No. 13-1654

In The

United States Court of Appeals

for the

Eighth Circuit

United States of America and State of Iowa ex rel. Susan **Thayer**,
Plaintiff/Relator-Appellant,

vs.

Planned Parenthood of the Heartland, Inc.,
Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA, CENTRAL DIVISION
NO. 4:11-cv-00129-JAJ-CFB (Honorable John A. Jarvey)

OPENING BRIEF OF APPELLANTS

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SUMMARY OF THE CASE - ORAL ARGUMENT REQUESTED

Quintessential "insider" Susan Thayer ("Thayer") seeks to recover millions of dollars for the federal and Iowa governments fraudulently obtained by Defendant ("PPH") as part of schemes that she personally witnessed over her years as a PPH Center Manager. Her Second Amended Complaint ("SAC") alleges her personal knowledge that the Defendant ("PPH") submitted false Medicaid reimbursement claims, received these payments, and retained them. The District Court, acknowledging that Thayer's SAC "describes many aspects of Planned Parenthood's alleged fraudulent schemes in detail," granted PPH's Rule 9(b) motion to dismiss. In error, the District Court determined that *Joshi* required dismissal as the SAC did not plead "representative examples" of the false claims submitted, a "necessary precondition" to an FCA complaint, no matter the pleaded personal knowledge of the relator as an "insider." This interpretation of *Joshi* would place this Circuit alone with such a requirement.

As this case raises a question of first impression in this Circuit, the necessity of a "representative examples" requirement for an "insider" relator pleading personal knowledge of the submitted false claims, and the District Court's holding, if adopted, would create a split with other Circuits, **oral argument** of 30 minutes is requested.

CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 and 8th Cir.R.26.1A, Relator-Appellant Susan Thayer states that she is an individual.

TABLE OF CONTENTS

TABLE OF CONTENTS v

TABLE OF AUTHORITIES vi

SUMMARY OF THE CASE-ORAL ARGUMENT REQUESTED i

CORPORATE DISCLOSURE STATEMENT ii

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE ISSUES 2

1. Whether the District Court erred when it ruled that "representative examples" of fraudulent conduct is a "necessary precondition" in any FCA complaint in order to satisfy the particularity requirement of of Rule 9(b) 2

2. Whether the District Court erred in concluding that Thayer's SAC did not adequately allege the "who, what, where, when and how" of the fraudulent scheme to satisfy the requirements of Rule 9(b) 2

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 7

SUMMARY OF THE ARGUMENT 8

STANDARD OF REVIEW FOR ALL ISSUES ON APPEAL 9

ARGUMENT.....9

I. RULE 9(b)INCLUDES NO REQUIREMENT THAT EVERY FCA COMPLAINT MUST INCLUDE 'REPRESENTATIVE EXAMPLES' OF EACH FRAUD ALLEGED. 9

A. NEITHER THIS CIRCUIT'S DECISION IN *JOSHI* NOR NOR THE DECISIONS UPON WHICH JOSHI RELIED REQUIRE THAT AN INSIDER RELATOR PLEADING PERSONAL KNOWLEDGE OF FALSE 11

B. ALL OTHER CIRCUIT COURTS THAT HAVE DIRECTLY ADDRESSED THE ISSUE HAVE HELD THAT "REPRESENTATIVES EXAMPLES" ARE NOT REQUIRED WHEN AN 'INSIDER' PROVIDES SUFFICIENT INDICIA OF RELIABILITY TO INFER THAT FALSE CLAIMS WERE FILED WITH THE GOVERNMENT.....22

1. The 5th Circuit – U.S. ex rel. *Grubbs*.....22

2. The 7th Circuit – *U.S. ex rel. Lusby*..... 25

3. The 1st Circuit – *U.S. ex rel. Duxbury*.....26

4. The 10th Circuit – *U.S. ex rel. Lemmon*..... 27

5. The 9th Circuit – *U.S. ex rel. Ebeid*.....28

6. The 6th Circuit – *U.S. ex rel. Nathan*.....30

C. COURTS IN OTHER CIRCUITS HAVE ALSO EXPRESSED APPROACHES CONSISTENT WITH THE COURTS ABOVE.....32

1. Opinions from courts in the D.C. Circuit.....32

2. The 6th Circuit decision in *Chesbrough*.....33

3. Opinions from courts in the 3rd Circuit.....34

I. THE DISTRICT COURT ERRED IN DISMISSING THAYER'S SECOND AMENDED COMPLAINT FOR FAILING TO PLEAD"REPRESENATIVE" EXAMPLES.....36

II. THAYER ALLEGED THE "WHO, WHAT WHEN AND HOW" OF PPH'S FRAUDS.....44

A. THAYER ALLEGED THE SPECIFIC INDIVIDUALS INVOLVED IN THE FRAUD…….....42

B. THAYER HAS ALLEGED 'WHAT' PPH'S FRAUD WAS AND WHAT IT OBTAINED.....43

C. THAYER HAS ALLEGED 'WHEN' PPH COMMITTED THE FRAUD.....46

D. THAYER HAS ALLEGED 'WHERE' PPH COMMITTED THE FRAUD.....47

E. THAYER ALLEGED 'HOW' PPH OPERATED THE SCHEMES.....48

CONCLUSION.....50

CERTIFICATE OF COMPLIANCE.....53

CERTIFICATE OF FILING AND SERVICE.....54

TABLE OF AUTHORITIES

CASES

Chesbrough v. VPA, P.C.,
655 F.3d 461 (6th Cir. 2011) 33, 34

Corsello v. Lincare, Inc.,
428 F.3d 1008, 1011 (2005) 16, 17, 18, 19, 20

Durham v. Business Management Associates,
847 F.2d at 1511.....13

Seville Indus. Mach. Corp. v. Southmost Mach. Corp.,
742 F.2d 786, 791 (3d Cir.1984) 13, 36

Tellabs, Inc. v. Makor Issues & Rights, Ltd.,
551 U.S. 308, 127 S.Ct. 2499, 168 L.Ed.2d 179 (2007) 23

U.S. ex rel. Bender v. North Amer. Telecomm.,
2013 WL 597657 (D.C. Cir. 2013) 33

U.S. ex rel. Budike, F.Supp. ,
2012 WL 4108910 (E.D. Pa. 2012) 36, 43, 47

U.S. ex rel. Clausen v Laboratory Corp. of America,
290 F.3d 1301 (11th Cir. 2012.....passim

U.S. ex rel. Costner v. URS Consultants, Inc.,
317 F.3d 883, 888 (8th Cir. 2003) 2, 41
.
U.S. ex rel. Duxbury v Ortho Biotech Products,
579 F3d 13 (2009) 26, 27, 31, 36, 44, 47

U.S. ex rel. Ebeid v. Lungwitz,
616 F.3d 993 (9th Cir. 2010) 2, 28, 29,36
.
U.S. ex rel. Folliard v. CDW Technology Services,
722 F.Supp.2d 20 (D.D.C. 2010) 33, 47

U.S. ex rel. Gagne v. City of Worcester,
565 F.3d at 46. 26

U.S. ex rel. Grubbs v. Kanneganti,
565 F.3d 180 (5th Cir. 2009) .....passim
.
U.S. ex rel. Hill v. Morehouse Medical Associates,
82 Fed. Appx. 213, 2003 WL 22019936 (11th Cir. 2003) (per curiam) .....passim

U.S. ex rel Hunt v. Merck – Medco Managed Care, LLC
336 F. Supp. 2d 430,437 (E.D. Pa2004).....47

U.S. ex rel. Joshi v. St. Luke's Hosp., Inc.,
441 F.3d 552 (8th Cir. 2006) .....passim

U.S. ex rel. Lane v. Murfreesboro Dermatology Clinic,
2010 WL 1926131 (E.D. Tenn. 2010) 2, 34, 36, 39, 40, 47, 48
.
U.S. ex rel. Lemmon v. Envirocare of Utah,
614 F.3d 1163 (10th Cir. 2010) 27, 31, 36, 43, 46

U.S. ex rel. Marlar v. BWXTY-12, LLC,
525 F.3d 46..... .34

U.S. ex rel. Matheny v. Medco Health Solutions, Inc.,
671 F.3d. 1217, 1225 (11th Cir. 2012) 21

U.S. ex rel. McCready v. Columbia/HCA Healthcare Corp.,
251 F.Supp2d 114, 117 (D.D.C. 2003) 33

U.S. ex rel. Murphy v. Baptist Medcare, Inc.,
2006 WL 3147440 (E.D. Ark 2006) 2, 41, 43, 46, 47, 48
.
U.S. ex rel. Nathan v. Takeda Pharma. North America, Inc.,
707 F.3d 451 (2013) 30, 36

U.S. ex rel. Osheroff v. Tenet Healthcare Corp.,
2012 WL 2871264 (S.D. Fla. 2012) 21
.

U.S. ex rel. Pogue v. Diabetes Treatment Center of America,
238 F.Supp.2d 258 (D.D.C. 2002) 32

U.S. ex rel. Raynor v. National Rural Utilities Coop.,
690 F.3d 951, 954 (8th Cir. 2002.....9, 40

U.S. ex rel. Singh v. Bradford Regional Medical Center,
2006 WL 2642528 (W.D. Pa. 2006) 35, 47

U.S. ex rel. Walker v. R & F Properties of Lake County, Inc.,
433 F.3d 1349 (11th Cir. 2005) 17,18, 19, 20, 23, 24, 33, 35, 36, 38
.
United States ex rel. Costner v. URS Consultants, Inc.,
317 F.3d 883, 888 (8th Cir.2003) 3, 42

United States ex rel. Lusby v. Rolls–Royce Corp.,
570 F.3d 849, (2009) 25, 33 39

Ziemba v. Cascade Intern, Inc.,
256 F.3d at 120217.....15

STATUTES & REGULATIONS

31 U.S.C. §§3729-3733 1
IOWA CODE ANN. § 685 *et seq*. 1
Pub.L. No. 104-191, 110 Stat. 1936 (1996) 6

OTHER AUTHORITIES

Fed. R. Civ. P. 9(b) .....passim
Fed. R. Civ. P. 59(e) 5,6

JURISDICTIONAL STATEMENT

Thayer appeals the Honorable John A. Jarvey's 12/28/12 Order granting PPH's Motion to Dismiss (Docket No. 39, App 049), entered as a judgment on 12/31/12 (Docket No. 40, App 058), and the Honorable John A. Jarvey's 02/27/13 Order denying Thayer's Motion to Alter or Amend Judgment. (Docket No. 49, App 059).

The district court properly had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and the federal the False Claims Act, 31 U.S.C. §§3729-3733 and Iowa False Claims Act, IOWA CODE ANN. § 685 *et seq*. (collectively herein "FCA").

Pursuant to 28 U.S.C. §1291, the Court of Appeals has subject-matter jurisdiction over these final decisions of the District Court. On 3/13/13, Thayer timely filed her Notice of Appeal. (Docket No. 50).

STATEMENT OF THE ISSUES

1. Whether the District Court erred when it ruled that "representative examples" of fraudulent conduct is a "necessary precondition" in any FCA complaint in order to satisfy the particularity requirement of Rule 9(b).

U.S. ex rel. Joshi v. St. Luke's Hosp., Inc., 441 F.3d 552 (8th Cir. 2006).
U.S. ex rel. Grubbs v. Kanneganti, 565 F.3d 180 (5th Cir. 2009).
U.S. ex rel. Ebeid v. Lungwitz, 616 F.3d 993 (9th Cir. 2010).
U.S. ex rel. Hill v. Morehouse Medical Associates, 82 Fed. Appx. 213, 2003 WL 22019936 (11th Cir. 2003) (per curiam).

2. Whether the District Court erred in concluding that Thayer's SAC did not adequately allege the "who, what, where, when and how" of the fraudulent scheme to satisfy the requirements of Rule 9(b).

U.S. ex rel. Murphy v. Baptist Medcare, Inc., 2006 WL 3147440 (E.D. Ark 2006).
U.S. ex rel. Joshi v. St. Luke's Hosp., Inc., 441 F.3d 552 (8th Cir. 2006).
U.S. ex rel. Costner v. URS Consultants, Inc., 317 F.3d 883 (8th Cir. 2003).
U.S. ex rel. Lane v. Murfreesboro Dermatology Clinic, 2010 WL 1926131 (E.D. Tenn. 2010).

STATEMENT OF THE CASE

Thayer's SAC asserts that PPH operated four "schemes" that resulted in millions of dollars of Medicaid fraud. Thayer's SAC alleges that PPH fraudulently obtained and retained Medicaid reimbursements for: (l) proscribing excessive quantities of oral contraceptive birth control pills that either had not been properly prescribed to PPH clients or were not received and/or used by PPH clients; (2) services provided in conjunction with abortions in violation of federal law and instructing clients to give false information to other medical professionals to cause them to file claims for abortion-related services; (3) services that had already been

paid, in whole or in part, by clients through coerced "donations;" and (4) billing for more expensive services, known as "upcoding," than were actually performed. (Docket No. 39, p. 2; App 050).

PPH moved to dismiss Thayer's SAC alleging that the SAC: (1) failed to comply with the particularity requirements of Rule 9(b); (2) was based on regulatory violations that could not form the basis of an FCA claim; and (3) the claim for relief relating to "upcoding," which had been added to the SAC by amendment after the SAC was ordered unsealed, should be dismissed as it was not filed under seal. (*Dismissal Order*, p. 2; App 050).[1]

Thayer resisted all three grounds and asserted that Thayer's 18 years of employment with PPH gave her personal, first-hand knowledge of PPH's billing and operational policies and practices and cloaked her allegations of PPH's fraudulent schemes and its actual submission of the false claims with the "indicia of reliability" needed to satisfy Rule 9(b).

Thayer's SAC alleged that she had been employed in, among other jobs, management-level jobs, with PPH for 18 years and was thus an "insider" with personal, first-hand knowledge of PPH's fraudulent schemes and billing practices resulting in false claims to Medicaid authorities and reimbursements which were

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[1] The district court's *Dismissal Order* dealt only with PPH's Rule 9(b) contentions and not with PPH's other asserted grounds for dismissal.

improperly retained by PPH. PPH was therefore enabled to defend against Thayer's SAC and her firsthand knowledge of the submission of false claims demonstrated that her allegations were reliable. (App 010, 017, 018, 019; ¶¶ 11, 33, 37, 39, 40, 41).

Nevertheless, on 12/28/12, the Honorable John A. Jarvey dismissed Thayer's SAC based on his understanding that, in view of this Court's ruling in *U.S. ex rel. Joshi v. St. Luke's Hosp., Inc.*, 441 F.3d 552 (8th Cir. 2006), Thayer's SAC had failed to plead fraud with the requisite particularity. In its *Dismissal Order*, the District Court concluded:

> In total, Thayer describes four different fraudulent schemes in the [SAC], one in each four counts. And Thayer pleads an amount of damages for each scheme based on Planned Parenthood's aggregate activities, rather than on individual false claims. See Dkt. No. 20, ¶¶84, 91, 107, 117. The [SAC] certainly **describes many aspects of Planned Parenthood's alleged fraudulent schemes in detail**, but that detail provides only a bird's eye view of how Planned Parenthood allegedly operated its schemes; it does not provide the type of ground-level specifics regarding particular fraudulent claims **demanded** by Rule 9(b).
>
> ***
>
> Even assuming Thayer's [SAC] did satisfy Rule 9(b)'s policy objectives – which it does not – the law in this Circuit does not suggest that an FCA plaintiff can eschew *Joshi's* "**representative examples**" **requirement** as long as she can otherwise satisfy Rule 9(b)'s objectives. Rather *Joshi* makes clear that providing **specific examples of fraudulent claims in a fraudulent scheme case is a necessary precondition** to meeting Rule 9(b)'s heightened pleading requirements.
>
> ***
>
> Thayer's [SAC] fails to plead even "a single, specific instance of fraud, much less any representative examples." *See Joshi*, 441 F.3d at 557. While many of Thayer's **allegations are detailed**, **none highlight a specific false claim that Planned Parenthood allegedly submitted to the government**.

> Because Rule 9(b) and *Joshi* **require** that an FCA plaintiff **plead representative examples of an alleged fraudulent scheme**, Thayer's [SAC] cannot survive Planned Parenthood's motion to dismiss.

(Dismissal Order, pp. 6-8; App 054-056) (emphasis added).

The *Dismissal Order* conveys the District Court's belief that the 8th Circuit's *Joshi* decision requires that "specific false claims" or "representative examples" of submitted false claims are demanded ("a necessary precondition") in all FCA complaints, including those brought by an "insider" like Thayer who pleads personal knowledge that false claims were actually filed. This belief led the district court to conclude that, "Thayer may not escape *Joshi's* particularly requirements simply by claiming that Thayer's position at Planned Parenthood gives her claims a higher 'indicia of reliability.'" (*Dismissal Order*, p.7; App 055). Thereafter, judgment was entered on 12/31/12. (Docket No.40; App 058).

On 1/25/13, Thayer filed her Motion to Alter or Amend Judgment pursuant to Rule 59(e) along with a supporting Memorandum. (Docket Nos. 44 & 45). On 2/27/13, the District Court denied Thayer's motion. (Docket No. 49; App 059). In this order, the District Court reiterated that "[w]hile Thayer provided a detailed overview of certain Planned Parenthood policies, in the complaint there is not one

single example of a particular fraudulent claim [PPH] submitted to the government, nor are there any representative examples." (Order, p. 2; App 060).[2]

Thayer's SAC had contended that detailed medical records and information necessary to provide specific examples of PPH's frauds were exclusively within the control of PPH. Thayer had also submitted that medical privacy laws, *e.g.*, HIPAA,[3] precluded her from relating specific examples or client names or even removing records from PPH; especially given the sensitive areas of PPH's frauds (*e.g.*, charges for abortion-related services). Thayer thus contended that her SAC pleaded significant specific details of PPH's frauds and, as is the rule in several other federals circuits, including, in Thayer's view, the 8th Circuit's *Joshi* case, that Thayer's SAC demonstrated that she had personal, first-hand, "inside" knowledge of PPH's billing policies, practices and procedures, had personally witnessed PPH's submission of fraudulent Medicaid claims and the subsequent reimbursement to PPH by Medicaid authorities of such fraudulent claims and PPH's wrongful retention of such reimbursements thereby satisfying Rule 9(b). Therefore, Thayer submitted that this personal, "firsthand" knowledge provided her SAC with more than sufficient "indicia of reliability" for her allegation that the

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[2] Notably, the district court also declined to permit Thayer to file a motion to amend and an amended complaint though she demonstrated, as a part of her Rule 59(e) motion, she was well-able to demonstrate "representative examples."

[3] Health Insurance Portability and Accountability Act of 1996, Pub.L. No. 104-191, 110 Stat. 1936 (1996).

schemes described actually resulted in the submission of false claims to meet the purpose and intent of Rule 9(b) and this Court's *Joshi* holding.

STATEMENT OF THE FACTS

Thayer worked for PPH for almost 18 years. (Docket No. 20, ¶¶ 11, 33; App 010, 017). She managed two of PPH's clinics in Iowa, was knowledgeable about PPH's billing practices and policies, and oversaw the input of data into PPH's centralized accounting and billing system. (Docket No. 20, ¶¶ 36, 37, 38-41; App 018, 019). She personally witnessed the implementation and management of PPH's four fraudulent schemes, to wit:

1. Count I: PPH's "C-mail" program through which PPH overcharged Medicaid for birth control pills that were inappropriately prescribed and inappropriately dispensed and in medically excessive amounts. (Docket No. 20, ¶¶ 46-91; App 023-037).

2. Count II: PPH's "unbundling" of and illegal billing to Medicaid of abortion-related services and causing other medical professionals to file such false claims. (Docket No. 20, ¶¶92-107; App 037-041).

3. Count III: PPH's overcharging Medicaid by failing to disclose that PPH's Medicaid clients had paid some or all of the charges later billed to Medicaid by coerced "voluntary" contributions. (Docket No. 20, ¶¶ 108-117; App 042-044).

4. Count IV: PPH's fraudulent overcharges to Medicaid by "upcoding" client visits to obtain higher Medicaid reimbursements than permitted. (Docket No. 20, ¶¶ 118-126; App 044-046).

As a PPH insider, Thayer not only possessed, but clearly pleaded in her SAC, her firsthand knowledge of PPH's fraudulent billing practices and policies, PPH's submission of false claims to Medicaid, the subsequent reimbursement by Medicaid to PPH of these false claims and the wrongful retention by PPH of the amounts it received.

SUMMARY OF THE ARGUMENT

In granting PPH's motion to dismiss, the District Court erred in overreading and mis-applying this Court's *Joshi* decision in a manner that would place this Court alone in requiring that a "necessary precondition" of **every** FCA Complaint is the inclusion of "representative examples" of the false claims submitted, even where the relator is a quintessential insider who actually oversaw the false billings, imbuing her allegations with the "indicia of reliability" required by Rule 9(b). (Docket No. 39, pp 4, 6, 7; App 052, 054, 055) (emphasis added).

Thayer submits that the District Court erred in its interpretation and application of *Joshi*. Both *Joshi* and the cases upon which *Joshi* relied, as well as decisions from other federal circuits, do not mandate, as the District Court below concluded, that all FCA complaints include "representative examples" where a

complaint, as did Thayer's SAC, contains "sufficient indicia of reliability" to demonstrate that false claims were likely submitted to the government. The District Court's mis-application of *Joshi* unmoors this Court's holding from the facts to which this Court expressly limited its analysis – an "outsider" relator unable to plead personal knowledge of the submission of false claims. While in such cases a requirement of "representative examples" of submitted claims may be necessary to demonstrate an "indicia of reliability" that such claims were filed, Thayer's *pleaded personal knowledge* that false claims were actually filed and Medicaid funds were actually retained. Thus, Thayer asserts that, pursuant to Rule 9(b) and the 8th Circuit's *Joshi* decision, her SAC sufficiently pleads the "who, what, when, where and how" of PPH's fraudulent schemes.

STANDARD OF REVIEW FOR ALL ISSUES ON APPEAL

The standard of review of a district court's dismissal of a complaint pursuant to Rule 9(b) is "**de novo**." *U.S. ex rel. Raynor v. National Rural Utilities Coop.*, 690 F.3d 951, 954 (8th Cir. 2012).

ARGUMENT

I. RULE 9(B) INCLUDES NO REQUIREMENT THAT EVERY FCA COMPLAINT MUST INCLUDE "REPRESENTATIVE EXAMPLES" OF EACH FRAUD ALLEGED.

Rule 9(b) requires that "the circumstances constituting fraud … be stated with particularity." "To satisfy the particularity requirement…, the complaint must

plead such facts as the time, place, and content of the defendant's false representations, as well as the details of the defendant's fraudulent acts, including when the acts occurred, who engaged in them, and what was obtained as a result." *Joshi*, 441 F.3d at 556. Notably, however, Rule 9(b) does not itself require that "representative examples" be pleaded in every FCA complaint. Nor did this Court hold that they were always required in *Joshi*. Thus, the issue raised by Thayer's SAC (and this appeal) are issues of first impression which mandate that this Court correct the District Court's erroneous interpretation and application of *Joshi* so that *Joshi's* "representative examples" relates, as the opinion itself and the counsel of the other federal circuits suggests, to an FCA complaint filed by an "**outsider,**" *i.e.*, a relator **without** firsthand, personal, inside knowledge of a defendant's fraudulent billing practices. Furthermore, in this appeal this Court should clarify and determine, , as other federal Circuit Courts have done and Thayer believes to be this Court's holding in *Joshi*, that "representative examples" are not **always** required by Rule 9(b) when an "**insider,**" (*i.e.*, a relator who is or was an insider employed by the defendant) pleads personal, first-hand knowledge of a defendant's fraudulent billing practices as well as the actual payment by the government of such false claims.

Thayer submits that this is the proper interpretation and application of this Court's *Joshi* ruling and that those federal circuits that have already addressed this

issue have ruled that Rule 9(b) is satisfied when an FCA complaint filed by an **insider** pleads sufficient detail of a fraudulent scheme and provides "sufficient indicia of reliability" (*i.e.*, personal and first-hand knowledge of fraudulent billings) to conclude that false claims were, in fact, submitted to the government.

A. NEITHER THIS CIRCUIT'S DECISION IN *JOSHI* NOR THE DECISIONS UPON WHICH *JOSHI* RELIED REQUIRE THAT AN INSIDER RELATOR PLEADING PERSONAL KNOWLEDGE OF FALSE CLAIMS BILLED TO THE GOVERNMENT PROVIDE "REPRESENTATIVE EXAMPLES" OF SUCH BILLS TO SUSTAIN A CLAIM.

The seminal case from which the "representative examples" "rule" is drawn is *U.S. ex rel. Clausen v Laboratory Corp. of America*, 290 F.3d 1301 (11th Cir. 2002).[4] In *Clausen,* the relator who filed an FCA complaint had never been employed by the defendant (*i.e.*, the relator was an "**outsider**"). *Id*. at 1302-1303. Although the *Clausen* relator purported to have knowledge of the fraudulent schemes alleged, he did not have personal, first-hand knowledge of whether or not false claims were actually submitted to the government.[5] Thus, the *Clausen* relator was only able to allege, in a "conclusory" fashion, that the defendant's "practices ***resulted in*** the submission of false claims to the United States." *Id*. at 1305

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[4] *Clausen* is cited by almost every circuit court, and most district courts, that have addressed the issue presented in this case.

[5] The court noted that this was because Clausen was "a corporate **outsider**" who was not "privy to [defendant's] policy manuals, files and computer systems." *Clausen* at 1314. To the contrary, Thayer was a corporate "**insider**" with such access.

(emphasis added). The *Clausen* court noted that the purposes of Rule 9(b) were as follows:

> The particularity rule serves an important purpose in fraud actions by [1] alerting defendants to the precise misconduct with which they are charged and [2] protecting defendants against spurious charges of immoral and fraudulent behavior.

Id. at 1310. The *Clausen* court's expressed purposes of its Rule 9(b) analysis are noteworthy as it is "purpose number [2]" above that forms the basis for the determination expressed by the District Court in this case that "representative examples" must be related in any FCA complaint. In an oft cited excerpt, *Clausen* stated:

> Therefore, a central question in [FCA] cases is whether the defendant ever presented a 'false or fraudulent claim' to the government.") [citation omitted]. Without the *presentment* of such a claim, while the practices of an entity that provides services to the Government may be unwise or improper, there is simply no actionable damage to the public fisc as required under the [FCA]. [citation omitted]. The submission of a claim is thus not, as Clausen argued, a "ministerial act," but the *sine qua non* of a [FCA] Act violation.
>
> As such, Rule 9(b)'s directive that "the circumstances constituting fraud or mistake shall be stated with particularity" does not permit a [FCA] plaintiff merely **to describe a private scheme in detail but then** to allege simply and **without any stated reason for his belief** that claims requesting illegal payments **must have been** submitted, **were likely** submitted or **should have been** submitted to the Government. As … with every other facet of a necessary [FCA] allegation, if Rule 9(b) is to be adhered to, **some indicia of reliability must be given** in the complaint to support the allegation of *an actual false claim* for payment being made to the Government.
>
> ***
>
> In none of [the relator's] descriptions of alleged schemes by LabCorp to increase its testing and testing revenues-which are accompanied by dozens of pages of exhibits-does he provide any factual basis for his **conclusory**

> **statement** tacked on to each allegation **that bills were submitted to the Government as a result of these schemes**,…

Id. at 1311-1312 (emphasis added). The *Clausen* court further noted that the relator had simply failed to provide any information "linking the testing scheme to the submission of any actual claims or actual charges." *Id.* at 1313. In requiring a linking between the scheme and actual claims or actual charges, *Clausen* goes on to specifically define Rule 9(b)'s purpose which it believed was being served by requiring representative examples in that case, to wit:

> FN24. Clausen argues that his allegations give LabCorp enough information to formulate a defense to the charges, which is one of the purposes of Rule 9(b). *See Durham*, 847 F.2d at 1511. However, we believe Clausen's failure to plead all the elements of his claim with specificity violates an equally strong purpose of Rule 9(b)-protecting defendants from frivolous suits, or "spurious charges of immoral and fraudulent behavior." *Id.* (quoting *Seville Indus. Mach. Corp. v. Southmost Mach. Corp.*, 742 F.2d 786, 791 (3d Cir.1984)).

Id. at 1313, n.24 (emphasis added). Thus, the majority in *Clausen* was **not** requiring the pleading of "presentment" to the government of "actual claims" or "representative examples" to fulfill Rule 9(b)'s purpose of putting a defendant on notice of the charges against it. Instead, the *Clausen* court was requiring the pleading of "actual claims" or "actual charges" to protect the defendant from spurious claims of fraud. The dissent noted this distinction and stated:

> The majority appears to accept that the first purpose of Rule 9(b)-alerting defendants to the precise misconduct with which they are charged-would not be frustrated were Clausen's complaint permitted to survive. **Obviously**, **the essence of the fraud in this case lies in the schemes** to perform

> unnecessary tests, rather than in the claims for payment. Clausen does not allege that LabCorp billed for the improper tests any differently than it bills for medically appropriate tests; the only issue is whether the underlying tests were medically necessary. Thus, **the schemes** by which LabCorp allegedly performed medically unnecessary tests **constitute the heart of the misconduct that LabCorp must defend against**, and the district court did not question the adequacy of the particularity with which Clausen described those schemes.

Id. at 1316 (dissent) (emphasis added).[6]

In 2003, the 11th Circuit Court of Appeals issued its opinion in *U.S. ex rel. Hill v. Morehouse Medical Assoc.*, 2003 WL 22019936 (2003). Once again, the 11th Circuit was confronted with a district court's dismissal of an FCA complaint on Rule 9(b) grounds. This time, however, the court was concerned with allegations by an "**insider**" who alleged that she had "witnessed firsthand the fraudulent submissions" to the government by the defendant. *Id*. at 2 & 5. The *Hill* court correctly distinguished *Hill* from *Clausen*. The *Hill* court pointed out that the *Clausen* relator was "a corporate **outsider**" who did not have access to the "policy

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[6] This distinction is important in the Thayer case. The District Court below appears to have concluded that "representative examples" were required in Thayer's SAC in order to adequately place PPH on notice of the charges against it. **Thayer submits this was error**. (*See Dismissal Order*, App 049). *Clausen* clearly stands for the proposition that the "fraudulent scheme" alleged is what places a defendant on notice of the claims against it. As Thayer submitted to the District Court below, and does so in this appeal, her detailed pleading of the fraudulent "scheme" engaged in by PPH was sufficient to place it on notice of the charges against it.

manuals, files and computer systems" of the defendant. *Id.* at 4. In reversing the district court's Rule 9(b) dismissal of the relator's complaint, the *Hill* court stated:

> Unlike the plaintiff in *Laboratory Corp. of America*,[7] however, Hill worked in the very department where she alleged the fraudulent billing schemes occurred - MMA's billing and coding department. Thus, **she has firsthand information about MMA's internal billing practices and the manner in which the fraudulent billing schemes were implemented**. Moreover, she alleged that she observed MMA billers, coders, and physicians alter various CPT and diagnosis codes over the course of seven months and thus submit false claims for Medicare reimbursement to the government. Throughout her complaint, she identified the confidential documents within MMA's exclusive possession that contain additional evidence of the fraud.[FN8] In addition, she supported her legal theory with facts describing MMA's billing process, the specific CPT and diagnosis codes that were altered for each of the five billing schemes, and the frequency of submission of each type of claim. Furthermore, in some instances, Hill provided the names of the employees and physicians who were responsible for making the fraudulent changes and the clinics where the codes were altered. **Most important**, however, unlike the plaintiff in *Laboratory Corp. of America*, **Hill was privy to MMA's files, computer systems, and internal billing practices that are vital to her legal theory**, because she worked in MMA's billing and coding department for seven months. *See id.* at 1314 (acknowledging that "an insider might have an easier time obtaining information about billing practices and meeting the pleading requirements under the" FCA).
>
> Thus, based upon Hill's legal theory and the specific factual allegations in her complaint, she "alert[ed the] defendants to the precise misconduct with which they are charged," and **there is no evidence that her allegations are spurious**. *Ziemba*, 256 F.3d at 1202 (internal quotation marks omitted). Moreover, as Hill was an employee within the billing and coding department and **witnessed firsthand the alleged fraudulent submissions, her factual allegations provide the indicia of reliability that is necessary in a complaint alleging a fraudulent billing scheme**. *See Lab. Corp. of Am.*, 290 F.3d at 1311.

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[7] i.e., *Clausen v. Laboratory Corp. of America*.

Id. at 4-5 (emphasis added). Importantly, the *Hill* court did not require "representative examples" of fraudulent claims; rather, having accepted the relator's factual averments as true, the *Hill* court was satisfied that these factual averments revealed that the relator, as an "**insider**," had witnessed first-hand the submission of false claims to the government. There was therefore "sufficient indicia of reliability" to fulfill Rule 9(b)'s purpose of protecting the defendant from spurious claims.

In *Corsello v. Lincare, Inc.*, 428 F.3d 1008, 1011 (2005), the 11th Circuit was again confronted with a district court's Rule 9(b) dismissal of an FCA complaint. Relator "Corsello [was] neither a "corporate insider" nor an employee in the billing department." *Id*. at 1013. In affirming the district court's dismissal, the *Corsello* court stated:

> In *Clausen*, we stated that the complaint must contain "**some indicia of reliability**" to satisfy Rule 9(b). 290 F.3d at 1311.
>
> ***
>
> Because Clausen was a "**corporate outsider**," his failure to include a credible set of facts to support his vague allegations rendered his complaint deficient under Rule 9(b). *Id.*
>
> In *Hill v. Morehouse Medical Associates*, an unpublished opinion, we **elaborated on the "indicia of reliability"** required by *Clausen*. 82 Fed. Appx. 213 (11th Cir.2003) (per curiam). Hill, who was a former employee in the billing department of the defendant, alleged a billing process and **details about five fraudulent billing schemes** the defendant used to submit claims to the government. *Id.* Unlike the relator in *Clausen*, who was a "corporate outsider," Hill had "**firsthand information**" **about the billing practices of the defendant**. *Id.* at 5. Because Hill "worked in the very department where she alleged the fraudulent billing schemes occurred," **her allegations that**

> **fraudulent claims were submitted** on a daily basis were **factually credible**. This Court held that Hill's complaint satisfied Rule 9(b) because Hill was "**privy to ... the internal billing practices" of the defendant and thus provided factual support for the allegations of fraudulent billing in her complaint**. *Id.* at 5.

Id. at 1012-1013. After reviewing these decisions, the 11th Circuit held that Corsello's complaint failed to satisfy 9(b) since it failed to allege when, where, and what FCA violations had occurred. *Id.* at 1013. Furthermore, the court held that Corsello's allegations "also **failed to provide a factual basis to conclude fraudulent claims were ever actually submitted** to the government in violation of the [FCA]." *Id*. (emphasis added).

Thus, in *Clausen*, *Hill*, and *Corsello*, the 11th Circuit's focus was on whether or not there was "sufficient indicia of reliability" to infer that false or fraudulent claims were actually submitted to the government, finding the complaints sufficient where the relator had personal knowledge of the billing processes and insufficient where it did not.

Just after *Corsello*, the 11th Circuit decided *U.S. ex rel. Walker v. R & F Properties of Lake County, Inc*., 433 F.3d 1349 (11th Cir. 2005). *Walker* dealt with a district court's denial of a defendant's Rule 9(b) motion to dismiss. The *Walker* court, in distinguishing the case from *Clausen* and *Corsello*, upheld the district court's refusal to dismiss the complaint. The *Walker* court stated:

> This is not a case like *United States ex rel. Clausen v. Laboratory Corporation of America, Inc.*, 290 F.3d 1301 (11th Cir.2002), **in which a**

> **"corporate outsider" made speculative assertions that claims "must have been submitted, were likely submitted or should have been submitted to the Government**." 290 F.3d at 1311. Neither is this case like *Corsello v. Lincare, Inc.*, 428 F.3d 1008 (11th Cir.2005), in which we recently affirmed the district court's dismissal on the ground that the relator's complaint was deficient under Rule 9(b) because **it "failed to explain why he believe[d] fraudulent claims were ultimately submitted**." 428 F.3d at 1014.
>
> Walker's complaint identifies her as a nurse practitioner who was employed at LFM. Amended Complaint ¶ 7. Walker alleges that, during her employment at LFM, she never had her own UPIN and that she was instructed each day "which doctor she would be billing under." Amended Complaint ¶¶ 11, 15. The Amended Complaint also alleges that Walker had at least one personal discussion with LFM's office administrator (identified in the complaint by name) during which the two women discussed that Walker did not have her own UPIN, whether Walker and the other nurse practitioners and physician assistants should have their own UPINs, that (according to the office administrator) LFM billed all nurse practitioner and physician assistant services as rendered "incident to the service of a physician," that (also according to the office administrator) LFM had "never" billed nurse practitioner or physician assistant services in another manner, and the propriety of the billing method. Amended Complaint ¶¶ 10-12. **These allegations are sufficient to explain why Walker believed LFM submitted false or fraudulent claims for services** rendered by nurse practitioners and physician assistants "incident to the service of a physician." Therefore, we affirm the district court's order denying LFM's motion to dismiss Walker's complaint.

Id. at 1359-1360 (emphasis added). Although the relator in *Walker* was an employee of the defendant and thus could be characterized as an "**insider,**" she was not employed in defendant's billing department nor had any personal, first-hand knowledge of defendant's billing practices. Even so, relator Walker's employment with the defendant (as an "**insider**") and her personal knowledge of the fraudulent scheme provided the "indicia of reliability" necessary to satisfy Rule

9(b)'s purpose of protecting the defendant from spurious claims. Thus, again, the 11th Circuit did not require Walker's complaint to contain specific or representative examples of the defendant's fraudulent claims.

After these 11th Circuit's decisions in *Clausen*, *Corsello*, *Hill* and *Walker*, the 8th Circuit issued its *Joshi* ruling. The 8th Circuit specifically pointed out that "absent from the [*Joshi*] complaint are any mention of … (9) how Dr. Joshi, an anesthesiologist, learned of the alleged fraudulent claims and their submission for payment." *Id*. at 556. After finding "persuasive the Eleventh Circuit's reasoning in *Corsello*," the *Joshi* court stated:

> Similarly, in the present case Dr. Joshi's allegation that "every" claim submitted by St. Luke's was fraudulent **lacks sufficient "indicia of reliability."** Dr. Joshi was an anesthesiologist at St. Luke's, **not a member of the billing department,** and **his conclusory allegations are unsupported** by specific details of St. Luke's and Dr. Bashiti's alleged fraudulent behavior.
>
> We fully recognize Dr. Joshi alleges a systematic practice of St. Luke's and Dr. Bashiti submitting and conspiring to submit fraudulent claims over a sixteen-year period. Clearly, neither this court nor Rule 9(b) requires Dr. Joshi to allege specific details of *every* alleged fraudulent claim forming the basis of Dr. Joshi's complaint. However, to **satisfy Rule 9(b)'s particularity requirement and** to **enable St. Luke's and Dr. Bashiti to respond** specifically to Dr. Joshi's allegations, Dr. Joshi **must provide *some* representative examples of their alleged fraudulent conduct**, specifying the time, place, and content of their acts and the identity of the actors. Dr. Joshi's complaint is void of a single, specific instance of fraud, much less any representative examples. … [p. 557]
>
> ***
>
> Concededly, the nature of Dr. Joshi's position with St. Luke's as an anesthesiologist, rather than as a member of St. Luke's billing or claims department, may not have made him privy to certain details relevant to his

> complaint and helpful to satisfying Rule 9(b). However, "**while an *insider* might have an easier time obtaining information about billing practices and meeting the pleading requirements under the [FCA]**, neither the Federal Rules not the [FCA] offer any special leniency **under these particular circumstances** to justify [Dr. Joshi] failing to allege with the required specificity the circumstances of the fraudulent conduct he asserts in his action. *See Clausen*, 290 F.3d at 1314. [p. 560].

Id. at 557 & 560 (emphasis added). As the 8th Circuit noted, Dr. Joshi was an "**outsider**" to the billing practices of the Defendants. Since he was an "outsider" and made only vague assertions that fraudulent claims must have been presented to the federal government, the court required that his complaint state "some representative examples" of such alleged fraudulent claims to provide the "indicia of reliability" necessary to support the "conclusory" allegations of his complaint.

The 8th Circuit panel which decided *Joshi* did so with full knowledge and understanding of the 11th Circuit's rulings in *Hill*, *Corsello* and *Walker* and this is why the *Joshi* court specifically pointed out Dr. Joshi's lack of personal knowledge of the defendant's billing practices. This is also why the *Joshi* Court noted that "an ***insider*** might have an easier time … meeting the pleading requirements under the [FCA]." This is also why the Court limited its holding to the "particular circumstances" before the court – an "outsider" relator. *Joshi* at 560.

Thus, Thayer submits that *Joshi* is properly applied to those situations where a relator is an "***outsider***" and apparently relies in his complaint on conclusory

statements about a defendant's billing practices or false claims. This is certainly not the case with regard to Thayer and her SAC.

Notably, the 11th Circuit has continued to adhere to the position that representative examples are not always required to satisfy Rule 9(b) in an FCA case. *See U.S. ex rel. Matheny v. Medco Health Solutions, Inc.*, 671 F.3d. 1217, 1225 (11th Cir. 2012) (Rule 9(b) motion denied in FCA case where relator ("**insider"**) was "personally involved in the process he now claims to be fraudulent" and had "personal knowledge of the accounting procedures" of the defendant."); *see also U.S. ex rel. Osheroff v. Tenet Healthcare Corp.*, 2012 WL 2871264 (S.D. Fla. 2012).

Just as the 11th Circuit has not drawn a hard and fast rule requiring specific, representative examples of fraudulent billings in every FCA complaint, so also should the District Court have applied this Circuit's holding in *Joshi*. Instead, when a fraudulent scheme has been pleaded, a district court's inquiry should assume all well-pleaded facts to be true and focus on whether or not the complaint contains sufficient "indicia of reliability" for the district court to plausibly infer that fraudulent claims were submitted to the government so that a defendant is protected from "spurious claims." When an FCA complaint demonstrates that a relator is an "**insider**" with personal, firsthand knowledge of a defendant's fraudulent billing practices, this provides sufficient indicia of reliability to the

complaint. **It is this inquiry and focus that the District Court below missed in the Thayer case**. Although *Joshi* applies to claims by "outsiders," this Court should clarify that, the rule in the 8th Circuit, as is the rule in other federal circuits, is that "**insiders**" can provide sufficient "indicia of reliability" necessary to satisfy Rule 9(b) without stating "representative examples." Indeed, this Court should determine that Thayer's SAC satisfies this test.

B. ALL OTHER CIRCUIT COURTS THAT HAVE DIRECTLY ADDRESSED THE ISSUE HAVE HELD THAT "REPRESENTATIVE EXAMPLES" ARE NOT REQUIRED WHEN AN "INSIDER" PROVIDES "SUFFICIENT INDICIA OF RELIABILITY" TO INFER THAT FALSE CLAIMS WERE SUBMITTED.

No other federal circuit court has held that, in all FCA complaints, "representative examples" are a "necessary precondition" to satisfying Rule 9(b), including where the relator is an "insider" with personal, first-hand knowledge of a defendant's fraudulent schemes.

1. The 5th Circuit - *U.S. ex rel. Grubbs*

In *U.S. ex rel. Grubbs v. Kanneganti*, 565 F.3d 180 (5th Cir. 2009). the district court had dismissed a relator's FCA complaint under Rule 9(b) in reliance on the 11th Circuit's decision in *Clausen*. *Id*. at 186. After discussing *Clausen*, the *Grubbs* court noted that some circuit courts "have relied, to a somewhat unclear degree, on *Clausen*, at the same time the 11th Circuit has moved away from *Clausen*'s most exacting language, accepting less billing detail in a case where

particular allegations of a scheme offered indicia of reliability that bills were presented." *Grubbs*, 565 F.3d at 187 (citing *United States ex rel. Walker v. R&F Properties of Lake County, Inc.*, 433 F.3d 1349, 1360 (11th Cir. 2005). The *Grubbs* court stated:

> Nevertheless, a plaintiff does not necessarily need the exact dollar amounts, billing numbers, or dates to prove to a preponderance that fraudulent bills were actually submitted. To require these details at pleading is one small step shy of requiring production of actual documentation with the complaint, a level of proof not demanded to win at trial and significantly more than any federal pleading rule contemplates. [citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 127 S.Ct. 2499, 168 L.Ed.2d 179 (2007)]
>
> Appellees retort that because presentment is the conduct that gives rise to § 3729(a)(1) liability, Rule 9(b) demands that it is the contents of the presented bill itself that must be pled with particular detail and not inferred from the circumstances. **We must disagree** with the sweep of that assertion. Stating "with particularity the circumstances constituting fraud" **does not necessarily and always mean stating the contents of a bill**. **The particular circumstances constituting the fraudulent presentment are often harbored in the scheme**. A hand in the cookie jar does not itself amount to fraud separate from the fib that the treat has been earned when in fact the chores remain undone. Standing alone, raw bills-even with numbers, dates, and amounts-are not fraud **without an underlying scheme to submit the bills for unperformed or unnecessary work**. **It is the scheme in which particular circumstances constituting fraud may be found that make it highly likely the fraud was consummated through the presentment of false bills**.
>
> In sum, the "time, place, contents, and identity" standard **is not a straitjacket for Rule 9(b)**. Rather, the rule is context specific and flexible and must remain so to achieve the remedial purpose of the False Claim Act. **We reach for a workable construction of Rule 9(b)** with complaints under the False Claims Act; that is, one that effectuates Rule 9(b) without stymieing legitimate efforts to expose fraud. **We hold** that to plead with particularity the circumstances constituting fraud for a False Claims Act § 3729(a)(1) claim, a relator's complaint, **if it cannot allege the details of an**

> **actually submitted false claim**, **may nevertheless survive by alleging particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted**.

Grubbs, 565 F.3d. at 190-191 (emphasis added).

As with the 11th Circuit cases discussed above, *Grubbs* held that the allegations of "particular details of a scheme" were sufficient to give defendant "fair notice of the plaintiffs' claims." As with the 11th Circuit's cases, "representative examples" of the fraud were not required to fulfill this purpose of Rule 9(b).

Additional purposes furthered by Rule 9(b), as noted by *Grubbs*, are to protect defendants from spurious or "baseless claims" claims and to protect defendants' reputations. *Id*. at 190. In order to satisfy these purposes, *Grubbs* recognized that the scheme must be paired with "**reliable indicia** that lead to a strong inference that claims were actually submitted" to the government. *Grubbs*, 565 F3d. at 186, 187 & 190 (citing the 11th Circuit's rulings in *Clausen* and *Walker*). This is the exact same rationale the 11th Circuit provided in *Grubbs*.

Contrary to the holding of the District Court below in the Thayer case, *Grubb*s supports a conclusion that an "**insider**" alleging personal knowledge of a fraudulent billing scheme, need not plead "specific claims" or "representative examples" in order to satisfy Rule 9(b). It is the personal, first-hand knowledge

that is sufficient to provide the "indicia of reliability" necessary to withstand scrutiny under Rule 9(b) when a fraudulent scheme is otherwise adequately pled.

2. The 7th Circuit - *U.S. ex rel. Lusby*

In *United States ex rel. Lusby v. Rolls–Royce Corp.*, 570 F.3d 849, (2009), the 7th Circuit addressed the sufficiency of an FCA complaint filed by a former employee (an "**insider"**) of the defendant. *Id*. at 850. Although the FCA complaint outlined the fraudulent scheme complained of, the defendant asserted that plaintiff had failed to identify "a specific request for payment." *Id*. at 854. "The district court held that, unless Lusby has **at least one** of [defendant's] billing packages, he lacks the required particularity." *Id*. at 854.[8] The 7th Circuit reversed the district court:

> Since a relator is unlikely to have those documents unless he works in the defendant's accounting department, the district court's ruling takes a big bite out of *qui tam* litigation.
>
> We don't think it essential for a relator to produce the invoices (and accompanying representations) at the outset of the suit. True, it is essential to show a false statement. But much knowledge is **inferential** - people are convicted beyond a reasonable doubt of conspiracy without a written contract to commit a future crime - and the inference that Lusby proposes is a plausible one.
>
> ***
>
> Lusby contends that Rolls-Royce *must* have submitted at least one such certificate, or the military services would not have paid for the goods, given

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[8] In coming to its conclusion, the *Lusby* district court had relied on the 11th Circuit's decision in *Clausen* requiring "representative examples". *United States ex rel. Lusby v. Rolls–Royce Corp.*, 2008 WL 4247689, p. 8 (S.D. Ind. 2008).

> the contractual (and regulatory) requirement that the FAR 246-15 certificate accompany every invoice.
>
> ***
>
> **It is enough to show, in detail, the nature of the charge**, so that vague and unsubstantiated accusations of fraud do not lead to costly discovery and public obloquy. See *United States ex rel. Clausen v. Laboratory Corp. of America*, 290 F.3d 1301, 1310 (11th Cir.2002)

Id. at 854-85.

3. The 1st Circuit - *U.S. ex rel. Duxbury*

In *U.S. ex rel. Duxbury v Ortho Biotech Products*, 579 F3d 13 (2009), the 1st Circuit reversed the dismissal of an FCA complaint filed by an **insider**.[9] *Id*. at 16. The district court had dismissed the complaint based on its conclusion that Rule 9(b) "requires relators to 'provide details that *identify particular false claims* for payment that were submitted to the government.'" *Id*. at 29 (italics in original). The 1st Circuit held "**[t]his was error**." *Id* (citing 5th Cir. in *Grubbs*). The 1st Circuit noted that a relator could satisfy Rule 9(b) by providing "factual or statistical evidence to strengthen the inference of fraud beyond possibility" without necessarily providing details as to each false claim. *Id*. at 29 (citing *Grubbs*). Ultimately, *Duxbury* held:

> Although a close call, Duxbury's claims satisfy Rule 9(b) under this "more flexible standard." *See Gagne*, 565 F.3d at 46. Although Duxbury **does not identify specific claims**, he **has alleged the submission of false claims** across a large cross-section of providers that alleges the "the who, what, where, and when of the allegedly false or fraudulent representation."

[9] The relators were employed in the sales department of the defendant.

> [citations omitted] … In particular, Duxbury has identified, as to each of the eight medical providers (the who), the illegal kickbacks (the what), the rough time periods and locations (the where and when), and **the filing of the false claims themselves**.
>
> ***
>
> Unlike in *Rost*, where the allegations gave rise to only speculation as to whether the alleged scheme caused the filing of false claims with the government, **Duxbury has alleged facts that false claims were in fact filed** by the medical providers he identified, which further supports a strong inference that such claims were also filed nationwide. We **thus have allegations of "factual ... evidence to strengthen the inference of fraud beyond possibility**."

Id. at 30-31. (emphasis supplied). Thus, the identification of "specific claims" is not required in the 1st Circuit when an "insider" with personal knowledge, alleges "that false claims were in fact filed." *Id*.

4. The 10th Circuit - *U.S. ex rel. Lemmon*

In *U.S. ex rel. Lemmon v. Envirocare of Utah*, 614 F.3d 1163 (2010), the 10th Circuit also reversed the dismissal of an insider's FCA complaint. *Id*. at 1171. The relator, a former employee ("**insider"**) alleged that the defendant had "repeatedly violated its contractual and regulatory obligations" and, even so, had repeatedly "received payment from the government." *Id*. at 1166. "Specifically, plaintiffs' claims allege[d] that they **observed** and – at the direction of Envirocare superiors – **participated** in Envirocare's improper" conduct that gave rise to the FCA claims. *Id*. The relators were "**insiders**" with personal, firsthand knowledge of, and participation in, the alleged fraudulent scheme. The court held:

> Thus, claims under the FCA need only show the specifics of a fraudulent scheme and provide an adequate basis for a **reasonable inference that false claims were submitted** as part of that scheme. [citations to the 1st, 5th and 7th Circuits omitted]

Id. at 1172. In doing so, the 10th Circuit cited with approval the 5th Circuit's decision in *Grubbs*. *Id*. The defendant had asserted that a relator was required to "match an act constituting a false claim to a **specific payment request**." *Id*. In rejecting this assertion, the 10th Circuit held:

> In so arguing, Envirocare seeks to hold Plaintiffs to a **higher standard than is required**. The federal rules do not require a plaintiff to provide a factual basis for every allegation. Nor must every allegation, taken in isolation, contain all the necessary information. Rather, **to avoid dismissal under Rules 9(b)** and 8(a), plaintiffs need only show that, **taken as a whole, a complaint entitles them to relief**. *See, e.g.*, *Twombly*, 550 U.S. at 554–56, 127 S.Ct. 1955. The complaint must provide **enough information to describe a fraudulent scheme to support a plausible inference that false claims were submitted**. Because Plaintiffs have provided sufficient factual detail to demonstrate the viability of their FCA claims, the dismissal under Rule 9(b) was error.

Id. (emphasis added). Thus, in the 10th Circuit, as well as the other federal circuits identified above, there is no absolute requirement that "specific payment requests" or "representative examples" be pled in order to satisfy Rule 9(b), certainly not by insiders. Once the fraudulent scheme has been pled, there must be an adequate basis for the court to plausibly infer that false claims were actually submitted to the government. *Id*.

5. The 9th Circuit - *U.S. ex rel. Ebeid*

In *U.S. ex rel. Ebeid v. Lungwitz*, 616 F.3d 993 (9th Cir. 2010), the 9th Circuit also rejected a requirement that a relator must always plead "representative examples of false claims." *Id*. at 998. In a holding directly contrary to the view expressed by the District Court in the case at bar, the *Ebeid* court stated:

> We do not embrace the district court's categorical approach that would, as a matter of course, require a relator to identify representative examples of false claims to support every allegation, although we recognize that this requirement has been adopted by some of our sister circuits. [citations omitted] … In our view, **use of representative examples is simply one means of meeting the pleading obligation.** We join the Fifth Circuit in concluding, in accord with general pleading requirements under Rule 9(b), that it is sufficient to allege "particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted." *United States ex rel. Grubbs v. Ravikumar Kanneganti*, 565 F.3d 180, 190 (5th Cir.2009).

Ebeid, 616 F.3d at 998-999 (emphasis added). Interestingly, the 9th Circuit specifically noted that the relator was "not an insider in [defendant's] business." *Id*. at 995. Although *Ebeid* may convey a more liberal standard than adopted by the decisions of other Circuit Courts discussed above in distinguishing between "insiders" and "outsiders," when squarely confronted with the issue, the 9th Circuit held in *Ebeid*, in direct contrast to the District Court's holding in this case, that representative examples are not "**required**" for an FCA complaint to comply with Rule 9(b). Instead, the 9th Circuit held that a court is to focus on whether or not there is "reliable indicia" to infer that false claims were submitted to the government. *Id*. at 999.

6. The 4th Circuit - *U. S. ex rel. Nathan*

In *U.S. ex rel. Nathan v. Takeda Pharma. North America, Inc.*, 707 F.3d 451 (2013), the 4th Circuit agreed with the 11th Circuit and did not adopt a universal "representative examples" requirement for all complaints. The relator was employed in the sales department without personal knowledge of the defendant's alleged frauds.[10] The relator contended that he "need only allege the existence of a fraudulent scheme that supports the inference that false claims were presented to the government for payment." *Id*. at 456. In essence, the relator asserted that satisfaction of the first requirement of *Hill* and *Grubbs* (*i.e.*, identification of a fraudulent scheme) was all that was required and that, despite his inability to plead personal knowledge of the actual submission of false claims, he could ignore the second requirement of *Hill* and *Grubbs* (*i.e.*, that there be a sufficient "***indicia of reliability***" to show that a claim was likely submitted to the government). The *Nathan* court focused on this contention and, citing *Clausen*, stated: "when a relator fails to plead plausible allegations of presentment, the relator has not alleged all the elements of a claim under the Act." *Id*. at 456. The *Nathan* court further stated:

> We agree with the Eleventh Circuit's observation that the **particularity** requirement of **Rule 9(b)** "does not permit a **False Claims Act** plaintiff

[10] Thus, the relator was an "**outsider**" as far as defendant's billing practices were concerned. This is similar to the relator in *Joshi*.

> merely to describe a private scheme in detail but **then to allege simply and without any stated reason for his belief** that claims requesting illegal payments must have been submitted, were likely submitted or should have been submitted to the Government." *Id.* at 1311. Rather, Rule 9(b) requires that "**some indicia of reliability**" must be provided in the complaint to support the allegation that an actual false claim was presented to the government. *Id.* Indeed, without such plausible allegations of presentment, a relator not only fails to meet the particularity requirement of Rule 9(b), but also does not satisfy the general plausibility standard of *Iqbal*. *See Clausen*, 290 F.3d at 1313 ("If Rule 9(b) is to carry any water, it must mean that an essential allegation and circumstance of fraudulent conduct cannot be alleged in such **conclusory fashion**."); *cf. United States ex rel. Joshi v. St. Luke's Hosp., Inc.*, 441 F.3d 552, 557 (8th Cir.2006) (requiring relator to "provide some representative examples of [the defendants'] alleged fraudulent conduct").

Id. at 456-457. The 4th Circuit specifically pointed to the decisions in *Grubbs* (5th Cir.), *Duxbury* (1st Cir.) and *Lemmon* (10th Cir.) for this position. *Id*. at 457. After doing so, the 4th Circuit held:

> Applying these principles, we hold that **when a defendant's actions**, as alleged and as reasonably inferred from the allegations, ***could* have** led, **but *need not necessarily* have** led, to the submission of false claims, a relator must allege with particularity that specific false claims actually were presented to the government for payment. To the extent that other cases apply a more relaxed construction of Rule 9(b) in such circumstances, we disagree with that approach.

Id. at 457-458 (bold/underline added, italics in original). Thus, as with all of the Circuit Courts above, the 4th Circuit requires the pleading of "specific false claims" when a complaint alleges, in a conclusory manner, that claims "could have, but need not necessarily have" been filed with the government.

Thayer submits that a common sense reading of all of these cases, including *Joshi*, leads to the conclusion that "specific false claims" need not be plead if the complaint contains sufficient indicia of reliability, including allegations that false claims were indeed submitted to the government. The District Court below erred in holding to the contrary in this case.

C. COURTS IN OTHER CIRCUITS HAVE ALSO EXPRESSED APPROACHES CONSISTENT WITH THE COURTS ABOVE.

Thayer is not aware of any cases directly on point from the 3rd, 6th and D.C. Circuit Courts regarding this "insider" vs. "outsider" approach as discussed above. However, Thayer submits that all of these federal circuits appear to agree that the focus of a Rule 9(b) analysis should be on the "indicia of reliability" alleged in the complaint, not a technical requirement of "representative examples" in every case. Furthermore, Thayer submits that none of these other circuits have gone so far as the District Court did in the case at bar as to hold that "providing specific examples of fraudulent claims … is a necessary **precondition** to meeting Rule 9(b)'s heightened pleading requirements." (Docket No. 39, p. 7; App 055).

1. Opinions from Courts in the D.C. Circuit

District courts in the D.C. Circuit do not require a relator in an FCA case to plead "representative examples" or "specific claims" of fraud so long as there is sufficient indicia of reliability that claims were submitted to the government. *See, e.g., U.S. ex rel. Pogue v. Diabetes Treatment Center of America*, 238 F.Supp.2d

258 (D.D.C. 2002) (representative examples not required if relator alleges that false claims were actually submitted); *U.S. ex rel. McCready v. Columbia/HCA Healthcare Corp.*, 251 F.Supp2d 114, 117 (D.D.C. 2003) (specific examples not required in FCA fraudulent scheme case); *U.S. ex rel. Folliard v. CDW Technology Services*, 722 F.Supp.2d 20 (D.D.C. 2010) (citing *Grubbs* and *Lusby* in holding that representative examples are not required when "allegations provide **reliable indicia**" that false claims were presented); *U.S. ex rel. Folliard v Synnex Corp.*, 798 F.Supp.2d 66, 78-79 (D.D.C. 2011) (In FCA case, the plaintiff "need not allege the existence of a request for payment with particularity."); *U.S. ex rel. Bender v. North Amer. Telecomm.*, 2013 WL 597657 (D.C. Cir. 2013) (although not an insider case, the court noted that "[t]he law permits a qui tam relator… to proceed if he provides the factual basis for the charges leveled against the defendant and some factual basis for the claim that the defendant is in control of the information that the relator requires in order to plead with particularity.").

2. The 6th Circuit's Decision in *Chesbrough*

In *Chesbrough v. VPA, P.C., 655 F.3d 461* (6th Cir. 2011), the 6th Circuit, even in affirming dismissal of an FCA Complaint, noted that the result may be different where the relator alleged personal knowledge of the false claims submitted. Citing the 11th Circuit decisions in *Hill* and *Walker*, the relator argued for a relaxed standard under Rule 9(b). In applying what appeared to be an

"**insider**" vs. "**outsider**" analysis, the *Chesbrough* court affirmed the district court's dismissal because the relator lacked personal knowledge of whether or not claims had been actually submitted to the government. In acknowledging that 6th Circuit law did not foreclose the possibility of adopting the 11th Circuit's position with respect to "**insiders,"** *Chesbrough* stated:

> Although **we do not foreclose the possibility** that this court may apply a "relaxed" version of Rule 9(b) in certain situations, we do not find it appropriate to do so here. The case law just discussed suggests that the requirement that a relator identify an actual false claim may be relaxed when, even though the relator is unable to produce an actual billing or invoice, he or she has pled **facts which support a strong inference that a claim was submitted**. Such an inference may arise when the relator has "**personal knowledge that the claims were submitted by Defendants ... for payment.**" *Lane*, 2010 WL 1926131, at *5; *see also Marlar*, 525 F.3d at 446 ("Marlar does not allege personal knowledge of [billing] procedures...."); *Hill*, 2003 WL 22019936, at * 3. Here, the **Chesbroughs' lack the personal knowledge of billing practices** or contracts with the government that the relators had in cases like *Lane*. Their personal knowledge is limited to the allegedly fraudulent scheme.
>
> There may be other situations in which a relator alleges facts from which it is highly likely that a claim was submitted to the government for payment. But that, too, is not the case here.

Id. at 470-472 (emphasis added). *See also U.S. ex rel. Lane v. Murfreesboro Dermatology Clinic*, 2010 WL 1926131 (E.D. Tenn. 2010) (where relator had "***personal knowledge*** of the false billing patterns by virtue of her employment," representative examples not required when representative examples could violate HIPAA.)

3. Opinions From Courts in the 3rd Circuit

While the 3rd Circuit has not directly addressed the question, district courts in the 3rd Circuit appear to reject a "representative examples" requirement for all FCA claims. For example, in *U.S. ex rel. Singh v. Bradford Regional Medical Center*, 2006 WL 2642528 (W.D. Pa. 2006), defendant, citing the 11th Circuit in *Clausen*, asserted "that a relator must provide details that identify particular false claims for payment that were submitted to the government." *Id*. at p. 3. The district court rejected defendant's assertion that *Clausen* "**required** identification of specific claims." *Id*. at p. 5 (citing the 11th Circuit's decisions in *Hill* and *Walker*). The *Singh* court held that requiring "one evidentiary example of the [fraud] claims alleging "date, place or time" is only one "alternative means of injecting precision and some measure of substantiation" into an FCA complaint. *Id*. at p. 7. In concluding, the *Singh* court stated:

> In the instant case, we fail to see how requiring Relators to provide a single claim example would put Defendants in a better position to answer and defend against the claims. As Relators point out, Defendants never assert that the Defendant doctors did *not* refer any Medicare or Medicaid patients to Bradford Regional, nor have Defendants asserted that no claims for payment were submitted for such patents, as alleged in the complaint. We agree with Relators that **the falsity of the instant claims does not turn on anything unique to any individual claim** or that would be revealed from an examination of any claim, but rather the claims "are false because of the improper financial arrangements between [Bradford Regional] and the physicians,...." (*Relators' Response*, at 4.) Relators allege that Bradford Regional entered into an improper financial relationship with V & S Medical Associates and the Defendant doctors. **Relators further allege that every claim submitted as a result of a referral from the Defendant doctors is alleged to be false**. **The addition of specific identifying information of**

> **each claim adds little to complete the description of the scheme since the fraudulent conduct at issue does not rely on any specific claim**. Thus, we find that the Complaint sufficiently alerts Defendants to the "precise wrongdoing misconduct with which they are charged." *Seville*, 742 F.2d at 791.

Id. at p.7 (emphasis added); *see also U.S. ex rel. Budike*, ---F.Supp. ---, 2012 WL 4108910 (E.D. Pa. 2012) (court refused to require the pleading of "at least one specific claim" when deciding a Rule 9(b) attack on a FCA complaint).

II. THE DISTRICT COURT ERRED IN DISMISSING THAYER'S SECOND AMENDED COMPLAINT FOR FAILING TO PLEAD "REPRESENTATIVE EXAMPLES."

As argued above, an FCA complaint of an "**insider**" with personal, first-hand knowledge of billing practices should be sufficient to withstand a Rule 9(b) motion to dismiss. *See U.S. ex rel. Hill*, 2003 WL 22019936; *U.S. ex rel. Walker*, 433 F.3d 1349; *U.S. ex rel. Grubbs*, 565 F.3d 180; *U.S. ex rel. Ebeid*, 616 F.3d 993; *U.S. ex rel. Lemmon*, 614 F.3d 1163; *U.S. ex rel. Duxbury*, 579 F.3d 13; *U.S. ex rel. Lane*, 2010 WL 1926131; *U.S. ex rel. Nathan*, 707 F.3d 451.

In this regard, there can be no doubt that Thayer alleged in her SAC sufficient facts, when taken as true and with all reasonable inferences, that established her as an "**insider**" with personal, first-hand knowledge of PPH's billings practices and of actual false claims submitted by PPH to the government and monies received and retained by PPH. For example, Thayer's SAC pleaded:

> "11. Qui Tam Plaintiff-Relator Susan Thayer (hereinafter "Plaintiff-Relator Thayer") is an individual resident in Lakeside, Iowa. From 1991 to

December 2008, **Plaintiff-Relator Thayer served as the center manager** of the Defendant Planned Parenthood of the Heartland's **Storm Lake, Iowa, clinic**. … From approximately 1993 to 1997, Plaintiff-Relator Thayer simultaneously served as the **center manager** for Defendant Planned Parenthood of the Heartland's **LeMars, Iowa, clinic**." (Docket No. 20, ¶ 11; App 010-011).

"36. Thayer oversaw the input of data into Defendant Planned Parenthood of the Heartland's centralized accounting and billing system." (Docket No. 20, ¶ 36; App 018).

"37. By virtue of her positions with Planned Parenthood of the Heartland as Storm Lake **clinic manager**, Plaintiff-Relator Thayer had **access via her office computer to and frequently did view billing information and records for clients** at other Planned Parenthood of the Heartland clinics, in addition to the clinics that Plaintiff-Relator Thayer managed. (Docket No. 20, ¶ 37; App 018).

"38. **In this way**, Plaintiff-Relator **Thayer** could and **often did view entries** in each client **billing record**, including client case histories, services and supplies provided to clients, test and lab results, staff chart notation called "flags," charges to clients, and **payments credited to the client's account**, whether made by clients, characterized as "**voluntary donations**" by Defendant Planned Parenthood of the Heartland, or **payments by** others, including private insurers, **Iowa Medicaid** Enterprise, and Iowa Family Planning Network. (Docket No. 20, ¶ 38; App 019).

"39. In addition to the foregoing, by virtue of her positions with Defendant Planned Parenthood of the Heartland, Plaintiff-Relator **Thayer had knowledge of the calculation and submission by Defendant Planned Parenthood** of the Heartland **of (a) claims to Iowa Medicaid Enterprise**, and (b) claims to Iowa Family Planning Network." (Docket No. 20, ¶ 39; App 019).

"40. In addition and by virtue of her positions with Planned Parenthood of the Heartland, Plaintiff-Relator Thayer **viewed and was thus aware of the amounts and dates of funds received by Planned Parenthood** of the Heartland **from Iowa Medicaid Enterprise** … for Title XIX-Medicaid eligible clients, as reimbursements for services and supplies that were

purportedly rendered by Defendant Planned Parenthood of the Heartland to such Title XIX-Medicaid eligible clients." (Docket No. 20, ¶ 40; App 019).

This case is wholly unlike *Joshi* wherein the 8th Circuit found: "Absent from the complaint are any mention of … (9) how Dr. Joshi, an anesthesiologist, learned of the alleged fraudulent claims and their submission for payment." *Joshi*, 441 F.3d at 556. Thayer specifically alleges how and where she learned of PPH's submission of fraudulent claims.

This case is wholly unlike *Clausen* wherein the 11th Circuit found the relator to be an outsider who did not have access to defendant's "policy manuals, files and computer systems" and thus could not provide the "indicia of reliability" necessary to reasonably infer that fraudulent claims had been submitted to the government. *Clausen*, 290 F.3d at 1314. Thayer specifically pleaded that she had access to each patient's file, including PPH's "centralized accounting and billing system" via her office computer. (Docket No. 20, ¶¶36-37; App 018).

In contrast, this case is like *Hill* wherein the 11th Circuit found sufficient indicia of reliability that false claims were submitted to the government because the relator was an **insider** with "firsthand information about [defendant's] internal billing practices and the manner in which the fraudulent billing schemes were implemented." *U.S. ex rel. Hill*, 2003 WL 22019936, pp. 4-5. Additionally, this case is wholly like *U.S. ex rel. Walker*, 433 F.3d 1349, wherein the relator's

complaint contained information indicating why she believed defendant submitted false or fraudulent claims to the government.

This case is also like *U.S. ex rel. Lusby*, 570 F.3d 849, wherein relator pleaded that the government had purchased goods and the court found that the government would not have paid for the goods without claims having been submitted. Thayer's SAC alleges that she personally witnessed "the amounts and dates of funds received by PPH from Iowa Medicaid." (Docket No. 20, ¶ 40; App 019).

This case is also like *U.S. ex rel. Lane*, 2010 WL 1926131, wherein the plaintiff had "personal knowledge of [defendant's] false billing patterns by virtue of her employment" for 3 ½ years, but could not plead "representative examples" because of patient confidentiality and HIPAA restrictions. Thayer's SAC alleges that she was employed by PPH for approximately 18 years, was in management, and oversaw the input of data in PPH's centralized accounting and billing system. (Docket No. 20, ¶¶ 11, 33, 36-40; App 010-011, 017, 018-019).

Thayer's SAC notes that the fraudulent claims submitted by PPH to Medicaid authorities relate to services performed in conjunction with abortions and birth control drugs distributed to PPH clients from PPH clinics, including the two clinics managed by Thayer. Thayer is precluded by state and federal law from specifically identifying the name of any PPH client or that client's bills, nor could

she have removed patient records necessary to provide those details. To do so in this case would link that client to specific services provided and violate the statutory confidentiality of each such client. Thus, Thayer is precluded from providing representative examples of individual clients. *See U.S. ex rel. Hill* at 4, n.8; *U.S. ex rel. Lane* at 6.

In addition, Thayer pleads that the information needed to prove PPH's false billings, including confidential medical and billing records for each client, are in the "exclusive control" of PPH. (Docket No. 20, ¶¶85, 116; App 033, 37). Since Thayer is no longer employed by PPH, it is impossible for her to provide specific details on exact dates, amounts and specific clients. *U.S. ex rel. Hill*, 2003 WL 22019936, pp. 4-5; *U.S. ex rel. Lane* at 6.

Thus, the District Court erred by requiring Thayer to plead "representative examples" of fraudulent claims.

III. THAYER ALLEGED THE "WHO, WHAT, WHEN, WHERE AND HOW" OF PPH'S FRAUDS.

As is discussed above, "[t]o satisfy the particularity requirement of Rule 9(b), the complaint must plead such facts as the time, place, and content of the defendant's false representations, as well as the details of the defendant's fraudulent acts, including when the acts occurred, who engaged in them, and what was obtained as a result." *U.S. ex rel. Raynor,* 690 F.3d at 955; *U.S. ex rel. Joshi,* 441 F.3d at 556. In essence, the law of the 8th Circuit requires Thayer to plead the who,

what, when, where and how of the alleged fraudulent conduct. *U.S. ex rel. Murphy*, 2006 WL 3147440, p. 1 (E.D. Ark. 2006) (citing *United States ex rel. Costner v. URS Consultants, Inc.*, 317 F.3d 883, 888 (8th Cir.2003)).

The District Court failed to discuss these elements and devoted only two (2) sentences to them, to wit:

> [The SAC] fails to identify any particular false claim submitted to the government, **any particular date** on which Planned Parenthood committed fraud, **any particular patient** related to fraudulent claims, any particular instance in which regulations were violated, any particular caretaker who falsely reported information, or any particular claim that the government wrongly paid.

(Docket No. 39, p. 6; App 054). As is evident from the above-statement, the District Court was focused on its belief that specific individual claims must be stated in an FCA complaint rather than, as alleged in Thayer's SAC, a detailing of the fraudulent schemes. Thayer submits this was error and that her SAC more than adequately alleges the "who, what, when, where and how" of the fraudulent schemes.

Moreover, with respect to the SAC's description of PPH's fraudulent schemes, the District Court stated:

> **The [SAC] certainly describes many aspects of [PPH's] alleged fraudulent schemes in detail**, but that detail provides only a bird's eye view of how [PPH] allegedly operated its schemes; it does not provide the type of ground-level specifics regarding *particular fraudulent claims* demanded by Rule 9(b).
>
> ***

> While Thayer's Second Amended Complaint **may provide Planned Parenthood with notice of the particular schemes Thayer claims are fraudulent**, it fails to notify Planned Parenthood of any particular Medicaid reimbursement claims that Planned Parenthood should be prepared to defend."
>
> ***
>
> While **many of Thayer's allegations are detailed**, none highlight a specific false claim that [PPH] allegedly submitted to the government.

(Docket No. 39, p. 6-7; App 054-55).

Thayer submits that the *Dismissal Order* actually demonstrates that Thayer's SAC sufficiently pled the details of the "fraudulent schemes" so as to place PPH on notice of the schemes it would have to defend against.

A. THAYER ALLEGED THE SPECIFIC INDIVIDUALS INVOLVED IN THE FRAUD.

Instead of addressing Thayer's specific allegations concerning the specific individuals involved in the fraud, the *Dismissal Order* simply states that the SAC "fails to identify … any particular patient related to fraudulent claims." (Docket No. 39, p. 6; App 054). The Court's focus on specific patients versus PPH personnel involved in the alleged frauds was error. *See U.S. ex rel. Hill*, 2003 WL 22019936 at p.5, n.8 ("Under the facts of this case, the question of "who engaged in" the fraudulent acts is answered by the names of the MMA employees and physicians who altered the CPT and diagnosis codes, **not the patient names**.")

Thayer's SAC adequately alleges that PPH's fraudulent schemes were perpetrated by PPH's CEO Jill June, PPH's V.P. of Health Services Penny Dickey,

and PPH's Regional Director Todd Buchacker. (SAC, ¶¶ 36, 42, 47, 55, 60, 101, 109, 111). *See U.S ex rel. Lemmon v. Envirocare*, 614 F.3d 1163, 1172 (10th Cir. 2010) (FCA complaint specific when it alleged "the names of the [defendant's] supervisors to whom [relators] reported"); *U.S. ex rel. Murphy*, 2006 WL at p. 2 ("Murphy addresses who allegedly perpetrated the fraud: Mike Heck, Mike Howell, Steve Thomason and Stacey Hines."); *U.S ex rel. Budike v. PECO Energy*, -- F.Supp.2d ---, 2012 WL 4108910, p.10 (E.D. Pa 2012) ("Relator alleges the "who" of the FCA violation. He alleges that Nancy Vizzard, PECO's employee, acted on behalf of PECO"). By identifying the specific individuals at PPH who implemented and directed the fraudulent schemes, Thayer's SAC has adequately described the "who" as they relate to the fraud.

B. THAYER HAS ALLEGED "WHAT" PPH'S FRAUD WAS AND WHAT IT OBTAINED.

Thayer's SAC also alleged "what was obtained" through PPH's fraudulent schemes. *U.S. ex rel. Joshi*, 441 F.3d at 556 ("what monies were fraudulently obtained as a result of any transaction"). The district court acknowledged that "Thayer pleads an amount of damages for each scheme based on [PPH's] aggregate activities, rather than any individualized false claims. See Dkt. No. 20, ¶¶ 84, 91, 107, 117." (App 054). Although it is unclear, it appears that the District Court believed that, by pleading the total aggregate amount of monies that PPH had fraudulently obtained from the government, Thayer's SAC was insufficient to

put PPH on notice of the frauds complained of. Thayer disagrees and submits this was error.

First, Thayer submits that in order to satisfy the objective of Rule 9(b), it is sufficient to place PPH on notice of the total amount of monies it received from the government as a result of its fraudulent conduct. *See U.S. ex rel. Duxbury*, 579 F.3d at 31 (1st Cir. 2009) (relator alleged the aggregate monetary amount of prescription medication each clinic inappropriately received from defendant). Even so, contrary to the statement by the District Court, Thayer's SAC provides both specific and aggregate allegations.

Thayer's SAC identifies the specific drug being fraudulently prescribed and dispensed (Ortho Tri-Cyclean Lo)[11] as well as PPH's cost for the drug ($2.98/menstrual-cycle). (Docket No. 20, ¶¶ 57, 66; App 026, 028-029). Thayer also identifies the amount PPH charged to Medicaid for each individual Medicaid eligible patient ($35.00/menstrual-cycle) as well as the per patient amount that PPH was actually paid by Medicaid for each patient prescription dispensed ($26.32/menstrual-cycle). *Id*.

At the aggregate corporate level, Thayer's SAC alleges that, as an **insider**, Thayer knew that: (a) PPH had enrolled 6,600 Title XIX-Medicaid eligible women

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[11] This is a far cry from *U.S. ex rel. Joshi* where the court noted that the relator did not identify "what supplies or prescriptions were fraudulently billed." *Joshi* at 556.

in its C-Mail Program as of 8/31/08. (Docket No. 20, ¶ 78; App 031); (b) to increase revenues in its fraudulent scheme, PPH established a goal of 7,667 Title XIX-Medicaid eligible women to be enrolled in its C-Mail Program by 10/31/08. (Docket No. 20, ¶77; App 031); and (c) from mid-2006 through and after December 31, 2008, PPH submitted false Medicaid claims for OCPs dispensed by PPH's C-Mail program totaling at least $3,316,320.00 per year. (Docket No. 20, ¶ 84; App 033). As a result, Thayer's SAC alleges that PPH submitted false, fraudulent, or ineligible claims to Medicaid of $824,768.78 or more per year. (Docket No. 20, ¶ 84; App 033). Thayer submits that this was more than adequate to alert PPH of the fraud being alleged.

Second, Thayer's SAC satisfies the "what" in a Rule 9(b) analysis by identifying the frauds. Thayer submits that she need not have pleaded specific monetary amounts since a violation of the FCA carries with it statutory penalties regardless of the amount of monies that may have been obtained by PPH. The 5th Circuit specifically discussed the fact that a claim under the FCA, unlike common law fraud, "lacks the elements of reliance and damages." *U.S. ex rel. Grubbs*, 565 F.3d at 189. Thus, a defendant can be liable for FCA's civil penalties for submitting a false claim, regardless of whether or not the claim is ever paid by the government. *Id*. In this instance, "it is adequate to allege that a false claim was knowingly presented regardless of its exact amount." *Id*.; *see also U.S. ex rel.*

Lemmon, 614 F.3d at 1172 (10th Cir. 2010) (relator sufficiently addressed "the *what*" by "alleg[ing] a series of contractual and regulatory breaches, pointing to specific obligations that [defendant] breached.")

In addition, Thayer's FCA claims under 31 USC §3729(a)(2) do not have a "presentment" requirement. Therefore, it was error for the District Court to require that Thayer allege details of fraudulent bills actually presented to the government. *Grubbs*, at 192.

C. THAYER HAS ALLEGED "WHEN" PPH COMMITTED THE FRAUD.

Thayer's SAC also alleges ***when*** the fraudulent schemes took place. With respect to this element of the Rule 9(b) analysis, the *Dismissal Order* acknowledged that Thayer "… claims the frauds took place from early 2006 to December 2008." (*Dismissal Order*, p. 2; App 050). In its *Dismissal Order*, the District Court later stated "[the SAC] fails to identify … any particular date on which [PPH] committed fraud…." (*Dismissal Order*, p. 6; App 054). The District Court's focus on a specific date in a "fraudulent scheme" case as opposed to the time frame during which the scheme was carried out was error.

Courts have routinely held that it is sufficient for a relator to allege the time period during which the acts occurred. *See U.S. ex rel. Murphy*, 2006 WL at p. 2 (E.D. Ark. 2006) ("In paragraph 12(c) she answers the when: approximately four to five months after she started in October 1999 at least until she was terminated in

February 2001."); *U.S. ex rel. Duxbury*, 579 F.3d at 30 (1st Cir. 2009) ("rough time periods" sufficient to allege "when"); *U.S. ex rel. Lane v. Murfreesboro Dermatology Clinic*, 2010 WL 1926131 at p.6 (E.D. Tenn. 2010) ("Plaintiff pleads … the time period during which these schemes took place (from at least September 2002 to March 2006, when Plaintiff was employed there.)…"); *U.S ex rel. Budike v. PECO Energy*, -- F.Supp.2d ---, 2012 WL 4108910, p.10 (E.D. Pa 2012) (Relator adequately alleged "[t]hese violations occurred from September 4, 2003 to 2007."); *U.S. ex rel. Hunt v. Merck–Medco Managed Care, L.L.C.*, 336 F.Supp.2d 430, 437 (E.D.Pa.2004) (allegation of "general time frame" sufficient to plead fraud); *U.S. ex rel. Folliard v CDW Technologies*, 722 F.Supp.2d at 31 (all that is required is ""time frame" for scheme rather that 'specific dates'"); *cf. U.S. ex rel. Singh*, 2006 WL 2642518 at pp.6-7 ("allegations of "date, place or time" not absolutely required and relators "are free to use alternative means of injecting precision and some measure of substantiation into their allegations of fraud.").

D. THAYER HAS ALLEGED "WHERE" PPH COMMITTED THE FRAUD.

Thayer's SAC also alleges "**where**" the fraudulent schemes were carried out. While the *Dismissal Order* did not address this issue, Thayer submits that it is sufficient that her SAC allege that the fraud was perpetrated at PPH's headquarters office in Des Moines, Iowa and through PPH's clinics specifically identified in her SAC. *See U.S. ex rel. Murphy*, 2006 WL at p. 2 (E.D. Ark 2006) (relator's naming

of defendant's specific clinics was sufficient.); *U.S. ex rel. Lane v. Murfreesboro Dermatology Clinic*, 2010 WL 1926131 at p.6 (E.D. Tenn. 2010) ("Plaintiff pleads … the place (Defendant Bell's main clinic in Murfreesboro or his satellite clinics)…"). Similar to the plaintiffs/relators in *U.S. ex rel. Murphy* and *U.S. ex rel. Lane*, Thayer's SAC sufficiently identifies PPH's headquarters and the specific PPH clinics from and through which the frauds were perpetrated in this case. (SAC, ¶¶ 11, 12, 31-37, 47, 60, 64, 93, 98, 102, 111 & 112; App 010-043).[12]

E. THAYER ALLEGED "HOW" PPH OPERATED THE SCHEMES.

Thayer's SAC also pleads "how" PPH implemented the fraudulent schemes. In Count I, for instance, Thayer's SAC alleges that PPH automatically submitted a Medicaid reimbursement claim for each new OCP prescription (84 pills) dispensed every 63 days to each Medicaid-eligible client in its mandatory "C-Mail" program. Thayer's SAC alleges that, by dispensing an 84-day supply of OCPs every 63 days, PPH created a medically unnecessary surplus of at least 120.96 doses (approximately a four-month supply) of Ortho Tri-Cyclen Lo OCPs for each Medicaid-eligible client each year, resulting in overcharges to Medicaid of at least $113.70 per patient/year. (Docket No. 20, ¶ 66; App 028-029). The "**how**" and "**why**" for the C-mail program are described in Thayer's SAC at ¶¶47-84. These

[12] Thayer's SAC, ¶¶ 12 and 31(b), specifically identify the PPH clinics involved. Other paragraphs of the SAC simply refer to PPH's "Iowa clinics" or PPH's clinics.

allegations include facts on how and why PPH set up the C-mail program, how and why it made the C-mail program mandatory for its clients, and even how and why PPH set up competitions among its clinics to get more clients enrolled in the C-mail program. (Docket No. 20, ¶¶ 56, 59, 60, 76; App 025, 026, 027, 031). Thayer submits that this level of detail of PPH's fraudulent scheme is more than sufficient to alert PPH of the fraud being complained of and to satisfy the ***how*** and ***why*** of the fraudulent scheme.

With respect to Count II, Thayer alleged that PPH billed Medicaid for and received reimbursements "for services and supplies rendered as part of the provision of abortions, including, without limitation, office visits, ultrasounds, Rh factor tests, lab work, general counseling, and abortion aftercare." (Docket No. 20, ¶ 95; App 037-038). PPH then reduced the amount otherwise charged to clients as a result of which Medicaid effectively illegally subsidized virtually every elective abortion performed by PPH for Medicaid-eligible women. (Docket No. 20, ¶P 97-100; App 038-039). Moreover, PPH, at the specific instruction of PPH manager Todd Buckhacker, instructed women suffering from post-medical abortion complications to go to the local hospital emergency room and falsely report that the client was experiencing a miscarriage, rather than disclose that PPH had just performed a medical abortion. (Docket No. 20, ¶¶ 101-103; App 039-040). As a result, PPH caused local hospitals to unknowingly file Medicaid claims for

abortion-related services in violation of law. (Docket No. 20, ¶¶ 102-104; App 040).

With respect to Count III, Thayer's SAC alleges that PPH inappropriately coerced payments (characterized as "voluntary donations") from Medicaid-eligible clients and received at least $10 from most clients. (Docket No. 20, ¶ 111; App 043). PPH would then bill Medicaid for 100% of the client's charges without offsetting the amounts of the "voluntary donations."

With respect to Count IV, Thayer's SAC alleges that PPH billed Medicaid for enhanced services that were never provided by PPH. In her SAC, Thayer provided specific "CPT codes" that PPH used to submit such false claims to Medicaid. (Docket No. 20, ¶¶ 43-45, 120-122; App 020, 021, 045). Thayer submits that these allegations were more than sufficient enough to place PPH on notice of how the fraudulent schemes were being carried out.

CONCLUSION

The District Court's determination that *Joshi* mandates that "representative examples" of fraudulent claims be pleaded in every FCA complaint was error. As a long-time clinic manager, an "insider" with personal and first-hand knowledge of PPH's billing practices and procedures, Thayer's SAC alleged personal knowledge that false claims were submitted by PPH to and paid to PPH by the

government and thereafter amounts received were wrongfully retained by PPH. Her SAC provided sufficient "indicia of reliability" to satisfy Rule 9(b).

In addition, Thayer's SAC satisfied Rule 9(b) by adequately alleging the "who, what, when, where, and how" of PPH's fraudulent schemes. Therefore, the District Court erred in granting PPH's motion to dismiss.

For these reasons, the District Court's order granting Defendant Planned Parenthood of the Heartland's Motion To Dismiss Relator Susan Thayer's Second Amended Complaint should be reversed and this cause remanded to the district court for further proceedings.

Respectfully submitted this 3rd day of May, 2013.

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CERTIFICATE OF COMPLIANCE

This brief has been prepared using 14 point, proportionately spaced Times New Roman typeface in Microsoft Office Word 2007. Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that the textual portion of the foregoing brief (exclusive of the disclosure statement, tables of contents and authorities, certificates of service and compliance, but including footnotes) contains 13,503 words as determined by the word counting feature of Microsoft Word 2007.

Pursuant to Circuit Rule 28A(h), I also hereby certify that electronic files of this Brief and accompanying Addendum have been submitted to the Clerk via the Court's CM/ECF system. The files have been scanned for viruses and are virus-free.

I understand that a material misrepresentation can result in the Court's striking the brief and imposing sanctions.

May 3, 2013.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the 3rd day of May, 2013, I caused the foregoing "Relator-Appellant's Opening Brief" to be filed with the Court electronically using the CM/ECF system, which will then send a notification of such filing to the following:

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