No. 20-

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, ex rel:
GWENDOLYN PORTER,

Petitioners

v.

MAGNOLIA HEALTH PLAN,
INCORPORATED

Respondent

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

APPENDIX TO THE
PETITION FOR WRIT OF CERTIORARI

C. W. Walker III
Counsel of Record
C. W. Walker III, LLC
512 Main Street
Greenville, MS 38702
Phone: (662) 347-9475

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
April 15, 2020
Lyle W. Cayce
Clerk

No. 18-60746

United States of America, ex rel, GWENDOLYN PORTER, Relator,

Plaintiff - Appellant

v.

MAGNOLIA HEALTH PLAN, INCORPORATED,

Defendant - Appellee

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 1:16-CV-75

Before SOUTHWICK, GRAVES, and ENGELHARDT, Circuit Judges.

JAMES E. GRAVES, Jr., Circuit Judge:*

This is a *qui tam* False Claims Act suit involving the administration of Medicaid services in Mississippi. The relator alleges that her former employer, which contracts with the Mississippi Division of Medicaid, is violating the False Claims Act by using licensed professional nurses for tasks that require the expertise of registered nurses. The federal government declined to intervene, and the district court dismissed the suit with prejudice. We affirm.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

I. BACKGROUND

Medicaid is a "joint state–federal program in which healthcare providers serve poor or disabled patients and submit claims for government reimbursement." *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S.Ct. 1989, 1996–97 (2016) (citing 42 U.S.C. § 1396 *et seq.*). The Mississippi Division of Medicaid contracts with third parties to co-administer the state's Medicaid program through a program commonly known as MississippiCAN. Companies that contract with MississippiCAN are known as Coordinated Care Organizations ("CCOs"). CCOs provide a "comprehensive package" of services including, "at a minimum, the current Mississippi Medicaid benefits which must be medically necessary." They operate call centers, process claims, and contract with health service providers for the provision of covered services. CCOs are expected to provide "care management"[1] services. During the time period at issue, Magnolia Health Plan, Inc. ("Magnolia" or "Defendant") operated as a CCO pursuant to several consecutive contracts.[2]

Gwendolyn Porter ("Relator" or "Plaintiff-Appellant") is a licensed registered nurse ("RN") in Mississippi. She was employed by Magnolia from February 2011 through September 2012. While there, she allegedly learned that licensed practical nurses ("LPNs") were serving as case and care managers. Plaintiff-Appellant alleges that this practice violates state and federal law. She reported the alleged violation to the Mississippi Division of

---

[1] The Mississippi Division of Medicaid has referred to these services as both "care management" services and "case management" services. The parties do not contend that these terms apply to different services.

[2] Mississippi CCOs, including Defendant, receive a "prepaid monthly capitated payment." Capitation payments are fixed, pre-arranged monthly payments based on the number of patients enrolled in a health plan.

Medicaid in late 2011 or early 2012.[3] She also informed the local U.S. Attorney of Magnolia's alleged violation.

In March 2016, Plaintiff-Appellant filed a complaint in federal court alleging claims under state common law and the federal False Claims Act. About two weeks later, she filed an amended complaint. The government filed a notice of its election to decline intervention. Magnolia then filed a motion to dismiss, arguing that the amended complaint did not satisfy the materiality element of the False Claims Act. In her response, Plaintiff-Appellant withdrew all claims other than those made pursuant to the False Claims Act. The district court granted Magnolia's motion to dismiss and dismissed the False Claims Act claims with prejudice.[4] Plaintiff-Appellant appealed.

II. DISCUSSION

Plaintiff-Appellant makes three arguments on appeal. She first asserts that the district court erred in declining to consider certain exhibits to her first amended complaint. She next argues that the district court erred in ruling that the amended complaint failed to adequately plead that alleged misrepresentations made by Magnolia were "material" misrepresentations as that term is used in the False Claims Act. Finally, she contends that the district court erred in declining to grant leave to amend.

A. Whether the district court erred in declining to consider certain exhibits to the first amended complaint

Plaintiff-Appellant complains that the district court "erred in excluding from consideration exhibits attached to the [amended] complaint on the basis that they did not form part of the [c]ontracts between [MississippiCAN] and Magnolia." The exhibits in question are documents published either by

---

[3] There is no indication in the record that the Division took any action in response.

[4] While the motion to dismiss was pending, Magnolia was awarded a MississippiCAN contract for the fourth time.

Magnolia or by its parent company, Centene. They include a press release, policy and procedure manual, job description, list of frequently asked questions, company handbook excerpt, and PowerPoint presentation. The district court found that it "need not consider" those exhibits because Plaintiff-Appellant did not identify "any contractual provision that incorporated [those] documents" into the contracts between Magnolia and MississippiCAN. But even if Plaintiff-Appellant is correct that the district court made that finding in error, none of the exhibits in question establish that the staffing of the case manager or care manager positions was a material term of the contracts. And materiality is a key component of Plaintiff-Appellant's claims, as explained below. We therefore assume *arguendo* that the district court committed error and proceed to the substance of Plaintiff-Appellant's claims.

B. Whether the district court erred in ruling that the amended complaint failed to adequately plead materiality

Plaintiff-Appellant's first amended complaint, the operative pleading, lists claims under two provisions of the False Claims Act. Plaintiff-Appellant first attempts to state a claim pursuant to Section 3729(a)(1)(A) of the Act, which is violated when a person "knowingly presents, or causes to be presented," a false or fraudulent claim to the government for payment or approval. 31 U.S.C. § 3729(a)(1)(A). She also attempts to state a claim under Section 3729(a)(1)(B) of the Act, under which liability attaches when a person "knowingly makes, uses, or cause to be made or used, a false record or statement material to a false or fraudulent claim." *Id.* at § 3729(a)(1)(B).[5] The

[5] Both claims implicate the implied false certification theory of liability. Under that theory, which has been accepted by the Supreme Court "in some circumstances," when "a defendant makes representations in submitting a claim but omits its violations of statutory, regulatory, or contractual requirements, those omissions can be a basis for liability if they render the defendant's representations misleading with respect to the goods or services provided." *Escobar*, 136 S.Ct. at 1999.

district court dismissed both claims because it could not find that Magnolia's staffing of care manager and case manager positions by licensed practical nurses, and not registered nurses, was material to its contracts with MississippiCAN. We agree.

1. Legal Standards

To survive a motion to dismiss, a complaint "must provide the plaintiff's grounds for entitlement to relief—including factual allegations that when assumed to be true 'raise a right to relief above the speculative level.'" *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Complaints filed pursuant to the False Claims Act must also satisfy the "heightened" pleading standard of Federal Rule of Civil Procedure 9(b). *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 185 (5th Cir. 2009). Under Rule 9(b), a party alleging fraud or mistake "must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). "We apply Rule 9(b) to fraud complaints with bite and without apology." *Grubbs*, 565 F.3d at 185 (quotation marks and citation omitted). However, "to plead with particularity the circumstances constituting fraud for a False Claims Act § 3729(a)(1) claim, a relator's complaint, if it cannot allege the details of an actually submitted false claim, may nevertheless survive by alleging particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted." *Id.* at 190.

2. Analysis

The False Claims Act, 31 U.S.C. § 3729 *et seq.*, "imposes significant penalties on those who defraud the Government." *Escobar*, 136 S.Ct. at 1995. There are four elements of a False Claims Act claim. Plaintiffs suing under the statute must show that (1) "there was a false statement or fraudulent course of conduct; (2) made or carried out with the requisite scienter; (3) that was

material; and (4) that caused the government to pay out money or to forfeit moneys due (i.e., that involved a claim)." *Abbott v. BP Expl. & Prod., Inc.*, 851 F.3d 384, 387 (5th Cir. 2017) (citing *United States ex rel. Longhi v. United States*, 575 F.3d 458, 467 (5th Cir. 2009)). Both Magnolia's motion to dismiss and the district court order granting that motion addressed only the third element of this test: materiality.

In 2016, the Supreme Court clarified how courts should interpret the materiality requirement. The Court noted that the False Claims Act itself defines "material" as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." *Escobar*, 136 S.Ct. at 1996 (citing 31 U.S.C. § 3729(b)(4)). Describing the materiality standard as "demanding" and "rigorous," *id.* at 2002–03, the Court explained:

> The False Claims Act is not "an all-purpose antifraud statute" or a vehicle for punishing garden-variety breaches of contract or regulatory violations. A misrepresentation cannot be deemed material merely because the Government designates compliance with a particular statutory, regulatory, or contractual requirement as a condition of payment. Nor is it sufficient for a finding of materiality that the Government would have the option to decline to pay if it knew of the defendant's noncompliance. Materiality, in addition, cannot be found where noncompliance is minor or insubstantial.

Id. at 2003 (citations omitted). The Court went on:

> [W]hen evaluating materiality under the False Claims Act, the Government's decision to expressly identify a provision as a condition of payment is relevant, but not automatically dispositive. Likewise, proof of materiality can include, but is not necessarily limited to, evidence that the defendant knows that the Government consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular statutory, regulatory, or contractual requirement. Conversely, if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material. Or, if the Government regularly pays a particular type of claim in full

> despite actual knowledge that certain requirements were violated, and has signaled no change in position, that is strong evidence that the requirements are not material.

Id. at 2003–04. In so holding, the Court expressly rejected the view of materiality advanced by the federal government and the U.S. Court of Appeals for the First Circuit: "that any statutory, regulatory, or contractual violation is material so long as the defendant knows that the Government would be entitled to refuse payment were it aware of the violation." *Id.* at 2004.

Here, the district court dismissed Plaintiff-Appellant's claims because her amended complaint failed to (1) identify a specific provision in any of the three contracts between Magnolia and MississippiCAN requiring that a case manager or care manager position be staffed by a registered nurse, (2) identify any specific federal or state statute or regulation mandating that a registered nurse provide those services, or (3) otherwise establish that the staffing of the case manager or care manager positions was a material term of the contracts. De novo review leads this panel to conclude the same.

Plaintiff-Appellant relies on two general categories of documents to support her claims that Magnolia committed fraud by employing licensed practical nurses as care or case managers: (1) the contracts between Magnolia and MississippiCAN; and (2) Mississippi statutes, regulations, and administrative materials. Neither work in her favor.

The contracts in question identify the minimum services to be performed by case or care managers, but do not require that those services be performed by a registered nurse. Indeed, while Plaintiff-Appellant alleges that Magnolia is "[i]n no event . . . to assign a Case Manager who is neither a Registered Nurse nor a licensed Social Worker," that allegation is contradicted by the contracts themselves. "When a plaintiff attaches documents to the complaint, courts are not required to accept the plaintiff's interpretation of those documents." *Kamps v. Baylor Univ.*, 592 F. App'x 282, 284 n.1 (5th Cir. 2014)

(per curiam) (unpublished). If "an allegation is contradicted by the contents of an exhibit attached to the pleading, then indeed the exhibit and not the allegation controls." *United States ex rel. Riley v. St. Luke's Episcopal Hosp.*, 355 F.3d 370, 377 (5th Cir. 2004) (citation omitted).

Each contract does, however, require Magnolia to "strictly adhere to all applicable federal and state law (statutory and case law), regulations and standards . . . including . . . the policies, rules, and regulations" of the Mississippi Division of Medicaid. Plaintiff-Appellant argues that Magnolia's staffing practices violate Mississippi law and therefore constitute material fraud. We assume *arguendo* that Plaintiff-Appellant's characterization of the Mississippi statutes and regulations is correct. But the Supreme Court has explicitly rejected the argument that "any statutory, regulatory, or contractual violation is material so long as the defendant knows that the [g]overnment would be entitled to refuse payment were it aware of the violation." *Escobar*, 136 S.Ct. at 2004. Indeed, "a misrepresentation cannot be deemed material merely because the [g]overnment designates compliance with a particular statutory, regulatory, or contractual requirement as a condition of payment." *Id.* at 2003. Here, the district court concluded that the contracts between Magnolia and MississippiCAN "contain broad boilerplate language generally requiring a contractor to follow all laws, which is the same type of language *Escobar* found too general to support a FCA claim." We agree.

Moreover, we note that the Mississippi Division of Medicaid took no action after Plaintiff-Appellant informed the Division that Magnolia was staffing care and case manager positions with licensed practical nurses. Instead, it continued payment and renewed its contract with Magnolia several times. And even after Plaintiff-Appellant's suit was unsealed, MississippiCAN awarded Magnolia a contract for the fourth time. *See Mississippi True v. Dzielak*, 28CH1:18-CV-557, Order, Dkt. 96, at 1, 3 (Hinds Cty. Ch. Ct. Sept.

28, 2018).[6] "[C]ontinued payment by the federal government after it learns of the alleged fraud substantially increases the burden on the relator in establishing materiality." *United States ex rel. Harman v. Trinity Indus.*, 872 F.3d 645, 663 (5th Cir. 2017).[7] Plaintiff-Appellant has not met that burden.

In summary: Plaintiff-Appellant's first amended complaint makes no specific allegations regarding the materiality of Magnolia's alleged fraud. The contracts between Magnolia and MississippiCAN do not require Magnolia to staff care or case manager positions with registered nurses, and they contain only broad, boilerplate language requiring Magnolia to follow all laws. And *Escobar* dictates that MississippiCAN's continued payments to and contracts with Magnolia substantially increase the burden on Plaintiff-Appellant in establishing materiality. *See Harman*, 872 F.3d at 663. We therefore affirm the district court's conclusion that Plaintiff-Appellant did not plead sufficient facts to survive a motion to dismiss.

---

[6] "Taking judicial notice of directly relevant public records is proper on review of a 12(b)(6) motion." *Biliouris as next friend of Biliouris v. Patman*, 751 F. App'x 603, 604 (5th Cir. 2019) (per curiam) (citing *Funk v. Stryker Corp.*, 631 F.3d 777, 783 (5th Cir. 2011)).

[7] Plaintiff-Appellant directs the court to *Campie*, in which the U.S. Court of Appeals for the Ninth Circuit applied *Escobar* and reversed a district court's dismissal of a False Claims Act suit involving HIV drugs. *See United States ex rel. Campie v. Gilead Sciences, Inc.*, 862 F.3d 890 (9th Cir. 2017). *Campie*, which is not precedential authority here, is also easily distinguished. In that case, "questions remained as to whether the approval by the [agency] was itself procured by fraud," "there existed other potential reasons for continued approval that prevent[ed] judgment for the defendant on 12(b)(6)," "the continued payment came after the alleged noncompliance had terminated," and "the parties dispute[d] exactly what and when the government knew." *Harman*, 872 F.3d at 664 (quoting *Campie*, 862 F.3d at 906–07). Here, Plaintiff-Appellant has made no allegations that MississippiCAN's contracts with Magnolia were themselves the product of fraud or that continued approval persisted for reasons other than non-materiality. Moreover, Plaintiff-Appellant alleges that the asserted noncompliance persists to this day.

C. Whether the district court erred in declining to grant leave to amend

The district court denied Plaintiff-Appellant leave to amend, explaining that the request was futile. We agree.

Rule 15(a) requires a trial court "to grant leave to amend 'freely,' and the language of this rule 'evinces a bias in favor of granting leave to amend.'" *Lyn–Lea Travel Corp. v. Am. Airlines*, 283 F.3d 282, 286 (5th Cir. 2002) (quoting *Chitimacha Tribe of La. v. Harry L. Laws Co., Inc.*, 690 F.2d 1157, 1162 (5th Cir. 1982)). A district court must have a "substantial reason" to deny a request for leave to amend. *Id.* (quoting *Jamieson v. Shaw*, 772 F.2d 1205, 1208 (5th Cir. 1985)). "However, decisions concerning motions to amend are entrusted to the sound discretion of the district court." *Smith v. EMC Corp.*, 393 F.3d 590, 595 (5th Cir. 2004) (quotation marks and citation omitted).

Ordinarily, this court reviews the denial of a motion for leave to file an amended complaint for abuse of discretion. *City of Clinton, Ark. v. Pilgrim's Pride Corp.*, 632 F.3d 148, 152 (5th Cir. 2010). "When the district court's sole reason for denying such an amendment is futility, however, we must scrutinize that decision somewhat more closely, applying a de novo standard of review similar to that under which we review a dismissal under Rule 12(b)(6)." *Wilson v. Bruks-Klockner, Inc.*, 602 F.3d 363, 368 (5th Cir. 2010) (citing *Stripling v. Jordan Prod. Co., LLC*, 234 F.3d 863, 872–73 (5th Cir.2000)).

Here, the district court denied leave to amend because Plaintiff-Appellant had not met, and "indeed cannot meet," her burden. The court concluded that "any amendment to continue to pursue" the theory advanced by Plaintiff-Appellant "would be futile." For the reasons articulated above, we find no error in this conclusion. Given the terms of the contracts between Magnolia and MississippiCAN, as well as MississippiCAN's election to continue paying and contracting with Magnolia after Plaintiff-Appellant reported Magnolia's

staffing practices and filed this complaint, there is no reasonable basis to predict that Plaintiff-Appellant can recover on her claims.

CONCLUSION

The district court did not err in granting Defendant's Motion to Dismiss with prejudice. Its order doing so is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-60746

D.C. Docket No. 1:16-CV-75

United States of America, ex rel, GWENDOLYN PORTER, Relator,

Plaintiff - Appellant

v.

MAGNOLIA HEALTH PLAN, INCORPORATED,

Defendant - Appellee

Appeal from the United States District Court for the
Southern District of Mississippi

Before SOUTHWICK, GRAVES, and ENGELHARDT, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-60746

United States of America, ex rel, GWENDOLYN PORTER, Relator,

Plaintiff - Appellant

v.

MAGNOLIA HEALTH PLAN, INCORPORATED,

Defendant - Appellee

Appeal from the United States District Court
for the Southern District of Mississippi

ON PETITION FOR REHEARING EN BANC

(Opinion April 15, 2020, 5 Cir., _____, _____ F.3d _____)

Before SOUTHWICK, GRAVES, and ENGELHARDT, Circuit Judges.

PER CURIAM:

(x) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court

having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ James E. Graves, Jr.

UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

UNITED STATES OF AMERICA, *ex rel.*
GWENDOLYN PORTER

PLAINTIFF

v.

CIVIL NO. 1:16cv75-HSO-JCG

CENTENE CORPORATION, AND
MAGNOLIA HEALTH PLAN, INC.

DEFENDANTS

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANT MAGNOLIA HEALTH PLAN, INC.'S MOTION TO DISMISS [19]

This matter is before the Court on Defendant Magnolia Health Plan, Inc.'s Motion to Dismiss [19]. This Motion is fully briefed. After consideration of the Motion, the Response, the record, and relevant legal authority, the Court finds that Defendant's Motion to Dismiss should be granted.

I. BACKGROUND

Relator Gwendolyn Porter ("Relator"), a Registered Nurse ("RN") licensed by the Mississippi Board of Nursing, was employed as a Case Manager by Defendant Magnolia Health Plan, Inc. ("Magnolia") from February 2011 through September 2012. Am. Compl. [3] at 20. Magnolia, a wholly owned subsidiary of Centene Corporation, was created to operate within the State of Mississippi to provide Medicaid services and products as one of two "Coordinated Care Organizations" authorized by a program known as "Mississippi Coordinated Care Network or MississippiCAN." *Id.* at 5-7. Medicaid "is a means-tested program that is jointly funded by the state and federal governments and managed by the states." *Id.*

Magnolia has operated under three different Contracts to provide these services for the State of Mississippi, Division of Medicaid, Office of the Governor, and Magnolia Health Plan, which in turn "is charged with the administration of the Mississippi State Plan for Medical Assistance in accordance with the requirements of Title XIX of the Social Security Act of 1935, as amended . . . ." *See* Exhibit "F" – First Contract [3-6] at 1; Exhibit "G" – Second Contract [3-7] at 2; and Exhibit "H" – Third Contract [3-8] at 2. "Mississippi directly pays Magnolia and then obtains the federal share of the payment from accounts drawn on the United States Treasury." Am. Compl. [3] at 6 (citing 42 C.F.R. §§ 430.0 – 430.30).

During the course of her employment with Magnolia, Relator allegedly discovered that Magnolia was staffing Case Manager or Care Manager positions with Licensed Practical Nurses ("LPN"), which she contends violated Mississippi statutory law as well as rules and regulations promulgated by the Mississippi Board of Nursing. *Id.* at 20-21. According to Relator, case management does not fall within the scope of practice of a LPN. *Id.* Relator alleges that Magnolia utilized LPNs because they are paid at a lower rate than a RN, and because these services were billed at a capitated rate, Magnolia was billing these nursing services to Medicaid at an inflated rate. *Id.* at 20-28. Relator asserts that on two separate occasions she wrote the United States Attorney for the Southern District of Mississippi and provided information and documents showing that Magnolia was in violation of its Contracts with the State of Mississippi, Division of Medicaid, Office of the Governor, based upon this improper staffing. *Id.* at 4-5, 35-36.

On March 1, 2016, Relator, on behalf of the United States of America, brought this *qui tam* action against Defendants Centene Management Company, LLC, and Magnolia Health Plan under the False Claims Act, 31 U.S.C. §§ 3729 - 3733 ("FCA"), alleging violations of the FCA and also raising claims for breach of contract, breach of the duty of good faith and fair dealing, payment by mistake, and unjust enrichment. Compl. [2] at 27-32. Relator filed an Amended Complaint [3] on March 16, 2016, in which she identifies Centene Corporation as Defendant's proper corporate name. Am. Compl. [3] at 1. Specifically, Relator alleges that "[f]rom February, 2011, through the present (the relevant period)" the Defendants "knowingly, systematically and illegally billed Medicaid through state administrative agencies for services rendered" by LPNs at the higher rate of pay typically allowed for RNs, knowing that the LPNs were not qualified to perform the services of a Case Manager or Care Manager as required by the Contracts between the State of Mississippi, Division of Medicaid, Office of the Governor, and Magnolia Health Plan, Inc.[1] Am. Compl. [3] at 1-37.

On March 10, 2017, the United States filed its Notice of Election [11] not to intervene. Notice [11] at 1. On September 29, 2017, Defendant Centene

[1] The Contracts provide that Magnolia is a Coordinated Care Organization and that it will "obtain services for the benefit of certain Medicaid beneficiaries" and provide "quality services efficiently, effectively and economically during the term of the Contract." Exhibit "F" – First Contract [3-6] at 2; Exhibit "G" – Second Contract [3-7] at 7; and Exhibit "H" – Third Contract [3-8] at 2.

Corporation filed a Motion to Dismiss [21], which was granted after Relator filed a Response [27] agreeing to Centene's dismissal without prejudice. Order [28] at 1.

Magnolia has now filed a Motion to Dismiss [19] pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted, arguing that the allegations set forth in the Amended Complaint fail to satisfy the materiality element of a FCA claim and that Realtor lacks standing to assert her common law and breach of contract claims. Mot. [19] at 1; Mem. in Supp. [20] at 1-8.

In her Response [30], Relator agrees to voluntarily dismiss her breach of contract and other common law claims without prejudice, conceding that she does not have standing to raise them. Resp. in Opp'n [30] at 1. As to her FCA claims, Relator maintains that the Amended Complaint adequately states the who, what, where, and how of the alleged fraud by identifying: (1) material contractual violations; (2) material violations of state statutory, regulatory, and administrative law; (3) medical materiality; and (4) economic materiality. *Id.* at 12-26.

II. DISCUSSION

A. Standard of review

In considering a motion to dismiss under Rule 12(b)(6), a court accepts "all well-pleaded facts as true" and views them in the light most favorable to the plaintiff. *Firefighters' Ret. Sys. v. Grant Thornton, LLP*, 894 F.3d 665, 669 (5th Cir. 2018) (quotation omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is

plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556).

Under Federal Rule of Civil Procedure 8(a)(2), a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *Wooten v. McDonald Transit Associates, Inc.*, 788 F.3d 490, 498 (5th Cir. 2015).

> The purpose of this requirement is "to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)). The factual allegations in the complaint need only "be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* (footnote and citations omitted). "[D]etailed factual allegations" are not required, but the pleading must present "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).

Id. (footnote omitted). A court's analysis is "generally confined to a review of the complaint and its proper attachments." *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008).

In this case, Relator has attached to the Amended Complaint the Contracts that form the basis of her claims. *See* Exhibit "F" – First Contract [3-6]; Exhibit "G" – Second Contract [3-7]; and Exhibit "H" – Third Contract [3-8]. Exhibits attached

to a complaint "are a part of the complaint 'for all purposes,'" including "for purposes of a Rule 12(b)(6) motion." *United States ex rel. Riley v. St. Luke's Episcopal Hospital*, 355 F.3d 370, 375 (5th Cir. 2004) (quoting FED. R. CIV. P. 10(c)). "When a plaintiff attaches documents to the complaint, courts are not required to accept the plaintiff's interpretation of those documents. If 'an allegation is contradicted by the contents of an exhibit attached to the pleading, then indeed the exhibit and not the allegation controls.'" *Kamps v. Baylor Univ.*, 592 F. App'x 282, 284 n.1 (5th Cir. 2014) (quoting *St. Luke's Episcopal Hospital*, 355 F.3d at 377).

Claims brought under the FCA must also comport with Rule 9(b), which requires pleading with particularity in cases involving fraud. *See United States ex rel. Williams v. Bell Helicopter Textron Inc.*, 417 F.3d 450, 453 (5th Cir. 2005) (quoting *United States ex rel. Doe v. Dow Chem. Co.*, 343 F.3d 325, 329 (5th Cir. 2003)). "At a minimum, this requires that a plaintiff set forth the who, what, when, where, and how of the alleged fraud." *Id.* (quoting *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir. 1997)).

In this case, because Relator consents to a dismissal without prejudice of all claims except her FCA claims, the Court need only address the FCA claims in resolving Magnolia's Motion.

B. The False Claims Act

The United States Court of Appeals for the Fifth Circuit has stated that

> [t]he FCA is designed to permit "suits by private parties on behalf of the United States against anyone submitting a false claim to the Government." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520

U.S. 939, 941, 117 S. Ct. 1871, 138 L. Ed. 2d 135 (1997). The FCA imposes liability on an individual who:

> (1) knowingly presents, or causes to be presented, to an officer or employee of the United States . . . a false or fraudulent claim for payment or approval;
>
> (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government; [or]
>
> (3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid.

31 U.S.C. § 3729(a)(1)-(3) (2008). In determining whether liability attaches under the FCA, this court asks "(1) whether there was a false statement or fraudulent course of conduct; (2) made or carried out with the requisite scienter; (3) that was material; and (4) that caused the government to pay out money or to forfeit moneys due (i.e., that involved a claim)." *United States ex rel. Longhi v. Lithium Power Techs., Inc.*, 575 F.3d 458, 467 (5th Cir. 2009) (quoting *United States ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 376 (4th Cir. 2008)) (internal quotation marks omitted).

Gonzalez v. Fresenius Med. Care N. Am., 689 F.3d 470, 475 (5th Cir. 2012) (footnote omitted); *See Abbott v. BP Exploration & Prod.*, 851 F.3d 384, 387 (5th Cir. 2017). The Relator asserts claims under § 3729(a)(1) and (2). Thus, materiality is an essential element of both of Relator's FCA theories of liability. *Gonzalez*, 689 F.3d at 475.

"The term 'material' means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." *Id.* (quoting *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 2002

(2016) (quoting 31 U.S.C. § 3729(b)(4)). The scienter and materiality requirements are "rigorous" and are strictly enforced. *Escobar*, 136 S. Ct. at 2002.

"The materiality standard is demanding. The False Claims Act is not an all-purpose antifraud statute . . . or a vehicle for punishing garden-variety breaches of contract or regulatory violations." *Id.* at 2003 (quotation omitted). Under this standard, a "misrepresentation cannot be deemed material merely because the Government designates compliance with a particular statutory, regulatory, or contractual requirement as a condition of payment," nor is the fact that the Government would have the option to decline to pay if it knew of the defendant's noncompliance sufficient to support a finding of materiality. *See id.* "Materiality, in addition, cannot be found where noncompliance is minor or insubstantial." *Id.*

> In sum, when evaluating materiality under the False Claims Act, the Government's decision to expressly identify a provision as a condition of payment is relevant, but not automatically dispositive. Likewise, proof of materiality can include, but is not necessarily limited to, evidence that the defendant knows that the Government consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular statutory, regulatory, or contractual requirement. Conversely, if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material. Or, if the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, and has signaled no change in position, that is strong evidence that the requirements are not material.

Id. at 2003-04. Applying the reasoning in *Escobar*, the Fifth Circuit has held that although "not dispositive, continued payment by the federal government after it learns of the alleged fraud substantially increases the burden on the relator in

establishing materiality." *United States ex rel. Harman v. Trinity Indus.*, 872 F.3d 645, 663 (5th Cir. 2017).

C. Relator's FCA claims against Defendant Magnolia Health Plan

Because the Government has declined to intervene, the FCA permits Relator to pursue the claims against Magnolia. *See* 31 U.S.C. § 3730(b)(4)(B) (stating, in relevant part, that "the Government shall . . . notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action"). Relator asserts that Magnolia both knowingly presented or caused to be presented a false claim to the Government in violation of § 3729(a)(1)(A), and that it made, used, or caused to be made or used "a false record or statement material to a false or fraudulent claim" in violation of § 3729(a)(1)(B). Am. Compl. [3] at 30-32.

Specifically, Relator alleges that the Contracts between "the State of Mississippi, Division of Medicaid, Office of the Governor" and Magnolia required Magnolia to staff its "Case Manager" or "Care Manager" positions exclusively with RNs and that the capitated rates Magnolia was allowed to charge for these services were formulated based upon a RN's rate of pay. Am. Compl. [3] at 6-29. Thus, each time Magnolia staffed one of these positions with an allegedly less qualified and lower paid LPN, and then submitted a claim for the LPN's services at the capitated rate, Magnolia submitted a false claim. *Id.* Relator further asserts that she learned of these false claims while she was employed with Magnolia as a Case Manager between February 2011 and September 2012, *id.* at 4-5, and that she voluntarily

provided this information to the United States Attorney for the Southern District of Mississippi in two anonymous letters, *id.* at 5 n.9.

After a thorough review of the record before it, the Court is of the view that Relator has failed to carry her burden to state a claim upon which relief may be granted, and that Magnolia's Motion to Dismiss should be granted. First, the Amended Complaint fails to identify a specific provision in any of the three Contracts requiring that a Case Manager or Care Manager's position be staffed by a RN. *See* Exhibit "F" – First Contract [3-6] at 43-45; Exhibit "G" – Second Contract [3-7] at 127; Exhibit "H" – Third Contract [3-8] at 89-94. Likewise, the MississippiCAN Program Summary attached as Exhibit "C" to the Amended Complaint does not state that RNs must provide Care Management services, only that the Department of Medicaid expects Magnolia to "implement comprehensive care management programs." MississippiCAN Program Summ. [3-3] at 5. Exhibit "E" to the Amended Complaint purports to be the "2013 MississippiCAN capitation rates," but this document is devoid of any explanation as to how the capitated rates were derived, nor does it state that one of the factors utilized in calculating the capitated rates was an assumption that services were being provided by RNs. *See* Exhibit "E" [3-5] at 1.

The Amended Complaint also fails to state a claim because it does not identify any specific federal or state statute or regulation mandating that a RN provide these services. Instead, Relator relies upon various documents published by Defendants Centene Corporation and/or Magnolia to support her contention that

Magnolia failed to comply with the Contracts because Case Managers were defined by Defendants to be either RNs or social workers. Relator submits the following documents to support this theory: (1) Exhibit "A" – Centene Corporation Press Release [1]; (2) Exhibit "T" – Page 16 of Policy and Procedure Book [9]; Exhibit "K" – Job Description [11]; (3) Exhibit "M" – FAQs [13]; (4) Exhibit "N" – Page 44 of Magnolia Health Plan Handbook [14]; and (5) Exhibit "O" – Power Point Presentation [15]. Am. Compl. [3] at 6-29.

The Court need not consider these additional documents because Relator has not identified, nor has the Court located, any contractual provision that incorporated these documents into the Contracts.[2] Under Mississippi law, only

---

[2] Relator also alleges that these documents support her FCA claims because they are in violation of 42 C.F.R. § 438.104(b)(2) in that they are misleading marketing materials. Am. Compl. [3] at 22. Section 438.104(b)(2) provides that contracts with certain entities must comply with the following requirements:

> (2)Specify the methods by which the entity ensures the State agency that marketing, including plans and materials, is accurate and does not mislead, confuse, or defraud the beneficiaries or the State agency. Statements that will be considered inaccurate, false, or misleading include, but are not limited to, any assertion or statement (whether written or oral) that--
>
> > (i)The beneficiary must enroll in the MCO, PIHP, PAHP, PCCM or PCCM entity to obtain benefits or to not lose benefits; or
> > (ii)The MCO, PIHP, PAHP, PCCM or PCCM entity is endorsed by CMS, the Federal or State government, or similar entity.

42 C.F.R. § 438.104(b)(2). The FCA claims in the Amended Complaint do not implicate either of these two scenarios, such that this Federal Regulation is not applicable to Relator's claims.

where a contract incorporates another document by reference must both documents be read together to give full effect to the intent of the parties. *Alford v. Kuhlman Elec. Corp.*, 716 F.3d 909, 913 (5th Cir. 2013). That is not the case here.

Next, the broad boilerplate language contained in the Contracts themselves and identified in the Amended Complaint is not sufficient by itself to establish that the staffing of the Case Manager or Care Manager positions was a material term of the Contracts. The Third Contract clearly states that "the Contract shall be governed by and construed in accordance with the laws of the State of Mississippi." Exhibit "H" – Third Contract [3-8] at 9. The Contracts also required Magnolia to "strictly adhere to all applicable federal and state law (statutory and case law), regulations and standards, as have been or may hereinafter be established, specifically including without limitation, the policies, rules, and regulations of the Division." Exhibit "F" – First Contract [3-6] at 3; Exhibit "G" – Second Contract [3-7] at 3. Magnolia was also required to "comply fully with administrative and other requirements established by federal and state laws, regulations and guidelines, and assume[s] responsibility for full compliance with all such laws, regulations, and guidelines." Exhibit "H" – Third Contract [3-8] at 144.

Relator submits that Magnolia violated Mississippi statutory and regulatory law, and thus the terms of the Contracts, by staffing the Case Manager and Care Manager positions with LPNs. As evidence to support this argument, Relator cites to a question and answer purportedly found on the website of the Mississippi Board of Nursing titled "Frequently Asked Questions":

> Telenursing
>
> 93. Is (sic) telephonic case referrals and telephonic case management within the scope of practice of the LPN?
>
> Telephonic case referrals and case management (on-site and telephonic) are not within the scope of practice of the licensed practical nurse in Mississippi. They are within the scope of practice of the registered nurse.

Am. Compl. [3] at 21; Exhibit "M" – FAQs [13] at 1. The Amended Complaint thus concludes that LPNs are not "qualified by training and experience" to be a Case Manager or a Care Manager in Mississippi, and that Magnolia's use of LPNs violated the contractual requirement that it maintain adequate staff "as specified in this Contract, RFP Proposal, and in accordance with appropriate standards of both specialty and sub-specialty care." Am. Compl. [3] at 21-22. According to Relator, because Magnolia staffed Case Manager and Care Manager positions with LPNs and then submitted claims based upon the capitated rates, it submitted false claims to the Government in violation of the FCA. Am. Compl. [3] at 6-29.

The Court is of the view that the Contracts in this case contain broad boilerplate language generally requiring a contractor to follow all laws, which is the same type of language *Escobar* found too general to support a FCA claim. *See Escobar*, 136 S. Ct. at 2004 (finding that the FCA does not adopt such an expansive view that a contractor is required to aver compliance with the entire United States Code and Code of Federal Regulations); *United States ex rel. Stephenson v. Archer Western Contractors, LLC*, 548 F. App'x 135, 138 (5th Cir. 2013) (finding that boilerplate language in a contract that requires a contractor to follow the law is too

expansive). Such broadly worded contractual provisions are insufficient on their own to supply a basis for the FCA claims in this case. Under the pleading standards applicable here, the Court cannot find that the staffing of the Case Manager or Care Manager positions by RNs, and not LPNs, was material to the Contracts. Further, the Amended Complaint does not assert that claims for capitated payments for these positions are routinely denied when the positions are staffed with LPNs.[3]

As stated previously, when facts contained in a document attached to a complaint contradict the factual allegations set forth in the body of a complaint, a court is not required to accept a plaintiff's version of the facts. *Kamps*, 592 F. App'x at 284 n.1 (quoting *Riley*, 355 F.3d at 377). Based upon its review of the Amended Complaint and the documents attached to it, the Court is of the opinion that the Contracts contradict the Relator's statement of facts in the Amended Complaint, in that the Contracts do not require that the position of Case Manager or Care Manager be staffed with a RN. As such, the use of a RN is not material to the

[3] The Amended Complaint states that in late 2011 or early 2012, on two separate occasions prior to the filing of the Complaint, Relator sent documents and other material evidence to the United States Attorney for the Southern District of Mississippi notifying the Government of Magnolia's false claims and misrepresentations. Am. Compl. [3] at 4-5, 35-36. Assuming that the Government received this information, it is apparently undisputed that the Government took no action to require that these positions be staffed with RNs. Instead, it subsequently chose to negotiate and enter into the Second and Third Contracts. This further negates any inference that this staffing issue was material to the Contracts. *See Trinity Indus.*, 872 F.3d at 663.

Contracts. This is insufficient to state a claim under the FCA, and Magnolia's Motion to Dismiss should be granted.

D. Relator's request to amend the First Amended Complaint

Relator's Memorandum contains footnotes proffering that, in the event the Court finds the First Amended Complaint insufficient to state a claim for relief, she seeks leave to amend her pleading to reference the specific statutory and regulatory authority that supports her claim that the use of LPN's violates of Mississippi law. Resp. in Opp'n [30] at 17. Why Relator did not do this in either her original or Amended Complaint is not clear. Relator has not filed a formal motion to amend, nor has she attached a proposed amended complaint. *See* L.U. CIV. R. 7(b) ("Any written communication with the court that is intended to be an application for relief or other action by the court must be presented by a motion in the form prescribed by this Rule."); *see also* L.U. CIV. R. 7(b)(2) ("If leave of court is required under FED. R. CIV. P. 15, a proposed amended pleading must be an exhibit to a motion for leave to file the pleading . . . ."); L.U. CIV. R. 15 (same). In short, Relator has not made a proper request to amend.

Even if the Court were to consider Relator's request to amend on its merits, it would be denied. Federal Rule of Civil Procedure 15(a)(2) states that a court "should freely give leave [to amend] when justice so requires." FED. R. CIV. P. 15(a)(2). While the language of Rule 15(a)(2) "evinces a bias in favor of granting leave to amend," *Smith v. EMC Corp.*, 393 F.3d 590, 595 (5th Cir. 2004) (quotation omitted), a district court should consider five factors to determine whether to allow

such leave: 1) undue delay; 2) bad faith or dilatory motive; 3) repeated failure to cure deficiencies by previous amendments; 4) undue prejudice to the opposing party; and 5) futility of the amendment, *id.* An amendment is considered futile if "the amended complaint would fail to state a claim upon which relief could be granted." *Stripling v. Jordan Prod. Co.*, 234 F.3d 863, 872-73 (5th Cir. 2000) (emphasis added).

In the present case, the Court has determined that based upon the Amended Complaint and the Contracts themselves, Relator has not met, and indeed cannot meet, her burden of stating a claim that hiring only RNs as Case Managers or Care Managers was material to the Contracts at issue, or that the boilerplate language requiring Magnolia to comply with Mississippi law and regulations, is sufficient to satisfy the materiality standard. Thus, any amendment to continue to pursue such a theory would be futile. Based upon a consideration of all of the relevant factors, Relator's request for leave to amend is futile and should otherwise be denied.

III. CONCLUSION

To the extent the Court has not addressed any of the parties' arguments, it has considered them and determined that they would not alter the result. Defendant Magnolia Health Care Plan, Inc.'s Motion to Dismiss [19] will be granted, and Relator Gwendolyn Porter's FCA claims will be dismissed with prejudice, but without prejudice to the rights of the United States.

IT IS, THEREFORE, ORDERED AND ADJUDGED that Defendant Magnolia Health Care Plan, Inc.'s Motion to Dismiss [19] is **GRANTED**, and

Relator Gwendolyn Porter's False Claims Act claims are **DISMISSED WITH PREJUDICE**, but **WITHOUT PREJUDICE** to the rights of the United States.

IT IS, FURTHER, ORDERED AND ADJUDGED that Relator's breach of contract and common law claims are **DISMISSED WITHOUT PREJUDICE.**

IT IS, FURTHER, ORDERED AND ADJUDGED that this Civil Action is **DISMISSED.** A separate judgment will be entered in accordance with this Order, as required by Rule 58 of the Federal Rules of Civil Procedure.

SO ORDERED AND ADJUDGED this the 27th day of September, 2018.

s/ Halil Suleyman Ozerden
HALIL SULEYMAN OZERDEN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

UNITED STATES OF AMERICA, *ex rel.*
GWENDOLYN PORTER

PLAINTIFF

v.

CIVIL NO. 1:16cv75-HSO-JCG

CENTENE CORPORATION AND
MAGNOLIA HEALTH PLAN, INC.

DEFENDANTS

FINAL JUDGMENT OF DISMISSAL

The Court, after a full review and consideration of the record in this case and relevant legal authority, finds that in accord with its prior Order [28] dismissing Relator Gwendolyn Porter's claims against Defendant Centene Corporation without prejudice, and the Memorandum Opinion and Order entered herewith,

IT IS, THEREFORE, ORDERED AND ADJUDGED, that this Civil Action is **DISMISSED WITH PREJUDICE** as to Relator Gwendolyn Porter's False Claims Act claims, and **DISMISSED WITHOUT PREJUDICE** as to Relator's breach of contract and common law claims, and all claims are **DISMISSED WITHOUT PREJUDICE** as to the United States.

SO ORDERED AND ADJUDGED this the 27th day of September, 2018.

s/ Halil Suleyman Ozerden
HALIL SULEYMAN OZERDEN
UNITED STATES DISTRICT JUDGE

31 U.S.C. § 3729

Section 3729 - False claims

(a) LIABILITY FOR CERTAIN ACTS.-

(1) IN GENERAL.-Subject to paragraph (2), any person who-

(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

(C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);

(D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;

(E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or

(G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government,
is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104-410[1]), plus 3 times the amount of damages which the Government sustains because of the act of that person.

(2) REDUCED DAMAGES.-If the court finds that-

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced

under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation,
the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of that person.

(3) COSTS OF CIVIL ACTIONS.-A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) DEFINITIONS.-For purposes of this section-

(1) the terms "knowing" and "knowingly"-

(A) mean that a person, with respect to information-

(i) has actual knowledge of the information;

(ii) acts in deliberate ignorance of the truth or falsity of the information; or

(iii) acts in reckless disregard of the truth or falsity of the information; and

(B) require no proof of specific intent to defraud;

(2) the term "claim"-

(A) means any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that-

(i) is presented to an officer, employee, or agent of the United States; or

(ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest, and if the United States Government-

(I) provides or has provided any portion of the money or property requested or demanded; or

(II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded; and

(B) does not include requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or as an income subsidy with no restrictions on that individual's use of the money or property;

(3) the term "obligation" means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment; and

(4) the term "material" means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

(c) EXEMPTION FROM DISCLOSURE.-Any information furnished pursuant to subsection (a)(2) shall be exempt from disclosure under section 552 of title 5.

(d) EXCLUSION.-This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

[1] So in original. Probably should be "101-410".

31 U.S.C. § 3729

Pub. L. 97-258, Sept. 13, 1982, 96 Stat. 978; Pub. L. 99-562, §2, Oct. 27, 1986, 100 Stat. 3153; Pub. L. 103-272, §4(f)(1)(O), July 5, 1994, 108 Stat. 1362; Pub. L. 111-21, §4(a), May 20, 2009, 123 Stat. 1621.

HISTORICAL AND REVISION NOTES

Revised Section Source (U.S. Code) Source (Statutes at Large)

3729 31:231. R.S. §3490.

In the section, before clause (1), the words "a member of an armed force of the United States" are substituted for "in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States" and "military or naval service" for consistency with title 10. The words "is liable" are substituted for "shall forfeit and pay" for consistency. The words "civil action" are substituted for "suit" for consistency in the revised title and with other titles of the United States Code. The words "and such forfeiture and damages shall be sued for in the same suit" are omitted as unnecessary because of rules 8 and 10 of the Federal Rules of Civil Procedure (28 App. U.S.C.). In clauses (1)-(3), the words "false or fraudulent" are substituted for "false, fictitious, or fraudulent" and "Fraudulent or fictitious" to eliminate unnecessary words and for consistency. In clause (1), the words "presents, or causes to be presented" are substituted for "shall make or cause to be made, or present or cause to be presented" for clarity and consistency and to eliminate unnecessary words. The words "officer or employee of the Government or a member of an armed force" are substituted for "officer in the civil, military, or naval service of the United States" for consistency in the revised title and with other titles of the Code. The words "upon or against the Government of the United States, or any department of the United States, or any department or officer thereof" are omitted as surplus. In clause (2), the word "knowingly" is substituted for "knowing the same to contain any fraudulent or fictitious statement or entry" to eliminate unnecessary words. The words "record or statement" are substituted for "bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition" for consistency in the revised title and with other titles of the Code. In clause (3), the words "conspires to" are substituted for "enters into any agreement, combination, or conspiracy" to eliminate unnecessary words. The words "of the United States, or any department or officer thereof" are omitted as surplus. In clause (4), the words "charge", "to other", and "to any other person having authority to receive the same" are omitted as surplus. In clause (5), the words "document certifying receipt" are substituted for "certificate, voucher, receipt, or other paper certifying the receipt" to eliminate unnecessary words. The words "arms, ammunition, provisions, clothing, or other", "to any other person", and "the truth of" are omitted as surplus. In clause (6), the words "arms, equipments, ammunition, clothes, military stores, or other" are omitted as surplus. The words "member of an armed force" are substituted for "soldier, officer, sailor, or other person called into or employed in the military or naval service" for consistency with title 10. The words "such soldier, sailor, officer, or other person" are omitted as surplus.

REFERENCES IN TEXT The Internal Revenue Code of 1986, referred to in subsec. (d), is classified generally to Title 26, Internal Revenue Code.

AMENDMENTS 2009 - Subsecs. (a), (b). Pub. L. 111-21, §4(a)(1), (2), added subsecs. (a) and (b) and struck out former subsecs. (a) and (b) which related to liability for certain acts and defined "knowing" and "knowingly", respectively. Subsec. (c). Pub. L. 111-21, §4(a)(4), substituted "subsection (a)(2)" for "subparagraphs (A) through (C) of subsection (a)". Pub. L. 111-21, §4(a)(2), (3), redesignated subsec. (d) as (c) and struck out heading and