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)

REPLY BRIEF RELATOR-APPELLANT SUSAN THAYER

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I. NO APPEALS COURT HAS HELD THAT RULE 9(B) REQUIRES EVERY FCA CLAIMANT TO PLEAD "REPRESENTATIVE EXAMPLES" OF FRAUDS AS A "NECESSARY PRECONDITION."

Neither this Court nor any Appeals Court has held, as the District Court did, that "representative examples" of frauds are a "necessary precondition" of every FCA claim. Rather than address this argument directly, PPH incorrectly claims Thayer advocates for a bright line "insiders" v. "outsiders" rule. (See PPH's Brief, 23-28). Thayer does not claim the Circuits are split on whether Rule 9(b) provides a more lenient standard turning solely on the relator's insider v. outsider status. *Id*. Rather, Thayer argues simply that Rule 9(b) requires a relator to demonstrate an "indicia of reliability" for her assertion that alleged false claims were actually submitted to the government. PPH contends, and the District Court expressly held, that the only way any relator is ever able to meet this standard is by listing specific "representative examples." Every other court that has addressed this question has rejected PPH's argument and held that where a relator is otherwise able to provide the required "indicia of reliability" for her claim that false claims were submitted – often supplied by her knowledge as an "insider" to the billing process – the requirements of Rule 9(b) are met without the need for a listing of "representative examples."

Because courts recognize the obvious difference in reliability between claims by a billing agent ("insider") and, for example, a customer ("outsider") that false claims were submitted to the government, the decisions frequently use these terms. But Thayer does not champion the adoption of a different standard for applying Rule 9(b) based solely and mechanically on the labeling of a relator as an "insider" or as an "outsider"; rather she urges this Court to the follow the common rule:

> We hold that to plead with particularity the circumstances constituting fraud for a False Claims Act … 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**.

United States ex rel. Grubbs v Kanneganti, 565 F.3d 180,191 (5th Cir. 2009). In *Grubbs*, the Fifth Circuit agreed with the Eleventh Circuit's decisions in *United States ex rel. Clausen v. Laboratory Corp. of America*, 290 F.3d 1301 (11th Cir. 2012) and *United States ex rel. Walker v. R&F Properties of Lake County, Inc.*, 433 F.3d 1349 (11th Cir. 2005) that Rule 9(b)'s focus is on whether there is "reliable indicia" for allegations that false claims were actually presented. 565 F.3d at 186-87, 190. As PPH concedes, these same Eleventh Circuit cases cited by the *Grubbs* court are the models for this Court's decision in *United States ex rel. Joshi v. St. Luke's Hos., Inc.*, 441 F.3d 552 (8th Cir. 2006), (PPH Brief, p.28). Yet

rather than harmonizing *Joshi* with the decisions of these other Circuits, PPH seeks to create a conflict.

Thayer has consistently focused on the importance of this "indicia of reliability." After pleading firsthand knowledge of PPH fraud, Thayer asserted in resistance to PPH Motion to Dismiss that her management positions and "her access to and review of [PPH] system-wide billing records all give Ms. Thayer and her SAC an '**indicia of reliability'** not found in the *Joshi* complaint." (Dkt. No. 32-1, pp.15, 24). The district court had no problem understanding Thayer's assertion, stating: "Thayer may not escape *Joshi's* particularity requirements simply by claiming that **Thayer's position at Planned Parenthood gives her claims a higher 'indicia of reliability.'**" (APP055). Thayer has consistently explained that her personal knowledge – in large part because she was an insider to the billing process – demonstrates this required "indicia of reliability."

A. There Is No "Split" Between the Circuits As To Whether "Representative Examples" Are a "Necessary Precondition" in Every False Claims Act Case.

Thayer rejects, as should this Court, PPH's assertion that the Eighth Circuit or any other Circuit has required that a relator in an FCA case must "always" plead "specific examples" of false claims submitted. Thayer agrees, however, with PPH when it relates that in "the First, Fifth, Seventh and Ninth Circuits"

> if a relator "cannot allege the details of an actually submitted false claim, [she] may nevertheless survive by alleging the particular details of a scheme to submit false claims paired with **reliable indicia** that lead to a strong inference that claims were actually submitted."

(PPH Brief, p.26). However, since the above rule of law runs directly afoul of the district court's decision and against PPH interpretation of the Eighth Circuit's decision in *Joshi*, PPH attempts to manufacture "a Circuit split concerning the level of particularity needed to plead an actual false claim to the government." *Id*. at 23. PPH claims that "among the Circuits that have taken a side, either *all* relators are subject to the heightened standards of 9(b) (Fourth, Sixth, Eighth and Eleventh Circuits – hereinafter the "***Strict Circuits***") … or, *all* relators are subject to a more relaxed standard under Rule 9(b)…." (PPH Brief, p.28) (emphasis PPH) (First, Fifth, Seventh and Ninth Circuits – hereinafter the "***Flexible Circuits***"). Yet none of the ***Strict Circuits*** have embraced the hard and fast rule asserted by PPH and none acknowledge this supposed "split."

It would surprise the Eleventh Circuit that it supposedly "requires" the pleading of representative examples in "*all*" FCA cases. (PPH Brief, pp.21-23). The Eleventh Circuit has not required specific examples when a relator has pled personal knowledge of a fraudulent billing scheme and this personal knowledge provides sufficient "indicia of reliability." *See United States ex rel. Hill,* 82 Fed. Appx. 213, *4-5 (11th Cir. 2003); *Walker* at 1359-1360. In fact, *Corsello v.*

Lincare, 428 F.3d 1008 (11th Cir. 2005), cited by PPH, agreed with the Eleventh Circuit's decision in *Hill* [1] in which the pleading of specific examples of fraudulent claims was not required. Thus, PPH's assertion that the Eleventh Circuit supports a strict interpretation of Rule 9(b) under "all" circumstances, is without merit.

Similarly, in citing *United States ex rel. Bledsoe*, 501 F.3d 493 (6th Cir. 2007), PPH asserts the Sixth Circuit requires "*all*" FCA relators to plead specific examples of fraudulent billing in "*all*" cases. (PPH Brief, p.28). PPH fails to point the Court to footnote 12:

> **We do not intend to foreclose the possibility of a court relaxing this rule in circumstances where a relator demonstrates that he cannot allege the specifics of actual false claims** …. For example, in *Hill v. Morehouse Medical Associates, Inc.,…* the relator worked in the billing department of the hospital, she described the alleged fraud in great detail, and **she allegedly possessed first-hand knowledge that false claims had been submitted to the government**. *Id.* at *4. *** **Because this case does not present such circumstances, we**

[1] Thayer is mindful of PPH's footnote 8, observing that *Hill* is an unpublished decision and usually should not be cited. Eighth Circuit, Local Rule 32.1A. Yet, *Hill* is specifically cited and discussed by published decisions in the Eleventh Circuit. *See Corsello*, 428 F3d at 1013; *see also United States ex rel. Heater*, 510 F. Supp. 2d 1027, 1033 (S.D. Fla. 2007). It is also cited in published decisions of other Circuit Courts as well as other federal district courts. *See Chesbrough v. VPA, P.C.*, 655 F.3d 461, 470, 471 (6th Cir. 2011); *United States ex rel. Lane*, 2010 WL 1926131, p.6 (E.D. Tenn. May 12, 2010); *United States ex rel. Osheroff*, 2012 WL 2871264 (S.D. Fla. 2012); *United States ex rel. Singh*, 2006 WL 2642518 (W.D. Pa 2006). Thus, understanding *Hill* is helpful when attempting to understand the rule of law established by courts relying on *Hill*.

> **express no opinion as to the contours or existence of any such exception** ….

Id. at 504 (emphasis added) (citation omitted). PPH also ignores that the Sixth Circuit subsequently recognized that "*Bledsoe* left open the possibility that a court may 'relax' the requirement of Rule 9(b)." *See Chesbrough*, 655 F.3d at 470. After acknowledging decisions by the Eleventh Circuit in *Hill* and *Walker* that did not require examples of false claims, the *Chesbrough* Court 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.

Id. at 471-472 (emphasis added). The Sixth Circuit has not drawn a bright line or espoused a strict approach. In fact, both *Bledsoe* and *Chesbrough* do not even support PPH's assertion that there is a "split" between the Circuits. PPH can hardly assert that the Sixth Circuit is "split" from the ***Flexible Circuits*** when that

Circuit has clearly stated that it has not yet decided the issue. *See also United States ex rel. Elliott v. Brickman Group Ltd*., 845 F. Supp. 2d 858 (S.D. Ohio 2012) (rejecting argument that FCA complaint must include representative examples of claims submitted and affirming that Sixth Circuit does not require examples in all cases).

In arguing that the Fourth Circuit is a ***Strict Circuit*** and evidences a Circuit split, (PPH Brief, p.28), PPH ignores that the Fourth Circuit in *United States ex rel. Nathan v. Takeda Pharma. North America, Inc.*, 707 F.3d 451 (4th Cir. 2013) neither alluded to a "split" in the Circuits nor indicated disagreement with any of the holdings by the ***Flexible Circuits***. Indeed, *Nathan* distinguished the facts before it from the facts before the ***Flexible Circuits*** in *Grubbs* (5th Cir.), *United States ex rel. Duxbury v. Ortho Biotech Products*, 579 F.3d 13 (1st Cir. 2009), and *United States ex rel. Lemmon v. Envirocare of Utah*, 614 F.3d 1163 (10th Cir. 2010):

> Based on the nature of the schemes alleged in many of those cases, specific allegations of the defendant's fraudulent conduct necessarily led to the **plausible inference** that false claims **were** presented to the government.

Nathan, 707 F.3d at 457 (emphasis added). Crafting its opinion so as not to conflict with these holdings, the Fourth Circuit stated:

> 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.

Nathan, 707 F.3d at 457 (italics in original). This holding does not disagree with the ***Flexible Circuits*** nor create the "split" asserted by PPH.

B. Neither *Joshi* nor Other Cases in This Circuit Support PPH's Mandate of Representative Examples in Every Case.

Erroneously finding support in other Circuits, PPH then reads *Joshi* as supporting a strict application of Rule 9(b), ignoring the language of *Joshi* limiting its holding to its facts. Being fully aware of the Eleventh Circuit's decisions not mandating examples,[2] the *Joshi* court was very careful to point out that "neither the Federal Rules nor the [FCA] offer any **special leniency under these particular circumstances** to justify failing to allege with the required specificity the circumstances of the fraudulent conduct…." *Joshi* at 560 (emphasis added). The *Joshi* court held that, as an outsider to the billing process lacking personal knowledge of the submission of claims, "Dr. Joshi's allegation that 'every' claim submitted by [defendant] was fraudulent lacks sufficient '**indicia of reliability**.'"

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[2] As pointed out in Thayer's Brief, pp.14-19, at the time the Eighth Circuit decided *Joshi*, the Eleventh Circuit had already rendered its decisions in *Hill* and *Walker* not requiring examples when sufficient indicia of reliability exists to infer that claims were submitted to the government.

Joshi at 557, quoting *Corsello*, 428 F.3d at 1012. This language does not support PPH's assertion that the Eighth Circuit always requires specific examples and does not consider whether a "sufficient indicia of reliability" in a complaint can satisfy Rule 9(b) without such specific examples.

PPH's citation to other cases in this Circuit, (PPH Brief, pp.24-25), do not support an expansion of *Joshi*. In *United States ex rel. Roop v. Hypoguard USA, Inc*., 559 F.3d 818 (8th Cir. 2009), the relator "concede[d] his original Complaint failed to meet this pleading standard" and the Rule 9(b) dismissal was not even at issue on appeal. *Id*. at 822. Although the relator in *Roop* was a past employee, he did not allege the defendant submitted any false claims nor that he had any personal knowledge of false claims submitted by his employer..

Nor does *United States ex rel. Vigil v. Nelnet, Inc.*, 639 F.3d 791 (8th Cir. 2011) support PPH's assertion that this Circuit requires the pleading of "representation examples" in "all" FCA cases. (PPH Brief, p.25). The issue was not even discussed in *Vigil*. The court noted that "[t]he Complaint does not allege that any specific claim was in fact paid or even submitted for payment." *Id*., at 797. Echoing the ***Flexible Circuits***, *Vigil* noted that the relator "[did] not allege **firsthand knowledge** of Nelnet's practices and procedures for submitting insurance claims to Guaranty Agencies…." *Id*. at 798 (emphasis added). Thus

"…the complaint fails to allege facts creating plausible inferences that Nelnet's allegedly false claims for insurance payments were presented to the government…." *Id.*

PPH asks the Court to break with the holdings of every other Circuit that has decided the question squarely and hold that a listing of "representative examples" of frauds is always a "necessary precondition" to maintaining an FCA claim. There is no current Circuit split between supposed "**Flexible**" and "**Strict**" Circuits on the question before this Court. It is PPH that invites this Court to create a split and hold, for the first time in any Appeals Court, that no relator, no matter how reliable their allegations that false claims were actually submitted to the government, must still provide specific examples to comply with Rule 9(b). The Court should decline PPH's invitation.

C. Thayer Has Sufficiently Pled Her Claims to Demonstrate They Are Not Spurious.

PPH asserts that this Court must require specific examples to protect it from "spurious charges." PPH points this court to a web address (PPH Brief, p.32, n.12) published by an entity not a party to this litigation, asserting from its contents that "Thayer's FCA claims are, in fact, a pretext for other intentions." (PPH Brief, p.32). PPH implies that Thayer's claims are, therefore, spurious.

First and foremost, any information contained in this website is hearsay, irrelevant and immaterial to any issues before this Court and should be stricken. As the Seventh Circuit has held, "[the Relator's] motivation in pursuing this case is not relevant." *United States ex rel. McCandliss v. Sekendur*, 282 Fed.Appx. 439, *3 (7th Cir. 2008).

PPH's counsel surely knows that citation to this website and reference to its contents is improper and PPH fails even to explain why it was not brought to the attention of the district court. The website represents factual information outside of the pleadings and cannot be properly considered by a court in deciding a motion to dismiss under Rules 9(b) and 12(b)(6). "[W]here matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided by Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." FED. R. CIV. P. 12(d). *See also United States ex rel. Raynor v. National Rural Utilities Coop.*, 690 F.3d 951, 955 (8th Cir. 2012); *United States ex rel. Onnen v Sioux Fall Indep. School Dist.*, 688 F.3d 410 (8th Cir. 2012) (court denied motion to expand the record on appeal).

On the other hand, properly before the Court is an affidavit in which Thayer provided PPH the actual names of 110 patients at PPH who were subject to PPH

fraudulent C-mail scheme and who were coerced into giving inappropriate "donations" to PPH. (Docket No. 45-1, Add. 022-25).[3] PPH virtually ignores this fact, at one point even protesting that Thayer had not provided names, *see* PPH Brief, 16-17, even though it finally acknowledges the Affidavit later, PPH Brief, 31 n.11. PPH can easily check these names in its computer system to confirm that false and fraudulent claims were submitted to the government through PPH's C-mail program for each of these patients and confirm these patients made "donations" to PPH at the time they were provided services at a PPH clinic and whether Medicaid was nevertheless fully billed.

Thayer also provided PPH and the district court with the Declaration of Pamela K. Estes, who was a senior clinician at PPH. (Docket 45, pp.30-39). Not only did ARNP Estes provide medical services to patients at various PPH clinics (Dkt. 45, p.31, ¶¶ 5-8), but she supervised "all other ARNPs in the Planned Parenthood clinic system…." (*Id*.; Estes Declaration, p.3, ¶ 9). Estes confirmed, under oath, many of the factual assertions in Thayer's SAC. (Dkt. 45, pp.33-39). She confirmed that she signed "prescriptions of Oral Contraceptive Pills ("OCPs") for clients without actually seeing the clients and after [PPH] non-medical staff at

[3] Thayer provided an unredacted version of this list to PPH. While PPH demands patient names be disclosed, PPH Brief, 16-18, it does not contest Thayer's argument that HIPAA prohibits such disclosures.

each clinic had dispensed OCPs to clients." (*Id*., p.34, ¶¶ 12.e-g). Estes confirmed that at one PPH clinic she "signed off each week on 30-60 prescriptions for OCPs which had been dispensed by [PPH] non-medical clinic personnel during the prior week and since [her] last visit." (*Id*., ¶ 12.h). In fact, at all other PPH clinics where Estes was assigned, "in a month's time, hundreds of prescriptions were signed off on by [Estes] and other [PPH] ARNPs after OCPs had been distributed to clients and without having been examined by an ARNP." (*Id*., ¶¶ 12.j). Estes estimated "that at least 80 percent of the clients treated in any given week between January 1, 2006 and August 2009 were C-Mail Program clients to whom OCPs were distributed without having been seen by a qualified healthcare professional." (*Id*., p.36).

With respect to Count III of Thayer's SAC, Estes confirmed that PPH executives "had instructed [PPH] clinic personnel to request that clients make payments to [PPH], which [PPH] management characterized as "voluntary donations," to offset the cost of services provided by [PPH] to such clients." (*Id*., ¶¶ 13.a-b).

Although this Court is required to "assume all facts in the complaint to be true and [to] construe[] all reasonable inferences most favorably to the complainant," *Raynor*, 690 F.3d at 955, Thayer provided sworn testimony from a

licensed professional who provide many of the subject services, and who thus supported her allegations. Thayer's claims are not spurious.

II. THAYER'S SAC ADEQUATELY PLEADS THE DETAILS OF PPH'S FRAUDULENT SCHEMES.

PPH's claim that Thayer failed to allege the who, what, when, where, and how of PPH fraudulent schemes is without merit.

A. Thayer Alleged the "Who" of PPH's Frauds.

PPH acknowledges that Thayer "points to certain PPH executives as those who 'directed' the alleged fraudulent schemes or 'instructed' PPH employees to engage in certain actions." (PPH Brief, p.16) (*See* Thayer's Brief, pp.42-43). However, PPH asserts that Thayer was also required to identify various PPH employees "who actually effectuated any of the alleged fraudulent schemes." *Id*. In doing so, PPH cites *Joshi*. (PPH Brief, p.17). *Joshi* does not stand for the proposition that the identification of lower-level employees effectuating a fraudulent scheme at the direction of others is mandatory at the pleading stage. In *Joshi* the relator failed to identify "who was involved in the fraudulent billing aspect of the conspiracy" (*Joshi* at 556); something that Thayer clearly pleads. (APP018-043; SAC, ¶¶ 36, 42, 47, 55, 60, 101, 109, 111).

Oddly, PPH cites *Bledsoe* to defend its view of the pleading requirements. (PPH Brief, p.28). On this very issue, the *Bledsoe* court stated:

> The parties' next bone of contention is whether, in addition to alleging specific false claims, the parties must plead the **identity of the specific individual employees within the defendant corporation** who submitted false claims to the government. **We reject Defendants' contention** that such information is an indispensable part of a complaint that passes muster under Rule 9(b). A requirement that a relator identify specific employees is dissimilar from a requirement that a relator identify specific false claims in every material respect. **Such a requirement is not required by the FCA itself or the text of Rule 9(b)**, nor is it required by *Bledsoe I* or other binding precedents. We therefore hold that while such information is relevant to the inquiry of whether a relator has pled the circumstances constituting fraud with particularity, it is not mandatory.
>
> The identity of the natural person within the corporate defendant who submitted false claims is not an essential element of a FCA violation. … The offending corporation can therefore be the perpetrator of a FCA violation. **Where, as here, the relator has alleged that the corporation has committed the fraudulent acts, it is the identity of the corporation, not the identity of the natural person that the relator must necessarily plead with particularity**.

Id. at 506 (emphasis added). *See also United States ex rel. Folliard v. CDW Technology Services, Inc.*, 722 F. Supp. 2d 20, 32 (D.D.C. 2010) (rejecting the argument that the relator "must name individual participations in the alleged fraud" and citing *Bledsoe* for the proposition that Sixth Circuit does not require names of individual employees involved in frauds).

Not only has Thayer identified PPH as the corporation committing the fraudulent schemes, she has identified the specific management personnel who

directed such frauds on behalf of PPH. (Thayer's Brief, pp.42-43). Additionally, although PPH asserts that Thayer could have no knowledge about claims at other clinics (PPH Brief, p.6), Thayer explains the specific basis for her knowledge – her access to the centralized billing system and meetings wherein she learned that the policies and practices at issue were affiliate-wide. (APP017-019, ¶¶ 33-40. This is more than sufficient to satisfy the particularity requirements of Rule 9(b).

B. Thayer's SAC Adequately Alleged the "What" of PPH Fraudulent Schemes.

Thayer's Brief points out "what" the fraudulent schemes were and "what" government funds were obtained as a result. (Thayer's Brief, pp.43-46). In *Raynor* this Court held that the "what" was satisfied by pleading "what was obtained." 690 F.3d at 955. See also *Folliard*, 722 F. Supp. 2d at 31 (the "what" was satisfied where relator pled that Defendant obtained excess Medicaid reimbursements). Ignoring *Raynor*, PPH focuses on specifics like [1] "what exactly was fraudulent about the schemes," [2] "what type of 'lab work'" was performed; [3] "what was 'medically unnecessary' about refilling prescriptions"; and [4] "what code was applied to which service?" (PPH Brief, pp.17-18). PPH asserts these questions are required to be contained in Thayer's SAC because the *Joshi* court, in *dicta*, noted the relator had not indicated "what services were provided." (PPH Brief, p.17). Although Thayer submits that the answer to many of the questions raised by PPH

can be found in her SAC, Rule 9(b) clearly does not **require** such a showing. To place a defendant on notice of the fraudulent scheme, Thayer submits it is sufficient to allege "what" the defendant fraudulently obtained from the government. Indeed, this was also the focus of the *Joshi* Court. *See Joshi*, 441 F.3d. at 556 (relator failed to allege "what monies were fraudulently obtained as a result of any transaction").

C. Thayer's SAC Adequately Alleged the "When" Regarding PPH's Fraudulent Schemes.

Thayer explains the time frames during which PPH fraudulently obtained monies from the government. (Thayer's Brief, 46-47). PPH does not contend that this time frame is insufficient. Instead, PPH misrepresents that Thayer's SAC pleads that the "schemes took place from 1999 to the present," but "those allegations have been transformed in her briefing to this Court (and to the District Court) into '2006 to 2008.'" (PPH Brief, 18). PPH makes this representation to imply that Thayer did not even know until the briefing stage "when" the fraudulent schemes were in effect. (*Id*. at 18-19). Thayer submits that PPH's representation to this Court is inaccurate. For example, with respect to PPH's fraudulent C-Mail scheme, Thayer's SAC specifically alleges the following:

> "[i]n early **2006**, upon the instructions from Defendant PPH CEO Jill June …each [PPH] clinics was instructed to and did implement …[PPH] C-Mail Program." (APP023, ¶ 47).

> "In about **mid-2006**, Defendant [PPH] converted the original 'opt-in' C-Mail Program to a mandatory 'opt-out' program." (APP026, ¶ 58)
>
> "Upon instructions from Defendant [PPH] CEO Jill June … on and after **mid-2006**, each of Defendant [PPH] clinics" implemented [PPH] C-mail scheme. (APP027, ¶ 60).
>
> "As of **August 31, 2008**, Defendant [PPH] had enrolled 6,600 Title XIX-Medicaid eligible women in its C-Mail Program." (APP031, ¶ 78)
>
> "From **mid-2006 through and after December 31, 2008**, Defendant [PPH] submitted claims to Iowa Medicaid … for OCPs Defendant [PPH] had dispensed to clients it had arbitrarily enrolled in its mandatory C-Mail Program totaling at least $3,316,320 per year…" which resulted in "ineligible claims to Iowa Medicaid … of $824,768.78 or more per year. (APP033, ¶ 84)

Contrary to PPH's assertion, the time from of "2006 to 2008" did not just magically appear in Thayer's Brief to this Court or to the district court, and PPH representation to the contrary lacks any merit.

D. Thayer Explains *How* the Frauds Were Implemented.

PPH confuses the "how" test with a relator's indicia of reliability for her allegation that false claims were submitted. PPH Brief, pp.19-20. Compare *United States ex rel. Budike v. PECO Energy*, 897 F. Supp. 2d 300, 318 (E.D. Pa. 2012) (relator "established the 'what' and 'how' elements of fraud by" explaining how the frauds were carried out).

Nevertheless, Thayer's SAC explains in detail not only that she was an "insider" to the billing process, but the specific computer access, billing responsibilities, meetings, and other ways in which she learned of PPH frauds. (APP010, 017-019, ¶¶ 11, 33, 37, 39-41). Thayer specifically alleges personal knowledge that false claims were submitted. PPH's assertion that "there is no dispute" that Thayer alleges schemes and "then … simply assume[s] that those schemes must have resulted in a false claim," PPH Brief ¶ 29, is puzzling. Thayer alleges that she personally knew false claims were submitted and paid in furtherance of the schemes. (APP019, ¶ 41). Whether the "how" is viewed as Thayer's explanation of the way the frauds were carried out or the reliable indicia for the veracity of her claims, Thayer passes the test.

III. DEFENDANTS ARE NOT ENTITLED TO DISMISSAL ON OTHER THEORIES NOT ADDRESSED BELOW.

PPH's theory that Rule 9(b) requires relators who plead personal knowledge that false claims were submitted to actually list the names and information of particular patients is unsupported by both law and logic, and the District Court erred in dismissing Thayer's claims on that ground. PPH asserts additional arguments, not raised in and entirely unaddressed by the District Court. While this Court may "affirm the judgment below on any ground ***supported by the record***," *Christiensen v. West Branch Comm'y Sch. Dist.,* 674 F.3d 927, 934 (8th Cir. 2012)

(emphasis added), the record before the Court does not demonstrate that there is no set of facts under which Thayer could prevail. *Ritchie Capital Management, LLC v. Jeffries*, 653 F.3d 755, 764 (8th Cir. 2011) (motion to dismiss is "appropriate only when it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief").

PPH insists that its false claims were, at worst, "regulatory noncompliance" and its "reasonable interpretation of a regulatory scheme cannot form the basis of an FCA violation." PPH Brief, p.34. While this amounts to an affirmative defense, Thayer pled and the applicable law demonstrates that PPH's claims were directly prohibited and would not have been paid had the government known the truth. PPH may attempt to develop its argument as the case proceeds, but the current record does not demonstrate that PPH must prevail. *See United States ex rel. Onnen*, 688 F.3d at 414; *United States ex rel. Miller v. Weston Educ.*, 2012 WL 6190307 (W.D. Mo. 2012) (regulatory violations can form basis of FCA claim).

A. PPH's Provider Agreement Confirms That The Claims Alleged Will Not Be Paid.

PPH would belittle its violations of state and federal law as insignificant "regulatory violations" that would not have affected the payment of its claims. Yet, applicable federal and state laws and regulations required Planned Parenthood to

comply with all applicable federal and state laws and regulations, and its Medicaid Provider Agreement states:

> ***[P]ayment will not be made*** for medical care and services
>
> a. That are medically unnecessary or unreasonable.
> b. That fail to meet existing standards of professional practice, [or] are currently professionally unacceptable . . . .
> *****
> c. That are fraudulently claimed.
> d. That represent abuse or overuse.

(APP015-016, ¶ 28) (emphasis added) (Def. Add., 3). Thayer alleges that Medicaid Authorities would not have reimbursed these false claims by PPH had these authorities known that these claims were false and were not eligible for reimbursement. (APP036, 041, 046, ¶¶ 90, 106, 125). At this stage the Court must accept as true the textually supported allegations that Medicaid would not pay claims that do not meet these specified criteria.

B. The Regulations PPH Cites Do Not Entitle It to Dismissal.

PPH attempts to minimize its frauds by suggesting that certain regulations justify its conduct. Notably, with the possible exception of Exhibit C discussed below, PPH's exhibits ***do not even apply to conduct during the period of the alleged fraud scheme***, *i.e.*, early 2006 to December 2008. Moreover, PPH's exhibits ***would actually forbid*** most of the subject claims.

1. The Regulations PPH Cites Concerning Its C-Mail Program Post-Date Thayer's Allegations and Do Not Permit Its False Claims.

During the relevant period, relating to Thayer's SAC, Iowa law required that "each prescription drug order issued or dispensed . . . must be based on a valid patient-practitioner relationship" and may not be dispensed to a client without a physician's order or prior to a physician's order. Iowa Code § 147.107(7). Likewise, Iowa's Medicaid Provider Manual states: "[p]rescriptions will be reimbursed only if written or approved by the primary physician." Iowa All Provider Manual, p.26. (APP016, ¶ 30). Thayer alleges that these regulations, which were clearly conditions of reimbursement, were systematically violated.

PPH seeks to excuse its claims by bringing the Court's attention to a regulation that was not in effect during the relevant time period. Iowa Code § 147.107 was amended pursuant to Acts 2009 (83 G.A.) ch. 69, H.F. 381, § 2; Iowa Code Ann. § 155A.2(3), adding subsection 7 on which PPH relies. To the extent this amendment exempts family planning clinics from the requirement that a physician's order is necessary for dispensing a prescription drug, it only demonstrates that prior to this amendment PPH was prohibited from dispensing birth control drugs and devices without a physician's order. PPH likewise cites a Standing Order that implemented this statutory change and that, on its face, went

into effect on March 1, 2011. Def. Add., 6. PPH cites no law that would have excused its false claims prior to this amendment. Moreover, PPH issued OCPs without a physician's examination or order despite complaints at the time from other medical professionals that its practices were professionally unacceptable. (APP032, ¶ 81).

Additionally, as PPH observes, during the relevant time period, Iowa Medicaid regulations provided that an OCP prescription could not be refilled until "after 75% of the previous supply is used." (APP028-029, ¶ 65). The regulation applied to the "previous supply" not the "previous prescription." Unlike some drugs that might be refilled only a few times, PPH refilled contraceptives routinely for many years – resulting in a substantial over-supply of excess contraceptives for each woman, all billed to Medicaid. Thus, as Thayer explained at page 48 of her Brief, every year PPH was billing to Medicaid and mailing to customers four months of excess contraceptives at a cost to Medicaid of $113.70 per year. (APP028-029, ¶¶ 65-67). This medically unnecessary stockpile continued to grow every year in violation of the regulations and with the knowledge of PPH.

2. The Abortion Services Prohibition Policy PPH Cites Confirms the Fraudulence of the Claims Thayer Alleges PPH Filed.

Iowa and federal law and regulations expressly prohibit the use of Title XIX-Medicaid funds to reimburse charges for abortions and all abortion-related

services except in very limited circumstances not applicable here. 123 Stat. 750, 802-03 (2009) (Hyde Amendment); 42 C.F.R. §§ 50.303, 50.304, 50.306; Iowa Admin. Code § 441-78.1(17); Iowa Admin. Code § 441-78.26(4) ("Abortion procedures are covered only when criteria in subrule 78.1(17) are met."). PPH nevertheless cites a part of a policy that it says permits it to bill for certain abortion-related services and products. However, this exhibit ***expressly prohibits*** billing for pre- and post-abortion care, "drugs necessary to perform the abortion," "[u]terine ultrasounds performed immediately following an abortion," certain lab work, Rh factor tests, and other "pre- and post-operative care and visits related to performing the abortion." Def. Add., 11. *Compare* SAC, ¶¶ 95-96 (PPH billed for, "without limitation, office visits, ultrasounds, Rh factor tests, lab work, general counseling, and abortion aftercare" rendered as part of abortions). PPH's cited policy simply confirms that, taking Thayer's allegations as true, PPH falsely billed the government for claims that violated this policy.

3. The Donation Policy PPH Cites Postdates the Allegations, but Would Prohibit PPH from Coercing Donations Using the Exact Language Thayer Alleges.

Federal and state law specifically required PPH to accept amounts prescribed by Medicaid Authorities as the fee for services and products rendered to Medicaid-eligible clients. Iowa Admin. Code § 79.142. Medicaid regulations

provide for **the exclusion from the Medicaid program** of those providers that do not comply with this requirement. 42 C.F.R. § 447.15 (emphasis added). PPH pretends that Thayer merely charges it with seeking "donations" and does not claim that it could permissibly collect these payments from customers and yet bill Medicaid for the full amount.

PPH merely draws the Court's attention to a policy announced in August 2012 (*see* Def. Add., 12), at approximately the same time as the SAC was unsealed, permitting certain requests for donations from Medicaid patients. While this policy may have been a response to the conduct alleged in the SAC, it did not apply to the conduct alleged in it. Moreover, the conduct Thayer alleges PPH engaged in did not comply with this policy. Thayer alleges that PPH instructed clinic staff, including Ms. Thayer, to "insist" that Medicaid-eligible clients pay a portion of the bill for their services, "strongly suggested" that this amount should be 50% of the bill, and did not inform clients that the services would be fully reimbursed by Medicaid. (APP042-043, ¶¶ 110-111). By contrast, the August 2012 policy states: "If a patient asks for a recommendation about what they should donate, staff should not provide a figure but tell the client to give what they feel comfortable with giving." Indeed, PPH instructed its staff not to use the term "donation" but instead to ask: "How much are you willing to pay today?"

(APP043, ¶ 111). Further, the policy specifically states that clinics must not say to a patient: "Our suggested amount for your services today is $XX." (Def. Add., 13). Thayer alleges that PPH did make virtually this *exact* statement to each patient. (APP043, ¶ 111).

The factual allegations of the SAC do not present mere careless or accidental technical breaches of regulations, but rather, systematic and knowing violations of federal and state laws and regulations that are explicitly conditions of reimbursement. *See Ab-Tech Construction, Inc. v. United States,* 31 Fed. Cl. 429 (Fed. Cl. 1994) (submission of claims included an implied certification of continued compliance with eligibility requirements for federal program so that noncompliance with those requirements rendered claims false).

The cases PPH cites are either not binding in this Circuit or do not support its arguments. For example, contrary to the language PPH cites from the Eighth Circuit's decision in *Hixson*, Planned Parenthood has not demonstrated any "reasonable interpretation of a statute" existing at the time that would excuse its false billings. *See United States ex rel. Hixson v. Health Management Systems, Inc.*, 613 F.3d 1186, 1190 (8th Cir. 2010) (only rejecting FCA claim where the defendant had "a reasonable interpretation of a statute … [and] there is no authoritative contrary interpretation of that statute."). In *Clausen*, 290 F.3d at

1311, as PPH acknowledges, the Eleventh Circuit held that a healthcare provider's disregard of government rules would be sufficient to state an FCA claim if "as a result of such acts, the provider knowingly asks the Government to pay amounts it does not owe." That is exactly what Thayer's SAC alleges PPH did.

C. Thayer Did Not Violate the FCA's Seal Requirements.

Notably, PPH does not cite a single Eighth Circuit case to support its argument that the Fourth Claim for Relief must be dismissed. PPH relies heavily on *United States ex rel. Pilon v. Martin Marietta Corp.*, 60 F.3d 995 (2nd Cir. 1995), a case involving an *original complaint* that was not filed under seal and where the plaintiff gave interviews to the press shortly after filing the complaint. PPH also cites distinguishable district court decisions from outside this Circuit. *See United States ex rel. Wilson v. Bristol Myers Squibb, Inc.*, 2011 WL 2462469, *7 (D. Mass. 2011) (third amended complaint added another relator and a "host of new allegations" that were based solely upon the knowledge of the new relator); *United States ex rel. Davis v. Prince*, 7 F. Supp. 2d 679, 684 (E.D. Virginia 2011) (denying motion to dismiss and holding sealing requirements applied to amended complaints only if they "add new claims for relief or new and substantially different allegations of false claims"); *United States ex rel. Fellhoelter v. Valley Milk Products*, LLC, 617 F. Supp. 2d 723 (E.D. Tenn. 2008) (original complaint

that was filed under seal but immediately served on the defendants violated seal requirement).

The False Claims Act, 31 U.S.C. § 3730(b)(2), is silent as to amendments made after a complaint is unsealed. Though there does not appear to be an Eighth Circuit case on point, the weight of authority from other federal decisions is that the sealing requirements of § 3730(b)(2) do not apply to such amendments. *See, e.g., United States ex rel. Branch Consultants, LLC v. Allstate Insurance Co.*, 668 F. Supp. 2d 780, 803 (E.D. La. 2009) (finding defendant's argument that relator's amended complaint must be filed under seal to be "meritless" and contrary to the plain language of the statute); *United States ex rel. Milam v. Regents of the Univ. of Cal.*, 912 F. Supp. 868, 899-90 (D. Md. 1995) (noting that there was no requirement imposed on relator either by statute or case law to file amendments to complaints under seal); *Wisz v. C/HCA Dev.*, Inc., 31 F. Supp. 2d 1068, 1069 (N.D. Ill. 1998) (finding that the FCA imposed no requirement on amended complaints, and noted that relator's "second amended complaint alleged the same type of fraudulent conduct as the original complaint, which the Government already had a chance to review").

1. The Seal Requirement Is Not Jurisdictional.

Assuming, *arguendo*, that Thayer's fourth claim violated § 3730(b)(2), the requirements of § 3730(b)(2) are not jurisdictional and a violation does not require dismissal of the claim not filed under seal. *See, e.g., Pilon*, 60 F.3d. at 1000 (declining to find that the seal provisions are jurisdictional); *In re Natural Gas Royalties Qui Tam Litig*., 467 F. Supp. 2d 1117, 1228 (D. Wyo. 2006); *Wisz*, 31 F. Supp. 2d at 1069; *United States v. Fiske*, 968 F. Supp. 1347, 1352 (E.D. Ark. 1997); *United States ex rel. Mikes v. Straus*, 931 F. Supp. 248, 259-61 (S.D.N.Y. 1996); *United States ex rel. Lujan v. Hughes Aircraft Co*., 67 F.3d 242, 245 (9th Cir. 1995).

2. Thayer's Fourth Claim for Relief is Not New

Regardless, the allegations set forth in the SAC's Fourth Claim for Relief are part of the same fraud schemes alleged by Thayer in the previously sealed complaints. Thayer's complaints have consistently alleged that PPH fraudulently billed for services and procedures that were not properly reimbursable because of a lack of physician oversight. (*See, e.g.*, Dkt. 1, Original Complaint, ¶¶ 46, 66, 67, 69). There is nothing "new" in the Fourth Claim for Relief. None of the purposes of the FCA's seal requirements would have been served by sealing the SAC's Fourth Claim for Relief. The government had already declined intervention; the original and first amended complaints had been unsealed; and PPH, already the

subject of multiple HHS OIG subpoenas, was already "tipped" off about the investigation. There was no prejudice, actual or even alleged, to either the government or to PPH by the amendment to clarify this Fourth Claim for Relief.

CONCLUSION

For these reasons and those in her Opening Brief, Thayer asks this Court to reverse the District Court.

Respectfully submitted this 3rd day of July, 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 6,957 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.

July 3, 2013.

/s/ M. Casey Mattox
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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the 3rd day of July, 2013, I caused the foregoing "Relator-Appellant's Reply 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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