No. 17-1477

IN THE

Supreme Court of the United States

UNITED STATES EX REL. NANCY CHASE,

Petitioner,

v.

CHAPTERS HEALTH SYSTEM, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

TILLMAN J. FINLEY
Counsel of Record
MARINO FINLEY LLP
1100 New York Avenue, N.W., Suite 700W
Washington, DC 20005
(202) 223-8888
tfinley@marinofinley.com

Counsel for Petitioner

283004

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

CASES

Nancy Chase respectfully submits this reply brief addressed to new points raised in the Brief in Opposition (hereinafter "Opposition" or "Opp'n") to her Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

REASONS FOR GRANTING THE PETITION

I. There Is a Circuit Split

Respondents attempt to downplay the divergence among the courts of appeal regarding the pleading requirements for a *qui tam* suit under the False Claims Act. According to Respondents, the Eleventh Circuit "does *not* apply a 'rigid view' or 'bright line' rule requiring citation of actual claims presented to the government" but instead merely requires that a complaint include some indicia of reliability to support the allegation that an actual false claim was submitted. Opp'n 9 (emphasis in original). According to Respondents, "[n]o court of appeals has held that a complaint under the False Claims Act can satisfy Rule 9(b) without pleading facts from which a reliable inference can be drawn that false claims were submitted to the government." Opp'n at 2-3. While this statement is correct on its own terms and most circuits, in fact, require a relator to allege facts supporting a reliable inference that false claims were submitted, Respondents gloss over the fact that the Eleventh Circuit requires *more* than this.

Nowhere in its opinion in this case does the Eleventh Circuit state that a relator may satisfy the pleading standard by alleging facts supporting a reasonable or reliable inference that false claims were submitted. To the

contrary, invoking its previous opinions in *United States ex rel. Clausen v. Lab. Corp. of Am.*, 290 F.3d 1301 (11th Cir. 2002) and *Corsello v. Lincare, Inc.*, 428 F.3d 1008 (11th Cir. 2005), the Eleventh Circuit expressly held that "[b]ecause it is the submission of a fraudulent claim that gives rise to liability under the False Claims Act, that submission must be pleaded with particularity *and not inferred from the circumstances*." App. 9a (emphasis added). Indeed, in *Corsello* the Eleventh Circuit explained that "[a]lthough we construe all facts in favor of the plaintiff when reviewing a motion to dismiss, *we decline to make inferences about the submission of fraudulent claims* because such an assumption would 'stip[ ] all meaning from Rule 9(b)'s requirements of specificity.'" 428 F.3d at 1013 (quoting *Clausen*, 290 F.3d at 1312 n.21).

Respondents attempt to harmonize the Eleventh Circuit's pleading requirements for False Claims Act cases with those of other circuits by generally asserting that "the Eleventh Circuit has disavowed any categorical rule about what type of allegations could satisfy Rule 9(b)'s requirement to plead fraud with particularity." Opp'n at 2. This is true only in the sense that the Eleventh Circuit (and others adhering to the rigid view) have held open the possibility that a relator could satisfy the pleading standard in one specific scenario not involving provision of specific billing information, *i.e.*, "where the relator alleged direct knowledge of the defendants' submission of false claims based on her own experiences and on information she learned in the course of her employment." App. 9a; *see also United States ex rel. Thayer v. Planned Parenthood of the Heartland,* 765 F.3d 914, 917 (8th Cir. 2014) (holding relator did not have to plead representative examples where he "was able to plead personal, first-hand knowledge of [the defendant's] submission of false claims");

United States ex rel. Prather v. Brookdale Senior Living Communities, Inc., 838 F.3d 750, 769-70 (6th Cir. 2016) (recognizing exception to requirement to plead submission of particular requests for payment "when a relator alleges specific personal knowledge that relates directly to billing practices"). Under the Eleventh Circuit's view, a relator may allege specific billing information or she may allege direct, personal knowledge of the defendants' submission of false claims. Such allegations give a complaint the "indicia of reliability" required by the Eleventh Circuit. But a relator may not rely on inference, no matter the circumstances.

As detailed in the Petition, the law of the majority of the other circuits recognizes that reliance on inferences is permissible. Respondents' denial of a circuit split relies on broad generalizations of the pleading standards applied by the circuits and careful parsing of the Eleventh Circuit's own ruling in this case, which expressly disapproves of any reliance on inference. The courts of appeal certainly view themselves as at odds. *See, e.g.*, *Foglia v. Renal Ventures Management, LLC*, 754 F.3d 153, 155-56 (3d Cir. 2014) (detailing split between Fourth, Sixth, Eighth and Eleventh Circuits on the one hand, and First, Fifth and Ninth Circuits on the other and choosing to align the Third Circuit with the latter). They are, and the Court should establish a uniform pleading standard applicable throughout the country.

II. Petitioner's Allegations Would Be Sufficient Under Decisions from Other Courts

Respondents contend Petitioner's claim would have fared no better in other circuits because "[n]othing about Petitioner's role as a social worker suggests that she would

know anything about the Respondents' billing practices." Opp'n at 18. But this argument assumes that other circuits would refuse to rely on inference and require Petitioner to allege direct, personal knowledge of billing practices in order to state a claim. In other words, Respondents presume that other circuits would apply the same pleading standard articulated by the Eleventh Circuit in this case and in *Corsello*.

But other circuits allow inferences and do not require allegations on personal knowledge. For example, in *United States ex rel. Chorches for Bankruptcy Estate of Fabula v. American Medical Response, Inc.*, 865 F.3d 71 (2d Cir. 2017)—one of the cases Respondents feature prominently in their Opposition—the Second Circuit reversed a district court's dismissal of a False Claims Act complaint despite that the relator "does not—and … cannot—allege on personal knowledge … that false claims were submitted to the government[.]" *Id.* at 84. Despite a lack of claim detail or personal knowledge, the Second Circuit held that the relator had alleged facts sufficient to support an inference that false claims were submitted to the government. *Id.* at 84-85.

Like the cases from outside the Eleventh Circuit discussed in the Petition, Pet. 20-23, *Chorches* shows how Petitioner's Complaint would have been treated differently under another standard. The relator in *Chorches*—like Petitioner—put forth "particularized allegations of a scheme to falsify records." 865 F.3d at 84. Though he could not allege the details of specific claims or personal knowledge of billing practices, the relator did allege that the scheme was directed at satisfying Medicare requirements for reimbursement and that "between 40%

and 70% of [the defendant's] business … involved Medicare or Medicaid patients." *Id.* at 85 & n.10. Petitioner's Complaint makes very similar allegations of schemes to falsify hospice documentation required for Medicare reimbursement and to make improper certifications required for reimbursement by Medicare. Plaintiff also alleges that approximately 80% of Respondents' enrolled hospice patients were covered by Medicare. As explained by the Second Circuit in *Chorches*,

> [I]n light of the significant share of runs that are reimbursed by Medicare and Medicaid (as distinct from private insurance), it is highly likely that any systematic scheme for documenting fabricated medical necessity for ambulance services will indeed reach the governmental insurers. While it can be hypothesized, as AMR indirectly suggests, that AMR falsified PCRs for runs that were "billed to payors other than Medicare, billed for a denial, or not billed at all," … any such conclusory defense of the underlying scheme is not persuasive at the pleading stage. If the allegations as to the falsification scheme are true, as we must assume at the pleading stage, it is highly implausible to suggest that the resulting records were never submitted to the federal government for reimbursement.

865 F.3d at 85.

Petitioner alleges fraudulent schemes specifically directed at creating or altering documents required for Medicare reimbursement. It is reasonable—in fact,

obvious—to infer from the allegations of such a scheme that false claims were submitted. Why go to the trouble of fraudulently modifying a Medicare-required Plan of Care if not to provide the basis for submitting a claim for reimbursement to Medicare? The basis for the inference is obvious, and other circuits have recognized the appropriateness of exactly this kind of inference. The Eleventh Circuit, however, refuses to allow for any inference.

CONCLUSION

For the foregoing reasons and those set forth in her petition, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

TILLMAN J. FINLEY
Counsel of Record
MARINO FINLEY LLP
1100 New York Avenue, N.W., Suite 700W
Washington, DC 20005
(202) 223-8888
tfinley@marinofinley.com

Counsel for Petitioner

Dated: August 28, 2018