No. 17-

IN THE

Supreme Court of the United States

GEORGE BELLEVUE,

Petitioner,

v.

UNIVERSAL HEALTH SERVICES OF HARTGROVE, INCORPORATED, DOING BUSINESS AS HARTGROVE HOSPITAL,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

MICHAEL C. ROSENBLAT
MICHAEL C. ROSENBLAT, P.C.
707 Skokie Boulevard,
Suite 600
Northbrook, Illinois 60062
(847) 480-2390

CLINTON A. KRISLOV
Counsel of Record
KENNETH T. GOLDSTEIN
KRISLOV & ASSOCIATES, LTD.
20 North Wacker Drive,
Suite 1300
Chicago, Illinois 60606
clint@krislovlaw.com

Counsel for Petitioner

277246

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

QUESTION PRESENTED

The False Claims Act, 31 U.S.C. 3730(e)(4)(A), directs a court to dismiss an action if substantially the same allegations or transactions were publicly disclosed – unless the person bringing the action is an original source. An "original source" "means a person who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action." Circuit Courts are split on the interpretation of the "materially adds" provision of the original source exception to the False Claims Act's public disclosure bar.

The First and Third Circuits, on the one hand, have concluded that "materially adds" must be distinct or the original source exception would be meaningless. On the other hand, the Seventh Circuit in Petitioner Bellevue's case, and in *Cause of Action v. Chicago Transit Authority*, 815 F.3d 267 (7th Cir. 2016), held that "because the plaintiff's allegations were 'substantially similar to' the publicly disclosed allegations, the plaintiff did not 'materially add' to the public disclosure and could not be an original source." *Bellevue v. Universal Health Servs. of Hartgrove, Inc.*, 867 F.3d 712, 721 (7th Cir. 2017)(quoting *Cause of Action*, 815 F.3d at 283. Essentially the Seventh Circuit decision has established that a plaintiff can never be an original source if the complaint is substantially similar to the publicly disclosed allegations.

The question presented addresses the proper interpretation of the "materially adds" provision of the False Claims Act's original source exception to the public disclosure bar.

The question raised is whether the information provided by an individual under Section 3730(e)(4)(B) of the False Claims Act must materially add to the publicly disclosed allegations to such an extent to cause the allegations on which the claims are based to no longer be substantially similar to the publicly disclosed allegations in order to qualify the person as an "original source" and to allow the action or claim to proceed.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS..... iii

TABLE OF APPENDICES v

TABLE OF CITED AUTHORITIES vi

PETITION FOR A WRIT OF CERTIORARI..... 1

OPINION BELOW..... 1

STATEMENT OF JURISDICTION..... 1

STATUTORY PROVISIONS INVOLVED..... 2

STATEMENT..... 3

STATEMENT OF THE CASE 4

A. The False Claims Act..... 4

B. Proceedings Below 5

C. The Seventh Circuit Reasoning is Rejected Elsewhere and is a Split Among the Circuits..... 7

REASONS FOR GRANTING THE PETITION..... 8

Table of Contents

Page

I. The First and Third Circuits are in Conflict with the Seventh Circuit *Bellevue Decision* *8*

A. *United States ex rel. Winkelman v. CVS Caremark Corp.*, 827 F.3d 201 (1st Cir. 2016) 9

B. U*nited States ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries, LLC*, 812 F.3d 294 (3rd Cir. 2016) 10

II. The Seventh Circuit's "materially adds" test Contravenes the Statutory Objective of the Original Source Exception to the False Claims Act's Public Disclosure Bar and is in Conflict with the First and Third Circuits. 11

III. The Decision Below Shows a Circuit Split 12

IV. The Seventh Circuit's Opinion Contradicts Principles of Statutory Construction and Disregards the Statutory Language of the False Claims Act. 12

CONCLUSION 14

TABLE OF APPENDICES

Page

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, FILED AUGUST 8, 2017 ..... 1a

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION, FILED JULY 5, 2016 ..... 17a

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, FILED OCTOBER 5, 2015 ..... 21a

APPENDIX D — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, FILED APRIL 24, 2015 ..... 32a

APPENDIX E — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, CHICAGO, ILLINOIS 60604 SEPTEMBER 8, 2017 ..... 65a

TABLE OF CITED AUTHORITIES

Page

CASES:

Bellevue v.
Universal Health Servs. of Hartgrove, Inc.,
867 F.3d 712 (7th Cir. 2017). . . . . *passim*

Cause of Action v. Chicago Transit Authority,
815 F.3d 267 (7th Cir. 2016). 9-10,11,12

Chickasaw Nation v. U.S.,
534 U.S. 84 (2001). 13

Dodd v. United States,
545 U.S. 353 (2005) 11

Graham County Soil and Water Conservation
Dist. v. U.S.,
559 U.S. 280 (2010). 13

Schindler Elevator Corp. v.
United States ex rel. Kirk,
563 U.S. 401 (2011). 4

U.S. v. Bornstein,
423 U.S. 303 (1976). 12

United States ex rel. Moore & Co., P.A. v.
Majestic Blue Fisheries, L.L.C.,
812 F.3d 294 (3d Cir. 2016) 7-8, 9, 10

Page

United States ex rel. Winkelman v. CVS Caremark Corp., 827 F.3d 201 (1st Cir. 2016) 8, 9

United States v. Menasche, 348 U.S. 528 (1995). 13

STATUTES & OTHER AUTHORITIES:

28 U.S.C. § 1254(1). 1

31 U.S.C. § 3730 5

31 U.S.C. § 3730(e). 3

31 U.S.C. § 3730(e)(4) 2

31 U.S.C. § 3730(e)(4)(A) 4, 7, 13

31 U.S.C. § 3730(e)(4)(B) 4, 7, 13

Illinois False Claims Act, 740 ILCS 175/4 5

PETITION FOR A WRIT OF CERTIORARI

Petitioner George Bellevue respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The court of appeals filed its opinion on August 8, 2017, and is reported at 867 F.3d 712 (7th Cir. 2017). Pet. App. 1a. On August 22, 2017, Bellevue filed a Petition for Rehearing and Rehearing en banc. On September 8, 2017, the Petition was denied. 2017 U.S. App. LEXIS 17450 (7th Cir. Sep. 8, 2017). Pet. App. 65a. The relevant district court orders are unreported but can be found at *United States ex rel. Bellevue v. Universal Health Servs. of Hartgrove Inc.*, No. 11 C 5314, 2015 U.S. Dist. LEXIS 53686 (N.D. Ill. Apr. 24, 2015). Pet. App. 32a; *United States ex rel. Bellevue v. Universal Health Servs. of Hartgrove, Inc.*, No. 11 C 5314, 2015 U.S. Dist. LEXIS 135138 (N.D. Ill. Oct. 5, 2015). Pet. App. 21a.

STATEMENT OF JURISDICTION

The Seventh Circuit Court of Appeals issued its decision on August 8, 2017, Pet. App. 1a. Petitioner timely filed a petition for rehearing and rehearing en banc on August 22, 2017, which was denied on September 8, 2017. Pet. App. 65a. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the False Claims Act ("FCA") 31 U.S.C. 3730(e)(4), provide:

> (4)(A) The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed--
>
> (i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;
>
> (ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or
>
> (iii) from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.

31 U.S.C. § 3730(e)

STATEMENT

The Seventh Circuit's interpretation of "materially adds" conflicts with the First and Third Circuits' interpretation of "materially adds". The Seventh Circuit's interpretation of "materially adds" renders the original source exception a nullity.

The public disclosure bar's original source exception is an important provision of the False Claims Act and permits a False Claims Act action or claim to proceed if the allegations or transactions have been publicly disclosed *if* the person bringing the action is an original source, even if the allegations remain substantially similar. However, the Seventh Circuit's interpretation allows an action to proceed only if the allegations are not substantially similar. The Seventh Circuit essentially held that if the relator materially added to the publicly disclosed allegations, the allegations would not be substantially similar. But if the allegations are not substantially similar, there would not have been a public disclosure in the first place.

The First and Third Circuits have held that an interpretation of "materially adds" similar to the one adopted by the Seventh Circuit, would abolish the materially adds provision of the False Claims Act. The Seventh Circuit holding means that there could never be an original source exception to the public disclosure bar, because a person can only meet the requirement of materially adds if the new information makes the publicly disclosed allegations no longer substantially similar. But if the allegations are not substantially similar there would not have been a public disclosure.

STATEMENT OF THE CASE

A. The False Claims Act

The False Claims Act was enacted in 1863 during the Civil War. The False Claims Act permits a person to bring an action on behalf of the government for a violation of the Act. The False Claims Act's intent and purpose is to encourage private persons to uncover fraud and file these actions on behalf of the government, and the public disclosure bar is intended to prevent parasitic lawsuits. *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 413 (2011). One type of parasitic action that is barred is an action or claim that is "substantially the same [as the] allegations or transactions" that were publicly disclosed. 31 U.S.C. 3730(e)(4)(A).

The False Claims Act includes an exception however, to these otherwise barred actions when a person bringing the action is an original source. An "original source" means:

> an individual who . . . has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.

3730(e)(4)(B).

B. Proceedings Below

Petitioner Bellevue worked as a mental health counselor at Hartgrove. Hartgrove is a psychiatric hospital and describes itself as a hospital that serves individuals suffering from acute mental illness. Many of the patients are adolescents who are covered under the Medicaid program. Bellevue alleged that patients were brought to Hartgrove through a variety of processes and that Hartgrove would not refuse a patient even if there was no patient room with a bed available, and even if the case was not an emergency. When there was no patient room with a bed available for a new admission, a Hartgrove employee removed a rollout bed from storage and placed it into a common area known as a dayroom. The new excess capacity patient slept in the dayroom, sometimes alongside other patients. These excess capacity patients were then placed back into a dayroom until a patient room with a bed became available. When Hartgrove was forewarned of an inspection by a government agency, these rollout beds were quickly removed from the dayrooms and placed in a storage area to conceal from the inspecting agency that Hartgrove was admitting patients beyond its bed capacity.

Seeing these violations, Petitioner Bellevue filed a suit under the *qui tam* provisions of the False Claims Act, 31 U.S.C. 3730, and the Illinois False Claims Act, 740 ILCS 175/4, on August 5, 2011. The Complaint alleged that Hartgrove violated the FCA under a number of theories. All of the theories of liability were premised upon the undisputed fact that Hartgrove regularly admitted patients in excess of its bed capacity.

The United States declined to intervene in this action on September 30, 2013, twenty-five months after

the complaint was filed, and on October 1, 2014, thirty-eight months after the complaint was filed, the State of Illinois declined to intervene. The case was unsealed and Hartgrove was served with a copy of the Complaint.

In response to being served with the Complaint, Hartgrove filed a motion to dismiss. The District Court denied the subject matter jurisdiction/public disclosure arguments of Hartgrove but dismissed the Complaint for failure to state a claim.

On June 26, 2015, Bellevue filed his Amended Complaint. Hartgrove responded by filing a motion to dismiss. The district court again rejected Hartgrove's public disclosure argument, but dismissed all of Bellevue's claims. Thereafter, the District Court denied reconsideration, a Motion to Set Aside Judgment, and a Rule 60 Motion.

Petitioner Bellevue appealed, and in Hartgrove's response, Hartgrove raised the argument that Bellevue's claims were foreclosed under the public disclosure bar to the False Claims Act.

The Seventh Circuit issued its Opinion on August 8, 2017, holding that Bellevue's complaint was barred by a public disclosure, reasoning that Bellevue did not satisfy the original source exception as he did not materially add to the publicly disclosed allegations because his allegations were substantially similar. The Seventh Circuit "found that because the plaintiff's allegations were 'substantially similar to' the publicly disclosed allegations, the plaintiff did not 'materially add' to the public disclosure and could not be an original source." *Bellevue*, 867 F.3d 712, 721; Pet. App., 1a at 16a.

The 2010 Amendments to the False Claims Act provides, "The court shall dismiss an action … if substantially the same allegations or transactions as alleged … were publicly disclosed … unless … the person bringing the action is an original source of the information." 3730(e)(4)(A). An "original source" is a person "who … has knowledge that is independent and materially adds to the publicly disclosed allegations." 3730(e)(4)(B). Thus, if substantially the same allegations as stated in the complaint are publicly disclosed, the action may proceed if (1) the relator's knowledge is independent, and (2) the relator materially adds to the substantially similar allegations.

The Seventh Circuit's interpretation undermines the original source exception by finding that the only way a plaintiff can "materially add" is by providing information which causes the allegations to no longer be substantially similar. The original source exception, however, applies only when the allegations are substantially similar to those publicly disclosed. If the allegations are not substantially similar, in the first place, then Section 3720(e)(4)(A) would not apply as there would not be a public disclosure. When Section 3730(e)(4)(A), does apply, the case should not be dismissed if the relator materially adds to the "substantially similar" publicly disclosed allegations, and his knowledge is independent.

C. The Seventh Circuit Reasoning is Rejected Elsewhere and is a Split Among the Circuits.

Other circuits have implicitly rejected the Seventh Circuit's reasoning, which would "read out of the statute the original source exception." *United States ex rel.*

Moore & Co., P.A. v. Majestic Blue Fisheries, L.L.C., 812 F.3d 294, 306 (3rd Cir. 2016). The Third Circuit also accepted that "materially adds" may overlap with the question of whether there has been a public disclosure, but "materially adds" must remain a separate and distinct concept. To do otherwise, would make the original source exception nugatory. *United States ex rel. Winkelman v. CVS Caremark Corp.*, 827 F.3d 201, 212 (1st Cir. 2016).

REASONS FOR GRANTING THE PETITION

This Court's review is necessary to resolve the disagreement between the Circuits for interpretation of this crucial False Claims Act Provision.

I. The First and Third Circuits are in Conflict with the Seventh Circuit *Bellevue Decision*

Not only is there a split based on the Seventh Circuit decision, but the Seventh Circuit also makes the original source provision meaningless. In *United States ex rel. Winkelman v. CVS Caremark Corp.*, 827 F.3d 201(1st Cir. 2016), the court found that although there could be some overlap with whether a public disclosure has occurred, the concept of "materially adds" must remain distinct. To do otherwise would make the concept meaningless. *Id.* at 211-12. Something can be said to be material if it would affect a person's decision or would be considered significant. *Id.* at 211.

In *United States ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries, LLC*, 812 F.3d 294, (3rd Cir. 2016), the defendants essentially adopted the Seventh Circuit's reasoning, that since the elements of the fraud were

publicly disclosed, Moore's additional details did not "materially add" to the publicly disclosed allegations. *Id.* at 306. The Third Circuit, like the First Circuit, rejected that reasoning since it would read out of the statute the "materially adds" provision of the original source exception.

A. *United States ex rel. Winkelman v. CVS Caremark Corp.*, 827 F.3d 201 (1st Cir. 2016)

In *Winkelman*, the relators alleged that the drug discount program of CVS known as Health Savings Pass resulted in Medicare and Medicaid not receiving the lowest price for pharmacy drugs as required. *Id.* at 203. These allegations were publicly disclosed a year before the relators filed their *qui tam* complaint. *Id.* at 205. A public disclosure occurs when either a direct allegation of fraud is disclosed or both misrepresented facts and true facts are disclosed so a person can infer fraud. *Id.* at 208. Winkelman and his co-relator argued that their knowledge was both independent and materially adds to the publicly disclosed allegations. *Id.* at 211. The court determined that their task was to "ascertain whether the relators' allegedly new information is sufficiently significant or essential so as to fall into the narrow category of information that materially adds to what has already been revealed through the public disclosures." *Id.* at 211.

The court in *Winkelman* also realized, that "whether a relator's information 'materially adds' to the public disclosure often overlaps with the question of whether [a] public disclosure has occurred and, if so, whether the relator's allegations are substantially the same as those prior revelations. *See, Cause of Action v.*

Chi. Transit Auth., 815 F.3d 267, 283 (7th Cir. 2016)." *Winkelman* continued, however, explaining that "Despite this potential for overlap, though, the 'materially adds' inquiry must remain conceptually distinct; otherwise, the original source exception would be rendered nugatory" *Id.* at 211-12.

B. *United States ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries, LLC*, 812 F.3d 294 (3rd Cir. 2016)

In *Majestic Blue Fisheries* the question before the court was whether the fraud was publicly disclosed and "whether Moore [the relator law firm] has materially added to those public disclosures by contributing details of the alleged fraud that it independently uncovered." *Id* at 297.

The *Majestic* court stated that "'add' means to 'put (something) in or on something else so as to improve or alter its quality or nature.' [citation omitted] And 'material' is defined as 'significant, influential, or relevant.'" *Id.* at 306. According to the defendants in *Majestic*, because the essential elements of the fraud were publicly disclosed, Moore's additional details did not materially add to the public disclosure of the fraud. *Id.* at 306. The court, however, found that "that cannot be the meaning of the term, for that would read out of the statute the original source exception." *Id.* at 306.

II. The Seventh Circuit's "materially adds" test Contravenes the Statutory Objective of the Original Source Exception to the False Claims Act's Public Disclosure Bar and is in Conflict with the First and Third Circuits.

The Seventh Circuit held in *Bellevue* and *Cause of Action*, that "because the plaintiff's allegations were 'substantially similar to' the publicly disclosed allegations, the plaintiff did not 'materially add' to the public disclosure and could not be an original source." *Bellevue v. Universal Health Servs. of Hartgrove, Inc.*, 867 F.3d 712, 721 (7th Cir. 2017) *quoting Cause of Action*, 815 F3d at 283.

The Seventh Circuit held that whenever a relator's allegations are substantially similar the relator cannot be an original source. A relator can only be an original source, according to the Seventh Circuit, if the information added caused the allegations that were publicly disclosed and the relator's allegations to no longer be substantially similar and if that was the case, there would not have been a public disclosure.

The Seventh Circuit's position is fundamentally flawed and ignores settled principles of statutory construction. The Seventh Circuit's position is impossible to reconcile with the presumption "'that [what] (the) legislature says in a statute [is] what it means and means in a statute what it says there.'" *Dodd v. United States*, 545 U.S. 353, 357 (2005)*quoting*, *Connecticut Nat. Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992).

It is vital to False Claims Act enforcement to clarify the meaning of "materially adds" to resolve conflicting

interpretations and to give proper meaning to the statutory language. The False Claims Act is the government's primary fraud-fighting tool. The Seventh Circuit's position reads out of the statute the original source exception to the public disclosure bar and chills relators looking to file and prosecute False Claims Act cases. Congress has created an award system to encourage the filing of these cases by private individuals designed to protect the public fisc. This issue is already likely being addressed in filed cases and in cases relators are contemplating filing.

III. The Decision Below Shows a Circuit Split

In *Bellevue* and *Cause of Action*, the Seventh Circuit explains its interpretation of materially adds clearly and plainly – if the plaintiff's allegations are substantially similar to the publicly disclosed allegations, then the plaintiff did not materially add, and cannot be an original source. *Bellevue*, 867 F.3d at 712, *Cause of Action* 815 F.3d at 283. A public disclosure analysis however only begins when the allegations are substantially similar. The original source exception permits substantially similar allegations to proceed if the relator is an original source. The Seventh Circuit disregards this exception. Other circuits do not.

IV. The Seventh Circuit's Opinion Contradicts Principles of Statutory Construction and Disregards the Statutory Language of the False Claims Act.

It is the duty of the courts to give meaning to statutory language. *U.S. v. Bornstein*, 423 U.S. 303, 310 (1976). Statutory language is also to be evaluated and given meaning in the context of the statute, here that being

the original source exception to the public disclosure bar. *Graham County Soil and Water Conservation Dist. v. U.S.*, 559 U.S. 280, 289 (2010). General canons of statutory construction are designed to help judges determine the legislative intent as stated by the statutory language and to give effect to each word if possible. *Chickasaw Nation v. U.S.*, 534 U.S. 84, 94 (2001). Every clause and word of a statute should be given meaning if possible. *United States v. Menasche*, 348 U.S. 528, 538-39 (1995).

Here, the statute provides a clear road map of both when there has been a public disclosure and when there is an original source exception. The Seventh Circuit's interpretation of "materially add" however, undermines the Congressional intent of the False Claims Act's original source exception. The False Claims Act states that "The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed." 31 U.S.C. 3730(e)(4)(A). Congress also created an exception, if the person bringing the action is an original source. 3730(e)(4)(A). "'Original source' means [as relevant here], an individual . . . who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transaction, and who has voluntarily provided the information to the Government before filing an action under this subsection." 3730(e)(4)(B).

Here two key phrases are in play, "substantially the same allegations or transactions" (e)(4)(A), and "materially adds" (e)(4)(B). This can be simplified to state that a claim shall be dismissed if substantially the same allegations were publicly disclosed unless the person materially adds

to the publicly disclosed allegations. The Seventh Circuit, however, held, that if the allegations are substantially similar, the person did not materially add. *Bellevue*, 867 F.3d at 712. If this were the correct interpretation, there would never be an original source analysis or exception, there would only be a public disclosure analysis, because the only way a person could be an original source would be to add information which would no longer make the claims or allegations substantially similar. If that were so, there would have been no public disclosure in the first place.

This Petition should be granted so that this Court can address an important provision of the False Claims Act, for both the government and relators. The stakes are high as the Seventh Circuit Court's interpretation nullifies an important provision of the False Claims Act. This Court now can resolve a circuit split, and clarify this important question

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

Michael C. Rosenblat
Michael C. Rosenblat, P.C.
707 Skokie Boulevard,
Suite 600
Northbrook, Illinois 60062
(847) 480-2390

Clinton A. Krislov
Counsel of Record
Kenneth T. Goldstein
Krislov & Associates, Ltd.
20 North Wacker Drive,
Suite 1300
Chicago, Illinois 60606
clint@krislovlaw.com

Counsel for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, FILED AUGUST 8, 2017

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 15-3473

GEORGE BELLEVUE,

Plaintiff-Appellant,

v.

UNIVERSAL HEALTH SERVICES OF HARTGROVE, INCORPORATED, DOING BUSINESS AS HARTGROVE HOSPITAL,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 11 C 5314 — **Thomas M. Durkin**, *Judge.*

February 15, 2017, Argued
August 8, 2017, Decided

Before BAUER, EASTERBROOK, and HAMILTON, *Circuit Judges.*

BAUER, *Circuit Judge.* Relator and plaintiff-appellant George Bellevue filed a *qui tam* action under the False

Claims Act (FCA), 31 U.S.C. § 3729 *et seq.*, and its Illinois analog, the Illinois False Claims Act (IFCA), 740 Ill. Comp. Stat. 175/1 *et seq.*, on behalf of the United States and the State of Illinois against defendant-appellee Universal Health Services of Hartgrove, Incorporated ("Hartgrove"). Bellevue argues that Hartgrove violated the FCA under a number of theories, including false certification and fraudulent inducement. The district court granted Hartgrove's motion to dismiss the complaint for failure to state a claim of fraud with particularity as required by Federal Rules of Civil Procedure 12(b)(6) and 9(b).

I. BACKGROUND

Hartgrove is a psychiatric hospital that primarily serves children with mental illness. It is enrolled with the Illinois Department of Healthcare and Family Services to receive reimbursement for treating patients through Medicaid. On April 8, 2004, Hartgrove signed a Provider Enrollment Application certifying that it understood "that knowingly falsifying or wilfully withholding information may be cause for termination of participation" in the State's Medical Assistance Program. It further certified that it was in compliance with all applicable federal and state laws and regulations.

On the same date, Hartgrove signed an Agreement for Participation in the Medical Assistance Program, in which it agreed to comply with all federal and state laws and regulations. Hartgrove agreed "to be fully liable for the truth, accuracy and completeness of all claims submitted

... to the Department [...] for payment." It also promised that "all services rendered on or after [the effective date of the agreement] were rendered in compliance with and subject to the terms and conditions" of the agreement. Upon receipt of Medicaid reimbursements, Hartgrove is required to certify that the services provided in the billing information were actually provided.

Hartgrove's license, issued by the Illinois Department of Public Health, permits it to maintain 150 beds for patients with acute mental illness, but it actually maintains 152 beds. Prior to September 30, 2009, Hartgrove was permitted to maintain 136 beds for acute mental illness patients. Newly admitted adolescent patients suffering from acute mental illness are placed in a room used for daytime group therapy, known as a "dayroom," rather than patient rooms. These patients sleep on rollout beds until a patient room becomes available. This occurred on 13 separate occasions between January 1, 2011, and June 3, 2011. Hartgrove submitted claims for inpatient care to Medicaid on behalf of these patients even though they were not assigned a room.

Bellevue joined the Hartgrove staff in October 2009, serving as a nursing counselor until October 2014. He contends that Hartgrove knowingly submitted fraudulent claims for reimbursement to Medicaid by admitting new patients with acute mental illness in excess of its 150-bed capacity and permitting these patients to sleep in the dayroom rather than in a private room. He further contends that Hartgrove certified, "either explicitly or implicitly," that it was in compliance with licensing

standards contained in state law, rules, and regulations, even though it was over capacity. *See* Ill. Admin. Code tit. 77, § 250.230(b). Prior to filing his complaint, Bellevue voluntarily provided the information on which his allegations are based to federal and state government authorities.

Bellevue filed suit on August 5, 2011; the United States and the State of Illinois declined to intervene. Hartgrove moved to dismiss the complaint under Rules 12(b)(1), 12(b) (6), and 9(b), on December 29, 2014. Specifically, Hartgrove argued that Bellevue's suit was foreclosed by the FCA's public-disclosure bar, which deprived the district court of jurisdiction.[1] It also argued that Bellevue's complaint failed on the merits. The district court disagreed with Hartgrove's jurisdictional argument, but agreed that Hartgrove failed on the merits; the court granted the motion without prejudice on April 24, 2015.

Bellevue filed an amended complaint on June 26, 2015. Hartgrove moved to dismiss on July 13, 2015, renewing

1. In support of its motion, Hartgrove attached a March 23, 2009, letter from the Illinois Department of Public Health and a May 5, 2009, letter and report from the U.S. Centers for Medicare & Medicaid Services that disseminated findings from two IDPH audits conducted in March 2009. IDPH found that Hartgrove's patient count exceeded the number it was permitted under its license on both audit dates, and therefore was "over census." The CMS report noted that Hartgrove was over census on at least 52 separate occasions between December 3, 2008, and February 28, 2009. These materials were properly before the district court because they were submitted to determine whether subject-matter jurisdiction existed. *See Evers v. Astrue*, 536 F.3d 651, 656-57 (7th Cir. 2008) (citation omitted).

its arguments from the previous motion. The district court found that Bellevue failed to state a claim, and the court granted the motion with prejudice on October 5, 2015. Bellevue filed a motion to reconsider in light of the United States Supreme Court's decision in *Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 1999, 195 L. Ed. 2d 348 (2016), in which the Court held that an implied false certification theory is a viable basis for liability under the FCA. The district court denied the motion on October 20, 2015, finding that Bellevue's amended complaint failed to state a claim for implied false certification. This appeal followed.

II. DISCUSSION

The FCA permits "both the Attorney General and private *qui tam* relators to recover from persons who make false or fraudulent claims for payment to the United States." *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 283, 130 S. Ct. 1396, 176 L. Ed. 2d 225 (2010). To establish civil liability under the FCA, a relator generally must show that "(1) the defendant made a statement in order to receive money from the government; (2) the statement was false; (3) the defendant knew the statement was false; and (4) the false statement was material to the government's decision to pay or approve the false claim." *United States ex rel. Marshall v. Woodward, Inc.*, 812 F.3d 556, 561 (7th Cir. 2015) (citation omitted).[2]

2. The IFCA "closely mirrors the FCA," and to date we have not found any difference between the statutes that is material to a jurisdictional or merits analysis. *United States ex rel. Absher v.*

The FCA also seeks to prevent parasitic lawsuits by "opportunistic plaintiffs who have no significant information to contribute of their own ... ." *Graham Cnty.*, 559 U.S. at 294 (citation omitted). In furtherance of this goal, Congress enacted the public-disclosure bar because "[w]here a public disclosure has occurred, [the relevant governmental] authority is already in a position to vindicate society's interests, and a *qui tam* action would serve no purpose." *United States ex rel. Feingold v. AdminaStar Fed., Inc.*, 324 F.3d 492, 495 (7th Cir. 2003) (citation omitted).

On appeal, Hartgrove argues that the district court erred in its finding that the FCA's public-disclosure bar contained in 31 U.S.C. § 3730(e)(4) did not apply to Bellevue's claims; a decision that we review *de novo. United States ex. rel. Heath v. Wis. Bell, Inc.*, 760 F.3d 688, 690 (7th Cir. 2014) (citation omitted). In 2007, the Supreme Court held that § 3730(e)(4) is a jurisdictional requirement that must be addressed before a court can reach the merits of the FCA claims. *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 467-70, 127 S. Ct. 1397, 167 L. Ed. 2d 190 (2007). Therefore, we address this issue at the outset.

Momence Meadows Nursing Ctr., Inc., 764 F.3d 699, 704 n.5 (7th Cir. 2014); *see also United States ex rel. Kennedy v. Aventis Pharms., Inc.*, 512 F. Supp. 2d 1158, 1163 n.2 (N.D. Ill. 2007) ("Case law regarding the FCA is also applicable to the [IFCA]."); *Scachitti v. UBS Fin. Servs.*, 215 Ill. 2d 484, 831 N.E.2d 544, 557-59, 294 Ill. Dec. 594 (Ill. 2005) (applying FCA case law to a jurisdictional analysis of the IFCA). The district court applied its analysis of the FCA equally to the IFCA claims. We will proceed in the same fashion.

Congress amended the public-disclosure bar in March 2010. Because Bellevue's allegations extend from August 5, 2005, to the present,[3] covering both pre- and post-amendment time periods, we examine both versions of the statute.

Prior to the 2010 amendments, § 3730(e)(4) provided:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a ... congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation ... unless ... the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

3. Although Bellevue contends that Hartgrove submitted false claims from August 2001 to the present, the district court dismissed Bellevue's claims that arose prior to August 5, 2005, due to the FCA's six-year statute of limitations. *See* 31 U.S.C. § 3731(b)(1). It also dismissed Bellevue's claims in his individual capacity. Bellevue does not challenge either action by the district court, so we need not address these claims further.

Appendix A

After the 2010 amendments, § 3730(e)(4) provides:

> (A) The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed ... in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation ... unless ... the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who ... has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.[4]

As an initial matter, we have noted that Congress removed the phrase "[n]o court shall have jurisdiction over an action under this section" and replaced it with "[t]he court shall dismiss an action or claim under this section" in the 2010 amendment to § 3730(e)(4)(A). *Absher*, 764 F.3d at 706. The Supreme Court's holding in *Rockwell* regarding the jurisdictional nature of the

4. Shortly after the public-disclosure bar of the FCA was amended, the IFCA was amended and re-codified effective July 27, 2010. The amendments mirror those of the FCA. *See* 740 Ill. Comp. Stat. 175/4 (2010).

public-disclosure bar was based on the inclusion of the phrase "[n]o court shall have jurisdiction over an action under this section." *Id.* (citing *Rockwell*, 549 U.S. at 467). Because this language has been removed from the statute, it is unclear whether the language of the 2010 amendment is jurisdictional. *Cause of Action v. Chi. Transit Auth.*, 815 F.3d 267, 271 n.5 (7th Cir. 2016). We have previously noted that other circuits have found that the language of the 2010 amendment is not jurisdictional, but we have declined to decide this issue in our circuit. *Id.* Because some of Bellevue's allegations occurred pre-amendment, we address the public-disclosure bar as a jurisdictional one. *See id.* (applying the pre-amendment version of § 3730(e)(4)(A), where the contested conduct spanned both pre- and post-amendment time periods).

In addition, we have held that the amendment to § 3730(e)(4)(A) involved "a change to what constitutes a 'public disclosure,'" and thus is a substantive change that is not retroactive. *United States ex. rel. Bogina, v. Medline Indus., Inc.*, 809 F.3d 365, 369 (7th Cir. 2016) (citation omitted). Consequently, "the pre-2010 version of [§ 3730(e)(4)(A)] governs conduct that occurred in that era while the new version governs only more recent conduct." *Id.* at 368 (collecting cases). However, this change is not significant, as "we have previously interpreted the phrase 'based upon [a] public disclosure' to mean 'substantially similar to publicly disclosed allegations' ... ." *Leveski v. ITT Educ. Servs., Inc.*, 719 F.3d 818, 828 n.1 (7th Cir. 2013) (citation omitted); *see also Bogina*, 809 F.3d at 368 (noting that the change in statutory language is not significant). The current version of the statute expressly incorporates

the "substantially similar" standard in accordance with the interpretation of this circuit and most other circuits. *Leveski*, 719 F.3d at 828 n.1.

In contrast to § 3730(e)(4)(A), our cases have found that the amendment to the "original source" definition in § 3730(e)(4)(B) is a clarification rather than a substantive change, and therefore is retroactive. *Bogina*, 809 F.3d at 369; *see also Cause of Action*, 815 F.3d at 283 n.22 (citing *Bogina*, 809 F.3d at 368-69) (applying the 2010 definition of original source to conduct occurring prior to 2010). Because the district court decided the instant case prior to *Bogina* and *Cause of Action*, we take a fresh look to ensure that subject-matter jurisdiction is present.

Hartgrove argues that Bellevue's claims were publicly disclosed by the IDPH and CMS letters and audit report from March and May 2009. Determining whether to apply the public-disclosure bar requires the court to complete a three-step inquiry. First, we examine whether the relator's allegations have been "publicly disclosed." *Cause of Action*, 815 F.3d at 274 (citation omitted). If so, we next ask whether the lawsuit is "based upon," *i.e.*, "substantially similar to" the publicly disclosed allegations. *Id.* (citation omitted). "If it is, the public-disclosure bar precludes the action unless 'the relator is an original source of the information upon which the lawsuit is based.'" *Id.* (citation and brackets omitted). "The relator bears the burden of proof at each step of the analysis." *Id.* (citation omitted).

Applying the three-step framework, we first address whether Bellevue's allegations were publicly disclosed.

"[T]he allegations in a complaint are publicly disclosed when the critical elements exposing the transaction as fraudulent are placed in the public domain." *Id.* (citation and quotation marks omitted). "This definition presents two distinct issues: whether the relevant information was placed in the public domain, and, if so, whether it contained the critical elements exposing the transaction as fraudulent." *Id.* (citation and quotation marks omitted).

Bellevue does not dispute that the information was in the public domain; he contends that the letters and audit report state merely that Hartgrove was over census without any reference to a knowing misrepresentation of facts, which is a critical element of fraud. The district court found that the government had enough information to infer scienter from the results of its audits. We agree. We have held that the public-disclosure bar applied in instances "where one can infer, as a direct and logical consequence of the disclosed information, that the defendant knowingly—as opposed to negligently—submitted a false set of facts to the Government." *Id.* at 279 (citing *Absher*, 764 F.3d at 709 n.10).

Bellevue relies on *Absher*, in which we held that the government's knowledge that the defendant had failed to comply with a patient's standard of care did not necessarily mean that the defendant had knowingly misrepresented its compliance when requesting payments from the government. 764 F.3d at 708-09. As we recognized in *Cause of Action*, decisions regarding a patient's standard of care involve "qualitative judgments," and thus there was an equally plausible inference that the *Absher* defendant's

error was a mistake rather than a knowing violation. 815 F.3d at 279. Therefore, it was inappropriate to apply the public-disclosure bar in *Absher*.

Here, as in *Cause of Action*, the audit report and letters provided a sufficient basis to infer that Hartgrove was presenting false information to the government. *See id.* The kind of qualitative judgments at issue in *Absher* are not present in this case. As the district court noted, because Bellevue did not have personal knowledge of Hartgrove's billing practices, his allegations necessarily required him to infer that Hartgrove was knowingly over census. There is no reason that the government could not have made the same inference based on its audits. Therefore, we find that Bellevue's allegations were publicly disclosed.

Moving to the second step, we address whether Bellevue's allegations are substantially similar to the publicly disclosed allegations. There are several factors courts consider in determining whether this standard is met: whether relators present genuinely new and material information beyond what has been publicly disclosed; whether relators allege "a different kind of deceit"; whether relators' allegations require "independent investigation and analysis to reveal any fraudulent behavior"; whether relators' allegations involve an entirely different time period than the publicly disclosed allegations; and whether relators "supplied vital facts not in the public domain[.]" *Cause of Action*, 815 F.3d at 281 (collecting cases).

The district court found that Bellevue's allegations concerning Hartgrove's conduct through May 5, 2009 (the issuance date of CMS's letter), are substantially similar to the publicly disclosed allegations.[5] However, it found that Bellevue's allegations that Hartgrove continued its billing practices beyond May 5, 2009, involves a different time period. Thus, it concluded that Bellevue's claims concerning conduct after May 5, 2009, are not substantially similar to the publicly disclosed allegations.

We agree with the district court as to Bellevue's allegations through May 5, 2009. Bellevue's complaint describes the same contested conduct and pertains to the same entity. In addition, the time periods overlap. Furthermore, Bellevue did not supply any genuinely new and material information in his amended complaint. Bellevue argues that his allegation that Hartgrove *knowingly* exceeded its capacity constitutes new information, but as we stated above, scienter can be inferred from the audit report and letters. Bellevue also argues that he provided new information by alleging that Hartgrove exceeded its capacity as part of its regular business practice as opposed to a temporary measure resulting from an emergency. This is, at best, a

5. Hartgrove correctly points out that the 2010 amendments to § 3730(e)(4)(A), added the qualification that an audit report must be "Federal" in order to qualify as a public disclosure, and the IFCA amendment correspondingly limited public disclosures to "State" audit reports, *see* 740 Ill. Comp. Stat. 175/4 (2010). Therefore, after the 2010 amendments, the May 5, 2009, CMS audit report and letter is relevant to Bellevue's FCA claims, and the March 23, 2009, IDPH audit and letter is relevant to his IFCA claims.

conclusory allegation that lacks any factual support. We have found that such conclusory allegations fail to meet the particularity standards required by Rule 9(b), and therefore are insufficient to evade the public-disclosure bar. *See Bogina*, 809 F.3d at 370.

As to Bellevue's post-May 5, 2009, allegations, we must disagree with the district court in light of our recent holding in *Cause of Action*. We recognize that in *Leveski*, we found that the relator's allegations were not substantially similar to those contained in a previous lawsuit because they involved a different time period. *See* 719 F.3d at 829-30. But in arriving at this conclusion, we also considered that the relator's allegations involved wrongdoing by a separate department, pertained to a more sophisticated scheme, and named specific individuals. *See id.* at 830-33.

In *Cause of Action*, we found that although the audit report had considered conduct through 2004, the defendant's conduct in subsequent years was part of its "continuing practice" of misreporting data to the government. 815 F.3d at 278 n.14. We held that the relator's claim of a continuing practice "does not warrant our characterizing [the relator's] allegations as not substantially similar" to the allegations disclosed in the audit report. *Id.* at 281-82; *see also Bogina*, 809 F.3d at 370 (finding that relator's allegation that the fraud continued to present day, along with other minor details, was an "unimpressive" difference from a previous complaint and did not preclude application of the public-disclosure bar). Here, as in *Cause of Action*, Bellevue's allegations

pertain to the same entity and describe the same contested conduct as the publicly disclosed information. Therefore, we find that Bellevue's post-May 5, 2009, allegations, are substantially similar to the publicly disclosed allegations.

Moving to the third step, we ask whether Bellevue was an original source of the information upon which the allegations in his complaint were based. The district court, applying the pre-2010 definition of original source, found that although Bellevue did not allege that he had direct knowledge of Hartgrove's billing practices, it nonetheless could be reasonably inferred that he had acquired direct knowledge through his employment. It also found that Bellevue "materially added" to the publicly disclosed allegations with his personal knowledge of specific instances in which Hartgrove was over census.

After the district court's decision, *Bogina* made clear that the amended definition of "original source" controls. *See* 809 F.3d at 369. Therefore, Bellevue must show that he "has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions" and "has voluntarily provided the information to the Government before filing [its] action." 31 U.S.C. § 3730(e) (4)(B) (2010). It is undisputed that Bellevue voluntarily provided information concerning his allegations to the government before filing suit.

In order to possess "independent knowledge," the relator must "have learned of the allegation or transactions independently of the public disclosure." *Cause of Action*, 815 F.3d at 283 (citation omitted). As the district court

noted, we have permitted an inference of independent knowledge where the relator had an opportunity to observe the contested conduct. *See Leveski*, 719 F.3d at 838; *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1017 (7th Cir. 1999). However, we need not decide whether Bellevue is entitled to such an inference because he has not "materially add[ed]" to the publicly disclosed allegations.

Bellevue recycles the district court's analysis regarding his material addition to the publicly disclosed allegations. However, this line of reasoning was foreclosed by *Cause of Action*. In that case, we found that because the plaintiff's allegations were "substantially similar to" the publicly disclosed allegations, the plaintiff did not "materially add" to the public disclosure and could not be an original source. 815 F.3d at 283 (citation omitted). This conclusion applies with equal force here, and Bellevue has not provided a reason to diverge from it. Thus, we find that Bellevue is not an original source of the allegations, and his FCA and IFCA claims are precluded by the public-disclosure bar.

III. CONCLUSION

The allegations in this case fall within the public-disclosure bar to the FCA, and, therefore, the district court properly dismissed the amended complaint with prejudice. The judgment of the district court is AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION, FILED JULY 5, 2016

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 11 C 5314

UNITED STATES OF AMERICA *EX REL.* GEORGE BELLEVUE; STATE OF ILLINOIS *EX REL.* GEORGE BELLEVUE and GEORGE BELLEVUE, individually,

Plaintiffs,

v.

UNIVERSAL HEALTH SERVICES OF HARTGROVE INC., d/b/a HARTGROVE HOSPITAL,

Defendant.

Order

On July 7, 2016, the Court denied Bellevue's motion to reconsider its decision dismissing Bellevue's claims, R. 65, in light of the Supreme Court's decision in *Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016). *See* R. 69. This Order provides the Court's reasoning for that decision.

Appendix B

In *Escobar*, the Supreme Court overturned Seventh Circuit precedent when it held that the "false certification theory can be a basis for liability [under the False Claims Act]. . . . when the defendant submits a claim for payment that makes specific representations about the goods or services provided, but knowingly fails to disclose the defendant's noncompliance with a statutory, regulatory, or contractual requirement." 136 S. Ct. at 1995. The Supreme Court also held that the requirement at issue does not necessarily have to be a "condition of payment," but the misrepresentation at issue "must be material to the Government's payment decision to be actionable." *Id.* at 1996.

Bellevue argues that the Court's decision dismissing his case was contrary to the *Escobar* holding because the Court's decision was based in part on the holding that "the licensing standards were [not] conditions of payment." R. 44 at 27. But even if that portion of the Court's decision is based on precedent that is no longer in effect, Bellevue also failed to allege that Hartgrove "specifically" misrepresented that it was providing rooms to patients when it sought payment from the government. *Escobar*, 136 S. Ct. at 1995. Bellevue's theory of Hartgrove's liability is structured as followes: (1) Hartgrove is certified as an "inpatient" hospital, and as such sought payment for "inpatient" services from the Government; (2) "inpatients" require "patient rooms"; (3) a "patient room" must include a bathroom that has a toilet, a sink, and closet for storing personal items; and (4) Hartgrove was making a misrepresentation to the Government

when it sought payment for "inpatient" services, because Hartgrove was not providing a "patient room" for all patients. *See* R. 48 ¶¶ 39-45. Bellevue, however, provides so authority for its allegation that an "inpatient" hospital must provide "patient rooms" as Bellevue describes them. Bellevue's complaint cites the Illinois Administrative Code's definition of inpatient, which is "a person admitted for at least one overnight stay to health facilities, usually hospitals, that provide board and room, for the purpose of observation, care, diagnosis or treatment." 77 ILAC 255.100. This definition not only does not reference the term "patient room," it does not specify the type of "room" an inpatient must receive at all. Bellevue took the definition of "patient room" that requires a toilet, sink, and closet, from the part of the Administrative Code section governing hospital construction, which does not appear relevant to licensure or payment. *See* 77 ILCA 250.2630(d)(1)(C). Moreover, contrary to Bellevue's characterization of the regulation, a "patient room" can be a room containing multiple beds, *see id.* 250.2630(d)(1)(B), and the hospital is not required to provide a toilet for each patient. Rather, "[t]oilets shall be provided at the rate of one per each eight beds." *Id.* 250.2630(d)(1)(C). In fact, Bellevue attached to his complaint an excerpt from the Illinois Application for Hospital Licensure that contemplates that a hospital can provide beds in a "ward room" so long as 80 square feet is provided for each bed. *See* R. 48-1 at 19. Thus, Bellevue has not plausibly alleged that Hartgrove is required to provide its patients with the kind of "patient rooms" Bellevue describes. And without a plausible allegation that Hartgrove is required to provide such rooms, it is not

plausible that Hartgrove represented to the Government that it was providing such rooms when it sought payment, despite the fact that it was at times over-census.

For these reasons, the Court denied Bellevue's Rule 60 motion.

ENTERED:

/s/:
Honorable Thomas M. Durkin
United States District Judge

Dated: July 15, 2016

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, FILED OCTOBER 5, 2015

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

No. 11 C 5314

UNITED STATES OF AMERICA EX REL. GEORGE BELLEVUE; STATE OF ILLINOIS EX REL. GEORGE BELLEVUE; AND GEORGE BELLEVUE, INDIVIDUALLY,

Plaintiffs,

v.

UNIVERSAL HEALTH SERVICES OF HARTGROVE INC., D/B/A HARTGROVE HOSPITAL,

Defendant.

Judge Thomas M. Durkin

MEMORANDUM OPINION AND ORDER

George Bellevue brings this action on behalf of the United States of America and the State of Illinois alleging that Universal Health Services of Hartgrove

Inc. ("Hartgrove") violated the False Claims Act ("FCA"), 31 U.S.C. §§ 3729(a)(1)(A), (B), and the Illinois False Claims Act ("IFCA"), 740 ILCS 175/3(a)(1)(A), (B), when it submitted certain Medicaid reimbursement claims. *See* R. 1. The Court dismissed Bellevue's initial complaint without prejudice, *see* R. 44, and he has now filed an amended complaint. R. 48. Hartgrove has moved to dismiss the amended complaint pursuant to Federal Rules of Civil Procedure 12(b)(6) and 9(b) for failure to state a claim. R. 50. For the following reasons, Hartgrove's motion is granted, and Bellevue's amended complaint is dismissed with prejudice.

Legal Standard

A Rule 12(b)(6) motion challenges the sufficiency of the complaint. *See, e.g., Hallinan v. Fraternal Order of Police of Chi. Lodge No. 7*, 570 F.3d 811, 820 (7th Cir. 2009). A complaint must provide "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), sufficient to provide defendant with "fair notice" of the claim and the basis for it. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). This standard "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). While "detailed factual allegations" are not required, "labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. The complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"

Iqbal, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). "'A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Mann v. Vogel*, 707 F.3d 872, 877 (7th Cir. 2013) (quoting *Iqbal*, 556 U.S. at 678). In applying this standard, the Court accepts all well-pleaded facts as true and draws all reasonable inferences in favor of the non-moving party. *Mann*, 707 F.3d at 877.

Additionally, it is well-established that the FCA "is an anti-fraud statute and claims under it are subject to the heightened pleading requirements of Rule 9(b)." *Thulin v. Shopko Stores Operating Co., LLC*, 771 F.3d 994, 998 (7th Cir. 2014). Rule 9(b) requires a "plaintiff to do more than the usual investigation before filing [a] complaint. Greater precomplaint investigation is warranted in fraud cases because public charges of fraud can do great harm to the reputation of a business firm or other enterprise (or individual)." *Ackerman v. Nw. Mut. Life Ins. Co.*, 172 F.3d 467, 469 (7th Cir. 1999) (citations omitted). A complaint generally "must provide the who, what, when, where and how" of the alleged fraud. *United States ex rel. Fowler v. Caremark RX, LLC*, 496 F.3d 730, 740 (7th Cir. 2007).

Analysis

The Court assumes familiarity with the facts and analysis in its opinion and order of April 24, 2015 (the Court's "prior order"). *See* R. 44 (*United States ex rel. Bellevue v. Universal Health Servs. of Hartgrove*, 2015 U.S. Dist. LEXIS 53686, 2015 WL 1915493 (N.D. Ill.

Apr. 24, 2015)). To the extent that Bellevue has made new allegations in his amended complaint, the Court will describe and address them in the course of the following analysis.

I. Public Disclosure Bar — Original Source

Congress amended the FCA in 2010. In its prior order, the Court applied the pre-2010 statute to hold that Bellevue is an "original source" of the allegations in his complaint regarding Hartgrove's conduct before the 2010 amendments took effect, such that those allegations are not barred by the public disclosure doctrine. *See* R. 44 at 17-23 (*Bellevue*, 2015 U.S. Dist. LEXIS 53686, 2015 WL 1915493, at *7-10). Hargrove now argues that "[s]ubsequent to the Court's [prior order] . . . the Seventh Circuit . . . clarified that the amended version of the public disclosure bar 'controls' the entirety of a case (like this one) filed after 2010, even where the plaintiff alleges conduct both before and after 2010." R. 50 at 14 (quoting *United States v. Sanford-Brown, Ltd.*, 788 F.3d 696, 703 (7th Cir. 2015)).

The Court disagrees that the Seventh Circuit's decision in the *Sanford-Brown* case (and in *United States ex rel. Heath v. Wis. Bell, Inc.*, 760 F.3d 688, 690 n.1 (7th Cir. 2014), on which *Sanford-Brown* relied) changed the standard such that the post-amendment statute is applicable to pre-amendment conduct. The Supreme Court has held that the 2010 amendments are not retroactive. *See Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 283 n.1, 130

S. Ct. 1396, 176 L. Ed. 2d 225 (2010). And the Seventh Circuit twice relied on the Supreme Court's holding in *Wilson* to hold that the "version of [the FCA] applicable to [a plaintiff's] lawsuit is the version that was 'in force when the events underlying [the] suit took place.'" *Leveski v. ITT Educ. Servs., Inc.*, 719 F.3d 818, 828 (7th Cir. 2013) (quoting *United States ex rel. Goldberg v. Rush Univ. Med. Ctr.*, 680 F.3d 933, 934 (7th Cir. 2012) (citing *Wilson*, 559 U.S. at 283 n.1)); *see also United States ex rel. Absher v. Momence Meadows Nursing Ctr., Inc.*, 764 F.3d 699, 706 (7th Cir. 2014) ("[B]ecause the conduct underlying this action and the filing of the action itself all occurred well before the 2010 amendments to [the FCA], we apply that section as it existed before 2010."). Moreover, the standard expressed in *Leveski, Goldberg*, and *Absher*—that it "is the version [of the statute] that was in force when the events underlying [the] suit took place [that controls]"—comports with the Supreme Court's general principle regarding the retroactive applicability of statutory amendments: "the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994); *see also Jeudy v. Holder*, 768 F.3d 595, 599 (7th Cir. 2014) (applying *Landgraf*). Furthermore, on the basis of this principle, the Sixth and Fourth Circuits, and courts in this District, have applied the pre-amendment FCA statutory language to pre-amendment conduct in cases filed after the amendments' effective date. *See United States ex rel. Antoon v. Cleveland Clinic Found.*, 788 F.3d 605, 615 (6th Cir. 2015) ("'the 2010 version of the public-disclosure bar cannot be applied . . . notwithstanding the

fact that the complaint was filed after the effective date of the amendments'" (quoting *United States ex rel. May v. Purdue Pharma L.P.*, 737 F.3d 908, 918 (4th Cir. 2013))); *United States v. Bd. of Educ. of City of Chi.*, 2015 U.S. Dist. LEXIS 54439, 2015 WL 1911102, at *7 (N.D. Ill. Apr. 27, 2015) (applying the *Leveski* standard); *United States ex rel. Bogina v. Medline Indus.*, 2015 U.S. Dist. LEXIS 36477, 2015 WL 1396190, at *2 n.3 (N.D. Ill. Mar. 24, 2015) (same); *United States ex rel. Cause of Action v. Chi. Trans. Auth.*, 71 F. Supp. 3d 776, 779 n.2 (N.D. Ill. 2014) (same).

Leveski, *Goldberg*, and *Absher*, however, all concerned conduct that occurred, and complaints that were filed, before the 2010 amendments to the FCA. By contrast, Hartgrove argues that complaints filed after the 2010 amendments are governed by the post-amendment statutory language, even if the complaint makes allegations about conduct that occurred before the amendments. In support of this argument, Hartgrove cites the following passage from the Seventh Circuit's decision in *Sanford-Brown*:

> [The plaintiff] filed this action in 2012, but it potentially covers claims that have accrued since 2006—and two different versions of the § 3730(e)(4) have operated as law throughout the time period covered by [the plaintiff's] suit. No matter. The 2010 version of § 3730(e)(4) is not retroactive and it controls here.

788 F.3d at 703 (citing *Heath*, 760 F.3d at 690 n.1). And in *Heath*, the court stated that "the version of the statute

in place at the time [the plaintiff] filed this suit applies." 760 F.3d at 690 n.1. In *Heath*, however, both the conduct at issue occurred, and the complaint was filed, *before* the amendments took effect. Thus, *Heath's* application of the version of the statute in place at the time the suit was filed does not conflict with *Leveski's* rule that the version of the statute in force when the events underlying the suit took place controls.

Unlike *Heath*, *Sanford-Brown* concerned a complaint filed after the FCA amendments, and conduct that occurred both before and after the amendments. Nevertheless, in that case the court found that the plaintiff conceded that his allegations were "publicly disclosed," and that he lacked "independent knowledge" of fraudulent conduct. *See Sanford-Brown*, 788 F.3d at 703-04. Although the court noted that the 2010 version of the statute "controls here," that statement was inconsequential to the court's analysis because the FCA both pre- and post-amendment prohibits claims based on publicly disclosed information and requires plaintiffs to have independent knowledge of the fraud. *Id.* Since the plaintiff in *Sanford-Brown* conceded both these points, the court did not need to determine whether the amendments applied to pre-amendment conduct.

The Seventh Circuit's holdings in *Sanford-Brown* and *Heath* that the version of the statute in place at the time the plaintiff filed the suit controls must be read in the context of those two cases. And as discussed, when read in context, the holdings do not contradict the standard as expressed in *Leveski*. Furthermore, *Leveski's* standard comports with general principles of statutory retroactivity, and a number

of courts have applied the FCA amendments in accordance with *Leveski's* standard. For these reasons, the Court does not agree with Hartgrove's argument that *Sanford-Brown* constitutes a change in the law. Accordingly, the Court will not revisit the rulings it made in its prior order and will not dismiss any of Bellevue's claims based on the public disclosure bar, including whether Bellevue was an original source.

II. Failure to State a Claim

A. Failure to Provide Inpatient Psychiatric Services Claim

Bellevue's amended complaint includes allegations supporting a theory of liability that he did not include in his initial complaint. Bellevue alleges that Hartgrove is an "inpatient psychiatric hospital" for purposes of Medicaid claims, *see* R. 48 ¶ 38, and that Hartgrove's failure to provide rooms to certain patients means that its claims for reimbursement for "impatient psychiatric services" are fraudulent. *Id.* ¶ 43. Bellevue supports this argument with reference to the Code of Federal Regulations governing Medicaid payments and unrelated provisions of the Illinois Administrative Code. Bellevue cites the definition of "inpatient" in the Illinois Hospital Report Card Code to allege that "inpatient" means "a person admitted for at least one overnight stay to health facilities, usually hospitals, that provide board and room, for the purpose of observation, care, diagnosis or treatment." *Id.* ¶ 39 (citing 77 ILAC 255.100). Bellevue also cites the Illinois administrative code governing "Construction Requirements for Existing Hospitals" to allege that a

"patient room" must have "a toilet, a sink, and closet for storing personal items." R. 48 ¶ 40 (citing 77 ILAC 250.2630(d)(1)). Bellevue then notes that 42 C.F.R. § 441.150 "specifies the requirements of inpatient psychiatric services for individuals under age 21," and alleges that "[p]atients not provided a room do not meet the definition of 'inpatient.'" R. 48 ¶ 42. "Therefore," Bellevue claims, "inpatient claims . . . submitted by [Hartgrove] for patients not assigned a patient room are false claims submitted in violation of the [FCA]." *Id.* ¶ 43.

This theory of liability borders on frivolous. Bellevue claims that 42 C.F.R. § 441.150 provides that "patients not provided a room do not meet the definition of 'inpatient,'" but there is no such provision in that section of the regulations. Bellevue argues that the definitions of "impatient" and "patient room" in the Illinois administrative code should be imported into the federal regulations, but he offers no authority for this theory. The definitions come from sections in the Illinois Administrative Code governing hospital construction and procedures for reporting data to the state. They are entirely unrelated to Medicaid payment conditions. Thus, Bellevue cannot succeed on this theory of liability.

B. Worthless Services Claim

As in his initial complaint, Bellevue again claims that Hartgrove's "submission of claims for patients assigned to dayrooms and not a patient room is a false claim." R. 48 at 12 (¶¶ 44-45). The Court dismissed this theory of liability in its prior order, explaining that it was a form of the "diminished value of services theory" that the Seventh

Circuit has rejected. *See* R. 44 at 25 (*Bellevue*, 2015 U.S. Dist. LEXIS 53686, 2015 WL 1915493, at *10-11 (citing *Absher*, 764 F.3d at 710)). The Court rejected this theory of liability here because "Bellevue's only argument in support of this theory . . . [was] that an individual room is 'essential' to the treatment Hartgrove provides to its patients. . . . Yet Bellevue only makes this argument in summary fashion . . . . and does not explain . . . why a room is so essential to treatment." R. 44 at 25 (*Bellevue*, 2015 U.S. Dist. LEXIS 53686, 2015 WL 1915493, at *11). In his amended complaint, Bellevue again summarily alleges the "essential" nature of an individual room, alleging that a "patient room, as opposed to a rollaway bed in a dayroom, is an essential requirement for inpatients being treated for acute mental illness." R. 48 ¶ 44. Despite the Court's analysis in its prior order that specifically noted this deficiency, Bellevue has again failed to explain or describe how a patient's treatment is adversely affected by temporarily sleeping in a dayroom, let alone how such circumstances equate to delivery of "worthless services" by Hartgrove, as the Seventh Circuit requires. For these reasons, the Court again dismisses Bellevue's claims based on this theory of liability.

C. False Certification Claim

Bellevue realleges his claims based on a theory of false certification. *See* R. 48 ¶¶ 46-55. He, however, fails to add anything to his allegations in this regard. Thus, the Court dismisses Bellevue's claims based on this theory of liability for the same reasons stated in the Court's prior order. *See* R. 44 at 26-29 (*Bellevue*, 2015 U.S. Dist. LEXIS 53686, 2015 WL 1915493, at *11).

Appendix C

D. Fraudulent Inducement Claim

In its prior order, the Court noted that although Hartgrove certified that it would comply with all applicable regulations, including those limiting the number of patients it could service, such "prospective certification can only establish an FCA claim under a theory of fraudulent inducement where the plaintiff alleges that the defendant never intended to comply with the conditions of participation." R. 44 at 28 (*Bellevue*, 2015 U.S. Dist. LEXIS 53686, 2015 WL 1915493, at *11). Bellevue alleges that Hartgrove "fraudulently induced HFS to permit [Hartgrove] to participate in the Illinois Medical Assistance Program." R. 48 at 14. But this is an unadorned allegation devoid of any factual content that was not already alleged in Bellevue's initial complaint. Thus, Bellevue has failed to state a claim based on a theory of fraudulent inducement.

Conclusion

For the foregoing reasons, Hartgrove's motion, R. 50, is granted, and Bellevue's complaint is dismissed with prejudice.

ENTERED:

/s/_____
Honorable Thomas M. Durkin
United States District Judge

Dated: October 5, 2015

APPENDIX D — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, FILED APRIL 24, 2015

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 11 C 5314

UNITED STATES OF AMERICA EX REL. GEORGE BELLEVUE; STATE OF ILLINOIS EX REL. GEORGE BELLEVUE; AND GEORGE BELLEVUE, INDIVIDUALLY,

Plaintiffs,

v.

UNIVERSAL HEALTH SERVICES OF HARTGROVE INC., D/B/A HARTGROVE HOSPITAL,

Defendant.

April 24, 2015, Decided
April 24, 2015, Filed

Judge Thomas M. Durkin

MEMORANDUM OPINION AND ORDER

Appendix D

George Bellevue brings this action on behalf of the United States of America and the State of Illinois alleging that Universal Health Services of Hartgrove Inc. ("Hartgrove"), violated the False Claims Act ("FCA"), 31 U.S.C. §§ 3729(a)(1)(A), (B), and the Illinois False Claims Act ("IFCA"), 740 ILCS 175/3(a)(1)(A), (B), when it submitted certain Medicaid reimbursement claims. *See* R. 1. Hartgrove has moved to dismiss the complaint pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), and 9(b), for lack of jurisdiction and failure to state a claim. R. 30. For the following reasons, Hartgrove's motion is granted.

Legal Standard

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) challenges the Court's subject matter jurisdiction. "The standard of review for a Rule 12(b)(1) motion to dismiss depends on the purpose of the motion." *Bolden v. Wells Fargo Bank, N.A.*, 2014 U.S. Dist. LEXIS 161521, 2014 WL 6461690, at *2 (N.D. Ill. Nov. 18, 2014) (citing *Apex Digital, Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 443-44 (7th Cir. 2009)). "If a defendant challenges the sufficiency of the allegations regarding subject matter jurisdiction (a facial challenge), the Court must accept all well-pleaded factual allegations as true and draw all reasonable inferences in the plaintiffs favor." *Bolden*, 2014 U.S. Dist. LEXIS 161521, 2014 WL 6461690, at *2 (citing *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 946 (7th Cir. 2003)). A factual challenge to the court's subject matter jurisdiction, on the other hand, is based on the assertion that "the complaint

is formally sufficient but . . . there is *in fact* no subject matter jurisdiction." *United Phosphorus*, 322 F.3d at 946 (emphasis in original). When considering a factual challenge to the court's jurisdiction, "[t]he district court may properly look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists." *Evers v. Astrue*, 536 F.3d 651, 656-57 (7th Cir. 2008). "Where jurisdiction is in question, the party asserting a right to a federal forum has the burden of proof, regardless of who raised the jurisdictional challenge." *Craig v. Ontario Corp.*, 543 F.3d 872, 876 (7th Cir. 2008).

A Rule 12(b)(6) motion challenges the sufficiency of the complaint. *See, e.g., Hallinan v. Fraternal Order of Police of Chi. Lodge No. 7*, 570 F.3d 811, 820 (7th Cir. 2009). A complaint must provide "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), sufficient to provide defendant with "fair notice" of the claim and the basis for it. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). This standard "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). While "detailed factual allegations" are not required, "labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. The complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S.

at 570). "'A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Mann v. Vogel*, 707 F.3d 872, 877 (7th Cir. 2013) (quoting *Iqbal*, 556 U.S. at 678). In applying this standard, the Court accepts all well-pleaded facts as true and draws all reasonable inferences in favor of the non-moving party. *Mann*, 707 F.3d at 877.

Additionally, it is well-established that the FCA "is an anti-fraud statute and claims under it are subject to the heightened pleading requirements of Rule 9(b)." *Thulin v. Shopko Stores Operating Co., LLC*, 771 F.3d 994, 998 (7th Cir. 2014). Rule 9(b) requires a "plaintiff to do more than the usual investigation before filing [a] complaint. Greater precomplaint investigation is warranted in fraud cases because public charges of fraud can do great harm to the reputation of a business firm or other enterprise (or individual)." *Ackerman v. Nw. Mut. Life Ins. Co.*, 172 F.3d 467, 469 (7th Cir. 1999) (citations omitted). A complaint generally "must provide the who, what, when, where and how" of the alleged fraud. *United States ex rel. Fowler v. Caremark RX, LLC*, 496 F.3d 730, 740 (7th Cir. 2007).

Background

Hartgrove is a psychiatric hospital that is enrolled with the Illinois Department of Healthcare and Family Services to receive reimbursement under the federal Medicaid program, which provides medical assistance for individuals and families with low incomes. R. 1 at 2 (¶ 5), 4-5 (¶ 15). Hartgrove's license with the Illinois

Department of Public Health permits it to maintain 150 beds for acute mental illness patients. *Id.* at 5 (¶ 18). Prior to September 30, 2009, Hartgrove was approved to maintain 136 beds for acute mental illness patients. *Id.* (¶¶ 17-18). Hartgrove has attached letters to its motion dated March 23, 2009, and May 5, 2009, that the Illinois Department of Public Health sent to Hartgrove, informing Hartgrove that government audits had determined that Hartgrove had more patients than authorized beds (i.e., it was "over census") on at least 52 separate occasions between December 3, 2008 and February 28, 2009. *See* R. 39-3; R. 39-4.

Bellevue has been a Hartgrove employee since October 2009, and is currently employed there as a "nursing counselor." R. 1-1 at 2 (¶ 4). Bellevue alleges that Hartgrove actually maintains 152 beds for acute mental illness patients, even though it is only authorized to maintain 150 such beds. *Id.* at 5 (¶ 19). Additionally, Bellevue alleges that "some newly admitted adolescent patients suffering from acute mental illness [are] not placed into patient rooms, but instead [are] placed into dayrooms." *Id.* at 11 (¶ 42). These patients sleep on a "rollout bed . . . . until a patient room becomes available." *Id.* at 12 (¶ 47). Bellevue provides 13 examples of patients who were treated this way between January 1, 2011 and June 3, 2011. *Id.* at 13-16 (¶¶ 52-64). Bellevue alleges that "[a]lthough these patients are not assigned a room, Hartgrove nevertheless submits a claim to Medicaid for inpatient care of the beneficiary, which essentially includes a patient room." *Id.* at 12 (¶ 49).

Bellevue alleges that "[w]henever a patient was admitted in excess of Hartgrove's capacity, Hartgrove was in violation of State laws, rules, and regulations." *Id.* at 12-13 (¶ 50). Specifically, Bellevue alleges that Hartgrove violated 77 Ill. Admin. Code § 250.230(b), which requires that a hospital shall ensure that its "occupancy does not at any time exceed capacity, except in the event of unusual emergency and then only as a temporary measure." *Id.* at 9-10 (¶ 36). Bellevue alleges that "[c]ompliance with these laws, rules, and regulations are material and a condition of payment." *Id.* at 12-13 (¶ 50).

Bellevue also alleges that in order to become a Medicaid provider in Illinois, Hartgrove has twice certified that it will comply with federal and state regulations. R. 1-1 at 6-8 (¶¶ 20-27). On April 8, 2004, Hartgrove signed a "Provider Enrollment Application." *Id.* at 6 (¶ 20); *see id.* at 41-42. By signing the "Provider Enrollment Application," Hartgrove certified that it understood "that knowingly falsifying or willfully withholding information may be cause for termination of participation in the Medical Assistance Program." *Id.* at 42. Hartgrove also certified that it was "in compliance with all applicable federal and state laws and regulations." *Id.*

On April 8, 2004, Hartgrove also signed an "Agreement for Participation in the Illinois Medical Assistance Program." *Id.* at 6 (¶ 20); *see id.* at 22-23. By signing the "Agreement for Participation," Hartgrove agreed "to comply with all current and future program policy provisions as set forth in the applicable Department of Public Aid Medical Assistance Program handbooks." *Id.* at

22 (¶ 1). Hartgrove also agreed "to comply with applicable licensing standards as contained in State laws or regulations." *Id.* (¶ 2). The "Agreement for Participation" provided that Hartgrove would "receive payment based on the Department's reimbursement rate," and that Hartgrove "agrees to be fully liable for the truth, accuracy and completeness of all claims submitted electronically or on hard copy to the Department for payment." *Id.* (¶¶ 6-7). Hartgrove also certified that "all services rendered on or after [the effective date of the agreement] were rendered in compliance with and subject to the terms and conditions of this agreement." *Id.* at 23 (¶ 17).

Bellevue alleges that by signing the "Agreement for Participation," Hartgrove also agreed to be bound by the terms of the Illinois Department of Healthcare and Family Service's "Handbook for Providers of Medical Services." *Id.* at 7-8 (¶¶ 26-27), 9 (¶ 31); *see id.* at 50-51. The Handbook provides the following:

> For consideration for payment by the Department under any of its authorized programs, covered services must be provided to an eligible participant by a medical provider enrolled for participation in the Illinois Medical Assistance Program. Services provided must be in full compliance with applicable federal and state laws . . . .

Id. at 51.

Additionally, Bellevue alleges that "[u]pon receipt of [Medicaid] payments, [Hartgrove] is required to sign and retain a billing certification which certifies that the services provided in the billing information were provided." *Id.* at 8 (¶ 29). Bellevue does not attach any of these "billing certifications," but he alleges that "[o]riginal billing certifications are in the possession of Hartgrove." *Id.* at 9 (¶ 30).

Based on Hartgrove's various certifications that it would comply with federal and state regulations, Bellevue claims that when Hartgrove requested reimbursement for patients who were admitted beyond Hartgrove's authorized capacity, "Hartgrove knowingly submitted a false or fraudulent claim for that patient." *Id.* at 12 (¶ 50). Bellevue alleges that "[t]hese claims are false in that Hartgrove certified either explicitly or implicitly that it was in compliance with all licensing standards contained in state law, rules, or regulations," even though it was allegedly in violation of 77 Ill. Admin. Code § 250.230(b) when Hartgrove was over census. *Id.* at 13 (¶ 50). Bellevue alleges that Hartgrove has "submitted false and/or fraudulent claim[s] from August 2001 to present." *Id.* at 16 (¶ 65).

Bellevue alleges that he "voluntarily provided the information [on which the allegations are based] to the [federal and state] Governments before filing this action." *Id.* at 3 (¶ 11). Bellevue also attached to his brief in opposition to Hartgrove's motion a letter from Bellevue's counsel to the United States Attorney's Office in Chicago and the Illinois Attorney General's Office, dated August 4, 2011, stating:

Appendix D

> Enclosed please find a copy of a disclosure statement, without exhibits, and a complaint which I intend on filing on behalf of George Bellevue in the United States District Court, Northern District of Illinois, alleging violations of the Federal and State False Claims Act.

R. 41-8. Bellevue did not attach the referenced "disclosure statement" to his complaint or brief, but in his brief, Bellevue contends that the "disclosure statements . . . outline[d] the fraud in detail." R. 41 at 7.

Bellevue filed this complaint under seal on August 5, 2011. *See* R. 1. The United States and the State of Illinois declined to intervene in the case, and Chief Judge Castillo entered an order on September 30, 2014 unsealing the complaint. *See* R. 17.

Analysis

As an initial matter, Hartgrove argues that any of Bellevue's allegations based on claims Hartgrove allegedly submitted prior to August 5, 2005 must be dismissed because the FCA has a six-year statute of limitations. R. 39 at 20; *see* 31 U.S.C. § 3731(b)(1) ("A civil action under section 3730 may not be brought more than 6 years after the date on which the violation of section 3729 is committed . . . ."); *see also* 740 ILCS 175/5(b). Bellevue does not respond to this argument. Accordingly, Bellevue's action is limited to the allegation that false claims were submitted on August 5, 2005 or later.

Additionally, Bellevue includes himself in his individual capacity as a plaintiff in this case. Hartgrove argues that Bellevue "has not alleged any injury to himself that would support Article III standing, nor has [Bellevue] identified a cause of action that would allow him to sue Hartgrove over the conduct that is the subject of this case." R. 39 at 20. Bellevue does not respond to this argument either. Hartgrove is correct that 31 U.S.C. § 3730(b)(1) creates rights of action only for the Attorney General and "private persons" whose "action[s] shall be brought in the name of the Government." *See also* 740 ILCS 175/4(b)(1) ("The action shall be brought in the name of the State."). Accordingly, Bellevue's claims in his individual capacity are dismissed.

With respect to the rest of Bellevue's claims, Hartgrove primarily argues that those claims should be dismissed for the following reasons: (1) Bellevue's allegations were publicly disclosed prior to his disclosure letter or complaint; (2) Bellevue is not an original source; (3) Bellevue has failed to state a valid theory of liability; and (4) even if Bellevue's theory of liability is valid, he has failed to plead it with particularity sufficient to satisfy Federal Rule of Civil Procedure 9(b).

I. Public Disclosure Bar

The FCA permits private citizens, known as "relators," to file a civil action on behalf of the government to recover money that the government paid on account of false or fraudulent claims. 31 U.S.C. § 3730(b)(1). These actions are referred to as *qui tam* actions. *See United*

States ex rel. Yannacopoulos v. General Dynamics, 652 F.3d 818, 822 (7th Cir. 2011).[1] "To establish civil liability under the [FCA], a relator generally must prove (1) that the defendant made a statement in order to receive money from the government; (2) that the statement was false; and (3) that the defendant knew the statement was false." *Yannacopoulos*, 652 F.3d at 822.[2]

A. Public Disclosure

Hartgrove argues that Bellevue's claims must be dismissed because they are subject to the "public disclosure bar." *See United States ex rel. Heath v. Wis. Bell, Inc.*, 760 F.3d 688, 690 (7th Cir. 2014). "Public disclosure" bars FCA actions, because "[w]here a public disclosure has occurred, [the relevant governmental] authority is already in a position to vindicate society's interests, and a qui tam action would serve no purpose." *United States ex rel. Feingold v. AdminaStar Fed., Inc.*, 324 F.3d 492, 495 (7th Cir. 2003).

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1. The statutory language and standards for the FCA and the IFCA are substantially the same. *See United States ex rel. Absher v. Momence Meadows Nursing Ctr., Inc.*, 764 F.3d 699, 704 n.5 (7th Cir. 2014) ("the [IFCA] closely mirrors the FCA"); *United States ex rel. Kennedy v. Aventis Pharm., Inc.*, 512 F. Supp. 2d 1158, 1163 n.2 (N.D. Ill. 2007) ("Case law regarding the FCA is also applicable to the [IFCA]."). Accordingly, the Court's analysis of the federal statute applies equally to Bellevue's claims under the state statute.

2. Specifically, these statutes prohibit "knowingly present[ing], or caus[ing] to be presented, a false or fraudulent claim for payment," and "knowingly mak[ing] or us[ing] . . . a false record or statement material to a false or fraudulent claim" paid by the government. *See* 31 U.S.C. §§ 3729(a)(1)(A), (B); 740 ILCS 175/3(a)(1)(A), (B).

Appendix D

Prior to statutory amendments that apply to claims arising after March 23, 2010, *see United States ex rel. Cause of Action v. Chi. Trans. Auth.*, 71 F. Supp. 3d 776, 2014 U.S. Dist. LEXIS 148776, 2014 WL 5333399, at *2 n.2 (N.D. Ill. Oct. 20, 2014), the FCA stripped courts of jurisdiction over:

> an action . . . based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media . . . .

31 U.S.C. 3730(e)(4)(A) (1986). By contrast, under the current version of the FCA, a public disclosure has been made if:

> substantially the same allegations or transactions as alleged in the action were publicly disclosed (i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party; (ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or (iii) from the news media . . . .

31 U.S.C. § 3730(e)(4)(A) (2010). For purposes of determining whether the public disclosure bar applies, however, this difference is immaterial because the Seventh Circuit has interpreted the pre-amendment language to

conform to the statute's current language. *See Glaser v. Wound Care Consultants, Inc.*, 570 F.3d 907, 910 (7th Cir. 2009) (interpreting the old statute to prohibit actions in which the "complaint describes allegations or transactions that are *substantially similar* to those already in the public domain") (emphasis added). Thus, although Bellevue's claims accruing before March 23, 2010 are governed by the old statute, the public disclosure bar analysis is the same for all of his claims.

To determine whether a plaintiff has demonstrated that his allegations are not "substantially the same" as publicly disclosed information, a court must engage in a comparison of the previously publicly disclosed information and the plaintiff's allegations. *See Leveski v. ITT Educ. Servs., Inc.*, 719 F.3d 818, 829 (7th Cir. 2013). The plaintiff bears the burden of establishing the inapplicability of the public disclosure bar. *See Glaser*, 570 F.3d at 913. To demonstrate that his allegations are not "substantially the same" as publicly disclosed allegations, a plaintiff must do more than "add[] extra details" or "additional instances" of false claims. *See Heath*, 760 F.3d at 691. Some of the factors used to determine whether a relator's allegations are substantially similar to those already publicly disclosed are: (1) whether the time periods for the allegations or transactions overlap; (2) whether the relator has first-hand knowledge of the allegations; (3) whether the allegations are similar or involve different schemes such that independent investigation and analysis was required; and (4) whether the relator presents genuinely new and material information than that previously disclosed. *See Leveski*, 719 F.3d at 829-33; *Heath*, 760 F.3d at 691-92.

Additionally, the public disclosure bar applies "*only* when either the allegation of fraud or the critical elements of the fraudulent transaction themselves are the subject of a governmental civil action or penalty proceeding or have already been publicly disclosed." *Absher*, 764 F.3d at 708 (emphasis in original). "If an allegation of fraud has already been made, the analysis is straightforward. But even if no allegation of fraud has been made, the [public disclosure bar] may still apply so long as facts disclosing the fraud itself are in the government's possession or the public domain." *Id.* In determining whether the "facts disclosing the fraud" are public, "the court must determine whether facts establishing the essential elements of fraud—and, consequently, providing a basis for the inference that fraud has been committed—are in the government's possession or the public domain." *Id.*

1. Allegations Regarding Hartgrove's Conduct Prior to May 5, 2009

Hartgrove argues that Bellevue's allegations were publicly disclosed by the audit referred to in the letters the Illinois Department of Public Health sent to Hartgrove on March 23, 2009, and May 5, 2009. *See* R. 39-3; R. 39-4.[3]

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3. The Court considers these documents even though they are outside the complaint because Hartgrove's motion is a factual challenge to the Court's subject matter jurisdiction over Bellevue's claims that are governed by the FCA's provisions as they were prior to the 2010 amendments. *See* 31 U.S.C. 3730(e)(4)(A) (1986) ("No court shall have jurisdiction over an action . . . ."). When considering a factual challenge to the court's jurisdiction, "[t]he district court may properly look beyond the jurisdictional allegations of the complaint

Bellevue argues, to the contrary, that these letters and the audit "simply state that the hospital was over census which is not enough for a reader to infer that a fraud had been committed." R. 41 at 7.

Bellevue cites the Seventh Circuit's reasoning in *Absher* in support of his argument that the letters from the Illinois Department of Public Health do not disclose the "critical elements" of "fraud." R. 41 at 5. In *Absher* the defendant nursing home was accused of failing to meet the statutorily mandated standard of care with respect to its residents' hygiene, pressure sore management, instances of scabies, and infection control. 764 F.3d at 708. The Seventh Circuit held that even though government survey reports disclosed the defendant's "provision of non-compliant care . . . . the surveys did not disclose facts establishing [the defendant] misrepresented the standard of care in submitting claims for payment to the government." *Id.* at 708-09. The court held that it "is not enough" that "as soon as the government learned that [the defendant] was providing non-compliant care, it necessarily knew that at least some of [the defendant's] claims for payment were for the provision of non-compliant care." *Id.* at n.10. Rather, the "government must also have access to facts disclosing that [the defendant] had the *scienter* required by the FCA." *Id.* (emphasis added). Bellevue contends that, like the surveys disclosing "non-compliant care" in *Absher*, the letters from the Illinois Department of Public Health noting that Hartgrove had

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and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists." *Evers*, 536 F.3d at 656-57.

more patients than authorized are "not enough" to show public disclosure "because [they do] not disclose facts of misrepresentation in submitting claims for payment to the government." R. 41 at 6.

As Hartgrove notes, whether the letters from the Illinois Department of Public Health "disclose facts of misrepresentation," as Bellevue puts it, is really a question of whether the information in the letters is a sufficient basis to infer the scienter element of a FCA violation—i.e., "knowingly" seeking payment on a false basis. In *Absher*, the Seventh Circuit found that the government's knowledge that the defendant had on certain occasions not complied with the standard of care did not necessarily constitute knowledge that the defendant had knowingly misrepresented its compliance with the standard of care when requesting payments from the government. 764 F.3d at 709 n.10. This is because determining whether a standard of patient care has been violated involves a qualitative judgment. Although the Seventh Circuit did not explain its reasoning in such detail, the mere fact that the standard of care had been violated did not necessarily mean that the defendant knew a statutory or regulatory violation had occurred when the defendant sought payment from the government for the care. In other words, the defendant in *Absher* could have mistakenly believed it was in compliance with the standard of care when it sought payment, and then later been found to have violated the standard of care through negligent (or perhaps reckless) conduct. In such circumstances, the mere fact of a regulatory violation does not necessarily imply the presence of the scienter required by the FCA,

and thus, public disclosure of a regulatory violation, by itself, does not necessarily bar a claim under the FCA based on that violation.

Here, by contrast, Bellevue's theory of fraud is that there can be no question that Hartgrove knew that it had too many patients when it sought payment from the government, because no qualitative judgment is involved in determining whether the regulation limiting the number of patients has occurred. In other words, Bellevue's allegations amount to the theory that since the regulation at issue permits only a binary option—i.e., either Hartgrove admitted an unauthorized number of patients or it did not—there can be no question that Hartgrove acted knowingly when it sought payment from the government for patients above its authorized maximum. Bellevue must make this inference to allege fraud because he has not alleged that he has personal knowledge of Hartgrove's billing practices, so he has no direct knowledge of Hartgrove's scienter. But this inference works against Bellevue with respect to analyzing whether his allegations have already been publicly disclosed. For if Bellevue can infer scienter from Hartgrove's receipt of payment when it was over census, so can the government. Since the government could have made the same inference based on its audit that Bellevue makes based on his personal observations, the "critical elements" of "fraud" were not missing from the government's audit and letters as Bellevue contends. Thus, Bellevue's allegations are "substantially the same" as the information in the March 23 and May 5, 2009 letters, and the letters constitute a prior public disclosure of Bellevue's allegations concerning

that time period. As a result, Bellevue's claims based on allegations of Hartgrove's conduct through May 5, 2009, can only proceed if Bellevue is an "original source" of those allegations.

2. Allegations Regarding Hartgrove's Conduct After May 5, 2009

Before proceeding to analyze whether Bellevue is an original source of his allegations concerning Hartgrove's conduct through May 5, 2009, the Court addresses whether Bellevue's allegations subsequent to the time period referenced by the March 23 and May 5, 2009 letters were publicly disclosed. While it is reasonable to infer based on the letters that the government was aware of any payments it made for patients admitted beyond Hartgrove's authorized capacity prior to May 5, 2009, Hartgrove has not argued—let alone provided any evidence demonstrating—that the government is aware that Hartgrove has continued to engage in this practice, as Bellevue alleges. The Seventh Circuit has held that allegations of fraud beyond the "time period" of which the government is already aware can demonstrate that the allegations are not "substantially the same" as publicly disclosed allegations. *See Leveski*, 719 F.3d at 829. Hartgrove argues that Bellevue has "merely alleg[ed] 'particular allegations of fraud that [were] not mentioned' in a prior public disclosure," which the Seventh Circuit found "'[was] not enough to take [the] case outside the jurisdictional bar' because the allegations 'pertain[ed] to the same entity and described the same fraudulent conduct.'" R. 41 at 7 (quoting Glaser, 570 F.3d at 920).

But in *Glaser*, the relator's allegations were about the same time period of which the government was already aware. 570 F.3d at 911-12. By contrast, Bellevue has made allegations of conduct that occurred after the time period reference in the March 23 and May 5 letters. Thus, Bellevue's allegations of fraud after May 5, 2009 are not "substantially the same" as the information that has already been publicly disclosed in the March 23 and May 5, 2009 letters. Therefore, these claims are not barred by the public disclosure doctrine.

B. Original Source

Despite his allegations regarding Hartgrove's conduct prior to May 5, 2009 being based upon publicly disclosed information, Bellevue's claims regarding that conduct may proceed if he can establish that he is an "original source" of that information. *See* 31 U.S.C. § 3730(e)(4)(A). Prior to the 2010 amendments, "original source" was defined as:

> an individual who has direct and independent knowledge of the information on which the allegation are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. § 3730(e)(4)(B) (1986). "Direct" knowledge is that which is "based on [a relator's] own investigative efforts and *not* derived from the knowledge of others." *Glaser*, 570 F.3d at 917 (emphasis in original). For a relator to establish that it has "independent" knowledge, the relator must

be "someone who would have learned of the allegation or transactions independently of the public disclosure." *Id.* at 921. If the information in question has already been publicly disclosed, " [t]he question is whether the relator is an original source of the allegations in the complaint and not . . . whether the relator is the source of the information in the published reports." *United States ex rel. Baltazar v. Warden*, 635 F.3d 866, 869 (7th Cir. 2011).

1. Disclosing Information to the Government

As an initial matter, to be an original source Bellevue must have "voluntarily provided the information to the Government before filing an action." 31 U.S.C. § 3730(e)(4)(B) (1986). Hartgrove argues that Bellevue has failed to plead that he has met "his burden to plead what he disclosed," R. 42 at 10, in that he only pled that he provided the government with "substantially all material evidence and information he possess[es]," R. 1-1 at 3-4 (¶ 12), without attaching or describing that evidence and information. But Bellevue has attached a letter addressed to both the United States Attorney's Office in Chicago and the Illinois Attorney General's Office, stating that he provided them with a copy of the complaint he filed the next day to initiate this case. *See* R. 41-8.[4] The complaint contains all the evidence and information Bellevue has—i.e., his personal knowledge that Hartgrove is sometimes

4. The Court considers this letter even though it was not attached to or referenced by the complaint, because it is relevant to the Court's subject matter jurisdiction, for the same reasons discussed with reference to the letters Hartgrove received from the Illinois Department of Public Health.

"over census," including 13 specific examples of when this occurred. The Court finds Bellevue's allegations and the attached letter sufficient to meet his burden to show that he disclosed the information he had to the government prior to filing this action.

2. Direct and Independent Knowledge

Bellevue argues that he "has direct and independent knowledge of the information" in his complaint in that as "an employee of [Hartgrove] [he] personally observed and recorded, [Hartgrove] being over census, children who were Medicaid beneficiaries sleeping in the dayroom, and rollaway beds being stored in a closet." R. 41 at 7. Hartgrove cites the Seventh Circuit's decision in *Glaser*, 570 F.3d at 921, and argues that Bellevue has failed to plead that he is an original source because he "has pled no facts, let alone direct and independent knowledge, of any fraudulent *billing* related to those patients." R. 39 at 9 (emphasis in original).

In *Glaser*, the plaintiff was treated a number of times at a clinic that billed its services to Medicaid. 570 F.3d at 911. The plaintiff alleged that she was always treated by a physician's assistant, but the clinic billed Medicaid at a doctor's rate. *Id.* The Seventh Circuit held that the plaintiff had failed to allege that she had "direct" knowledge of the basis for her claim because "the only knowledge [the plaintiff] has of [the defendant's] billing practices comes from her attorney." *Id.* at 921. Moreover, the court rejected the plaintiff's argument that the treatment she received from the defendant gave her direct knowledge sufficient

to support her claim. The court reasoned that "the fraud alleged pertains to the billing, not the treatment." *Id.*

It is true that Bellevue does not allege that he has any direct knowledge of Hartgrove's bills or billing practices. But the Seventh Circuit's reasoning in *Glaser* does not destroy Bellevue's ability to allege that Hartgrove fraudulently sought payment from the government. The Seventh Circuit has also held that "knowledge obtained through an *investigation* can be the basis for a qui tam action." *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1017 (7th Cir. 1999) (emphasis added). The relator in *Lamers* alleged that the defendant municipal bus company was operating in violation of federal regulations that were conditions of federal funding. The relator did not work for the defendant municipal bus company, but "he had direct and independent knowledge derived from 'walk[ing] the streets of Green Bay observing the buses in action.'" *Leveski*, 719 F.3d at 838 (quoting *Lamers*, 168 F.3d at 1017). "It was unnecessary for [the relator in *Lamers*] to prove his personal knowledge that [the defendant] had fraudulently certified its compliance with [the] regulations [at issue] at the outset of his suit," because "[c]learly, [the defendant] was certifying that it was in compliance since it was still receiving [federal] funding—which meant that if [the relator's] allegation were true, [the defendant] was falsely certifying it was in compliance." *Leveski*, 719 F.3d at 838; *see also United State ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849, 854 (7th Cir. 2009) (engineer involved in building engines for the Air Force was permitted to allege false billing because he knew the engines were not built to Air Force specifications and the builder received payment from the Air Force anyway). The Seventh Circuit reasoned that since it is "unlikely" for a relator to have

actual documentation of false billing "'unless he works in the defendant's accounting department,'" relators must be permitted to allege false billing through an inference like those in *Lamers* and *Lusby*, because "holding otherwise would have 'take[n] a big bite out of qui tam litigation.'" *Leveski*, 719 F.3d at 839 (quoting *Lusby*, 570 F.3d at 854).[5]

As the Court reasoned above with respect to the public disclosure analysis, the alleged binary nature of Hartgrove's regulatory violation leads to the inference that Hartgrove acted knowingly when it falsely certified that it did not exceed its authorized number of patients. The Seventh Circuit cases discussed above show that it has applied similar reasoning to the original source analysis. Thus, Bellevue's failure to directly allege fraudulent billing does not mean that he cannot be an original source.

3. Material Addition

Hartgrove also argues that Bellevue is not an original source because his allegations are not "qualitatively different information than what had already been discovered," and are "merely the product and outgrowth of publicly disclosed information." R. 42 at 8 (citing *United States ex rel. Fried v. W. Indep. Sch. Dist.*, 527 F.3d 439, 443 (5th Cir. 2008)). Hartgrove acknowledges that "the Seventh Circuit has not explicitly adopted the [Fifth

5. *See also Lamers*, 168 F.3d at 1018 ("In our case, we think it's clear that [the relator] provided a service to the [City agency] by keeping an eye on how the City's practices matched up to its statements. He may be viewed by some as a bit of a busybody with his own agenda, but he is certainly not a parasite. And to a certain degree, Congress wanted to encourage busybodies who, through independent efforts, assist the government in ferreting out fraud.").

Circuit's] requirement that the Relator's knowledge be qualitatively different." R. 42 at 8. Hartgrove contends, however, that three Seventh Circuit cases—*Lamers*, *Leveski*, and *Glaser*—exemplify the Seventh Circuit's application of this principle in practice, because in those cases the court found relators to be original sources when they either disclosed their information to the government prior to any public disclosure, or disclosed information to the government that was uniquely in their possession. *See* R. 42 at 8-9.

The cases Hartgrove relies on are inapposite because in those cases the court found that either the relator's allegations were not publicly disclosed or that the relator had disclosed information to the government prior to any public disclosure. By contrast, the question here is what Bellevue has to allege to be an original source even though his allegations have already been publicly disclosed. When the Seventh Circuit has addressed allegations like Bellevue's—allegations that were publicly disclosed apart from relator's disclosure—the Seventh Circuit has rejected the kind of qualitative comparison of a relator's allegation to publicly disclosed information required by the Fifth Circuit. In *Leveski*, the Seventh Circuit held that it is not "appropriate to ask whether [a relator] was the first person to bring [the alleged violations] to the public's attention. Rather, it is appropriate to ask whether [the relator] is the original source of the specific allegations *in her complaint*." 719 F.3d at 836 (emphasis added). This standard acknowledges that relator allegations that are already publicly disclosed are necessarily "substantially similar" to the publicly disclosed information; otherwise there would not have been a basis for a court finding that the allegations were already publicly disclosed, and the

original source analysis would be superfluous. Requiring a relator to disclose allegations that are "qualitatively different" from information in the public record would all but disqualify people who "learned of the [same] allegation or transactions independently of the public disclosure" from being an original source. *Glaser*, 570 F.3d at 921 (quoting *United States v. Bank of Farmington*, 166 F.3d 853, 865 (7th Cir. 1999)). But the Seventh Circuit has emphasized that the appropriate question is how the relator learned about his own allegations, not whether his allegations overlap with previously disclosed information. Since it is reasonable to infer that Bellevue has personal knowledge of occasions when Hartgrove has been over census based on Bellevue's employment with Hartgrove, the Court finds that Bellevue is an original source for his allegations of Hartgrove's fraud prior to March 23, 2010.[6]

Therefore, none of Bellevue's claims are barred by the public disclosure doctrine.

II. Failure to State a Claim Under the False Claims Act

A. Theory of Fraud

In addition to Hartgrove's argument that Bellevue's claims are barred by public disclosure, Hartgrove contends that Bellevue's "allegations fail to state an FCA claim as a matter of law." R. 39 at 10. As the Court noted

6. The Court has already held that Bellevue's allegations of fraud occurring after May 5, 2009 are not "substantially the same" as allegations that have been publicly disclosed, so the Court does not have to apply the amended definition of "original source" in this case.

earlier, "[t]o establish civil liability under the [FCA], a relator generally must prove (1) that the defendant made a statement in order to receive money from the government; (2) that the statement was false; and (3) that the defendant knew the statement was false." *Yannacopoulos*, 652 F.3d at 822. Bellevue argues that two separate theories of liability satisfy these elements: (1) Hartgrove "submitted false per diem claims to Medicaid," R. 41 at 9; and (2) Hartgrove's "false certification and licensing violations create false claims," *id.*

1. Worthless Services Claim

Bellevue argues that "[w]hen [Hartgrove] admitted a patient and placed that patient into a dayroom, [as] opposed to a patient room, because the hospital . . . was over capacity, and [Hartgrove] submitted a per diem claim for that patient, that claim was false," because "a patient room is required [and] essential to treatment." R. 41 at 9. In opposition, Hartgrove contends this claim is a "diminished value theory of false claims" that the "Seventh Circuit rejected" in *Absher*. R. 42 at 11.

As already noted, in *Absher* the defendant nursing home was accused of failing to meet the statutorily mandated standard of care for its residents. 764 F.3d at 704-05. Besides engaging in the public disclosure analysis reviewed above, the Seventh Circuit also held that the plaintiff had failed to "establish[] that [the defendant's] services were truly or effectively 'worthless,'" and "any such claim would be absurd in light of the undisputed fact that [the defendant] was allowed to continue operating and rendering services of some value despite regular visits

by government surveyors. . . . [who] would certainly have noticed if [the defendant] was providing no or effectively no care to its residents." *Id.* at 710. "It is not enough to offer evidence that the defendant provided services that are worth some amount less than the services paid for." *Id.* "That is, a 'diminished value' of services theory does not satisfy this standard." *Id.*

Bellevue has alleged an analogous claim. Bellevue has not alleged that patients who slept on cots in the dayroom did not receive any treatment. Rather, he alleges that they did not receive the one particular service of an individual room. Certainly the regulations recognize that it is better to have a room of one's own. *See* 77 Ill. Admin. Code § 250.230(b). But absent an allegation that the failure to provide a room destroyed the effectiveness of the rest of the treatment provided, Bellevue's allegation that certain patients were deprived of this particular aspect of the services to which they were entitled cannot serve as the basis for an FCA claim. Thus, even if Bellevue's allegations that Hartgrove falsely certified that it provided rooms for patients when it did not are true, such facts do not establish liability under the FCA.

Bellevue's only argument in support of this theory of liability is that an individual room is "essential" to the treatment Hartgrove provides to it patients. He implies that failure to provide such a room constitutes a complete abdication of Hartgrove's obligation to treat its patients. Yet, Bellevue only makes this argument in summary fashion in his brief and does not make any such allegations in his complaint. Bellevue does not explain—either in his complaint or brief—why a room is so essential to

treatment. Bellevue alleges that the patients affected by Hartgrove's alleged failure to provide rooms suffered from "acute mental illness." It is not plausible to believe that the room Hartgrove is supposed to provide to such patients is more "essential" than the therapy they also receive. Bellevue himself is a therapeutic counselor. As such, he is in prime position to know whether Hartgrove's failure to provide rooms to certain patients has affected their treatment or prognosis. Yet he makes no such allegations. There are no allegations explaining why the deprivation of a room is so detrimental to a patient's treatment that a claim for services provided to a patient should be considered false. There are also no allegations that any of the patients placed in the dayroom was left there for an extended period of time. In fact, Bellevue's allegations indicate that this was always a short-term arrangement. *See* R. 1-1 at 12 (¶ 47) ("May of these patients are then placed back into a dayroom until a patient room becomes available."); *id.* at 12-23 (¶ 50) ("Hartgrove knowingly submitted a false or fraudulent claim for that patient whether or not the patient was given a room *prior to the midnight census*.") (emphasis added).[7] The Court cannot reasonably infer that Hartgrove's services were worthless, making that theory of liability unavailable to support Bellevue's claims.

2. False Certification Claim

Bellevue's alternative theory of liability is that Hartgrove falsely certified that it was in compliance with

7. In only one instance does Bellevue allege that a patient was housed in the dayroom for "several days." R. 1-1 at 15 (¶ 60).

77 Ill. Admin. Code § 250.230(b), which requires that a hospital shall ensure that its "occupancy does not at any time exceed capacity, except in the event of unusual emergency and then only as a temporary measure." The problem with this argument is that "[v]iolating a regulation is not synonymous with filing a false claim." *United States ex rel. Grenadyor v. Ukrainian Vill. Pharm., Inc.*, 772 F.3d 1102, 1107 (7th Cir. 2014). For violating a regulation to imply false certification, the regulation violated must be a "condition[] of, or prerequisite[] to, government payment." *Absher*, 764 F.3d at 710; *see also United States ex rel. Gross v. AIDS Research Alliance-Chi.*, 415 F.3d 601, 604 (7th Cir. 2005) ("An FCA claim premised upon an alleged false certification of compliance with statutory or regulatory requirements also requires that the certification of compliance be a condition of or prerequisite to government payment.").

Here, Bellevue does not allege that 77 Ill. Admin Code § 250.230(b) is a condition of payment. Nor could he as there is no language in 77 Ill. Admin Code § 250.230(b) indicating that it is a condition of payment. Instead, Bellevue alleges that the documents that Hartgrove signed certifying that it was in compliance with licensing standards were conditions of payment. Despite these allegations, however, Bellevue does not allege that Hartgrove signed and submitted any of these documents in connection with obtaining any particular payment. *See Gross*, 415 F.3d at 604 (The FCA "requires that the fraudulent statement's purpose must be to coax payment of money from the government."); *cf. Absher*, 764 F.3d at 703, 713 ("To receive reimbursement, [the defendant] was required to provide government regulators with a completed [MDS] form on behalf of each resident.

The form is . . . a billing document . . . . [A] reasonable jury could certainly find that these MDS forms were conditions of payment because they specifically affirm that reimbursement is 'conditioned on the accuracy and truthfulness of [the] information contained in the forms.'"). Absent such a connection, the certification documents Bellevue identifies in his complaint cannot support an FCA claim.

Furthermore, the certification documents Bellevue cites demonstrate that their purpose is to establish or maintain Hartgrove's status as a participating Medicaid provider, and not part of the process for obtaining reimbursement for services provided to particular patients. *See* R. 1-1 at 22-23, 41-42. To the extent that these documents reference the process for billing and receiving reimbursement, they do so only generally and prospectively. Such prospective certification can only establish an FCA claim under a theory of fraudulent inducement where the plaintiff alleges that the defendant never intended to comply with the conditions of participation. *See United States ex rel. Main v. Oakland City Univ.*, 426 F.3d 914, 917 (7th Cir. 2005) ("[F]raud requires more than breach of promise: fraud entails making a false representation, such as a statement that the speaker will do something it plans not to do."); *see also United States ex rel. Upton v. Family Health Network, Inc.*, 900 F. Supp. 2d 821, 834 (N.D. Ill. Oct. 1, 2012) ("Relators' argument fails, however, because alleging that the claims are 'conditions of participation' is only sufficient if the plaintiff asserts liability on the fraudulent inducement theory, which Relators have not done."). Absent an allegation that Hartgrove *intended* to violate 77 Ill. Admin Code § 250.230(b) at the time it signed the certification documents Bellevue cites,

Hartgrove's failure to comply with § 250.230(b) cannot serve as the basis for an FCA claim, even if it is true that Hartgrove knew it had not complied with § 250.230(b) when it requested such reimbursement. Bellevue has made no such allegation of intent contemporaneous with Hartgrove signing the certification documents. Therefore, Bellevue's claims are dismissed because he has failed to allege a viable theory of liability under the FCA.

B. Allegations of Fraud

In case Bellevue should decide to replead his claims with a different theory of liability, the Court addresses the application of Federal Rule of Civil Procedure 9(b) to his complaint. Hartgrove argues that Bellevue has "fail[ed] to plead any facts about the 'who, what, when, where, and how' of the alleged scheme, most notably who at Hartgrove submitted a misrepresentation in a claim for payment, when that misrepresentation was made, what was the content of that misrepresentation, or how the misrepresentation was revealed to [Bellevue]." R. 39 at 18-19.

Hartgrove is correct that Bellevue does not allege these facts. But Bellevue does not work in a position at Hartgrove that would give him access to such particularized information. Plaintiffs who have limited information like Bellevue are permitted to allege fraud based upon "information and belief" when "(1) the facts constituting the fraud are not accessible to the plaintiff[,] and (2) the plaintiff provides the grounds for his suspicions." *See Pirelli Armstrong Tire Corp., Retiree Medical Benefits Trust v. Walgreen Co.*, 631 F.3d 436, 443 (7th Cir. 2011). The Seventh Circuit has held that a relator

who does not have personal knowledge of particularized facts about the alleged fraud can nonetheless comply with Rule 9(b) if the relator has sufficient circumstantial evidence of the fraud. *See Lusby*, 570 F.3d at 854-55 ("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 . . . . 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."). Thus, if Bellevue can allege a viable theory of liability (which he has not done in his current complaint), his inability to provide details of the billing would not necessarily doom his amended complaint.

Nevertheless, "even as courts remain sensitive to information asymmetries that may present a plaintiff from offering more detail," the "grounds for the plaintiff's suspicions must make the allegations plausible." *Pirelli Armstrong Tire*, 631 F.3d at 443. Even though Bellevue does not have to allege billing details to the extent Hartgrove contends, Bellevue's allegations are insufficient in a more prosaic aspect. Bellevue alleges that Hartgrove falsely certified that it was in compliance with 77 Ill. Admin. Code § 250.230(b) on the basis that Hartgrove continued to receive Medicaid reimbursements even though it was over census on a number of occasions. The regulation, however, does not simply prohibit hospitals like Hartgrove from being over census. Rather, § 250.230(b) requires that a hospital shall ensure that its "occupancy does not at any time exceed capacity, *except in the event of unusual emergency* and then only as a temporary measure." (emphasis added). Bellevue ignores

the provision that permits a hospital to be over census "in the event of unusual emergency." Absent allegations that Hartgrove was not over census due to an "unusual emergency," Bellevue has failed to allege that Hartgrove violated the regulation at the heart of his claims. This is also a sufficient basis to dismiss Bellevue's claims.

Conclusion

For the foregoing reasons, Hartgrove's motion, R. 30, is granted, and Bellevue's complaint is dismissed without prejudice. Bellevue is granted leave to replead his claims with a viable theory of liability by May 27, 2015.[8]

ENTERED:

/s/_____
Honorable Thomas M. Durkin
United States District Judge

Dated: April 24, 2015

8. Hartgrove asks the Court to dismiss Bellevue's claims with prejudice because both of Bellevue's theories of liability fail as a matter of law. Nevertheless, the Court cannot say with certainty that Bellevue does not possess additional facts which may allow him to allege a different theory of liability than those the Court has rejected. Thus, the Court grants Bellevue leave to amend his complaint, because it is not necessarily futile for Bellevue to do so.

APPENDIX E — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, CHICAGO, ILLINOIS 60604 SEPTEMBER 8, 2017

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

No. 15-3473

GEORGE BELLEVUE,

Plaintiff-Appellant,

v.

UNIVERSAL HEALTH SERVICES OF HARTGROVE, INCORPORATED, DOING BUSINESS AS HARTGROVE HOSPITAL,

Defendant-Appellee.

September 8, 2017

Before

WILLIAM J. BAUER, *Circuit Judge*

FRANK H. EASTERBROOK, *Circuit Judge*

DAVID F. HAMILTON, *District Judge*

Appendix E

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 11 C 5314

Thomas M. Durkin, *Judge.*

ORDER

On consideration of plaintiff-appellant's petition for rehearing and rehearing *en banc*, filed on August 22, 2017, in connection with the above-referenced case, all of the judges on the original panel have voted to deny the petition for rehearing, and no judge in active service has requested a vote on the petition for rehearing *en banc*.* It is, therefore, ORDERED that the petition for rehearing and petition for rehearing *en banc* are DENIED.

*. Judge Joel M. Flaum did not participate in the consideration of the petition for rehearing *en banc*.