IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 13-23671 CIV-COOKE

United States of America
and
The State of Florida, *ex rel.*
Thomas Bingham,

Plaintiffs,

vs.

HCA, Inc.,

Defendant.
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PLAINTIFF RELATOR'S OPPOSITION TO MOTION TO DISMISS

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Plaintiff/Relator Bingham ("Plaintiff") alleges HCA entered into financial relationships with referring physicians in violation of the Stark Statute, and paid remuneration in violation of the Anti-kickback Statute ("AKS"). The Complaint alleges:

i. In Centerpoint, Missouri, HCA collaborated with a third party to pay referring physician-tenants pursuant to Cash Flow Participation Agreements. The well-documented trail leads to HCA's Real Estate Vice-Presidents in its Nashville corporate headquarters.

ii. In Aventura, Florida, HCA granted a multi-million dollar parking easement directly to physician tenants.

iii. In both locations, HCA transferred millions of dollars to medical office building developers to induce patient referrals.

Plaintiff asks the Court to find plausible that:

i. The payments, easements, and transfers "took into account" patient referrals. This violates the Stark Statute.

ii. At least one purpose of the payments, easements, and multi-million dollar transfers was to induce referrals. This violates the Anti-kickback Statute.

Plaintiff's First Amended Complaint (the "FAC") pleads facts with particularity that, when accepted as true for purposes of reviewing HCA's Motion, present more than a "plausible" claim for relief, as required by Federal Rules 8(a), 9(b) and 12(b)(6).

I. The Parties and the Alleged Schemes

***Qui Tam* Plaintiff/Relator Thomas Bingham** is a Certified Real Estate Appraiser, who works for one of the country's largest medical office management firms. FAC at ¶ 11. In 2008, in his capacity as a professional medical office building ("MOB") appraiser, he uncovered a scheme to induce patient referrals in HCA's Largo, Florida hospital (and a Tennessee. Hospital). FAC ¶ 16 ["*HCA-Largo*"]. Among other allegations, that lawsuit alleged with respect to Largo, that HCA paid tenant-physicians for patient referrals via substantial lease benefits provided through a medical office developer. *Ex. 1 HCA-Largo* Second Amended Complaint ["Largo SAC"]. That case settled for $16.5 million, and helped inform the allegations here. FAC ¶ 16.

Defendant HCA owns and operates more than 270 healthcare facilities. FAC ¶ 15. HCA is familiar with the False Claims Act due to its history of paying fines, civil damages, and other penalties on account of kickbacks and self-referrals. FAC ¶ 16.

Unlike other hospitals that are presumed sufficiently honest to operate medical office buildings, the Department of Justice mandated and HCA agreed that HCA's medical office buildings must be managed by professional *independent* third-party managers. FAC ¶ 148.[1] In other words, *HCA conceded it needs oversight because it could not be trusted to operate medical office buildings without succumbing to the temptation of using the buildings as conduits to pay kickbacks for referrals. Id.*

Summary of HCA's Schemes

The parties agree that a complaint alleging fraud must describe *who, what, where, when*, and *how*. *U.S. ex rel. Bukh v. Guldmann, Inc*., No. 8:14-cv-1089-T-23EAJ, 2014 U.S. Dist. LEXIS 116622, at *3 (M.D. Fla. Aug. 21, 2014). The FAC answers these questions. It details HCA's alleged frauds sufficiently to permit HCA to formulate a defense.

Where: Plaintiff alleges frauds at HCA's Centerpoint and Aventura hospitals. He alleges that HCA planned the schemes at its Nashville headquarters. FAC ¶¶ 200-205.

Who: For the Centerpoint scheme, HCA Vice-Presidents Howard K. Patterson and Mark Kimbraugh executed the relevant documents (FAC ¶¶ 200-205); and for Aventura, Howard K. Patterson (FAC ¶¶ 109, 110, 114, 116, 125). Not coincidentally, Aventura's developer/landlord, RTH Partners, LLP and RTH Equity, LLC c/o Greenfield Group, are related to the HCA-Largo's developer/landlord, MMP Partners, LLP and MMP Equity LLC c/o Greenfield Group. FAC ¶ 115; Ex. 1 Largo SAC at ¶ 55. *See* FAC ¶¶ 200-205.

When: HCA finalized documents in spring 2005 at Aventura (FAC ¶ 115) and in the summer of 2005 at Centerpoint. (FAC ¶ 45). *See* Ex. 1, Largo SAC ¶ 55 (April 2005).

What and **How:** Plaintiff refers the Court to the FAC. It lays out HCA's frauds in a readily understandable manner while providing sufficient detail to permit Defendant to formulate a defense. That is all that is required. These allegations are summarized below.

1. HCA Covertly Transferred $12.7 Million Dollars to MOB Developers

In Centerpoint, HCA charged the developer a single upfront payment of $1.78 million for a 99-year ground lease on about 1.5 acres. FAC ¶ 46. Plaintiff estimates the site's value at $3.3 million. FAC ¶ 84. HCA threw in a parking easement to an adjacent 9.5 acres and agreed to construct and maintain parking on that adjacent property. FAC ¶¶ 48-51. Plaintiff values the

[1] *See.* FAC ¶¶ 148-156, detailing DOJ mandated compliance procedures.

parking construction and easement at $2.3 million. FAC ¶¶ 79-81. HCA further subsidized the developer when it paid an estimated $1.46 million for empty space it did not need or use. FAC ¶¶ 86, 95-98. In total, in exchange for $1.78 million, HCA expended over $7 million ($3.3 + $2.3 + $1.46).

In Aventura, Plaintiff alleged "on information and belief" HCA charged "less than $2 million" for a 99-year ground lease. FAC ¶ 134. Notwithstanding HCA's contention that these are "baseless conclusions" (MTD at 13), discovery has since confirmed this allegation and revealed HCA charged the MOB developer a single payment of $1,875,000 for the 99-year ground lease.[2] Ex. 9, Ground Lease.

In exchange for $1.875 million, HCA agreed to construct and maintain a parking garage on an adjacent property and granted an easement. FAC ¶108. Plaintiff values the parking easement and construction at $5.25 million. FAC ¶113. The approximate value of the 99-year ground lease, including the parking easement, is $9.4 million. FAC ¶133.

The MTD disclosed yet another *unusual* and *valuable* rent concession—a "Sponsorship Agreement." Doc 38-1. HCA assumed financial risks and agreed to pay rent "shortfalls." *Id.* at pp. 4, 17-21. HCA's V.P. Howard K. Patterson executed the document. *Id*. at 32.

In total, Plaintiff alleged HCA gave at least a $7.525 million ($9.4 - $1.875) windfall to Aventura's MOB developer *and its partners*.[3]

What did HCA purchase for $12.7 million (Centerpoint's $5.2 + Aventura's $7.525)? Unraveling a scheme alleging a hospital's use of medical office buildings as kickback conduits in *U.S. ex rel. Osheroff v. Tenet HealthCare Corp*. (*Tenet II*):

> [T]he Court can reasonably infer that a landlord would not enter into a lease agreement for a price that fell below the fair market rate if some other consideration were not involved. Here, that other consideration would be, as Relator alleges, patient referrals.

No. 09-22253, 2013 U.S. Dist. LEXIS 44235 at *28 (S.D. Fla. Mar. 27, 2013) (denying MTD). *See also U.S. v. Rogan*, 459 F. Supp. 2d 692, 716 (N.D. Ill. 2006) *aff'd*, 517 F.3d 449 (7th Cir.

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[2] Citations are to ECF's page numbers, or if none, to the PDF's page number.

[3] HCA estimated construction costs at $17.5 million. MTD Ex. 1, Doc 38-1, p. 35. Months later, in October 2007, the developer sold the building and its leasehold interest for $25.4 million. FAC ¶ 130. The developer *and its partners* enjoyed a fast and risk-free return of about $7.9 million ($25.4 - $17.5), about the same amount as the alleged HCA subsidy.

2008) (noting that gross overpayments allow inference "that payments were intended to be kickbacks."). *See generally U.S. v. Nachamie*, 121 F. Supp. 2d 285, 293 (S.D.N.Y. 2000) (noting in kickback case, "it is common knowledge that 'you can't get something for nothing' and 'money doesn't grow on trees.'").

2. HCA Transferred Parking Rights to Developers *and to Doctors*

Rather than charging commercially reasonable parking rates to the MOBs, their tenants, and their patients for 99 years, HCA transferred valuable parking easements to the MOB developers. Centerpoint FAC ¶¶ 76-88; Aventura at FAC ¶¶ 106, 140. *See* Ex. 1, Largo SAC ¶ 59 (99-year lease plus parking).

In Aventura, HCA also **granted a 99-year easement *directly* to referring physicians,** their employees, and patients.[4] FAC ¶ 108. Ex. 7 at 2., made "perpetual," Ex. 8 at 8 and 9. Although the Hospital may charge *its* patients and visitors parking fees, no fees are charged to physician *tenants*, and *their* staff who enjoy a "perpetual" easement granted directly to them by HCA. FAC ¶ 140. *See* Ex. 8 at 20 ("perpetual").

HCA conferred a direct benefit on referring physician tenants when it recorded the non-exclusive cross-parking "perpetual" easement after the construction of the medical office building had begun. This "perpetual" easement was more expansive than the parking easement granted to the developer (which also benefitted the physician tenants). FAC ¶ 108, Ex. 7 and Ex 8. The lack of express consideration for this valuable "perpetual" real estate interest "running with the land" makes plausible Plaintiff's allegation that one purpose was to induce referrals.

3. HCA Controls Referring Physicians' Leases and Cash Flow Agreements

Centerpoint: Through the HCA-drafted Development Agreement, HCA directly controls physicians' lease terms and cash flow agreements. FAC ¶ 161, citing Development Agreement, Doc. 14-8, requiring referring-physician leases' terms on a form approved by HCA, § 4(c)(8); $18.90 /ft. rates and $55 /ft. tenant improvement allowances (more than two-years' anticipated rent), § 14; all of which was confidential, § 13.

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[4] FAC ¶¶ 108, 130, 140 *et seq*. referencing Ex.7 Non-Exclusive Cross Parking Agreement, recorded in Book 278979, page 1412, Miami-Dade County Recorder. FAC ¶¶ 116, 130, 140 *et seq*. referencing Declaration of Covenants, Restrictions and Easements, Ex. 8. *See* pp.1, 2, 4, 8, and 9 (HCA granting "perpetual" easement at § 3.1(a)).

The Development Agreement not only controlled the "Tenant Lease Form," but also shows HCA's involvement in the cash flow agreements between the developer and the physicians. *Id*. at 8. § 4(c)(8). It states "Developer and Hospital [HCA] shall be prepared to execute a cash flow participation agreement satisfactory to both parties. *Id*. at § 4(c)(11). Ex. 5 is a Cash Flow Participation Agreement between the developer (Tegra) and HCA (Centerpoint Orthopedics, executed by HCA V.P. Mark Kimbrough at 8, May 2008). *See* doc. 38-4 (Cash Flow Agreement signed by HCA's V.P. Howard K. Patterson, June 2005). Exhibit 5 and doc 38-4 are *identical* (but for tenants) to FAC exhibits 14-1 and 14-3 (referring physicians' executed Cash Flow Agreements). *See* FAC ¶¶ 53-69, explaining fraudulent post-dating.

Consequently, Plaintiff plausibly alleges HCA drafted the cash flow agreements and directed the developer to use these agreements to pay referring physicians. FAC ¶¶ 63-66.

The leases' doubletalk further supports the allegation: "Landlord shall not enter into any cash flow agreements or similar type agreements with any physicians. *Notwithstanding the foregoing to the contrary, Landlord and Tenant are executing and delivering a cash flow participation agreement* in the form attached hereto as Exhibit F." 14-2 at 25, § 25.19. [Emphasis added.] Why the doubletalk? Discovery may reveal that while HCA needed to include "landlord shall not…," physician tenants needed assurance they would receive their payments.

Of course, HCA could not risk disclosure of referring-physicians' cash flow agreements under its Corporate Integrity Agreement (CIA), so these were drafted as separate documents. FAC ¶ 56. See FAC ¶ 60, Doc. 14-1 at 1 (stating payments were "in consideration of executing said long-term Lease Agreement, *but not as part of the Lease Agreement*."); Doc. 14-3 (same). Then they were fraudulently post-dated to appear they were not executed contemporaneously with referring physicians' leases. FAC ¶¶ 63-66. Consequently, a lease-related affirmative defense would seem inapplicable to payments made "not as part of the Lease Agreement." Doc. 14-1, 14-3 at 1. *See* 42 U.S.C. § 1395nn(e)(1)(A)(iv) (requiring lease terms "set in advance").

HCA disputes factual allegations it intended payments to physicians to induce referrals by arguing that the developer's payments to *it* somehow purifies the physician's payments. MTD at 15. HCA cites no law to support this theory because there is none. Discovery may also reveal a more plausible explanation. First, HCA did not intend to overly enrich the developer for the space it was leasing. Additionally, HCA may have used its share of the payments from the $5.2

million subsidy for the space HCA leased from Tegra to remunerate or subsidize the independent physician sub-tenants that worked in HCA's clinics.

Aventura: Through the Sponsorship Agreement, Doc. 38-1, HCA directly controlled the approval of tenants, all of whom must be potentially referring physicians, § 2.3(b) at p. 15; the form of physicians' leases and rental payments, Doc. 38-1 § 2.5 at pp. 15, 16; the rates "not less than $19.25/ft.," p. 13; and $53 improvement allowance, p. 7.

Similarly, HCA exerted tenant control at Aventura. FAC ¶ 118 as confirmed by HCA's Exhibit 38-1, defining "Approved Tenant" at § 2.5, also mandating the form of the lease at Ex. C (omitted from 38-1 by Defendant).

HCA argues that the Sponsorship Agreement prohibited physician referral source ownership or profit sharing. MTD at 18. But this is belied by a trigger that causes the Agreement to expire upon the occurrence of a referral source transaction, thus making the prohibition illusory. *Id.* at § 9.8.

4. HCA Built Garages and Skywalks for Referrals

HCA built parking facilities, rather than requiring the on-campus MOB developers to lease the property and construct their own facilities (the customary practice). FAC ¶¶ 48, 51, 110, 113 and doc 14-8 at 2. *See* Largo SAC ¶ 56-59 (same). These parking facilities were adjacent to the hospitals with direct access to the hospital. *Id*.

HCA also constructed at its own expense a skywalk between the office building and Centerpoint's hospital. Doc. 14-8 at 4. HCA protected the physician tenants' access rights. This and the underlying easements show a Stark "direct relationship," and also an "indirect relationship," to the extent the expense and easements "took into account" potential referrals.

5. The FAC Plausibly Alleges Fraudulent Schemes

The FAC should be viewed in light of HCA's history. Specifically, HCA's implicit acknowledgment in the CIA that it needed help to avoid succumbing to the temptation of kickbacks. FAC ¶ 148. *HCA-Largo* also supports the scheme's plausibility because the same HCA executives perpetuated a similar scheme in Largo, Florida. Ex.1, Largo SAC, ¶¶ 55-58.

The MTD disparages some allegations as "baseless," "conclusory," and "estimates" not "supported by any facts."[5] Nonetheless, a key "information and belief" allegation ("less than $2 million" Aventura ground lease) proved true ($1.875 million). Plaintiff's allegations were informed by his experience as a professional medical office appraiser, his prior HCA lawsuit, documents, such as HCA's Cash Flow Agreements, and also by CLE materials. For example, American Health Lawyers Real Estate Group *Roundtable Discussion.* Ex. 6. "Development Scenario #1" involves a hospital's long-term lease of unimproved hospital property to a third-party developer for a below-market value rate, with the developer leasing office space based on a $17 per foot "fair market value appraisal." Ex. 6 at 4-6. Similar to what Plaintiff alleged:

> *Facts of the Deal:*
> Developer is able to charge a $17.00 gross rate because Developer's operating costs are less due to below fair market rent under the ground lease. Put another way, Developer would have charged higher rent to Physicians if Developer had paid higher ground lease rent.

Ex. 6 at 7, American Health Lawyers Real Estate Group.

HCA cites *U.S. ex rel. Jamison v. McKesson Corp*., 649 F.3d 322, 331 (5th Cir. 2011) as holding a declination to intervene means that the claims "presumably lacked merit." MTD at 1, note 1. But *Jamison* made no such ruling. Rather, the government intervened in only seven of 450 defendants, and the court inferred "that Jamison selected them arbitrarily." *Jamison*, 649 F.3d at 331. In this Circuit, a declination does not reflect on the merits of the case. *U.S. ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1359 n.17 (11th Cir. 2006).[6]

A recent decision denied a motion to dismiss where a complaint alleged a structurally near-identical scheme (by the same Bingham). *U.S. ex rel. Bingham v. BayCare Health Sys*., No. 8:14-cv-73-T-23EAJ, 2015 U.S. Dist. LEXIS 107220 (M.D. Fla. Aug. 14, 2015). That court concluded that Bingham had plausibly and with particularity alleged a scheme similar to what is alleged here. *Id.* at *6; Ex. 2, *Baycare* FAC.

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[5] The MTD inappropriately seeks to dispute material facts. *See, e.g., Pharma Supply, Inc. v. Stein*, No. 14-80374-CIV, 2015 U.S. Dist. LEXIS 23994, at *5 (S.D. Fla. Feb. 27, 2015); *Page v. Postmaster Gen.*, 493 F. App'x 994, 995-96 (11th Cir. 2012) (*per curiam*) (factual disputes not resolved on motion to dismiss).

[6] Recently, a relator settled a *declined* case for $495 million. *See DaVita Agrees to $495 Million Settlement in Alleged Medicare Fraud Lawsuit Filed by Qui Tam Whistleblowers*, Nat'l L. Rev (May 7, 2015), http://www.natlawreview.com/article/davita-agree-to-495-million-settlement-alleged-medicare-fraud-lawsuit-filed-qui-tam-.

II. The *Stark Statute* Allegations Satisfy Rule 9(b)

Congress passed the Stark amendments following reports suggesting that financial relationships could distract physicians from making objective medical decisions. *See U.S. v. Halifax Hosp. Med. Ctr.*, No. 6:09-cv-1002, 2014 U.S. Dist. LEXIS 1950, at *6, n.1 (M.D. Fla. Jan. 8, 2014). HCA's history shows this a legitimate concern. FAC ¶ 16.

At Aventura hospital these risks are more than theoretical. A pending case includes allegations of *unnecessary cardiac procedures* at Aventura hospital. *U.S. ex rel. Gentile v. HCA*, No. 12-cv-20638, (S.D. Fla.) ("*HCA-Gentile*") (doc. 1 at ¶¶ 235, 238).[7] *See* FAC ¶ 129 (listing on-campus tenant cardiologists).

1. It is Not Necessary to Plead a "Direct" or "Indirect" Relationship

HCA contends that the FAC failed to sufficiently detail whether the financial relationship was direct or indirect. MTD at 21. But that argument was considered and rejected by a Florida district court that held that *Stark allegations need not specify whether a financial relationship is direct or indirect*.

> The Defendants contend that the Complaint fails to set out whether the financial relationship between Halifax and the physicians at issue is a direct relationship or an indirect relationship. Although the Stark Amendment does distinguish between the two—some exceptions apply to direct financial relationships, but not to indirect financial relationships, and vice versa— *nothing in its language requires that the particulars of that relationship be established in the complaint*, and the Defendants have not cited to any cases imposing such a requirement. Accordingly, this argument is rejected.

U.S. ex rel. Baklid-Kunz v. Halifax Hosp. Med. Ctr., No. 6:09-cv-1002, 2012 U.S. Dist. LEXIS 36304, at *12-13 (M.D. Fla. Mar. 19, 2012) (emphasis added). Even without allegations characterizing the relationship as direct or indirect, Halifax sufficiently understood the misconduct with which it was charged and later settled for $85 million.

Similarly, this Circuit found a Stark complaint to have been pled with particularity when it alleged only a "financial relationship." *U.S. ex rel. Mastej v. Health Mgmt. Assocs.*, 591 Fed. Appx. 693, 698 (11th Cir. 2014). Mr. Mastej's Third Amended Complaint alleged only a

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[7] Mr. Gentile, an HCA insider, alleged HCA disregarded internal reports documenting thousands of medically unnecessary cardiac procedures. *HCA-Gentile*, doc. 1 at ¶ 19. *HCA-Gentile* also alleges HCA maintains a culture of "systemic fraud." *Id.* at ¶¶ 3-4.

financial relationship. Ex. 3, Third Amended Complaint, *U.S. ex rel. Mastej v. Health Mgmt. Assocs.*, No. 11-CV-89-FTM-29DNF (M.D. Fla.), Doc. 79.

HCA cites no case law to support its proposition that Stark's *regulations* must be pled to satisfy Rule 9(b). Rather, the MTD relied on one case that considered Stark *jury instructions*, not pleading standards. *U.S. ex rel. Drakeford v. Tuomey Healthcare Sys*., 675 F.3d 394, 401 (4th Cir. 2012), and another that considered a motion for summary judgment. *U.S. ex rel. Singh v. Bradford Reg'l Med. Ctr*., 752 F. Supp. 2d 602, 620 (W.D. Pa. 2010). Similarly in S*ingh*, years earlier, defendants' motion to dismiss attempted a Stark regulatory argument similar to that construed by HCA. Ex. 4, Motion to Dismiss, at 15–17, *U.S ex rel. Singh v. Bradford Reg'l Med. Ctr*., No. 04 –CV–0186 (W.D. Pa. Aug. 25, 2005), Doc. 14. That court wholly rejected that argument about pleading lease-based Stark violations:

> Defendants' argument rests on their own interpretation of the Stark Law, as they have provided no supporting citation. We note that to accept Defendants' largely undeveloped argument and dismiss Relator's Stark Law claim *would be inappropriate at this stage of the proceedings*, and possibly be contrary to Congress' intent in passing Stark Law.

U.S ex rel. Singh v. Bradford Regional Medical Ctr., No. 04-186, 2006 U.S. Dist. LEXIS 65268, at *23 (W.D. Pa. Sept. 13, 2006) (emphasis added).

2. The Statute Does Not Require "Vary With"

HCA's unsupported interpretation contradicts the statute, which broadly defines "compensation arrangement" as "any arrangement involving any remuneration between a physician … and an entity other than an arrangement involving only remuneration described in subparagraph (C)," and defines "remuneration" to include "any remuneration, directly or indirectly, overtly or covertly, in cash or in kind." 42 U.S.C. § 1395nn(h)(1)(A).

Indeed, the statute itself recognizes that lease agreements may violate the statute and provides that such agreements are proper only if, among other things, "the rental charges over the term of the lease are set in advance, are consistent with fair market value, and are not determined *in a manner that takes into account* the volume or value of any referrals or other business generated between the parties." 42 U.S.C. § 1395nn(e)(1)(A)(iv).

Notably, Congress used the words "takes into account," but not "vary with," demonstrating that it prohibited any lease which "takes into account" referrals.

Under HCA's interpretation, however, such arrangements would be impermissible only if a lease stated on its face that the rental amount was directly tied to the number or value of illegal referrals made by the lessor-physicians. It is almost impossible to conceive of any defendant who is (i) clever enough to enter into a lease intended to disguise improper compensation, while at the same time (ii) foolish enough to expressly state in the lease that the rental amount is directly tied to the number or value of referrals.

HCA's argument also fails because the Stark *regulations* do not limit arrangements to those that *vary with* referrals. Rather, an *indirect* compensation arrangement exists if:

> [t]he referring physician … receives aggregate compensation . . . that varies with, *or takes into account*, the volume or value of referrals or other business generated by the referring physician for the entity furnishing the DHS.

42 C.F.R. § 411.354(c)(2)(ii) (emphasis added).

Consequently, it is sufficient to allege compensation "takes into account" or "otherwise reflects" the volume or value of referrals. FAC ¶¶ 57, 70, 83, 194.

Indeed, HCA's construction reads the words "takes into account" out of the regulation, and would open a loophole for devious parties to exploit. One could easily imagine a hospital's proposition: "I can't pay you $100 for each referral, but I expect that you'll refer 10 patients a month, so we'll just agree on $1,000 per month." While such an arrangement might not "vary with" the number of referrals, it "takes into account" such referrals and is prohibited by the Stark Act.[8]

3. Plaintiff Alleges Direct and Indirect Financial Relationships

Although a complaint is not required to allege any more than a "financial relationship" for Stark, the FAC details both direct and indirect relationships. HCA entered a *direct* financial relationship when it granted easements directly for the benefit of Aventura referring physicians. FAC ¶¶ 108, 116, 119 and 140; Ex. 7 and Ex. 8. *See* 42 C.F.R. § 411.354(c)(2).

HCA entered into *indirect* relationships when it *took into account* potential referrals before committing millions of dollars to enter into money-losing ground leases with third- party developer landlords. FAC ¶¶ 57, 70, 75, 83, 194. To consider the plausibility of whether it took

[8] The regulation originally used "otherwise reflects." Effective December 2007, this was changed to "takes into account." CMS clarified that this was non-substantive, that the terms had the same meaning and "were used interchangeably." 72 Fed. Reg. 51012, 51027.

into account anticipated referrals, one could ask whether HCA would purchase land *off*-campus, lease part of it at below-market value, expend more than the ground lease payments constructing a garage on the other part of it, and gratuitously convey near-permanent easements or the right to free parking to *non-referring* physicians and the public in general. The answer to that question is "No." In Aventura, for example, HCA charges parking for its hospital's patients and visitors.

4. Not Just "Free Parking"

HCA seeks to characterize the kickback as nothing more than some "free parking," ignoring allegations that it covertly expended millions of dollars on easements (and other transactions). But even parking can be Stark and AKS remuneration.

> We have also been asked about parking spaces that a hospital provides to physicians who have privileges to treat their patients in the hospital. It is our view that, while a physician is making rounds, the parking benefits both the hospital and its patients, rather than providing the physician with any personal benefit. Thus, we do not intend to regard parking for this purpose as remuneration furnished by the hospital to the physician, but instead as part of the physician's privileges. *However, if a hospital provides parking to a physician for periods of time that do not coincide with his or her rounds, that parking could constitute remuneration*.

66 Fed. Reg. 856, 921 (Jan 4, 2001), referencing preamble to the January 1998 proposed rule at 63 Fed. Reg. 1713-1714 (emphasis supplied).

III. The *Anti-kickback Statute* Allegations Satisfy Rule 9(b)

HCA (i) knowingly and willfully, (ii) offered or paid remuneration, (iii) to induce a physician to refer a patient for services that may be paid by a federal health care program. 42 U.S.C. § 1320a-7b(b)(2). *See BayCare*, 2015 U.S. Dist. LEXIS 107220, at *16 (M.D. Fla. Aug. 14, 2015) (articulating three elements to plead Anti-kickback Statute violation).

1. Plaintiff Pled "Knowingly and Willfully"

Plaintiff pled "knowingly and willfully" at FAC ¶¶ 198, 199, 208, and 209, that HCA's cost reports certified Stark and Anti-kickback statutes compliance. FAC ¶¶ 104, 198. *See BayCare*, 2015 U.S. Dist. LEXIS 107220 at *16 (finding sufficient allegations that hospital paid remuneration "knowingly and willfully" because it certified compliance on cost reports); *Tenet II)*, No. 09-22253, 2013 U.S. Dist. LEXIS 44235 at *8-9, 2013 WL 1289260 (holding AKS representations in hospital cost reports "ground a claim under the False Claims Act.").

HCA's history of fines, damages, and penalties on account of past kickbacks and self–referrals under AKS and Stark also show that HCA has knowledge of both statutes. FAC ¶ 197. *U.S. ex rel. Osheroff v. Tenet Healthcare Corp*. (*Tenet I*), No. 09-22253-CIV, 2012 U.S. Dist. LEXIS 96434, at *34 (S.D. Fla. July 12, 2012) (holding a "long-history of paying fines, civil damages, and other penalties on account of past kickbacks and self–referrals under both AKS and Stark" allowed the court to "reasonably infer that Defendants have actual knowledge of the requirements of both statutes.").

2. Plaintiff Pled "Offered or Paid Remuneration"

Plaintiff alleged remuneration, including remuneration that was *indirect* and *covert*.[9] FAC ¶¶ 44-102 at Centerpoint and FAC ¶¶ 103-143 at Aventura.

In Aventura, Plaintiff estimated the value of the parking benefit in the range of $9,600 up to $13,000 per referring physician per year, excluding the value of the land underlying the parking garage. FAC ¶ 142. He further alleged that HCA granted this easement *directly* to referring physician tenants. FAC ¶ 117. *See* Ex. 7 and Ex. 8.

In Centerpoint, he alleged the parking easement, FAC ¶ 76-85; cash payments made during the lease (FAC ¶ 55-68); and cash windfalls upon the building's sale. FAC ¶ 74. For example, $622,200 for Independence Women's Clinic, and $481,100 to Hausheer Braby. *Id.*

In *Baycare,* the court found sufficient the allegations of remuneration that referring physician tenants, their staff, and their patients could use the hospital's parking facilities at no charge and allegations estimating a parking benefit per referring physician of more than $10,000 per year. *BayCare Health Sys*., 2015 U.S. Dist. LEXIS 107220, at *7.

HCA correctly notes that one possible form of "remuneration" includes transfers for other than fair market value, but incorrectly argues that a complaint must allege facts showing fair market value. MTD at 17-20.

The regulations define remuneration (under Stark), stating that "[r]emuneration means any payment or other benefit made directly or indirectly, overtly or covertly, in cash or in kind," subject to certain exceptions. 42 C.F.R. § 411.351. The definition includes "other benefit," thus, it is not necessary that remuneration be "money paid." *Id.* Provision of a valuable parking

[9] The MTD sought to introduce magazine articles (note 11) and other exhibits, Docs 38-2 to 38-5. Plaintiff objects to these exhibits on the grounds that they are irrelevant, extrinsic, hearsay and lack foundation.

easement (as in Aventura), and the Cash Flow Agreements and free office parking (as in Centerpoint), would certainly constitute benefits. *See BayCare Health Sys.*, 2015 U.S. Dist. LEXIS 107220, at *16 (finding allegations of free parking and rent concessions constituted remuneration).

The AKS does not require any referral be made in return for a kickback. *U.S. v. Patel*, 778 F.3d 607, 619 (7th Cir. 2015). The MTD cites *Tenet I* for the proposition that AKS "remuneration" allegations must allege *quid pro quo* or pressure to make referrals. But it failed to apprise this Court that "*quid pro quo*" was later reconsidered in favor of the statutes' and regulation's definitions. *See* Order Granting in Part and Denying in Part Relator's Motion for Reconsideration, *U.S. ex rel. Osheroff v. Tenet HealthCare Corp.*, No. 09-CV-2253 (S.D. Fla. Aug. 3, 2012), Doc. 121. *See Tenet II*, 2013 U.S. Dist. LEXIS 44235, at *28 (holding relator need only allege Tenet knowingly *offered* a below-market lease).

HCA relies on cases that support Plaintiff because those pleadings were allowed to stand. *See, e.g., U.S. ex rel. Barker v. Tidwell*, No. 4:12-cv-108, 2015 U.S. Dist. LEXIS 71390, *3 (M.D. Ga. June 3, 2015) (pleadings allowed to stand, later resolved on summary judgment); *Klaczak ex rel. U.S. v. Consol. Med. Transp.*, 458 F. Supp. 2d 622, 626 (N.D. Ill. 2006) (same); *U.S. ex rel. Armfield v. Gills*, No. 8:07-cv-2374-T-27TBM, 2013 U.S. Dist. LEXIS 12475, at *6 (M.D. Fla. Jan. 30, 2013) (same); *U.S. ex rel. Goodstein v. McLaren Reg'l Med. Ctr.*, 202 F. Supp. 2d 671, 674 (E.D. Mich. 2002) (involving issues of proof during trial). In *Tenet II*, the court distinguished HCA's other cases:

> The cases Tenet cites in support of dismissing Relator's Complaint for failing to plead a benchmark of fair market value, *see, e.g., United States ex rel. Obert-Hong v. Advocate Health Care*, 211 F. Supp. 2d 1045 (N.D. Ill. 2002); *United States ex rel. Woods v. N. Ark. Reg'l Med. Ctr.*, No. 03-3086, 2006 U.S. Dist. LEXIS 63870, 2006 WL 2583662 (W.D. Ark. Sept. 7, 2006), are distinguishable. In *Obert-Hong*, the relator provided the court with nothing more than "bald allegations" that defendant health care provider acquired a group of medical practices for a "commercially unreasonable" amount to induce the selling physicians to refer patients to the medical provider.

Tenet II, 2013 U.S. Dist. LEXIS 44235, at *26-27, 2013 WL 1289260.

Tenet II also distinguished *U.S. ex rel. Woods v. N. Ark. Reg'l Med. Ctr.*, No. 03-3086, 2006 U.S. Dist. LEXIS 63870, (W.D. Ark. Sept. 7, 2006), finding "the court's dismissal of

relator's complaint for 'failure to identify the fair market value of the goods and services provided' was but one of a laundry list of deficiencies contributing to its dismissal." *Tenet II*, 2013 U.S. Dist. LEXIS 44235, at *26-27.

3. Plaintiff Pled Remuneration "Intended to Induce Referrals"

HCA disregards the uncontradicted body of law holding that if *one purpose* of the relationship is to induce referrals of Medicare or Medicaid patients, the agreement violates the AKS. *See U.S. v. Borrasi*, 639 F.3d 774, 782 (7th Cir. 2011) (noting that all circuit courts to address the issue have concluded that if one purpose is to induce referrals, the AKS is violated). Plaintiff alleged remuneration intended to induce referrals. FAC ¶ 2 *et seq.*

Ignoring Rule 12(b)(6), HCA seeks to have the Court view facts and inferences in its favor. It defends its kickbacks by attempting to morph allegations of intent to induce referrals into allegations of a lawful "collateral hope or expectation" that the transfer of parking easements and Cash Flow payments would result in more referrals. MTD at 20 (*citing U.S. v. McClatchey,* 217 F.3d 823, 834 n.7 (10th Cir. 2000)). But even HCA's cited authority makes clear that, "[A] hospital . . . may lawfully enter into a business relationship with a doctor and even hope for or expect referrals from that doctor, *so long as the hospital is motivated to enter into the relationship for legal reasons* ***entirely distinct from its collateral hope for referrals***." *McClatchey*, 217 F.3d at 834 (emphasis added). Plaintiff alleges that HCA's motivation was entirely consistent with an expectation of referrals. *See* FAC ¶¶ 60, 61 (asserting Cash Flow Agreements' express consideration for leasing on-campus at Centerpoint); and FAC ¶ 38, note 4 (Aventura CEO stating purpose of the then-proposed medical office building was to recruit physicians). *See generally* ¶¶ 55-70 (alleging peculiarities of front-dated Cash Flow Agreements) and Sponsorship Agreement Recitals, Doc 38-1 at 1.

In *Tenet II*, the court found

> Relator satisfied his pleading burden merely by alleging that Tenet was motivated to enter into below-market-rate leases at least in part to induce the physicians to refer patients to Tenet. See ¶ 129; *cf. United States v. McClatchey*, 217 F.3d 823, 835 (10th Cir. 2000) ("[A] person who offers or pays remuneration to another person violates the Medicare Antikickback Act so long as one purpose of the offer or payment is to induce Medicare or Medicaid patient referrals.").
>
> This is because the Court can reasonably infer that **a landlord would not enter into a money-losing lease agreement** if some other consideration were not involved. Here, that other consideration would be, as Relator alleges, patient referrals.

Tenet II, 2013 U.S. Dist. LEXIS 44235, at *28, 2013 WL 1289260 (emphasis added).

4. HCA Offered and Paid *Covert, Indirect,* and *In-Kind* Remuneration

The MTD argues a statutory revision for 42 U.S.C. § 1320a-7b(b)(2):

> whoever knowingly and willfully ~~**offers or**~~ pays ~~**any**~~ remuneration ~~**(including any kickback, bribe, or rebate)**~~ directly ~~**or indirectly**~~, overtly ~~**or covertly**~~, in cash ~~**or in kind**~~ to any person to induce such person…'

HCA purposefully obscured the remuneration it paid physicians to induce them to refer patients. FAC ¶2. The alleged scheme and remuneration was necessarily *covert*, *indirect*, and *in-kind*.

> [In addition, the] . . . Stark regulations [further] . . . explain that remuneration "means any payment or other benefit made directly or indirectly, overtly or covertly, in cash or in kind, ..." 42 C.F.R. 411.351. Thus, we do not only look to the direct and overt remuneration payments in cash under the sublease arrangements, *but also to any indirect or covert payment (or other benefit)* that the doctors may have received.

U.S. ex rel. Singh v. Bradford Reg'l Med. Ctr., 752 F. Supp. 2d 602, 618 (W.D. Pa. 2010) (emphasis supplied). *See U.S. v. Weingarden*, 468 F. Supp. 410, 413 (E.D. Mich. 1979) ("kickback" includes paying a third party for services performed for the payor).

IV. False *Claims* and False *Statements* Allegations Satisfy Rule 9(b)

HCA asserts a failure to plead "specific samples" of claims. MTD at 23. However, this Circuit has *never* required a complaint to provide specific false claims submitted to the government; all it has required is "some indicia of reliability" that false claims were submitted. *U.S. ex rel. Clausen v. Lab. Corp. of Am.*, 290 F.3d 1301, 1311 (11th Cir. 2002).

The majority in *Clausen* criticized the dissent for suggesting that it was creating a laundry list of details that *had* to be included to satisfy Rule 9(b). It required only that the "circumstances constituting fraud or mistake" be pleaded with particularity to (1) "protect defendants against spurious charges" and (2) give notice of "the precise misconduct with which they are charged." *Id.* at 1310 (internal quotation marks and alterations omitted).

1. Pleading Stark and AKS Violations under the False Claims Act

AKS and Stark-based allegations must detail the alleged AKS and Stark *violations*. Rather than detailing *claims*, "[a] plaintiff must satisfy *Rule 9(b)* with respect to the circumstances of the

fraud he alleges—but not as to matters that have no relevance to the fraudulent acts." *U.S. ex rel. Mastej v. Health Mgmt. Assocs.*, 591 Fed. Appx. 693, 708–09 (11th Cir. Fla. 2014) (emphasis added) ("HMA").

HMA synthesized case law clarifying a complaint does not always require the pleading of exact billing data.

> However, *there is no per se rule that an FCA complaint must provide exact billing data or attach a representative sample claim*. Under this Court's nuanced, case-by-case approach, other means are available to present the required indicia of reliability that a false claim was actually submitted.

HMA, 591 Fed. App'x. at 704-05 (internal citations omitted) (emphasis added).

While HCA would urge the Court to focus on claims, "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." U.S. ex rel. Sanchez v. Abuabara*, No. 10-61673-CIV, 2012 U.S. Dist. LEXIS 10079, at *23, (S.D. Fla. June 4, 2012) (emphasis added).[10] As in *HMA* and *Abuabara*, Plaintiff alleges that improper relationships with referring physicians taint *every* claim submitted as a result of those referrals. FAC ¶¶ 29, 31. For this reason, most cases cited by HCA are not relevant.[11]

Plaintiff detailed particularized claim data under the subtitle HCA *Filed False Claims*. FAC ¶¶ 167-192. Significantly, the *Baycare* court considered and readily accepted—for the purposes of Rule 9(b)—CMS *insider* hospital claims data from the same CMS-sourced websites relied on here. FAC ¶¶ 167 *et seq*. *Baycare*, 2015 U.S. Dist. LEXIS 107220 at *12. *See also Tenet I*, 2012 U.S. Dist. LEXIS 96434, at *23 (finding public filings showed "reliable evidence that actual claims were submitted to the government").

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[10] Defendant's MTD at 4 seemingly concedes (as it does not contest) that when a hospital provides prohibited remuneration to physicians, the hospital is prohibited from presenting to Medicare claims referred by such physicians.

[11] *Hopper v. Solvay Pharms., Inc.*, 588 F.3d 1318 (11th Cir. 2009) (alleged off-label marketing caused unknown and unidentified third parties to file claims); *Clausen*, 290 F.3d at 1309–10 (billing for 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 unnecessary or non-existent treatment in context of individual claims).

2. The Eleventh Circuit Relaxes 9(b) for "False Records or Statements"

Plaintiff also alleged "false records or statements" at FAC ¶¶ 199 and 209 (Florida) under 31 U.S.C. § 3729(a)(1)(B) (2009), amending 31 U.S.C. § 3729(a)(2) (1986).[12] Because "false record or statement" counts do not require payment of "claims," this Circuit allows relaxed pleading requirements for those counts: "in the appropriate case, we may consider whether the particularity requirements of Rule 9(b), as to the details of the alleged false claims at issue, are more relaxed for claims under 31 U.S.C. § 3729(a)(2) than for claims under § 3729(a)(1)." *Hopper*, 588 F.3d at 1329. *See also Urquilla-Diaz v. Kaplan Univ.*, 780 F.3d 1039, 1055 n.13 (11th Cir. 2015) (same).

Plaintiff also alleged false statements made in violation of HCA's Corporate Integrity Agreement (CIA). FAC ¶¶ 148-156. General allegations of CIA non-compliance and the failure to satisfy a CIA's reporting obligations can form a basis for FCA liability. *U.S. ex rel. Matheny v. Medco Health Solutions*, 671 F.3d 1217, 1224 (11th Cir. 2012).

V. HCA Improperly Seeks to Assert Affirmative Defenses

1. Leases and Other Exceptions Should Be Pled as Affirmative Defenses

Stark and AKS exceptions are affirmative defenses. *U.S. ex rel. Baklid-Kunz v. Halifax Hosp. Med. Ctr.*, No. 6:09-cv-1002, 2012 U.S. Dist. LEXIS 36304, at *5 (M.D. Fla. Mar. 19, 2012) (stating the financial relationship exceptions to the Stark Amendment appear to be affirmative defenses, and "nothing in [the Amendment's] language requires that the applicability of such exceptions be denied in the initial pleadings."); *Tenet I*, 2012 U.S. Dist. LEXIS 96434, at *27, n. 11. *U.S. v. Rogan*, 459 F. Supp. 2d 692, 716 (N.D. Ill. 2006) *aff'd*, 517 F.3d 449 (7th Cir. 2008) (holding exceptions are affirmative defenses).

Further, HCA fails to properly plead any exception. While "fair market value" is an element of many exceptions, there is no "fair market value" exception as HCA argues. Even if a lease were proven to have been provided at fair market value, it would not meet the AKS exception if it *took into account* referrals, or if there were unusual concessions inconsistent with prevailing market terms. 42 U.S.C. § 1395nn(e)(1)(A) (iv). *See, e.g.* 42 C.F.R. § 1001.952(b) (Space rental) and 42 C.F.R. § 411.357(a) Rental of office space.

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[12] In 2009, Congress enacted the Fraud Enforcement and Recovery Act, which amended the language and numbering of 31 U.S.C. § 3729. *Hopper*, 588 F.3d at 1327 n.3.

In short, rather than identifying a pleading deficiency, HCA's fair market value arguments only confirm that it is aware of the precise misconduct with which it is charged.

2. Statute of Limitations is an Affirmative Defense

HCA argues that all claims prior to October 10, 2007 are barred by the FCA's six- year statute of limitations. But it failed to apprise the Court that 31 U.S.C. § 3731(b)(2) permits a limitations period of up to ten years under certain circumstances. *U.S. v. Sulzbach*, 2008 U.S. Dist. LEXIS 30949, *3, 2008 WL 1771841 (S.D. Fla., 2008).[13] Here, Section 3731(b)(2) is applicable because HCA concealed its fraudulent conduct.

Second, this is an affirmative defense. *Sulzbach*, at *3 (holding plaintiffs are not required to negate statute of limitations affirmative defense in their complaint.).[14]

VI. Conclusion

In order to grant Defendant's 12(b)(6) Motion, this Court must conclude that Plaintiff's allegations of remuneration and benefits, worth millions of dollars, do not even "suggest" the possibility that a jury could believe them to be true. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

Indeed, to grant the MTD the Court would have to conclude that the allegations are beyond "very remote and unlikely" and fall somewhere in the realm of speculation, while viewing the complaint broadly and drawing all reasonable inferences in Plaintiff's favor. *Watts v. Fla. Int'l Univ*., 495 F.3d 1289, 1295 (11th Cir. 2007).

The MTD ignores many of the factual allegations; argues "alternative explanations" as to facts it deems harmful to its defense; it ignores "takes into account" language under Stark; and ignores the uncontradicted body of law that the AKS is violated if one purpose of remuneration is to induce referrals.

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[13] Tolling has been held by some courts to serve only the government and not a *qui tam* relator. *U.S. ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc*., 474 F. Supp. 2d 75 (D.D.C. 2007) (holding tolling provision *does* apply to *qui tam* relators).

[14] Because there are relatively few 2007 claims, the parties may be able to stipulate to the number of claims referred from tenant physicians in that year.

In sum, HCA has not demonstrated under Rule 12(b)(6) that the Complaint fails to state a plausible claim for relief under the FCA.[15]

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the date stamped above I electronically filed this document with the Clerk of the Court using CM/ECF to be served on all counsel of record.

[15] HCA's request for dismissal *without leave to amend* is absurd. If the Court finds any of the Complaint deficient, Plaintiff should be allowed to correct the deficiency. HCA has provided no reason to deny leave to amend. *Bryant v. Dupree*, 252 F. 3d 1161, 1163 (11th Cir. 2001) (directing that leave to amend shall be freely given when justice so requires).

Exhibit List

1 Second Amended Complaint, *U.S. ex rel. Bingham v. HCA*, No. 1:08-CV-71 (E.D. Tenn.)

2 First Amended Complaint, *U.S. ex rel. Bingham v. BayCare Health Sys*., No. 8:14-cv-73-T-23EAJ, (M.D. Fla.), Doc. 32.

3 Third Amended Complaint, *U.S. ex rel. Mastej v. Health Mgmt. Assocs.*, No. 11-CV-89-FTM-29DNF (M.D. Fla.), Doc. 79.

4 Motion to Dismiss, *U.S ex rel. Singh v. Bradford Reg'l Med. Ctr*., No. 04 –CV–0186 (W.D. Pa. Aug. 25, 2005), Doc. 14.

5 Centerpoint Ortho Cash Flow Agreement

6 American Health Lawyers Association slides

7 Non-Exclusive Cross Parking Agreement

8 Declarations of Covenants, Restrictions and Easements