UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

UNITED STATES OF AMERICA *ex rel.* STEPHEN DEAN,	§	
Plaintiffs,	§	
v.	§	
PARAMEDICS PLUS, LLC, EAST TEXAS MEDICAL CENTER REGIONAL HEALTHCARE SYSTEM, INC., EAST TEXAS MEDICAL CENTER REGIONAL HEALTH SERVICES, INC., EMERGENCY MEDICAL SERVICES AUTHORITY, and HERBERT STEPHEN WILLIAMSON,	§	CIVIL ACTION NO. 4:14-CV-203
	§	JUDGE MAZZANT
	§	ORAL HEARING REQUESTED
Defendants.	§	

DEFENDANTS EAST TEXAS MEDICAL CENTER REGIONAL HEALTHCARE SERVICES, INC.'S AND EAST TEXAS MEDICAL CENTER REGIONAL HEALTHCARE SYSTEM, INC.'S MOTION TO DISMISS

East Texas Medical Center Regional Healthcare Services, Inc. ("Services"), and East Texas Medical Center Regional Healthcare System, Inc. (the "System"), two of the defendants in the above-captioned proceeding, move the Court for dismissal of the claims set forth against them in the Complaint of the United States in Partial Intervention ("Complaint") filed by the United States of America (the "Government").[1]

I. INTRODUCTION

This is an action for alleged violations of the False Claims Act ("FCA"), 31 U.S.C. §§ 3729, *et seq.*, and "the common law." Complaint at ¶ 2. The case was originally filed as a *qui tam*

[1] The Complaint treats Services and the System as a single entity labeled "ETMC." *See* Complaint at 1. As explained below, we reject that treatment as substantively incorrect and procedurally improper.

action by relator Stephen Dean ("Dean"). (Docket Nos. 1, 6). After years of unexplained and inexplicable delay, the Government partially intervened and filed the Complaint. (Docket Nos. 25, 28). In addition to Services and the System, the Government names as defendants Paramedics Plus, LLC ("PMP"), Emergency Medical Services Authority ("EMSA"), and Herbert Stephen Williamson ("Williamson"). *See* Complaint ¶¶ 1, 22-23. The Complaint alleges claims – apparently against all defendants in intervention – for (i) violations of the FCA in three respects, (ii) fraud, (iii) unjust enrichment, and (iv) payment by mistake. *Id.* at ¶¶ 166-186.

Broadly speaking, the Complaint alleges that, from 1998-2103, "[PMP] and its parent company ETMC," *Id.* at ¶ 3, "engaged in a kickback scheme" with EMSA – the ambulance authority for Oklahoma City and Tulsa, Oklahoma – and Williamson, its President. *Id.* at ¶ 3, 7. The charge apparently is that, in return for receiving and keeping an exclusive contract to provide the emergency ambulance services in those cities, "ETMC" and PMP paid kickbacks and bribes to Williamson and EMSA. *Id.* at ¶¶ 3, 7, 10. According to the Government, that conduct violated the Anti-Kickback Statute ("AKS"), 42 U.S.C. § 1320a-7b(b), and allegedly "caused" EMSA to submit false claims to Medicare and Medicaid. *Id.* at ¶ 15.

There is no merit to any of this. PMP, Services, and the System neither offered, nor paid, any kickbacks or bribes to EMSA, Williamson, or anyone else. All sums remitted to EMSA by (or on behalf of) PMP were to "true-up" the amounts due PMP for services rendered. Those sums were not intended to – and did not – violate the AKS or any other law. Indeed, the "profit cap" decried by the Government is now commonplace in the ambulance service industry.

Further, as explained in PMP's motion to dismiss in this case, the Government's claims of violations of the FCA neither identify – nor even allege – any economic damages. For example, the Complaint does not allege that EMSA billed Medicare or Oklahoma Medicaid for any service

not actually provided. Likewise, it does not allege overcharges or inflated billings by EMSA and, indeed, could not do so because Medicare and Medicaid pay standard fixed amounts for the services EMSA billed. Correlatively, the Government does not allege that PMP overcharged EMSA in any respect, or even that any patient transported by PMP received substandard or inadequate care. Thus, as the effective purchaser of the medical services provided to Medicare and Medicaid beneficiaries, the Government received the full value of all services billed by EMSA.

Most importantly (at least for purposes of this Motion), the Government's allegations against Services and the System are insufficient under Federal Rules of Civil Procedure 8(a), 9(b), and 12(b)(6) to plead any violation of the AKS, the FCA, or federal common law. Treating Services and the System as a single entity labeled "ETMC" gives neither defendant fair notice of the conduct with which it is charged, thereby running afoul of Rule 8(a), nor do the Government's efforts to lump together "ETMC" and PMP when describing contracts and various payments provide fair notice under Rule (8(a).

Further, the Complaint fails to allege even a facially plausible claim for violation of the AKS, the FCA, or federal common law by either Services or the System, let alone with the specificity required by Rule 9(b). Finally, the Complaint's allegations are substantively fruitless. Specifically, and among other reasons, Services and the System filed no false claims (or any claims at all), did not "cause" (and could not have caused) EMSA to file false claims, and received no payments from Medicare or Oklahoma Medicaid. Thus, for the reasons set forth below, as well as the reasons set forth in PMP's Motion to Dismiss, the claims against Services and the System should be dismissed.[2]

[2] The System and Services adopt the arguments presented in PMP's Motion and incorporate those arguments by reference as if set forth herein.

II. STATEMENT OF ISSUE TO BE DECIDED

Should the claims against Services and the System be dismissed for failure of the Complaint to adequately plead or otherwise state a plausible claim for relief?

III. STANDARDS APPLICABLE TO THE MOTION

As noted above, Services and the System seek dismissal of the claims against them pursuant to Rules 8(a), 9(b), and 12(b)(6). In *U.S. ex rel. Fisher v. Homeward Residential, Inc.*, No. 4:12-CV-461, 2015 U.S. Dist. LEXIS 78637 (E.D. Tex. June 17, 2015) (Mazzant, J.), the Court recited the standards applicable to a motion to dismiss FCA claims on these bases. Further, in *U.S. ex rel. Jackson v. Univ. of N. Texas*, No. 4:13-CV-734, 2015 U.S. Dist. LEXIS 175706 (E.D. Tex. November 18, 2015), *adopted*, 2016 U.S. Dist. LEXIS 11304 (E.D. Tex. February 1, 2016) (Mazzant, J.), Magistrate Judge Nowak similarly articulated the standards applicable in this context. As explained at length in both cases, the well-recognized standards of review applicable to the instant Motion are as follows.

1. A Rule 12(b)(6) motion argues that the complaint fails to assert facts that give rise to legal liability. *Jackson, supra*, at *11. The Federal Rules of Civil Procedure require that each claim in a complaint include a short and plain statement showing that the pleader is entitled to relief. *Id.*, at *11-12 (quoting FED. R. CIV. P. 8(a)(2)). "The claims must include enough factual allegations 'to raise a right to relief above the speculative level.'" *Id.* at *12 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Under the *Twombly* standard, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *Id.* (quoting *Gonzalez v. Kay*, 577 F. 3d 600, 603 (5th Cir. 2009) and *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "'A claim has facial plausibility when the [government] pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the

misconduct alleged.'" *Id.* (quoting *Gonzalez, supra*, at 603). Thus, to survive the motion to dismiss, the Complaint must contain sufficient factual allegations to enable the Court to draw the reasonable inference that Services and System are liable for the misconduct alleged.

2. "A complaint…under the FCA must [also] meet the heightened pleading standard of…[Rule 9(b)], which states '[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.'" *Jackson, supra*, at *10 (quoting FED. R. CIV. P. 9(b) and citing *U.S. ex rel. Grubbs v. Kanneganti*, 565 F. 3d 180, 185 (5th Cir. 2009)). "Pleading fraud with particularity in the Fifth Circuit 'requires 'time, place and contents of the false representations, as well as the identity of the person making the misrepresentation and what [that person] obtained thereby.'" *Id.* (quoting *Williams v. WMX Techs., Inc.*, 112 F. 3d 175, 178 (5th Cir. 1997). "Rule 9(b) also 'requires a plaintiff to…explain why the statements were fraudulent.'" *Id.* at *10-11 (quoting *Williams, supra*, at 177-78). "Relators must 'set forth *specific facts* supporting an inference of fraud,' and 'simple allegations that a defendant possesses fraudulent intent will not satisfy Rule 9(b).'" *Id.* at *11 (quoting *Dorsey v. Portfolio Equities, Inc.*, 540 F. 3d 333, 339 (5th Cir. 2008) (quotations omitted) (emphasis in original).

3. In deciding the Motion, the Court accepts the Complaint's well-pleaded allegations as true, but may not accept as true "conclusory allegations, unwarranted deductions, or legal conclusions." *Hall v. Phenix Investigations, Inc.*, 642 Fed. App'x 402, 404 (5th Cir. 2016) (citation omitted). In this regard, the Court takes a two-step approach, first identifying and disregarding the Complaint's conclusory allegations, and then determining whether the allegations plausibly suggest an entitlement to relief. *Jackson, supra*, at *13 (quoting *Iqbal, supra*, at 681). "This evaluation will 'be a context-specific task that requires the…[Court] to draw on its judicial experience and common sense.'" *Id.* (quoting *Iqbal, supra*, at 679). I

IV. ARGUMENT

The Complaint alleges that, through a contractor, EMSA provided emergency and non-emergency transport services for Oklahoma City and Tulsa. *See* Complaint at ¶ 22. More specifically, EMSA owns or leases ambulances, but does not employ the personnel who staff the ambulances, *i.e.*, drivers, EMTS, and paramedics. *Id.* at ¶ 4. "Instead, EMSA contracts with a private contractor for drivers, EMTS, paramedics, and other personnel that actually perform health care services." *Id.* After ambulance and/or paramedic services are provided to a patient, EMSA bills the "appropriate party" for the services provided. In *some* cases, the "appropriate party" is Medicare or Medicaid while, in other cases, the "appropriate party" will be a private health insurer, the individual patient, or some other private payor. *Id.* at ¶¶ 4, 22. At all times relevant herein, PMP was the contractor EMSA used to provide the specified services.[3]

The Government's theory of the case is twofold. *First*, in violation of the AKS, EMSA and Williamson sought and received kickbacks from "ETMC" and PMP in exchange for awarding a contract to PMP, and "ETMC" and PMP reciprocally violated the AKS by paying kickbacks to obtain and retain that contract. *Second*, claims that EMSA subsequently submitted to Medicare and Medicaid were false under the FCA because, when those claims were submitted, EMSA was not in compliance with the AKS, yet certified--either expressly or impliedly--to the contrary. Thus, the Government alleges that EMSA filed false claims, and "ETMC" and PMP "caused" the false claims to be filed. Medicare and Medicaid allegedly suffered "damages" by EMSA's false claims,

[3] From 1994 through 1998, EMSA's contractor was American Medical Response ("AMR"). *See* Complaint, at ¶¶ 6, 60. PMP was then EMSA's contractor until "EMSA's Board voted [on July 24, 2013] to award the…contract back to AMR…." *Id.* ¶ 147. Notably, as Dean alleged, EMSA's contract with AMR contained a 10% "profit cap." *See* First Amended False Claims Act Complaint ("FAC") at ¶¶ 71-73. The Government incorporated Dean's allegations, *see* Complaint at ¶ 1, but it did *not* intervene as to his claims against AMR. *See* The United States' Notice of Partial Intervention. (Docket No. 25). At Dean's request, and with the Government's express consent, the Court dismissed Dean's claims against AMR. (Docket Nos. 43, 44, 46).

id. at ¶¶ 149-169, but, as noted above, the Complaint alleges neither any deficiency in the services provided by EMSA, nor any economic damages.

As Judge Boyle has noted, "the FCA 'does not create liability merely for a health care provider's disregard of [g]overnment regulations…unless, as a result of such acts, the provider knowingly asks the [g]overnment to pay amounts it does not owe.'" *U.S. ex rel. Williams v. McKesson Corp.*, 2014 U.S. Dist. LEXIS 92987, *20 (N.D. Tex. July 9, 2014) (quoting *Willard v. Humana Health Plan of Texas, Inc.*, 336 F.3d 375, 381 (5th Cir. 2003)) (other citations omitted). Liability under the FCA instead requires that a provider ask (or be caused to ask) the Government to pay amounts it does not owe. Under the Government's theory, then, it must adequately plead and prove violations of both the AKS and the FCA. In both respects, the Complaint fails to state a claim against Services and the System. Accordingly, the FCA claims against Services and the System should be dismissed under Rules 8(a), 9(b), and 12(b)(6).

A. The Complaint Does Not Provide Fair Notice to Services and the System.

The Complaint must contain, *inter alia*, "a short and plain statement of the claim showing that the…[Government] is entitled to relief." Fed. R. Civ. P. 8(a)(2). The purpose of Rule 8(a)(2) is to give defendants fair notice of the claim and the grounds upon which it rests. *Twombly*, *supra*, at 555 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). "'An adequate complaint" for purposes of Rule 8(a)(2), must therefore 'provide fair notice to the defendants and state a facially plausible legal claim.'" *Hamilton v. Partners Healthcare Sys.*, 2016 U.S. Dist. LEXIS 95469, *9 (D. Mass. July 21, 2016) (quoting *Ocasio-Hernandez v. Fortuño-Burset*, 640 F. 3d 1, 12 (1st Cir. 2011)). Thus, "[f]or a complaint to meet the…requirements of Rule 8(a)(2) and…survive a Rule 12(b)(6) motion to dismiss…every element of each cause of action must be supported by *specific factual allegations*…." *Kan v. OneWest Bank, FSB*, 823 F. Supp. 2d 464, 468 (W.D. Tex. 2011) (emphasis

added). For two reasons, the Complaint fails to give fair notice to Services and the System and should be dismissed for non-compliance with Rule 8(a)(2).

First, although the Government acknowledges that Services and the System are distinct corporate entities, *see* Complaint at ¶¶ 19-20, it defines and treats them as one entity labeled "ETMC." *Id.* at ¶ 1.[4] This treatment persists throughout the Complaint, with the Government (i) making no distinction between Services and the System, and (ii) failing to set forth any *specific factual allegation* of what either is individually accused of doing. The result is that the Complaint fails to give Services and the System adequate notice of the grounds upon which the claims against them rest. Compounding the problem, the Government then adopts the protocol of collectivizing all the defendants in its claims for relief, *id.* at ¶¶ 166-186, thereby making it impossible to know which claims are directed at Services (if any), which are directed at the System (if any), and why any of the claims is directed at either. This is patently insufficient under Rule 8(a)(2).[5]

Second, the Complaint is a classic example of a universally-reviled "shotgun pleading." *See, e.g.*, *Weiland v. Palm Beach County Sheriff's Office*, 792 F. 3d 1313, 1320-23 (11th Cir. 2015). For example, it commits what the Eleventh Circuit has called the "mortal sin" of alleging multiple counts where each count adopts the allegations of all preceding counts, causing each successive count to carry all that came before and the last count to be a combination of the entire

[4] Dean's allegations, which the Government incorporates, *see* Complaint at ¶ 1, correctly identify PMP as a subsidiary of Services and an indirect subsidiary of the System. *See* FAC at ¶ 18. In other words, Services is a subsidiary of the System, and PMP is a subsidiary of Services, leaving the System two corporate steps removed from its second-tier subsidiary.

[5] In practical effect, Services and the System are mentioned individually only in the caption of the Complaint, with the collectivized "ETMC" appearing throughout its body. However, "[a] plaintiff cannot state a claim against a defendant [simply] by including the defendant's name in the caption." *Collins v. Kibort*, 143 F. 3d 331, 334 (7th Cir. 1998). Further, the Complaint sets forth no well-pleaded facts that would support treating Services and the System as one entity through piercing of their corporate veils, or otherwise. Again, therefore, the Complaint is deficient under Rule 8(a)(2).

complaint." *Id.* at 1321-22; *see also* Complaint at ¶¶ 166, 170, 175, 178, 183, 185 (each incorporating "each of the preceding paragraphs…."); *see also, e.g.*, *Martinez v. Foster*, 2014 U.S. Dist. LEXIS 44376, *10-16 (E.D. Tex. Feb. 27, 2014) (ordering a more definite statement in response to a shotgun pleading), *adopted*, 2014 U.S. Dist. LEXIS 41808 (E.D. Tex. March 28, 2014). Further, it commits the less serious (in the Eleventh Circuit's view, at least) "sin" of asserting multiple claims against multiple defendants without specifying which defendant(s) are responsible for which acts or omissions, or which of the defendant(s) the claim is brought against." *Weiland, supra*, at 1323; *see also* Complaint at ¶¶ 166-186 (alleging each of the claims for relief against "Defendants" en masse).

"The unifying characteristic of all types of shotgun pleadings," and there are others of which the Government is not guilty (or at least not overly so), "is that they fail to one degree or another, and in one way or another, to give the defendants adequate notice of the claims against them and the grounds upon which each claim rests." *Weiland, supra*, at 1323. The Complaint's generic factual allegations lumping together "ETMC" and PMP cannot and do not globally support all claims for relief against each of these defendants. The defendants are therefore left to sort out for themselves which allegations go to which claims. Worse, since (i) each claim refers to the "Defendants," (ii) Services and the System are treated as "ETMC" throughout the Complaint, and (iii) most of the allegations reference "ETMC" and PMP together, Services and the System are left to guess which claims actually apply to them and why. Again this treatment fails to give fair notice and is insufficient under Rule 8(a)(2). Indeed, it is especially inappropriate in this case because Services and the System had no direct contractual relationship with EMSA, made no representations to Medicare or Oklahoma Medicaid, and received no payments from Medicare or Oklahoma Medicaid, thereby facially negating most of the Complaint's claims against them. The

Court should therefore (i) dismiss the claims against Services and the System, or (ii) order the Government to provide a more definite statement of those claims under Rule 12(e). *See, e.g., Copeland v. Axion Mortg. Group. LLC*, 2016 U.S. Dist. LEXIS 106249, *9-14 (S.D. Miss. August 11, 2016) (dismissing shotgun pleading with leave to amend); *Martinez v. Foster*, *supra*, at *16 (ordering more definite statement).

B. The Complaint Alleges No Violation of the AKS by Services or the System.

As relevant to Services and the System, the AKS forbids "knowingly and willfully offer[ing] or pay[ing] any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person…to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program…." 42 U.S.C. § 1320a-7b(b)(2)(B). Because they are brought as the basis for the Government's FCA claims, the elements of the alleged AKS violations must be pleaded with particularity under Rule 9(b). *U.S. ex rel. Nunnally v. West Calcasieu Cameron Hospital*, 519 Fed. App'x 890, 894 (5th Cir. 2013). For three reasons, the Complaint alleges no plausible AKS violation by Services or the System, and its FCA claims should be dismissed accordingly.

1. The Complaint Fails to Satisfy the Requirements of Rule 9(b) as to Services or the System.

Just as the Complaint fails to satisfy Rule 8(a)'s pleading requirements with respect to Services and the System, it also fails to satisfy the heightened pleading requirements of Rule 9(b). Services and the System are separate, stand-alone corporations. *See* Complaint at ¶¶ 19-20. Directing allegations against them as a single entity labeled "ETMC" fails not only to give fair notice of what each is alleged to have done, but also fails to provide anything resembling the specificity required by Rule 9(b).

Likewise, rather than plead its claims against each defendant with particularity, the Government attributes various payments and other acts to "ETMC" and PMP together. For instance, the Complaint repeatedly alleges that "ETMC and Paramedics Plus" made various payments to or on behalf of EMSA. *See, e.g.*, Complaint at ¶¶ 3, 69-83, 87-88, 92, 95, 103-105, 116. But the Complaint fails to show how Services, the System and PMP collectively made any such payments. As a practical matter, it is implausible that these three separate entities made any of the alleged payments together. The Complaint also repeatedly alleges – again without sufficient factual support – that various payments were "designed to induce Williamson and EMSA to contract with ETMC *and* Paramedics Plus." Complaint at ¶¶ 86, 96 (emphasis added). However, the Complaint only references contracts between PMP and EMSA. Complaint at ¶ 66.

If the Government truly intends to allege that Services and the System participated in a "kickback scheme" in violation of the AKS, then it must plead the elements of the purported violation as to each entity with the particularity required by Rule 9(b). The Complaint manifestly fails to do so, and should be dismissed as a result.

2. The Government Has Failed to Plead a Plausible Violation of the AKS.

As explained in PMP's Motion to Dismiss, the Government's allegations of a purported "kickback" scheme between PMP and EMSA that purportedly dates back to 1998 is implausible. In addition, the Government fails to allege a plausible connection between any of the alleged payments, political contributions or gifts described in the Complaint and any particular patient referral, service referral, or contract.

3. The Complaint Alleges No Intent by Services or the System to Violate the AKS.

"[I]n order to violate the AKS, it is not enough to covet the business of another, there must actually be some bad intent to violate the law." *U.S. ex rel. Jamison v. McKesson Corp.*, 900 F.

Supp. 2d 683, 699 (N.D. Miss. 2012) (citing *United States v. Davis*, 132 F. 3d 1092, 1094 (5th Cir. 1998). As applicable to the Government's allegations against Services and the System, the AKS targets transfers intended to induce the purchase of services for which payment may be made by a program such as Medicare or Medicaid. *See* 42 U.S.C. § 1320a-7(b)(1)(B). The Government alleges that EMSA received payments from Medicare and Medicaid, and that it could not have billed Medicare and Medicaid for ambulance services "without the services provided by…[PMP] personnel." Complaint at ¶ 155. While this may be true, it does not follow that Services or the System intended to violate the AKS (or any law).

The Government's theory that the System and Services intended to induce EMSA into referring Medicare or Medicaid patients or services to PMP is implausible, given that EMSA's contract was with PMP (not the System or Services) and that neither the System nor Services received any direct benefit from EMSA, let alone from Medicare or Medicaid. As the Complaint acknowledges, PMP performed services for EMSA, and EMSA was contractually responsible for paying PMP for those services. PMP was entitled to be paid for services rendered to EMSA whether or not EMSA was able to obtain collections from other sources. PMP, then, did not look to Medicare – or anyone other than EMSA – as the source of any payment for the services it provided. Moreover, the System and Services had no contract with EMSA, and performed no services for EMSA. These facts necessarily belie any intent to violate the AKS (or any other law) on the part of Services and the System.

The Complaint therefore fails to plead an AKS violation as to Services and the System. Consequently, the Government's FCA claims should be dismissed.

C. The Complaint Alleges No Violation of the FCA by Services or the System.

The FCA (as relevant herein) forbids three practices: (i) knowingly presenting or causing to be presented a false or fraudulent claim for payment or approval by Medicare or Medicaid, (ii) knowingly making, using, or causing to be made or used, *false records or statements* material to a false or fraudulent claim, and (iii) conspiring to commit those acts. *See* 31 U.S.C. § 3729(a)(1)(A)-(C) (emphasis added). The Government alleges violations by "Defendants" of all three provisions. *See* Complaint at ¶¶ 166-177. Assuming (for purposes of argument only) that the Government alleged AKS violations by the System and/or Services, the FCA claims against Services and the System should nevertheless be dismissed for the following reasons.

1. The Complaint States No Claim for Violation of § 3731(a)(1)(A).

To state a claim under §§ 3731(a)(1)(A), the Government must allege (i) a false statement or fraudulent course of conduct, (ii) made or carried out with the requisite scienter, (iii) that was material, and (iv) that is presented to the Government. *U.S. ex rel. Steury v. Cardinal Health, Inc.*, 625 F. 3d 262, 267 (5th Cir. 2010). More succinctly, "[a] claim under the FCA requires presentation of a knowingly false claim to the government for payment; *i.e.*, the requirements are a knowing conduct, falsity, and materiality." *U.S. ex rel. Steury v. Cardinal Health, Inc.*, 735 F. 3d 202, 205 (5th Cir. 2013 ("*Steury II*"). The Complaint states no claim against Services or the System for violating § 3731(a)(1)(A).

(i) As noted above, the FCA attaches liability not to underlying fraudulent activity or even the government's wrongful payment, but to the filing of false claims for payment. A core question in FCA cases, therefore, is whether there is a false or fraudulent claim seeking payment from the United States. Indeed, § 3729(a)(1)(A)'s "*sine qua non* is the presentment of a false claim." *Kanneganti, supra*, at 188. *Accord, U.S. ex rel.Wall v. Vista Hospice Care, Inc.*, No. 2016 U.S. Dist. LEXIS 80160, at * 53 (N.D Tex. June 20, 2016) (Lynn, J.) ("Evidence of an actual false

claim is the '*sine qua non* of a False Claims Act violation.'") (citations omitted). The Complaint alleges that EMSA filed false claims, and identifies a smattering of examples. But it does not identify any false claim presented to Medicare or Medicaid by Services or the System, and does not even allege the existence of any such claims. As a result, the Complaint states no claim against Services or the System for actually presenting a false claim to the Government.

(ii) The Complaint does not allege that the System or Services "caused" EMSA to present false claims either. The Complaint alleges that the "*Defendants* knowingly caused to be presented…false or fraudulent claims for payment…in violation of the…[FCA]…." Complaint, at ¶ 168 (emphasis added). As noted above, alleging that "Defendants" collectively violated the FCA runs afoul of Rules 8(a) and 9(b). And while the Complaint fails to meet Rule 9(b)'s requirements with respect to the allegations that Services and the System violated the AKS, it fails all the more to satisfy Rule 9(b) with respect to its claims the Services and the System violated the FCA.

Specifically, the Government's abject failure to comply with Rule 9(b) with respect to causation is fatal to its FCA claims against Services and the System. The Complaint alleges no facts that would support a finding that Services or the System proximately caused EMSA (or anyone else) to file false claims with Medicare or Medicaid. As the Supreme Court recently reminded, the focus of the FCA "remains on those who *present or directly induce the submission of false or fraudulent claims*." *Universal Health Servs. v. U.S. ex rel. Escobar*, __ U.S. __, 136 S. Ct. 1989, 1996 (2016) (emphasis added). Thus, to state a claim against Services and the System for "causing" the filing of false claims by EMSA, the Government must articulate how they "directly induce[d]" the submission of those false claims. Indeed, "[n]umerous courts have held that some level of *direct* involvement in causing the submission of false claims…is necessary for

direct liability under the FCA." *U.S. ex rel. Polansky v. Exec. Health Res., Inc*., Civ. No. 12-4239, 2016 U.S. Dist. LEXIS 102113, at * 91 (E.D. Pa. May 10, 2016) (emphasis added).

Since PMP was a subsidiary of Services (and since Services was, in turn, a subsidiary of the System), Services and the System cannot be directly liable to the Government for causing the submission of allegedly false claims absent participation in the actual claims process: "merely '[b]eing a parent corporation of a subsidiary that commits a FCA violation, without some degree of participation by the parent in the claims process, is not enough to support a claim against the parent for the subsidiary's FCA violation.'" *U.S. ex rel. Hockett v. Columbia/HCA Healthcare Corp.*, 498 F. Supp. 2d 59-60 (D.D.C. 2007) (quoting *U.S. ex rel. Tillson v. Lockheed Martin Corp*., 2004 U.S. Dist. LEXIS 22246, *107 (W.D. Ky. 2004)). The Complaint sets forth *no* facts showing direct (or any) involvement by Services or the System in EMSA's claims-filing process. Nor could it: Services and the System were not involved in EMSA's collection activities--including its claims for reimbursement to Medicare and Medicaid--in any way.[6] Accordingly, if (and to the extent that) the Government alleges claims against Services or the System for direct violations of § 3731(a)(1)(A), then those claims should be dismissed under Rule 12(b)(6). *See also U.S. ex rel. Schaengold v. Mem'l Health, Inc.*, 2014 U.S. Dist. LEXIS 169555, *31-33 (S.D. Ga. Dec. 8, 2014) (holding Government's allegations insufficient to state a claim against parent and other subsidiaries for direct reverse-false claim FCA liability).

(iii) Likewise, any claims that Services or the System are liable under a veil-piercing theory for causing the filing of false claims should be dismissed. While the Government's first claim for relief facially asserts only direct liability (Complaint at ¶¶ 166-169), it incorporates an

[6] In addition, as explained in *Polansky*, *supra*, allegations that a parent corporation benefits financially from its subsidiary or has "overlapping employees, managers or officers" is insufficient to show that the parent is directly liable under the FCA. *Polansky*, *supra*, at *94-*95.

earlier paragraph apparently alleging that "ETMC" is liable under veil-piercing or other theories of derivative liability. *Id.* at ¶ 166 (incorporating paragraph 24). That paragraph alleges that "ETMC" is jointly and severally liable for PMP's actions because PMP and "ETMC" are "affiliated entities governed and controlled by the same individuals and whose operations are inextricably intertwined." *Id.* at ¶ 24. "Specifically," the Complaint continues, "these Defendants share common management, finances, control, and supervision," and "acted in concert to facilitate and cause the submission of false claims to the United States." *Id*. By these conclusory allegations, the Complaint seeks to hold "ETMC" liable for PMP's conduct.

In *U.S. ex rel. DaKort v. Integrated Coast Guard Sys.*, 705 F. Supp. 2d 519 (N.D. Tex. 2010), the court observed that, "[a]lthough not yet addressed by the Fifth Circuit, other…[courts] have held that federal common law (rather than the law of the state where a corporation is incorporated), governs the veil-piercing question in a FCA case." 705 F. Supp. 2d at 546.[7] The rationale for applying federal common law in this context is that the Supreme Court "ha[s] consistently held that federal law governs questions involving the rights of the United States arising under nationwide federal programs." *United States v. Kimbell Foods*, 440 U.S. 715, 726 (1979). The federal public health insurance regimes are such programs, as is the FCA. Hence, in cases such as this, common law claims, including veil-piercing, are governed by federal common law. Under that law, the Complaint is insufficient to state a claim for derivative liability.

[7] *See, e.g., U.S. ex rel. Davis v. Prince*, No. 1:08cv1244, 2011 U.S. Dist. LEXIS 77152, at * 8 (E.D. Va. June 23, 2011) ("In FCA suits, "federal law governs the veil-piercing question."), *citing U.S. ex rel. Kneepkins v. Gambro Healthcare, Inc.*, 115 F. Supp. 2d 35, 39 (D. Mass. 2000) ("The Medicare program and…[FCA] provide the basis for the government's claims; federal law, therefore, controls the veil-piercing question."). *See also, e.g., U.S. ex rel. Powell v. Am. Intercontinental Univ., Inc.*. No. 1:08-CV-2277, 2016 U.S. Dist. LEXIS 127598, at * 23 (S.D. Ga. September 20, 2016) ("Because this is an FCA case, federal law controls the veil piercing question."), *citing U.S. ex rel. Hockett v. Columbia/HCA Healthcare Corp., supra,* at 60.

For example, in *U.S. ex rel. Reagan v. E. Tex. Med. Ctr. Reg'l Healthcare Sys.*, 1999 U.S. Dist. LEXIS 23319 (S.D. Tex. July 20, 1999), *adopted*, 1999 U.S. Dist. LEXIS 23318 (S.D. Tex. Sept. 14, 1999), the relator sued the System and several of its subsidiaries under the FCA based on allegations that one of its subsidiaries, University Park Hospital ("UPH"), allegedly submitted false claims. As here, the relator argued that the court should pierce the corporate veil to hold the System (and certain of its subsidiaries) liable for the actions of the subsidiary. *See* 1999 U.S. Dist. LEXIS 23319 at * 2-6. Also as here, the relator conflated the System and certain subsidiaries into an amalgam ("East Texas") broadly identified as UPH's "parent." *Id.* at *6. In seeking to hold "East Texas" liable for UHP's alleged FCA violations, relator claimed that "East Texas…controlled [UPH's] operations, so that the 'illegal Medicare schemes were designed, promoted, and implemented by the East Texas defendants.'" *Id.* "From these allegations, [the relator sought]…a 'piercing of the corporate veil,' and a finding that East Texas violated the FCA because of actions taken by UPH.'" *Id.*

Observing that the relator claimed "in only the broadest and most conclusory terms that UPH was under the 'direction' and 'control' of its parent, East Texas," the court held that relator's pleadings were "clearly insufficient" under Rule 9(b). *Id.* at *12. Indeed, the court noted that it could not adequately evaluate the 12(b)(6) motion until the relator clarified, among other things, "her allegations regarding the corporate structure of East Texas and UPH…." *Id.* at *13. It therefore ordered her to amend her complaint to state "the basis of her conclusory statements as to the relationship between" East Texas and UPH.[8]

[8] The court's evaluation of the relator's pleadings addressed in one fell swoop the several defects in her allegations. *See* 1999 U.S. LEXIS 23319 at *11-13. We have excerpted from the opinion the statements relevant to the relator's attempt to pierce the corporate veil. The point is that, along with other allegations, the veil-piercing allegations were insufficient under Rule 9(b).

No less should be required here. The Complaint's allegations concerning liability for "ETMC" are just as conclusory, uninformative, and insubstantial as those in *Reagan*. This treatment does not satisfy Rules 8(a) and 9(b), and the Court should therefore reject the Government's veil-piercing allegations.

Schaengold, supra, is also instructive. In that case, the court applied a more substantive analysis in dismissing the Government's veil-piercing claims, observing that "merely being a parent, or an associated corporation, of a subsidiary that commits an FCA violation is insufficient to support an FCA action against the parent or the associated corporation." 2014 U.S. Dist. LEXIS 169555 at *27. "Rather, the Government must demonstrate that the parent and the associated corporations are 'liable under a veil piercing or alter ego theory, or that [they are] directly liable for [their] own role in the submission of false claims.'" *Id.* (quoting *Hockett, supra*, at 60). With respect to veil-piercing, the court noted first that, "[i]n general, federal courts accord separate corporate entities great deference and will disregard the corporate form only in limited circumstances 'when the incentive value of limited liability is outweighed by the competing value of basic fairness to parties dealing with the corporation.'" *Id.* at *7-28 (quoting *Labadie Coal Co. v. Black*, 672 F. 2d 92, 96 (D.D.C. 1982)). In assessing the Complaint, the Court should accord the same strong deference to Service's and the System's corporate forms and dismiss the Government's allegations of joint and several liability.

As explained in *Schaengold*, "[t]he question whether to disregard the corporate form can be expressed as a two-step inquiry." *Id.* at *28. Under this test, "the Government's veil-piercing claims can survive...[the instant] motion to dismiss only if…[the Complaint] alleges facts sufficient to show that (1) there was such unity of interest between…[Services and/or the System and PMP] that…[PMP] had no 'legal or independent significance of…[its] own, and (2) that the

corporate form was used to perpetrate some form of injustice or fraud.'" *Schaengold*, *supra*, at *28 (citation omitted).

The Government has not alleged sufficient facts showing either element. The Complaint does not allege any facts demonstrating that PMP's separate corporate personality did not exist--such as, for example, failure to maintain corporate formalities, undercapitalization, or lack of corporate records. The Complaint is also "devoid of any factual averments tending to show that any injustice would result if the misconduct giving rise to the alleged…[FCA] violations is treated as…[PMP's] alone." *Schaengold*, *supra*, at *31. Hence, "a veil-piercing theory cannot support the Government's…[FCA] claims against…[Services and the System]," and its veil-piercing claims should be dismissed.[9]

(iv) In its separate Motion to Dismiss, PMP sets forth further reasons why the Complaint states no claim for violations of § 3731(a)(1)(A). Services and the System agree with and adopt PMP's arguments, and incorporate them by reference as if set forth herein.

2. The Complaint States No Claim for Violation of § 3731(a)(1)(B).

To adequately plead a claim under subsection (a)(1)(B),the Government must allege that (i) the defendants made a statement in order to receive money from the United States, (ii) the statement was false, and (iii) the defendants knew it was false. The Complaint states no claim against Services or the System for violation of this subsection.

The Government's Complaint fails to identify a specific "false statement or record" made

[9] In *Polansky*, the court considered the first federal requirement for veil-piercing using an eight- factor test suggested by circuit precedent. The Government failed that test--and therefore the first requirement--as well as federal veil-piercing's second requirement. *See Polansky*, *supra*, at * 98-104. In *DaKort*, Judge O'Connor used a 12-factor test suggested by Fifth Circuit precedent in holding that the relator's veil-piercing allegations survived the defendants' motion to dismiss. *See DaKort*, *supra*, at 546-47. The Complaint's minimalist veil-piercing allegations are not comparable to the allegations in *DaKort* and, in fact, are on a par with those in *Reagan*. Thus, the Court should find Complailnt's allegations insufficient under any iteration of the federal veil-piercing test.

or used by either the System or Services, let alone any specifics regarding who made such a statement or when it was made. The Complaint alleges – generally – that "ETMC and Paramedics Plus" submitted Medicare Enrollment Forms (Complaint at ¶ 47), but the Complaint does not allege (or even suggest) that such forms were material to the Government's decision to pay EMSA's Medicare claims, nor does the Complaint identify who submitted the forms, when they were submitted, or any other information about the forms.

The Complaint also states that "ETMC and Paramedics Plus submitted false claims to EMSA under the ambulance services contract." Complaint at ¶ 156. Again, however, the Complaint does not identify any "false claims," nor does it describe when such claims were submitted, who submitted them, or how they were submitted. The Complaint also does not show how such claims were allegedly "false." These vague allegations do not satisfy Rule 9(b).

The Complaint also fails to allege that the System or Services knowingly caused EMSA to submit "false records or statements." 31 U.S.C. § 3729(a)(1)(B). The Complaint generally alleges that EMSA submitted "certification statements" regarding AKS compliance from 1998 through 2005 and that EMSA signed various Medicaid-related contracts in which it agreed to comply with federal statutes. *See* Complaint at ¶¶ 46-58. However, the Complaint does not allege that anyone at Services or the System reviewed, approved, or in any way influenced EMSA's alleged certifications or its Medicaid contracts. *See, e.g., U.S. ex rel. Bennett v. Medtronic, Inc.*, 747 F. Supp. 2d 745, 781 (S.D. Tex. 2010) ("Because the relators have not alleged that Medtronic caused any hospital or physician to certify compliance with the anti-kickback statute, these allegations are dismissed."). Accordingly, the Government has failed to plead a claim against the System or Services with particularity under 31 U.S.C. § 3729(a)(1)(B).

3. The Complaint States No Claim for Violation of § 3731(a)(1)(C).

The Government's third claim for relief is for conspiracy to violate the FCA. *See* Complaint at ¶¶ 175-177. To plead a claim for FCA conspiracy, it must allege (i) "the existence of an unlawful agreement between defendants to get a false or fraudulent claim allowed or paid by the government[,]" and (ii) at least one act performed in furtherance of that agreement. *DeKort, supra*, at 548 (citing *U.S. ex rel. Farmer v. City of Houston*, 523 F. 3d 333, 343 (5th Cir. 2008)). The conspiracy allegations must satisfy Rule 9(b) and, specifically, "'plead with particularity the conspiracy as well as the overt acts . . . taken in furtherance of the conspiracy.'" *Id.* (citing *Grubbs supra*, at 193). The Complaint states no claim against either Services or the System for conspiracy to violate the FCA.

The Government's sole allegation regarding an alleged conspiracy is that "Defendants knowingly conspired with each other and/or their employees and agents to violate 31 U.S.C. §§ 3729(a)(1)(A) and (B) and to defraud the United States by causing federal health care programs to pay for false claims relating to services arranged for through the payment of illegal kickbacks." Complaint at ¶ 176. This allegation is even less particular and more paltry than the conspiracy allegations in *DeKort*, which Judge O'Connor dismissed *sua sponte* under Rules 9(b) and 12(b)(6). *See DeKort, supra,* at 548. The same result should obtain in this case. The Complaint's conspiracy allegations are, at best, "merely a formulaic recitation of the legal elements of conspiracy," and as such should be dismissed accordingly. *Id.*[10]

[10] The FCA conspiracy claim should also be dismissed, at least in part, because, under the intra-corporate conspiracy doctrine, a juridical entity cannot conspire with itself. Thus, a corporation generally cannot conspire with itself, its employees, or its subsidiaries. Services and the System therefore cannot have conspired with PMP, each other, or any of their employees.

D. The Complaint's Common Law Claims Should Also Be Dismissed.

The Government alleges common law claims for (i) fraud, (ii) unjust enrichment, and (iii) payment by mistake. *See* Complaint at ¶¶ 178-186. In addition, it apparently contemplates vicarious liability for "ETMC." *Id.* at ¶ 24. As noted above, the Supreme Court "ha[s] consistently held that federal law governs questions involving the rights of the United States arising under nationwide federal programs." *United States v. Kimbell Foods, supra*, at 726. Thus, because the federal public health insurance regimes and the FCA are such programs, common law claims in FCA cases are governed by federal law. *See U.S. ex rel. Heesch v. Diagnostic Physicians Group, LLC*, 2014 U.S. Dist. LEXIS 71170, *31 (S.D. Ala. April 11, 2014), and cases cited therein, *adopted*, 2014 U.S. Dist. LEXIS 70300 (S.D. Ala. May 22, 2014). Applying federal law, the Complaint's common law claims should be dismissed.

1. The Complaint States No Claim for Common Law Fraud.

The Complaint's fourth claim is for fraud. *See* Complaint at ¶¶ 178-182.[11] The elements of fraud are (1) a misrepresentation or omission; (2) of material fact; (3) made with the intent to defraud; (4) on which the plaintiff relied; and (5) which proximately caused the plaintiff's injury. *Williams v. WMX Techs.*, 112 F.3d 175, 177 (5th Cir. 1997).

The Complaint does nothing more than recite the elements of fraud as to all "Defendants." As explained in PMP's Motion to Dismiss, the Complaint does not allege any actual damages resulting from fraud, which is fatal to the Government's fraud allegation. The Complaint also does not identify any misrepresentation made by the System or Services, let alone the time, place and

[11] A plaintiff in an FCA action may plead alternative common law theories. The Complaint's common law claims, however, are not alleged in the alternative as contemplated by Rule 8(d)(3), and should therefore be dismissed as insufficiently pleaded. But even if those claims are not dismissed, the Government cannot recover on both its FCA and common law claims. Instead, it ultimately may receive only one recovery upon election of its remedy. *See Heesch, supra*, at * 31 n.2.

content of any such misrepresentation or the person who made it. Nor does the Complaint explain how any alleged misrepresentation was material to the Government's decision to pay Medicare or Medicaid claims, or how the Government purportedly relied on such misrepresentations. Likewise, the Complaint does not allege facts showing that either Services or the System intended to defraud the Government. Accordingly, the Government's common-law fraud claims should be dismissed. *See, e.g., Iqbal,* 56 U.S. at 678 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.").

2. The Complaint Fails to Plead Claims for Mistake and Unjust Enrichment.

"Under the common-law theory of payment by mistake, the government may recover money it mistakenly, erroneously, or illegally paid from a party that received the funds without right." *U.S. v. Medica Rents Co.*, 2008 U.S. App. LEXIS 17946, *11-*12 (5th Cir. Aug. 19, 2008). Similarly, "[r]ecovery under unjust enrichment is justified when [the government] obtains a benefit from another by fraud, duress, or the taking of an undue advantage." *Id.*

The Government's mistake and unjust enrichment claims are premised upon Defendants' alleged noncompliance with the AKS and FCA. Complaint at ¶¶ 184, 186. Since the Government has failed to allege violations of either statute against the System or Services, its common-law claims based on such violations should also be dismissed.

Further, to plead a claim for mistake, the Government must show that it made payments under "an erroneous belief that was material to [its] decision to pay." *See Heesch, supra*, at *32 (quoting *U.S. v. Mead,* 426 F.2d 118, 124 (9th Cir. 1970)). As explained in PMP's Motion to Dismiss (which the System and Services adopts and incorporates herein by reference), the Complaint does not sufficiently plead that use of a profit cap is material to the Government's decision to pay Medicare and Medicaid claims.

Finally, the Complaint does not allege, or plead sufficient facts showing, that any funds paid by Medicare and Medicaid to EMSA during the relevant time period flowed to Services or the System, such that the Government can now recoup those funds from the System or Services. Accordingly, the Court should dismiss the Government's common law claims for mistake and unjust enrichment against the System and Services.

V. REQUEST FOR ORAL HEARING

Pursuant to Local Rule CV-7(g) Defendants request an oral hearing on this motion.

PRAYER

For the foregoing reasons, East Texas Medical Center Regional Healthcare Services, Inc., and East Texas Medical Center Regional Healthcare System, Inc. respectfully request that the Court dismiss the Government's Complaint as to all claims against them with prejudice and requests such other and further relief, at law or in equity, to which they may be entitled.

Date: March 27, 2016

Respectfully submitted,

By*: /s/ Otis Carroll*
Otis W. Carroll, Jr.
State Bar No. 03895700
Collin M. Maloney
State Bar No. 00794219
Mandy Nelson
State Bar No. 24055270
IRELAND, CARROLL & KELLEY, P.C.
6101 S. Broadway Ste. 500
Tyler, TX 75703
(903) 561.1600
otiscarroll@icklaw.com
cmaloney@icklaw.com
mnelson@icklaw.com

T. John Ward
State Bar No. 20848000
WARD, SMITH, & Hill PLLC

1127 Judson Road, Suite 220
Longview, TX 75601
(903) 757.6400
tjw@wsfirm.com

Michael C. Coker
ADAMS & COKER, P.C.
State Bar. No. 04527100
4540 Kinsey Drive
Tyler, TX 75703
(903) 581.1196
mikecoker@adams-coker.com

Scott E. Stevens
State Bar No. 00792024
David P. Henry
State Bar No. 24027015
STEVENS | HENRY
P.O. Box 3427
Longview, Texas 75606
Telephone: (903) 7536760
Fax: (903) 753-6761
scott@stevenshenry.com
david@stevenshenry.com

Kyle J. Nelson
State Bar no. 24056031
NELSON LAW FIRM
5380 Old Bullard Rd., Ste 600-187
Tyler, Texas 75703
(903) 561-8449
kyle@knelsonlaw.com

CERTIFICATE OF SERVICE

By my signature below, I do hereby certify that on March 27 2017, a true and correct copy of the foregoing Motion was filed using the Court's electronic filing system, which will provide notice to all parties of record, specifically:

Josh M. Russ
James Gillingham
United States Attorney's Office
Tyler Office
110 North College, Ste. 700
Tyler, Texas 75702

By: */s/ Otis W. Carroll*
Otis W. Carroll