that access to the website was limited to "bidders who executed confidentiality agreements." Ponticiello Call for Offers – July 2, 2008. Exhibit C hereto.

Not surprisingly, the requirement of a "Confidentiality Agreement" conflicts fundamentally with Defendants' current claims that their confidential information was publicized through a "news media-" type website and was shared with the public as if it were a press release.[3] Rather, the four-page agreement detailed that the disclosures were *not* intended to be

---

[2] http://www.clickz.com/clickz/news/1698827/wikipedias-popularity-traffic-soar, last visited April 10, 2012

[3] Although Mr. Ponticiello calls it "a boilerplate Confidentiality Agreement," ¶ 2, this is also untrue, as the Confidentiality Agreement is tailored to the Tenet sale, with notices to Tenet, and remedies for public disclosure available to Tenet. Exhibit B hereto.

made public, leaving no ambiguity that this information was not for public consumption and that public dissemination of the information would be penalized. For example:

> 4. **The term "Evaluation Material" does not include any information which, at the time of or subsequent to disclosure is generally available to and known by the public** ….
>
> Emphasis supplied. Confidentiality Agreement, ¶ 4, Exhibit B hereto.
>
> 1. ...**such information will be kept strictly confidential** by Prospective Purchaser, except that the Evaluation Material or portions thereof may be disclosed to those directors, officers, employees, . . . who (i) need to know such information for the purpose of evaluating a possible transaction, (ii) agree to use such information solely for that purpose, and (iii) **agree to be bound by the terms of this Confidentiality Agreement**. **Prospective Purchaser agrees to be responsible for any breach of this Confidentiality Agreement by any of its Representatives.**
>
> 3. If Prospective Purchaser or any of its Representatives are requested or required as a result of a judicial or regulatory proceeding . . . to disclose any Evaluation Material, Prospective **Purchaser agrees to provide Tenet with prompt notice thereof so that the latter may seek an appropriate protective order and cooperate in the other's efforts with respect thereto.** . . .
> [Emphasis supplied.] Confidentiality Agreement, ¶¶ 1 and 3.

The binding Confidentiality Agreement required that the materials be returned to Tenet or destroyed within 90 days, ¶5; prohibited disclosures to "any person," ¶ 7; and detailed damages for any breach of the agreement, ¶ 11.

3. Access to JLL's website was not "public" because Relator was denied unlimited access.

Mr. Ponticiello claims that "anyone who signed a confidentiality agreement was provided with a password that granted them unrestricted access to the website." ¶ 3. This is false. The Confidentiality Agreement repeatedly states that this information is limited to "Prospective Purchasers." Exhibit B at ¶¶ 1, 2, 3, 4, 5, 6 and 9.

Even Relator, who had shown himself to be a *bona fide* prospective purchaser, was not granted unrestricted access. *See* Palacios affidavit, Exhibit A, and Palacios correspondence with Mr. Ponticiello and with Tenet's executives. Exhibits E, F and G.[4]

[4] Relator believes he was kicked off the website precisely because Tenet knew his history of raising rents to market value.

How can information be classified as "publicly disclosed" and "news media" when it was *denied* to a potential purchaser—a serious purchaser like Relator, who had made a $63 million ($63,000,000) offer backed by a two million dollar ($2,000,000) deposit. *Id*.

4. The JLL website's format precluded public disclosure.

The information's format precluded it from being available to the "public" since only a sophisticated professional real estate investor could access, comprehend and synthesize this information.

First, much of the financial data was in Argus software format, investment analysis software virtually unknown outside of the investment industry, costing nearly $6,000, plus initial training costs in excess of $1,200, and $600 per year for service/tech support. Palacios Affidavit, ¶ 9 -12, Exhibit A hereto. This makes it prohibitively expensive to all but a select group of commercial real estate professionals. *Id*. [5]

Second, only a sophisticated commercial real estate investor (with access to the password-protected website) might be able to uncover Defendants' Stark and kickback violations. In addition to an understanding of commercial real estate concepts and jargon such as BOMA, FSG, NNN, RSF, and usable square feet, an analysis of the data required an understanding of thousands of ancillary documents. *See* FAC pp. 16 – 32; Relator's Analysis, Exhibit B (Doc. 41-2); Exhibit D hereto (49-page list of Florida portfolio documents). The Texas, California, Tennessee and Georgia portfolio disclosures include thousands of additional documents as well.

The general public, even with access to Argus software and the thousands of documents made available by Tenet, would not likely discover Tenet's Stark and kickback violations. Thus, the information attained through the website cannot be categorized as "publicly disclosed." *Cooper v. Blue Cross and Blue Shield of Florida, Inc.*, 19 F.3d 562, 566 (11th Cir. 1994). *See, United States ex rel. Yannacopolous v. Gen. Dynamics*, 315 F. Supp. 2d 939, 954 (N.D. Ill. 2004) (holding publicly disclosed material "discovered and synthesized" during an independent investigation makes relator an original source.).

---

[5] Tenet did not provide financial analysis information in Microsoft Excel or any other format available to the general public. The only Excel spreadsheets included in the data were calculations of individual physician tenants' back rent due and COLA calculations. *Id. See* Exhibit D hereto showing Argus (.sf) files.

B. The Disclosed Information Did Not Constitute "Allegations Or Transactions"

The Federal False Claims Act bars suits based on publicly disclosed "allegations or transactions," not mere "information" that is innocuous and does not suggest foul play. *U. S. ex rel Springfield Terminal Ry. v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994). *See, U.S. ex rel Pogue v. American Healthcorp*, 977 F. Supp. 1329 (facially valid or innocuous disclosures not sufficient). The information obtained through Defendants' website, even if publicly disclosed, cannot be defined as "allegations" or 'transactions" for purposes of the statutory bar.

In *Cooper v. Blue Cross and Blue Shield of Florida, Inc.*, 19 F.3d 562 (11th Cir. 1994), the court considered whether certain public disclosures were "public disclosures of allegations or transactions." The court held they were not because there were no *allegations* of wrongdoing. Referring to the legislative history of the 1986 amendments to the FCA, the court stated:

> This result seems consistent with the purposes of the FCA and the 1986 amendments. See *United States ex rel. Stinson, Lyons, Gerlin & Bustamante v. Provident Life & Acc. Ins. Co*, 721 F. Supp. 1247, 1258 (S.D. Fla. 1989) (hereinafter *Provident*) (*qui tam* suit not barred when neither defendant's name nor its **alleged fraudulent conduct** was disclosed in government reports); 1990 Implementation Hearing, at 6 ("The publication of **general, non-specific information** does not necessarily lead to the discovery of **specific, individual fraud** which is the target of the *qui tam* action") (Statement of Sen. Grassley).

19 F.3d at 566 (emphasis added).

In summary, the court in *Cooper* required public disclosure of allegations that the defendant "actually engaged in wrongdoing" before invoking the public disclosure bar. *Id.* at 577. Other courts have accepted this limitation on the nature of publicly disclosed information. "The Eleventh Circuit has held . . . that a public disclosure does not trigger the jurisdictional bar unless the publically disclosed document alleges that a defendant 'actually engaged in wrongdoing' involving the specific transactions and matters at issue in the relator's complaint." *U.S. ex rel. Saldivar v. Fresenius Med. Care Holdings, Inc*., slip opinion at p. 15 (No. 10-CV-01614-AT, N.D. Ga. 3/26/2012). Exhibit H hereto. The court further stated that "[s]imilarly, the Middle District of Georgia noted that the public disclosure inquiry should focus on whether the disclosures 'are allegations of fraud or of fraudulent transactions . . . [that] allege the defendant engaged in the type of wrongdoing alleged in the plaintiff's complaint." *Id*.[6] Here, no such

[6] Some Eleventh Circuit decisions have used loose language about "publicly disclosed information." In each of these cases, however, there was no dispute that the essential allegations

allegations of fraud or fraudulent transactions were evident within the Evaluation Materials. Rather, Relator – a prospective purchaser seriously interested in the properties – conducted a thorough analysis of the materials and, through the lens of a professional real estate investor/manager, was able to identify the Stark and AKS violations.

C. Defendants' Other Disclosures Do Not Form the Basis of Relator's Case

Defendants assert that a 2010 Internet article quoting a Tenet VP is sufficient to trigger the jurisdictional bar. Motion, p. 11. In that article Tenet's Vice President acknowledged Stark violations. FAC p. 2. However, Relator's 2009 Complaint could not have been "based upon" a Stark admission published in 2010, long after the complaint was filed. 31 U.S.C. §3730(e)(4).

Defendants also argue that some e-mails to potential investors were public disclosures because they disclose that Tenet was selling medical office buildings. Ponticiello Affidavit, Doc 67-1. But emails to potential investors are business communications not "news media." 31 U.S.C. §3730(e)(4)(A). The selectivity of the target audience precludes such a characterization. Nor did the emails contain information that in any way could be characterized as "allegations or transactions." *Cooper v. Blue Cross & Blue Shield,* 19 F.3d at 566. Thus, this information cannot disqualify Relator's *qui tam* action.

D. Relator Qualifies as an Original Source of the Florida Portfolio Violations

Relator is an "original source" of the Florida allegations and is not precluded by the jurisdictional bar from bringing his action. FAC ¶ 8.

An original source is "an individual who has direct and independent knowledge of the information on which the allegations are based." § 3730 (e)(4)(B). A relator does not have to be a corporate "insider" to qualify as an original source. Any "person" may file a *qui tam* claim and any "individual" may qualify as an original source. 31 U.S.C. §§3729 (b) and 3730 (e)(4)(B). *See Cooper* at 565 (a Medicare beneficiary, who "acquired his knowledge . . . through three years of his own claims processing, research and correspondence" was an original source); *U.S. ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1018 (7th Cir. 1999) (competitor who conducted an

---

or transactions suggesting fraud had been publicly disclosed and, thus, the courts had no reason to examine the text of Subsections A and B or to distinguish between "allegations or transactions" and innocuous "information" about the general subject matter of the suits. *See e.g. U.S. ex rel. Lewis v. Walker*, 438 Fed. Appx. 885 (11th Cir. 2001); *McElmurray v. The Consolidated Government of Augusta-Richmond County*, 501 F.3d 1244 (11th Cir. 2007); and *Battle v. Board of Regents for the State of Georgia*, 468 F. 3d 755 (11th Cir. 2006).

investigation and gleaned information "readily available to the government investigators . . . or even to members of the general public" was an original source.).

Relator's knowledge of the violations preceded Defendants' disclosures, FAC ¶¶ 15-16, because of his position as a landlord to many physician tenants at his building on Tenet's Palmetto Hospital campus (7150 W. 20th Ave.). He also owns medical office buildings on the campus of Tenet's former Parkway Hospital (now Jackson North) and other buildings that compete with Tenet for physician tenants.[7] Palacios Affidavit, Exhibit A hereto; Exhibit F hereto.

Relator learned from potential physician tenants of the below-market rates offered by Defendants independently of and well before the disclosures made in connection with Tenet's sale. Exhibit A. He disclosed this information to the government (FAC ¶ 6) and this information forms the crux of Relator's allegations against Tenet. Thus, Relator qualifies as an original source of this information and is not precluded from filing this *qui tam* action.

II. THE COMPLAINT SATISFIES RULE 9(B)'S PARTICULARITY REQUIREMENT

Defendants argue that the FAC fails to allege claims with sufficient specificity to meet the requirements of the Federal Rules of Civil Procedure, Rule 9(b).

Significantly, Defendants do not assert the FAC does not give them enough information to formulate a defense relating to their illegal below-market leases. Defendants' failure to link the FAC's supposed shortcomings to the purpose of Rule 9(b) speaks volumes and should be sufficient reason for this Court to deny their motions. Clearly, Defendants raise the Rule 9(b) issue not to ensure that they can defend but rather as a *pro forma* opening gambit.

A. The Correct Legal Standard for Rule 9(b)

Defendants correctly note that a complaint under the FCA must meet the heightened pleading standard of Rule 9(b), which states "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." *U.S. ex rel. Clausen v. Lab. Corp. of Am.*, 290 F.3d 1301, 1309-10 (11th Cir. 2002). The Eleventh Circuit has cautioned, however, that "Rule 9(b) must not be read to abrogate Rule 8 . . . and a court considering a motion to dismiss for failure to plead fraud with particularity should always be careful to

[7] The FAC alleges Relator's knowledge of market rates but does not detail all his knowledge by detailing the buildings he owns near Tenet's hospitals. If necessary, Relator would seek leave to amend the FAC to include this information.

harmonize the directive of Rule 9(b) with the broader policy of notice pleading." *Friedlander v. Nims,* 755 F.2d 810, 813 n.3 (11th Cir. 1985).

The Eleventh Circuit recently stated that the particularity requirement is satisfied if the complaint alleges "facts as to time, place, and substance of the defendants' alleged fraud, specifically the details of the defendants' *allegedly fraudulent acts*, when they occurred, and who engaged in them." *U.S. ex rel. Matheny v. Medco Health Solutions, Inc*., --- F.3d ---, 2012 WL 555200, at *3 (11th Cir. Feb. 12, 2012). Exhibit K hereto.

Moreover, the Eleventh Circuit has *never* required a complaint to provide details of specific false claims submitted to the government; all it has required is that a complaint contain "some indicia of reliability" to support the allegation that false claims were submitted. *See U.S. ex rel. Clausen v. Lab. Corp. of Am.*, 290 F.3d 1301, 1311 (11th Cir. 2002). The relator's problem in *Clausen* was *not* that he failed to identify specific claims, but that he failed to explain why he believed such claims were submitted, other than "mere conjecture."[8]

Indeed, the majority in *Clausen* criticized the dissent for suggesting that it was requiring any particular type of information to satisfy Rule 9(b):

> 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).

Clausen, 290 F.3d at 1312 & n.21 (emphasis supplied). *Clausen* thus expressly rejected the idea that it was creating a laundry list of details that had to be included to satisfy Rule 9(b).

Post-*Clausen*, the Eleventh Circuit refined its analysis of the impact of Rule 9(b) as it relates to FCA complaints. And as shown by the cases relied on by Defendants, even where the Eleventh Circuit has dismissed complaints under Rule 9(b), it has not rejected the principle that if a relator can adequately explain why he believes false claims were submitted, it is unnecessary

---

[8] Although *Clausen* has been frequently misunderstood, other courts have recognized that it does not purport to require identification of specific claims. *See United States ex rel. Singh v. Bradford Regional Med. Ctr*., 2006 U.S. Dist. LEXIS 65268, *16 (W.D. Pa. Sept. 13, 2006) (recognizing that "*Clausen* does not stand for the proposition that identification of specific claims is required to satisfy Rule 9(b) at the motion to dismiss stage.")

to provide details about specific false claims. Moreover, *Clausen* makes clear that where, as here, a complaint alleges a "complex and far-reaching fraudulent scheme," then pleading examples of *some* of the resulting false claims satisfies Rule 9(b). *See Clausen*, 290 F.3d at 1312 & n.21 (holding there are "valid reasons for not requiring a relator to plead every specific instance of fraud where the relator's allegations encompass many allegedly false claims over a substantial period of time").

More important, every court that has addressed Rule 9(b) challenges in the context of AKS and Stark violations has recognized that compliance with AKS and Stark is a fundamental condition of payment under Medicare. AKS- and Stark-based cases consequently have focused on whether allegations provide the requisite detail with respect to the alleged AKS and Stark violations, rather than detailing the "claims." For example, in *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 20 F. Supp.2d 1017, 1049 (S.D. Tex. 1998), the failure to identify specific claims did not affect the reliability of the relator's allegations. Indeed, that case was subsequently settled for over $200 million. Similarly, another ruling on 9(b) in the context of AKS allegations in a FCA case held:

> [a]lthough no specific dates or West Paces employees are identified, the complaint alleges that the hospital participated in a systematic, fraudulent scheme, spanning the course of twelve years; thus, reference to a time frame and to "West Paces" generally is sufficient. . . . [R]equiring Plaintiff to refer to the specific instances underlying each Medicare and Medicaid claim submission that he claims was fraudulent in his [complaint] would undermine Rule 8's admonishment to keep pleadings simplistic.

U.S. ex rel. Pogue v. American Healthcorp, Inc., 977 F. Supp. 1329, 1333 (M.D. Tenn. 1997) (rejecting a Rule 9(b) challenge to a complaint which alleged a kickback scheme).

Recently, in a case alleging that all claims were false because the Government was fraudulently induced into entering a contract with defendants, this Court held:

> While Defendants would urge the Court to focus its analysis on the claims themselves, as is required in the cases cited by Defendants, a finding that *all claims* under a contract are deemed false or fraudulent by virtue of the contract itself being fraudulently induced suggests that **the analysis should instead focus on the particularity of the fraudulent inducement allegations rather than the subsequently filed claims**. Indeed, in *Harrison [v. Westinghouse Savannah River Co.,* 176 F.3d 776, 784 (4th Cir. 1999)], the 4th Circuit alluded to a similar time, place and substance test as the 11th Circuit with regard to the Rule 9(b) analysis, but its focus was not on the individual claims, but on the circumstances constituting fraud in the inducement.

U.S. ex rel. Sanchez v. Abuabara, *supra*, 2012 WL 254764, at *8 (emphasis supplied). *See, e.g.,United States ex rel. Villafane v. Solinger*, 457 F. Supp. 2d 743, 754-55 (W.D. Ky. 2006) (determining that although identifying specific referrals were essential elements of the FCA claims, Rule 9(b) should not be interpreted to require such detail at the motion to dismiss stage because it is unnecessary to alert defendants to the nature of the fraud); *United States ex rel. Singh v. Bradford Reg. Med. Ctr, et al.*, No. 04-186 ERIE, 2006 WL 2642518 (Sept. 13, 2006 W.D. Penn.).

The present case is similar to the above cases in that the fraudulent conduct at issue does not turn on anything specific to any particular patients' medical treatments. Rather, the fraudulent conduct here relates to the provision of kickbacks (AKS) and entry into financial relationships (Stark) by virtue of Defendants' execution of below-market leases. It is these leases and those financial relationships that are the "circumstances constituting fraud," and Relator has alleged the existence and circumstances of these inducements with more than adequate specificity. FAC ¶¶ 73 – 137. This conduct taints **all claims** referred to Defendants from below-market physician tenants and submitted to the government for payment. For this reason, the cases cited by Defendants do not apply. Each involves allegations that the defendant violated the FCA in submitting *individual claims* that were fraudulent and, therefore, not relevant to the circumstances presented here.[9]

By contrast, in the instant case, as in *Thompson, Pogue*, and *Abuabara*, Relator alleges that Defendants entered into improper financial relationships and thus *every* claim submitted as a result of those referrals is tainted. FAC ¶¶ 140 and 141.

It is only common sense that the sufficiency of pleadings under Rule 9(b) may depend "upon the nature of the case, the complexity or simplicity of the transaction or occurrence, the relationship of the parties and the determination of how much circumstantial detail is necessary

---

[9] *Hopper v. Solvay Pharm., Inc.,* 588 F.3d 1318 (11th Cir. 2009) (alleged off-label marketing program caused unknown and unidentified third parties to file thousands of false claims); *Clausen*, 290 F.3d at 1309-10 (FCA claims centered on billing for specific unnecessary tests performed on specific patients); *U.S. ex rel. Corsello v. Lincare, Inc.*, 428 F.3d 1008 (11th Cir. 2005) *cert. denied*, 429 U.S. 810 (2006) (alleged FCA violations stemmed from unnecessary or non-existent treatment in context of individual claims); *Mitchell v. Beverly Enterprises, Inc.*, 248 Fed. Appx. 73, 74 (11th Cir. 2007) (submission of claims for services not rendered and for unnecessary services).

to give notice to the adverse party and enable him to prepare a responsive pleading." *Payne v. United States*, 247 F.2d 481, 486, (8th Cir. 1957). Similarly, it has been widely held that where the alleged fraud was complex and occurs over a period of time, the requirements of Rule 9(b) are less stringently applied. *Anthony Distrib., Inc. v. Miller Brewing Co*., 904 F. Supp. 1363, 1366 (M.D. Fla. 1995). To approach the issue otherwise would allow the more sophisticated fraudster to escape liability under a False Claims case due to the scope and complexity of their scheme and their deviousness in escaping detection.

Here, there can be no credible claim that Defendants are not fully aware of the nature of Relator's claims, and, to their credit, they do not attempt to so argue. Rather, they simply identify purported technical deficiencies – and say that Rule 9(b) requires more. But the overarching question is not whether any particular piece of information is or is not present; rather, the question for the Court is whether there is enough information in the Complaint to put Defendants on notice of the nature of the allegations against them. The following review of the FAC shows that this requirement has been met.

B. Relator Alleged with Requisite Specificity the "Circumstances Constituting Fraud"

The FAC is as simple and clear as circumstances permit and lays out the identified areas of Defendants' false claims in a readily understandable manner while providing sufficient detail to permit them to formulate a defense. The FAC identifies the "who, what, when, where, how and why" of the circumstances constituting the fraud.

The FAC identifies *who* because it identifies the physician tenants or their medical practices. FAC Exhibit B (Doc 41-2), FAC ¶¶ 99-108, 110, 112-118. The FAC's Exhibits L1, L2, L3 (Docs. 41-14, -15, -16) are sample leases. It also alleges a Tenet VP implicating all the hospitals' CEOs. FAC p. 2 and ¶ 60. Although Defendants (Tenet and wholly owned subsidiary corporations) argue the FAC must identify the parties to each lease, the parent company is liable for all false claims pursuant to a Corporate Integrity Agreement with the government. FAC ¶ 26.[11] Further, the statute covers those who make the claims and those who cause the claims to be made. FAC ¶ 142. The FAC identifies *when* the fraudulent activity occurred as

[11] If the Court were to conclude that the inclusion of the Corporate Integrity Agreement, fuller identification of all parties to the leases, identification of Tenet employees who signed the leases, or more leases would be necessary for Defendants to understand the allegations against them, then Relator would seek leave to amend to include that information and exhibits of another dozen, hundred, or even more leases.

shown by the starting date of each lease included in Exhibit B. It shows *where* the fraudulent activity took place by identifying each hospital at FAC Exhibit C (Doc. 41-3, pp. 3, 9, 10) for every lease listed on FAC Exhibit B, and in sample leases at Exhibits L1, L2, L3 (Docs. 41-14, -15, -16.). The FAC identifies *why* Defendants knew their conduct violated the False Claims Act. FAC ¶¶ 26, 20-26, 122-137. It explains *how*, and details examples of below-market leases entered into through various schemes. FAC ¶¶ 70-141 .

C. Relator Provides Reliable Indicia that False Claims Were Filed

Tenet argues that Relator has not sufficiently alleged *any* claims. Motion pp. 15 – 18. It is bizarre that the parties and this Court must spend time and resources on an issue that is not in dispute in this case – whether Defendants filed Medicare and Medicaid claims based on referrals from its tenant physicians. As the case progresses, Defendants will doubtlessly assert factual and legal defenses. One thing the Court can be certain of, however, is that Defendants will not assert, as a factual matter, that they never submitted claims to Medicare and Medicaid referred by their physician tenants. Indeed, any suggestion that Defendants did *not* submit such claims would be rejected as unbelievable.[12]

In making its argument, Defendants discount the thousands of claims referred by physician tenants listed on FAC Exhibit F (Doc 41-4), implying that because these *sample* claims come from doctors at only one hospital the FAC must lack the necessary *indicia* of reliability that Tenet filed claims based on referrals from its tenant physicians identified in FAC Exhibit B. Nonetheless, the sample claims provide more than mere *indicia of reliability* that claims were filed.

Nonetheless, if the Court deems the FAC lacking "indicia of reliability" that claims were filed, Relator proposes that he be permitted to amend the Complaint to include tens of thousands of Medicaid claims filed by Tenet and referred from California tenants. The proposed amendment could allege a *sample* of California data for one hospital (Garden Grove, CA, not that hospital's entire Medicaid claim set) which shows Defendants filed claims for $28,943,507 (Medicaid only) for dates of service after April 1, 2004. Exhibit L hereto. Relator is still

---

[12] CMS publishes hospitals' Medicare claims. For example, at Tenet's Palmetto Hospital in Hialeah Florida, CMS reports for calendar year 2010 more than **$ 232,705,382** in Medicare claims. Exhibit J hereto.
http://www.ahd.com/free_profile/100187/Palmetto_General_Hospital/Hialeah/Florida/

analyzing the claim data in order to determine how best to extract a manageable exhibit from the over 500 pages of thousands of claims detailed in the report. Sample pages at Exhibit M.[13]

Further, the proposed amendment could also allege Texas Medicaid claim samples and summaries showing claims totaling $57,631,457, based on tens of thousands of claims from 2000 through early 2010, paid to seven Tenet hospitals *based on referrals from physicians in addresses in its medical office buildings*. For each of Tenet's seven Texas hospitals affiliated with an office building identified in FAC Exhibit B, the Exhibit at P1 hereto shows *sample* claims including:

- 10 referring tenant-physician for each of Tenet's Texas hospitals, pp. 1-3.
- 10 claims per hospital, pp. 4-6.
- Annual referral totals from physicians in addresses in its medical office buildings, p. 7

If it were deemed necessary, a second amended complaint could also include an 18-page list of nearly 900 physicians with addresses in Tenet's medical office buildings who have referred to Tenet's Texas hospitals. Exhibit P2 hereto. [14]

Relator also anticipates additional claim data from other states. If the Court accepts Defendants' argument that the FAC lacks sufficient "indicia of reliability" that claims were filed, Relator proposes that he be permitted to amend to include additional tens of thousands of Medicaid claims filed by Tenet in Texas, California and elsewhere, and referred from providers in Tenet's medical office buildings.

---

[13] The 500+ pages of claim data is a *sample* of Medicaid referrals from a single building, 12555 Garden Grove Blvd, Garden Grove, CA, to Tenet's Garden Grove Hospital (since sold) from 04/01/2004 – 4/10/2010. The data shows a sample of the many claims referred by physicians with below-market leases (see FAC Ex. B). For example:

Referring Provider	suite #	billed	lines*
Andrew H. Ahn, MD,	403	$234,451	243
Jae H. Kim MD,	407	$707,104	586
Francis S. Lee, MD,	303	$817,445	373
Brian S. Rhee, MD,	408	$ 72,949	190
Peter K. Wang, MD Inc.,	306	$290,664	247

* Each "line" is a procedure, but more than one procedure may be bundled into a "claim" so there are fewer "claims" than "lines."

[14] The exhibits P1 and P2 are for purposes of "reliability" that claims were filed. Relator does not allege that all of these physicians enjoy below-market leases.

But none of this should be required. The ultimate question in deciding a Rule 9(b) motion is whether a relator's allegations are "sufficient to explain why [the relator] believed [the defendant] submitted false or fraudulent claims for services rendered." *U.S. ex rel. Walker v. R & F Props. of Lake County, Inc*., 433 F.3d 1349, 1360 (11th Cir. 2005) (discussions with other employees about billing practices provided sufficient indicia of reliability, notwithstanding lack of information about specific claims). As detailed above, Relator's FAC satisfies Defendants' Rule 9(b) objections and would pass muster under the myriad of holdings in other cases that have analyzed this issue. *See Hill v. Morehouse Med. Assocs., Inc.*, 82 Fed. Appx. 213, 2003 WL 22019936, at *4 -*5 (11th Cir. 2003) (FCA claim could go forward solely upon a Relator's "information and belief" despite failure to identify a specific false claim, and observing 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"); *U.S. ex rel. Lockhart v. General Dynamics,* 529 F.Supp.2d 1335, 1341 (N.D. Fla. 2007) (denying Rule 9(b) motion where substance of the fraud and requisite reliable basis for relator's knowledge of it was alleged with particularity, even though ". . . complaint does not give dates or amounts of deliveries or payments."); *U.S. ex rel. King v. DSE, Inc.*, No. 8:08–cv–2416–T–23EAJ, 2011 WL 1884012, at *1 (M.D. Fla. May 17, 2011) (finding the relator's detailed complaint "undoubtedly has *alerted the defendants to the pertinent acts and omissions*" because no party disputes the fact that the defendants billed for, and were paid for, their grenades).

III. RELATOR PROPERLY ALLEGES STARK AND AKS VIOLATIONS

A. Relator Properly Pleads Stark Statute Violations

Defendants misstate the pleading required for a Stark violation. Motion to Dismiss, p. 16. The law is clear: a hospital may not submit for payment a Medicare claim for services rendered pursuant to a prohibited referral. 42 U.S.C. § 1395nn(a)(1)(B); 42 C.F.R. § 411.353(b). The United States may not make payments pursuant to such a claim, and hospitals must reimburse any payments that are mistakenly made by the United States. 42 U.S.C. § 1395nn(g)(1); 42 C.F.R. § 411.353(c), (d).

"Falsely certifying compliance with the Stark or Anti-Kickback Acts in connection with a claim submitted to a federally funded insurance program is actionable under the FCA." *United States ex rel. Baklid-Kunz v. Halifax Hosp. Med. Ctr.*, 2012 U.S. Dist. LEXIS 36304 (M.D. Fla. Mar. 19, 2012), Exhibit N hereto. *See United States ex rel. Drakeford v. Tuomey Healthcare Sys*.,

2012 U.S. App. LEXIS 6444 (4th Cir. S.C. Mar. 30, 2012) (considering Stark under FCA), Exhibit I hereto; *United States ex rel. Kosenke v. Carlisle HMA, Inc.*, 554 F.3d 88, 95 (3d Cir. 2009); *United States ex rel. Schmidt v. Zimmer, Inc.*, 386 F.3d 235, 243 (3d Cir.2004) (*citing United States ex rel. Thompson v. Columbia/HCA Healthcare Corp*., 125 F.3d 899, 902 (5th Cir.1997)); *United States v. Rogan*, 459 F.Supp.2d 692, 717 (N.D.Ill.2006). For support, Defendants rely on various inapposite cases relating to Stark violations.[16]

Unlike the Anti-Kickback Law, which requires scienter, Stark is essentially a ‘‘strict liability’’ statute. Even if the parties did not intend to violate the Stark Law, Stark will nevertheless be violated as long as there is a financial relationship, a referral and no exception applies. 42 U.S.C. § 1320a-7b(b). Once the existence of a financial relationship has been established, “the burden shifts to the defendant to establish that his conduct was protected by a safe harbor or exception; the United States need not prove, as an element of its case, that defendant’s conduct does not fit within a safe harbor or exception.” *United States v. Rogan*, 459 F. Supp. 2d 692, 716 (D. Ill. 2006), *affirmed*, 517 F.3d 449 (7th Cir. 2008); *United States ex rel. Kosenske v. Carlisle HMA, Inc*., 2007 U.S. Dist. LEXIS 84294, *26 (M.D. Pa. Nov. 14, 2007) (“When a financial relationship exists, the defendant incurs the burden of demonstrating the applicability of an exception.”).

The Stark statute defines “compensation arrangement” as “any arrangement involving any remuneration between a physician (or an immediate family member of such physician) and an entity other than an arrangement involving only remuneration described in subparagraph (C).” 42 U.S.C. § 1395nn(h)(1)(A). “Remuneration,” in turn, is defined to “include[] any remuneration, directly or indirectly, overtly or covertly, in cash or in kind.” 42 U.S.C. § 1395nn(h)(1)(B). Thus, the statute does not set forth different requirements for “direct” and

---

[16] Defendants rely on *Ebeid v. Lungwitz*, 616 F.3d 993, 1000 (9th Cir. Ariz. 2010) but the FAC in this case is in no way comparable to the deficient bare-bones complaint in *Ebeid.* Similarly, Defendants rely on *United States ex rel. Smart v. Christus Health*, 626 F. Supp. 2d 647 (S.D. Tex. 2009) where the relator failed to allege *any* claims. *Smart*, a Stark/AKS case, also held allegations were not "based upon" earlier disclosures of below-market leases and references to Stark violations in earlier unrelated litigation. *Id.* at 656.

The court reached the same correct result in *United States ex rel. Woods v. N. Ark. Reg'l Med. Ctr.,* 2006 U.S. Dist. LEXIS 63870 *10 (W.D. Ark. Sept. 7, 2006) (dismissing when "plaintiff provides absolutely no specifics with regard to the ‘who, what, where, when, and how.’").

"indirect" compensation agreements, but rather recognizes that even "indirect" remuneration is sufficient to create a compensation arrangement and hence a financial relationship.

Defendants argue the FAC failed to allege whether the financial relationship was direct or indirect. But that issue was considered and rejected by the court in *Baklid-Kunz*, which held that Stark does not require allegations as to whether the financial relationship is direct or indirect. *Id* at *12 -13, Exhibit N hereto. Further, a physician stands in the shoes of his practice. 42 C.F.R. § 411.354(c)(1). Thus, for the majority of the leases, the physicians themselves would be deemed to have a direct financial relationship with the hospital.

Defendants argue that Stark does not cover Medicaid. Motion p. 23. Clearly, this is incorrect. 42 U.S.C. § 1396b(s); *Baklid-Kunz at* *10-11. Defendants caused the states to submit false claims to the federal government for services furnished on the basis of improper referrals. *See, Renal Physicians Ass'n v. United States HHS*, 489 F.3d 1267, 1269 (D.C. Cir. 2007) ("In 1993, Congress extended the law [Stark] to several other health services, *id*. § 1395nn(h)(6), and also included Medicaid patient referrals within the scope of the law, *id*. § 1396b(s).").

Defendants also maintain that the FAC fails to plead Stark's "designated health care services" with particularity. "Inpatient and outpatient *hospital* services" are among the eleven "designated health care services included within the Stark provisions." 42 U.S.C. § 1395nn(h)(6); 42 C.F.R. § 411.351. The FAC pleads Tenet's hospital services at ¶¶ 18, 56-60, 70, 74, 138, 140.

Finally, Defendants argue that their below-market leases may fall within Stark exceptions, such as those for compensating physicians or for physician leases. But such exceptions must be raised by Defendants as affirmative defenses. *Baklid-Kunz* at *13. *U.S. v. Rogan*, 459 F. Supp. 2d 692, 716 (N.D. Ill. 2006). Relator does not have to plead the Defendants' conduct does not fit within a safe harbor or exception. *Baklid-Kunz* at *15, *Rogan* at 716.

B. Relator Properly Pleads AKS Violations

This Circuit has long held that "compliance with the [AKS] is a material condition of payment under the Medicare program." *U.S. ex rel. McNutt v. Haleyville Med. Supplies, Inc.,* 423 F.3d 1256, 1259-1260 (11th Cir. 2005). Claims tainted by kickbacks are "false" under the FCA. 42 U.S.C. § 1320a-7b(g). The *McNutt* court held that a claim is validly stated where it is alleged that the defendants "violated the Anti-Kickback Statute; compliance with the Statue is necessary for reimbursement under the Medicare program; and the [defendants] submitted claims for

reimbursement knowing that they were ineligible for the payments demanded in those claims." *McNutt*, 423 F.3d at 1260. It is undisputed that the FAC alleges each of these elements:

- Defendants violated the AKS (FAC ¶¶ 141, *passim*.);
- Compliance with the AKS is necessary for reimbursement under the Medicare program (FAC ¶¶ 30, 43-48); and
- Defendants knowingly submitted claims for reimbursement and caused additional claims for reimbursement knowing that those claims were ineligible for the payments demanded (Alleged submission at ¶ 1, and "knowingly" at FAC ¶¶ 20-26, 122, 141, *passim*).

1. Relator plausibly alleges illegal remuneration

Defendants acknowledge that Relator plausibly alleges that many leases were below market value at the time of the sale. Motion, p. 20. Further, Relator plausibly alleges that Tenet sought to keep their leases below market after the sale with the imposition of the 3% maximum increase. ¶ 92. Finally, Relator plausibly alleges that Defendants offered and provided kickbacks to physician tenants because *at the time Defendants entered into the leases that understated square footage*, Defendants gave *valuable* remuneration to physician tenants in the form of free space in exchange for patient referrals. FAC Exhibit B.

How valuable? As typical of commercial leases, Defendants' leases set forth the rental rate as a base rent per square foot and state the number of square feet in the leased property.[17] For example, if the stated market value of an 800 square feet property is $20.00 per sq. ft., a tenant would pay $16,000 annually. However, if the *actual* size of the space is 1,000 sq. ft. then the tenant should have paid $20,000 annually -- $4,000 more. Relator asserts it is plausible that such a discount (from $20,000 to $16,000) reduces leases from fair market value to below fair market value, and that the $4,000 (the free 200 sq. ft.) is covert compensation to the physician tenant. [18]

---

[17] Defendants' leases also assert that the base rate is a "fair market value." *See, e.g.* Sample lease at FAC Exhibit L3, "base rent at $18.50 per square foot," p. 4, and is "commercially reasonable, fair market value" p.9, ¶ 6 (Doc. 41-16).

[18] In addition, when a landlord understates the size of the leased space, a tenant could pay a lower share of operating expenses. For example, for leases that include such expenses, if annual operating expense is $10 per sq. ft. (about average for Miami-Dade), an understatement of 200 feet results in an additional $2,000 "discount" (*i.e.* "remuneration") the first year and an increasing discount each year with the increase of expense components such as insurance, taxes, maintenance. Thus, in the example above, Tenet pays $6,000 ($4,000 plus $2,000) per year covert remuneration to a physician tenant.

FAC Exhibit B shows the percentage difference between stated square footage and actual square footage for over 500 leases. Nearly all of these "errors" favor physician tenants with free space. Innocent mistakes would tend to overstate and understate square footage at random. Commercial landlords tend to "err" by overstating square footage since that works to landlord's advantage. But Defendants consistently understated their physicians' leases. From this data, Relator has alleged and this Court may reasonably infer that hundreds of leases which understated actual square feet provided remuneration to physician tenants in the form of free office space, and that such leases' *actual* rates were below-market from the day they were signed.

The inference is strengthened by allegations that compare market rates Tenet charges non-physician tenants with the lower rates enjoyed by physician tenants. FAC ¶¶ 96 – 108.

The inference is further strengthened by suspect tenant improvement allowances. *Bona fide* improvements such as new paint, carpet or plumbing tend not to be identical dollar per square foot per year from one unit to the next. But concealed rent subsidies, characterized as tenant improvements, would tend to be identical from lease to lease, as alleged at FAC ¶¶ 109 – 121. *See U.S. v. Silvestri*, 409 F.3d 1311, 1328 (11th Cir. 2005) (allowing "inferences from the conduct of the alleged participants or from circumstantial evidence of a scheme.").

2. Relator alleges referrals "resulting from" remuneration.

Defendants inaccurately argue the FAC failed to allege referrals "resulting from" remuneration. Motion, p. 19. *But see* FAC ¶¶ 1, 122, 141. Courts have held that the AKS is violated if any one purpose of the remuneration is to induce or reward referrals. *See United States v. Kats*, 871 F.2d 105, 108 (9th Cir. 1989) ("the Medicare fraud statute is violated if one purpose of the payment was to induce future referrals, even if the payments were also intended to compensate for professional services") (citations and internal quotation marks omitted); *United States v. Greber*, 760 F.2d 68, 72 (3d Cir. 1985) (same).

3. Relator alleges "knowing" presentment of false claims.

Defendants argue the FAC insufficiently alleges "knowing" presentment of false claims. Motion pp. 18, 24, 25. But the allegations are more than sufficient to suggest the plausible inference that Defendants, through their participation in the kickback scheme, knowingly caused the submission of such claims. *See* 31 U.S.C. § 3729(b) (defining "knowingly" to include actual knowledge, deliberate ignorance, or reckless disregard). The FAC alleges intent at ¶¶ 1, 20-26, 122. Moreover, Defendants, operating under a Corporate Integrity Agreement imposed by the

HHS Office of Inspector General, knew or should have known their submissions were illegal. FAC ¶ 26. [19] It required additional monitoring to attempt to ensure Stark and AKS compliance.

IV. CONCLUSION

By uncovering the astounding breadth of Tenet's illegal scheme to use below-market leases as remuneration for Medicare and Medicaid referrals, Relator has rendered an invaluable service to the federal government. Relator's discovery required independent research, analysis of thousands of documents, and use of an expensive and sophisticated computer software program commonly unavailable to the general public. Some of the crucial information that Relator used for his analysis was obtained through Defendants' password-protected website that required a Confidentiality Agreement for access. This information, forming the crux of Relator's claims, would have revealed nothing suspicious to a casual real estate investor. However, it became a critical piece of an illegal fraudulent scheme when viewed in conjunction with other documents, focused and fortified by first-hand knowledge of Tenet's Miami / Hialeah practices, and scrutinized through Relator's expert lenses. The jurisdictional bar against the use of publicly disclosed "news media" was never intended to prevent the use of this type of information as a basis for a FCA case. In fact, this is the paradigm for a legitimate *qui tam* action.

Moreover, Relator has pled his allegations with sufficient specificity to allow Defendants to defend. He has alerted Defendants to the precise misconduct that forms the basis of his claims by providing the "who, what, where, why, and how" of the fraudulent conduct — Stark and AKS violations — and ample indicia of reliability to show that claims were filed. There is sufficient, specific information in the First Amended Complaint to show that this lawsuit is not spurious.

Congress has expressed its intent to use the False Claims Act aggressively to combat healthcare fraud, and judicial precedent strongly advises against summarily denying a plaintiff his day in court. Thus, this Court should reject Defendants' assertion that Relator's allegations

---

[19] Recurring Medicare fraud settlements suggest lessons not learned: 1994: $379 million; 2003: $54 million; 2004: $22.5 million; 2006: *$900 million*; 2007: United States case against in-house counsel (dismissed for statute of limitations). FAC ¶¶ 20 – 26. The FAC overlooked *United States ex rel. Sturrock v. Tenet Healthcare Corp. and Southwest Gen. Hosp.* (W.D. Tex.). But that's not all – Tenet paid another $43 million in April 2012 for yet another Medicare fraud. Http://www.justice.gov/opa/pr/2012/April/12-civ-446.html.

fail to meet the specificity requirements of Rule 9(b). Clearly, the FAC provides abundant indicia of reliability to support Relator's allegations that false claims were submitted.

Respectfully submitted,

Jonathan Kroner
420 Lincoln Road, Suite 248
Miami Beach, Florida 33139-3031
(305) 310-6046

/s/ Jonathan Kroner

FBN 328677
jk@FloridaFalseClaim.com

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

Martin B. Goldberg mgoldberg@lashgoldberg.com
Michael Lee Ehren mehren@lashgoldberg.com
Katherine A. Lauer katherine.lauer@lw.com
Jason M. Ohta jason.ohta@lw.com
Christopher S. Olson chritsopher.olson@lw.com
Jeremy D. Kernodle jeremy.kernodle@haynesboone.com
George William Morrison bill.morrison@haynesboone.com
Nicole Somerville nicole.somerville@haynesboone.com
Stacy L. Brainin stacy.brainin@haynesboone.com

Erica Galpern Waxman erica.waxman@myfloridalegal.com
June C. Acton june.acton@usdoj.gov,
Renee.Balancier@usdoj.gov

Via Email

Mark Coffee mark.coffee@oag.state.tx.us
Renee Orleans renee.orleans@usdoj.gov
Steven U. Ross steven.ross@doj.ca.gov
Mary Elizabeth McCullohs mary.mccullohs@ag.tn.gov