Nos. 16-17059

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

THOMAS BINGHAM, Relator, *ex rel.* United States of America and Florida,

Qui Tam Plaintiff-Appellant

vs.

HCA, INC.

Defendant-Appellee

Appeal from the Honorable Marcia G. Cook
United States District Court Judge
Southern District of Florida, Case No. 13-23671-Civ-MGC

OPENING BRIEF

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STATEMENT REGARDING ORAL ARGUMENT

Relator Thomas Bingham desires oral argument. This appeal involves three federal statutes (False Claims Act, Anti-Kickback Statute and Stark law) intended to protect against fraud on federal funds, a complex factual record of agreements between a hospital defendant and developers of two medical office buildings, and multiple points of contentions between the parties. Relator believes oral argument would aid the Court's decisional process.

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JURISDICTION

Subject matter jurisdiction in the district court for this action under the False Claims Act, 31 U.S.C. §§3729 *et seq.*, is predicated upon 28 U.S.C. §1331 and §1345, as well as 31 U.S.C. §3730 and §3732(a) and (b); and supplemental jurisdiction over relator's claims under the Florida False Claims Act, Fla. Stat. Ann. §68.081 *et seq*, is pursuant to 28 U.S.C. §1359.

This appeal is from the Judgment of the district court disposing of all claims dated November 4, 2016, ECF 203, following entry of an order of dismissal, ECF 202, on October 14, 2016, and an Omnibus Order granting partial summary judgment, ECF 183, entered on April 11, 2016.

Jurisdiction here over the district court's judgment is predicated on 28 U.S.C. §1291. Notice of appeal, ECF 204, was timely filed November 10, 2016.

ISSUES PRESENTED

1. Under the Anti-Kickback Statute, Medicare claims by hospitals are prohibited when the hospital directly or indirectly pays physicians, if one purpose was to induce referrals. Must HCA be denied summary judgment, in light of substantial evidence it subsidized Centerpoint medical office building to induce referrals by physician tenants?
2. Under the Stark Statute, Medicare claims by hospitals are prohibited when the hospital directly or indirectly pays physicians, unless an exception applies. Must HCA be denied summary judgment, in light of substantial evidence of an unbroken chain of remuneration which took into account the value of referrals and other business for HCA?
3. Under Rule 15 of the Federal Rules of Civil Procedure, the district court granted leave to file a second amended complaint to supplement claims involving Aventura Hospital. Did the court err when it ignored newly pleaded facts and dismissed those claims under Rule 9(b)?

STATEMENT OF THE CASE

A. Statutory Background

Relator Thomas Bingham brings this action in the name of, and on behalf of, the United States and Florida, pursuant to the *qui tam* provisions of the federal and Florida False Claims Acts, 31 U.S.C. §3729 *et seq.*; Fla. Stat. Ann. §68.081 *et seq.* In the second amended complaint, ECF 104, he alleges defendant HCA violated the Anti-Kickback Statute, 42 U.S.C. §1320a-7b(b) ("AKS"), and Stark Statute, 42 U.S.C. §1395nn ("Stark"), by arranging for compensation to referring physicians at Centerpoint Medical Center ("Centerpoint") and Aventura Hospital and Medical Center ("Aventura") through subsidies paid to developer/landlords of medical office buildings at its hospital campuses. Relator seeks to hold HCA liable under the False Claims Act for claiming Medicare funds in violation of AKS and Stark.

1. Anti-Kickback Statute

AKS was enacted in 1972 to proscribe improper remuneration in the context of federal health care programs. Among other aspects, the statute makes it a felony to "knowingly and willfully" offer or pay remuneration in exchange for a referral of service for which payment may be made under a Federal health care program." 42 U.S.C. §1320a-7b(b). Remuneration includes "any kickback, bribe or rebate," and broadly applies to anything of value provided "directly or indirectly, overtly or covertly, in cash or in kind." *Id.* §1320a-7b(b)(1), (2).

Congress intended AKS to be a critical tool in the fight against health care fraud. *See* H. Rep. 95-393, 95th Cong., 1st Sess. at 44, *reprinted in* 1977 U.S.C.C.A.N. 3039, 3047 (fraud "cheats taxpayers who must ultimately bear the financial burden of misuse of funds in any government sponsored program"). "The statute has been broadly interpreted to cover any arrangement where *one purpose* of the remuneration is to obtain money for the referral of services or to induce future referrals." *United States ex rel. Bartlett v. Ashcroft*, 39 F. Supp. 3d 656, 676 (W.D. Pa. 2014) (original emphasis). *Accord United States v. Greber*, 760 F.2d 68, 72 (3d Cir. 1985) ("If the payments were intended to induce ... the statute was violated, even if the payments were also intended to compensate for professional services"); *United States v. Borrasi*, 639 F.3d 774, 782 (7th Cir. 2011) ("Each circuit to actually reach the issue has rejected the primary motivation theory"); *United States v. McClatchey*, 217 F.3d 823, 835 (10th Cir. 2000) (agreeing with the "sound reasoning in *Greber*"); *United States v. Davis*, 132 F.3d 1092, 1094 (5th Cir. 1998) (AKS is violated when benefits extended partially to induce patient referrals); *United States v. Kats*, 871 F.2d 105, 108 (9th Cir. 1989) (AKS violated if "'one purpose of the payment was to induce future referrals'").

AKS is violated even when payment is made at fair market value, or when there exists a legitimate business purpose for the payment. HHS – OIG states:

> Importantly, under the anti-kickback statute, neither a legitimate business purpose for the arrangement, nor a fair market value payment, will legitimize a payment if there is also an illegal purpose (*i.e.*, inducing Federal health care program business). [70 Fed. Reg. 4858, 4864 (Jan. 31, 2005).]

See 69 Fed. Reg. 32,012, 32,018-32,019; *Bartlett*, 39 F. Supp. 3d at 677.

AKS recognizes certain exclusions – called "safe harbors" – from the broad definition of "remuneration." *See* 42 U.S.C. §1320a-7b(b)(3). These safe harbors "apply only in very specific instances," *United States v. Shaw*, 106 F. Supp. 2d 103, 113 (D. Mass. 2000), to "exempt[] only a small subset of such transactions," *United States v. Bay State Ambulance & Hosp. Rental Serv., Inc.*, 874 F.2d 20, 31 (1st Cir. 1989). "To receive protection, a business arrangement must fit squarely within a safe harbor; substantial compliance is not enough." *United States ex rel. Westmoreland v. Amgen, Inc.*, 812 F. Supp. 2d 39, 47 (D. Mass. 2011). *See* 54 Fed. Reg. 3088 ("In order for a business arrangement to comply with one of the exemptions set forth [in the regulations], each provision of that exemption must be met"). Defendants have the burden of establishing each element of the safe harbor is met. *Westmoreland*, 812 F. Supp. 2d at 80; *Bartlett*, 39 F. Supp. 3d at 676. Moreover, since the focus is on substance over form, even if "the requisite intent to willfully or knowingly solicit or offer a kickback is present, formal compliance with a safe harbor is not sufficient to avoid liability under the Anti-Kickback Statute." *Westmoreland*, 812 F. Supp. 2d at 48.

Relevant here, AKS regulations contain a safe harbor provision for space rentals. 42 C.F.R. §1001.952(b). To qualify, payments must be (1) "by a lessee to a lessor *for the use of premises*," (2) pursuant to a lease agreement that "is set out in writing and *signed by the parties*," (3) where the "aggregate rental charge is *set in advance*," (4) "is *consistent with fair market value* in arms-length transactions," (5) "is not determined in a manner that *takes into account the volume or value of any referrals or business otherwise generated between the parties* for which payment

may be made in whole or in part under Medicare, Medicaid or other Federal health care programs"; and (6) *"does not exceed that which is reasonably necessary to accomplish the commercially reasonable business purpose* of the rental." *Id*. (emphasis supplied).

With respect to "fair market value," safe harbor regulations state value "shall not be adjusted to reflect the additional value that one party (either the prospective lessee or lessor) would attribute to the property *as a result of its proximity or convenience to sources of referrals or business otherwise generated* for which payment may be made in whole or in part under Medicare, Medicaid and all other Federal health care programs." *Id*., at (b)(6) (emphasis supplied).

2. Stark Statute

Congress passed Stark to eliminate the corrupting influence of money on medical decision-making. Enacted by amendment to the Medicare statute in 1989, Stark establishes a clear rule the United States will not pay for any "designated health services" ("DHS") referred by a physician having a "financial relationship" with an entity, unless the relationship satisfies an applicable exception. 42 U.S.C. §§1395nn(a)(1), (g)(1). *See United States v. Rogan*, 459 F. Supp. 2d 692, 711 (N.D. Ill. 2006), *aff'd*, 517 F.3d 449 (7th Cir. 2008). "The Stark Law is intended to prevent 'overutilization of services by physicians who [stand] to profit from referring patients to facilities or entities in which they have a financial interest.'" *United States ex. rel. Drakeford v. Tuomey*, 675 F.3d 394, 397 (4th Cir. 2012) (citation omitted). *See generally United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 901-02 (5th Cir. 1997) (discussing origins of Stark); *Council for Urological Interests v. Sebelius*, 946 F. Supp. 2d 91, 94-95 (D.D.C. 2013) (same).

Stark is a strict liability statute with no *scienter* requirement. Any amounts reimbursed by Medicare for services furnished in violation of Stark must be repaid.

See §1395nn(g)(1); 42 C.F.R. §411.353(d); *Drakeford*, 675 F.3d at 397-98; *Rogan*, 517 F.3d at 453. Once the United States, or a relator suing on its behalf, proves a financial relationship exists, defendants bear the burden of proving requirements for an applicable exception have been met. *Drakeford*, 675 F.3d at 405; *Rogan*, 459 F. Supp. 2d at 716.

In the Stark statute, "financial relationship" includes any "compensation arrangement," defined as "any arrangement involving any remuneration between a physician . . . and an entity." Section 1395nn(h)(1)(A). "Remuneration," in turn, is defined in the statute, as "any remuneration, directly or indirectly, overtly or covertly, in cash or in kind." Section 1395nn(h)(1)(B).

The statute defines an exception to liability for "rental of office space," §1395nn(e)(1)(A), similar to the AKS safe-harbor provision for space rentals. *See United States ex rel. Kosenske v. Carlisle HMA, Inc.*, 554 F.3d 88, 91 (3d Cir. 2009) (two provisions are "substantially identical"). Among other things, this exception requires (1) payments be made "for the *use of premises*," (2) pursuant to a lease set out in writing, *signed by the parties*," (3) "rental charges ... are *set in advance*, are *consistent with fair market value*," (4) "are not determined in a manner that *takes into account the volume or value of any referrals or other business generated between the parties*," and (5) "the lease would be *commercially reasonable even if no referrals were made* between the parties" (emphasis added).

In stating other exceptions, the statute uses "directly" or "indirectly," usually in conjunction with each other; but for purposes of liability, it makes no distinction between compensation arrangements. Stark regulations distinguish between the two types, stating an "indirect compensation arrangement" exists if:

> (i) Between the referring physician ... and the entity furnishing DHS there exists an *unbroken chain* of ... persons or entities that have financial relationships ... between them (that is, each link in the chain has either an ownership or investment interest or a compensation arrangement with the preceding link);

> (ii) The referring physician ... receives *aggregate compensation* from the person or entity in the chain with which the physician ... has a direct financial relationship that varies with, *or takes into account, the volume or value of referrals or other business generated by the referring physician for the entity furnishing the DHS*, ... [and]
>
> (iii) The entity furnishing DHS has actual *knowledge of, or acts in reckless disregard or deliberate ignorance of, the fact* that the referring physician ... receives aggregate compensation that varies with, or takes into account, the volume or value of referrals or other business generated by the referring physician for the entity furnishing the DHS. [42 C.F.R. §411.354(c)(2) (emphasis supplied).]

This regulatory definition is then referenced in the exception for indirect "financial relationships" in 42 C.F.R. §411.357(p). As stated there, "indirect compensation arrangements, as defined at §411.354(c)(2)" are excepted, if among other requirements, (1) the "compensation received by the referring physician ... is fair market value for services and items actually provided and not determined in any manner that takes into account the volume or value of referrals or other business generated by the referring physician for the entity furnishing DHS;" (2) the "compensation arrangement ... is set out in writing, signed by the parties, and specifies the services covered by the arrangement;" and (3) the "compensation arrangement does not violate the anti-kickback statute ... or any Federal or State law or regulation governing billing or claims submission."

3. The False Claims Act

"The False Claims Act is the primary law on which the federal government relies to recover losses caused by fraud." *McNutt ex rel. United States v. Haleyville Med. Supplies, Inc.*, 423 F.3d 1256, 1259 (11th Cir. 2005). Known originally as "Lincoln's Law," the Act was passed during the Civil War, providing for damages and penalties against those who falsely or fraudulently claim federal funds**.** In 1986, Congress amended the Act, to make it "the Government's primary litigative

tool for combating fraud" "in modern times." S. Rep. No. 99-345, at 2, 1986 U.S.C.C.A.N. 5266. *See also* H. Rep. No. 99-660, at 18 (1986) (Act "used as the primary vehicle by the Government for recouping losses suffered through fraud" and it is "important that it be an effective tool for recouping these losses").

In 2009, Congress declared the reinvigorated Act "[o]ne of the most successful tools for combating waste and abuse in Government spending." S. Rep. No. 111-10, at 10, 2009 U.S.C.C.A.N. 430, 437. Since 1986, more than $31.1 billion was recovered under the Act from the healthcare industry, "which has seen an explosion in the size of its government-funded programs, and in the fraud against them." *See* Oversight of the False Claims Act, Hearing Bef. Subcomm. on the Constit. and Civil Justice, H. Comm. on the Judiciary, 114th Cong. (2016).[1]

Qui tam provisions, §3730(b), authorize private persons to "stand in the shoes of the government" and enforce the statute's proscriptions. This provision "is a powerful tool that augments the government's limited enforcement resources by creating a strong financial incentive for private citizens to guard against efforts to defraud the public fisc." *United States ex rel. Totten v. Bombardier Corp.*, 286 F.3d 542, 546 (D.C. Cir. 2002).

Under the False Claims Act, damages and penalties are imposed on any person who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval" to the United States government, or who "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim" to the United States, §3729(a)(1)(A) & (a)(1)(B). "Knowingly" is defined as "actual knowledge," "reckless disregard," or "deliberate ignorance" of the truth or falsity of the information, and the Act expressly requires "no proof of specific intent to defraud," §3729(b)(1).

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[1]Statement of Sen. Grassley, Chairman, available in the Senator's news release at https://www.grassley.senate.gov/news/news-releases/grassley-false-claims-act-our-most-important-tool-fight-fraud-against-taxpayers.

Violations of AKS and Stark form the predicate for violations of the False Claims Act. Because HCA certifies compliance, any misrepresentations in connection with those certifications rendered false any claims for reimbursement HCA submitted to federal healthcare programs. *See Kosenske,* 554 F.3d at 94 ("Falsely certifying compliance with the Stark or Anti-Kickback Acts in connection with a claim submitted to a federally funded insurance program is actionable under the FCA"). Moreover, Congress made this link directly in 2010, when it amended AKS. Adopting the prior view of a majority of circuits, *see United States ex rel. Wilkins v. United Health Group, Inc.*, 659 F.3d 295, 313-14 (3d Cir. 2011), Congress clarified "a claim that includes items or services resulting from a violation of this section constitutes a false or fraudulent claim for purposes of [the False Claims Act]." Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, §6402(f), 124 Stat. 119 (*codified at* 42 U.S.C. §1320a-7b(g)).

B. Background on HCA as Defendant in False Claims Act Cases Involving Stark and AKS, and as Signatory to Corporate Integrity Agreement

HCA is a leading health care services provider, comprised of approximately 165 hospitals and 115 outpatient surgery centers. ECF 85 at 4, ¶15; ECF 104 at 6, ¶15. It owns and operates Centerpoint, located in Independence, Missour., and Aventura, located in Aventura, Florida. ECF 104 at 9, ¶¶21-24. HCA does not come into this litigation with a clean slate; it has a long history of sanctions, penalties and fines for kickbacks, self-referrals and unnecessary medical procedures. Dating back to its predecessor forms, government entities, *qui tam* plaintiffs and others have initiated dozens of civil and criminal prosecutions against HCA, leading to nearly $2 billion dollars paid in settlements. *See* ECF 104 at 6-9, ¶¶17-20; ECF 85 at 4, ¶16.

As a result of improper relationships with referring physicians, the United States in 2000 imposed affirmative obligations on HCA through a Corporate Integrity Agreement ("CIA"). Until it expired in 2009, the CIA required HCA to:

- Identify physician relationships with the greatest risk of noncompliance, including examination of leases of medical office buildings, *see* CIA,[2] at 87;
- Retain professional independent third-party medical office buildings managers, who certify compliance requirements, *id*., at 88;[3]
- Conduct internal audits of "payments to physicians without documentation of services rendered," *id*.;
- Report annually all physician relationships that constituted reportable events as determined either by the legal department, the Internal Audit Department, or a public accounting and/or law firm Independent Review Organization, *id*. *See* ECF 104 at 50-51; ECF 85 at 2, 13.

Failure to satisfy a CIA's reporting obligation – paired with CIA-mandatory certifications of compliance – violates the False Claims Act. *See United States ex rel. Matheny v. Medco Health Solutions*, 671 F.3d 1217, 1224 (11th Cir. 2012).

C. Background on Relator Bingham

Relator Bingham is a certified real estate appraiser with over 30 years of experience. ECF 104, at 5-6. Since 2005, relator was employed with Holladay Properties, one of the country's largest third party management firms for medical office buildings. Most of his workload consisted of conducting market rent and fair market value analyses and studies. *Id*.

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[2]*See* Corporate Integrity Agreement Between the Office of Inspector General of the Dep't of Health & Human Servs. and HCA–The Healthcare Company, available at http://oig.hhs.gov/fraud/cia/agreements/the_hc_co_121400.pdf

[3]Independent managers are required to sever the hospital control and influence over lease terms, so that remuneration is not paid to referring physicians in the hopes for future referrals. "[W]here an entity leases space to a physician at a rental price that is substantially below fair market value, it may raise the inference that the below market rent was in exchange for future referrals, including referrals made beyond the expiration of the lease." 72 Fed. Reg. 38122, 38183.

While employed at Holladay Properties, Bingham witnessed a scheme by HCA to circumvent the CIA, and funnel kickbacks to referring physicians at Parkridge Medical Center, an HCA hospital in Chattanooga TN. *See* ECF 162-18 at 8, ¶8. Holladay had been hired by HCA to conduct a market rent study on fair market value for an office space leasing arrangement at a medical office building (MOB) on the Parkridge campus. When Bingham's market value study reached conclusions not to HCA's liking, the hospital hired Hap Duncan – who is not a certified appraiser – to arrive at different valuations. When Bingham refused to compromise his professional responsibilities, HCA terminated its contract. *Id*.

Applying his personal knowledge and expertise, Bingham concluded HCA developed a complex scheme to pay and obscure kickbacks and thereby avoid CIA scrutiny, through complicated financial relationships with physician tenants. After retaining counsel and conducting his own investigation, he served as relator in a *qui tam* action against HCA involving Parkridge, United States *ex rel.* Bingham v. HCA, No. 1:08-CV-71 (E.D. Tenn). In that action, the Government partially intervened, and HCA settled, paying the United States $16.5 million.

While the Tennessee case was pending, Bingham joined claims against HCA involving a medical office building it subsidized on campus in Largo, FL *See* ECF 44-1. Bingham learned HCA used a below-market ground lease and free parking garage with the developer, Greenfield Group, to indirectly remunerate referring physician tenants. Relator discovered HCA entered into a 99-year ground lease with Greenfield that was valued at 6-8 times the lump sum payment for the lease. Greenfield then sold the building at a substantial profit for referring physicians serving as Greenfield secret limited partners. ECF 104, at 35-36, ¶¶163-170 & nn. 43 & 44. Relator learned Greenfield regularly worked with HCA to develop medical office buildings, completing between 12 and 15 Florida-based projects since 1999, including the medical office building at Aventura. *Id*., ¶171.

Before terminating its contract, HCA also had Holladay Properties perform a market rent study on the Centerpoint medical office building, developed through third party Tegra. ECF 104, at 15, ¶50. Based on his participation as a Holladay employee, but also upon review of the records, Bingham concluded HCA had manipulated the Centerpoint market rent study, to cover up lucrative payments to physician tenants through cash flow agreements. HCA omitted disclosure of the cash flow agreements when it arranged for the Centerpoint rent study; it obtained a broker's price opinion from the same non-appraiser (Hap Duncan) rather than an actual market study; and it directed a Holladay employee – who did not perform the study – to alter the study conclusion, after the fact. *See* ECF 162-2 (testimony of investigator Doris Modglin), ¶¶8-26; ECF 162-18, ¶¶9, 43, 47-48.

As a result of his investigation, Bingham concluded HCA had entered into unlawful schemes to remunerate physicians tenants at HCA's Centerpoint and Aventura hospitals, directly, and indirectly through third party developers Tegra and Greenfield, in violation of AKS, Stark, the False Claims Act and the CIA.

D. Procedural History

Bingham filed his initial *qui tam* complaint under seal, serving the complaint and disclosure statement on the United States, pursuant to §3730(b)(2). ECF 1. Relator alleged HCA "purposefully employed a confusing trail of complex real estate transactions" in the development of a MOB at Aventura, during the "period in which the [CIA] remained in effect," resulting in lucrative remuneration to referring physician tenants in violation of Stark and AKS. *Id.*, ¶2. Although it had a significant amount of information – including detailed recitations of ground leases and agreements – the complaint lacked a succinct, narrative statement of facts. *See id.*, at 12-20. Bingham did, however, articulate HCA's scheme to subsidize the Greenfield development, affording sale profits and lucrative parking easements and rights to referring physicians. *Id.*, ¶¶19, 31-32, 38-40.

While under seal, Bingham filed a first amended complaint, adding claims involving physicians at Centerpoint. ECF 14 at ¶¶44-102. He also added allegations on violations of the CIA, ¶¶144-165; Medicare claims from referring physician tenants, ¶¶167-192; and corporate knowledge and control, ¶¶200-205. Relator's Aventura allegations, ¶¶103-143 – listing much information but lacking in narrative – remained relatively unchanged. On requests by the United States, the seal was extended to February 23, 2015, when intervention was declined. ECF 22.

After the first amended complaint was unsealed, relator and HCA jointly moved for a partial stay of discovery, while the Court resolved HCA's anticipated motion to dismiss. Both parties stated they "expect discovery to be extensive and involve significant volumes of documents," and both suggested a complex case track. ECF 32, at 2; ECF 33, at 3; and ECF 36. Judge Cooke denied the stay, struck the parties' proposed schedule, assigned the case to a standard track, and set short deadlines, including fact discovery cutoff 205 days from the date of the scheduling order. ECF Nos. 34, 35 and 37.

In August 2015, HCA moved to dismiss the amended complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. HCA argued relator failed to state Stark or AKS violations, applying Rules 8 and 9(b) pleading standards. In September, relator opposed the motion, and filed additional records, including the Aventura ground lease and agreements. ECF Nos. 44, 44-7, 44-8 & 45-1.

While the fully-briefed motion was pending, to meet the district court's deadlines, the parties exchanged document requests and engaged in discovery disputes, providing HCA opportunities to object to the burden of discovery, and to argue over the adequacy of its responses. *E.g.*, ECF 55, at 5 (HCA opposition to motion to extend deadlines, on grounds relator "has already received documents from the two entities involved with development of the Aventura building"); ECF 56, at 6-7 (HCA motion for protective order, to limit scope of discovery); ECF 57-

4, at 6 (HCA objections to discovery of physician referral data, on the grounds relator must first establish Stark violation); ECF 62, at 5 (HCA reply on motion for protective order, seeking to bar discovery into Aventura physician tenants' interests in Greenfield projects); ECF 68, at 5 (opposing motion to compel production of records on Greenfield agreements); and ECF 81, at 2 n.1 (opposing motion related to interrogatories addressing Aventura). Before the magistrate judge, HCA prevailed on objections to discovery; and before Judge Cooke, HCA prevailed opposing relator's motions for relief from the scheduling order. *See* ECF 70 (denying motion to extend deadlines); ECF 71 (same); ECF 93 (granting HCA protective order on discovery); ECF 94 (denying relator's motion to compel).[4]

On January 28, 2016, the motion to dismiss was granted in part, and denied in part. ECF 66. Judge Cooke found Bingham's Centerpoint allegations sufficient. Under Stark, she addressed whether physician remuneration must vary with the volume or value of referrals, and concluded Bingham satisfied that standard.

> HCA's argument that Relator failed to plead facts suggesting that any physician's lease rate changed or varied with the amount of referrals it made to an HCA hospital is flawed in that it misapprehends the issue. As Relator points out, it is impossible to conceive of any defendant foolish enough to expressly state in a lease agreement that the rental amount shall change or vary with the amount of referrals made to an HCA hospital. Instead, Relator outlines a much more nuanced scheme wherein physician tenants draw a profit that varies with the size of their leased office space, which in turn, could plausibly vary based on the volume or value of patient referrals. [*Id*., at 10.][5]

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[4]On appeal, relator does not assign error to these discovery and scheduling orders. If he prevails, however, discovery would reopen, and Bingham on remand would be entitled to learn of any financial agreements between referring physicians at the Aventura medical office building and Greenfield's many corporate forms.

[5]With respect to AKS, the court found Bingham's allegations, "considered as a whole," presented a scheme to remunerate physicians through "a variety of financial benefits," were sufficient to establish "an intent to induce" referrals, and demonstrated HCA acted "knowingly and willfully." *Id*., at 11-12.

The court dismissed Bingham's Aventura claims with leave to amend. It noted relator provided "details regarding a parking easement, lists various memoranda and declarations filed with Miami-Dade County, and include[d] names of physician tenants." But Bingham failed "to fully explain how these facts interconnect to form a scheme to defraud the United States." *Id.,* at 13-14.

In footnote 2, the court stated relator tacitly acknowledged the relative lack of detail he provided, because he cited "to information not included in his complaint to bolster his argument regarding the sufficiency of his Aventura allegations" in response to the motion. *Id*., at 13. At the conclusion, the order read:

> As to Relator's Aventura allegations, Defendant's Motion to Dismiss is **GRANTED** with leave to amend. If Relator seeks to amend his First Amended Complaint, he must file a Second Amended Complaint within seven (7) days of the date of this Order. [*Id*., at 14.]

On February 11, 2016, HCA filed an answer and affirmative defenses, solely with respect to the alleged Centerpoint scheme. ECF 85.

Relator intended to amend, timely, but counsel misapplied the rule extending time after service, and Bingham was required to request relief from the court. *See* ECF Nos. 72, 73-1, 74-1 to 74-3, 75-1 to 75-5, 76-1 to 76-8. HCA opposed, in part arguing relator should not be permitted to amend with information about Aventura learned through discovery. ECF 79, at 8-12. On March 7, 2016, Judge Cooke granted the motion, without limitation on the scope of relator's amendment. ECF 102. Relator then filed his second amended complaint. ECF 104.[6]

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[6]In light of the protective order, ECF 51, and to avoid a dispute over HCA's designations, relator filed the complaint and exhibits under seal, stating he "does not agree with such designations." ECF 103, at 2. Relator also filed a redacted version. ECF 105. As set forth more fully in ECF 197, relator contends no judicial records in this case should be sealed from the public. Further, contrary to the opinion of the court below, counsel's redactions do not correspond in fine detail to information learned through discovery; and indeed, principal allegations in the redacted version were pleaded in the first amended complaint. *See infra*, at 39.

On March 9, 2016, the district ordered parallel track briefings. ECF 113. HCA thereafter filed a motion for partial summary judgment on Centerpoint, with supporting pleadings, ECF Nos. 115-118, 120-130; and an "Omnibus Motion to Dismiss Aventura-Based Allegations and Strike Impermissible Facts," ECF Nos. 151 & 189. Bingham opposed, filing a motion to strike expert testimony, ECF Nos. 187; opposition to summary judgment, ECF 159, counter statement of facts, ECF 159-1, and exhibits, ECF 162; and opposition to the motion to dismiss, ECF 177.

E. Dispositions Below

1. Partial Summary Judgment on Centerpoint Claims

At the conclusion of oral argument, after a brief recess, Judge Cooke granted HCA's motion for partial summary judgment on Centerpoint, making a record of her decision. ECF 195, at 60:12-63:18. *See* ECF Nos. 182 & 183.

a. The District Court Put the Burden of Disproving HCA's Affirmative Defenses On Relator

Although liability boils down to whether HCA is entitled to protections of an AKS safe harbor or Stark exception – both affirmative defenses – the district court thought it was deciding issues of relator's *prima facie* case. ECF 195, at 60:16-18. *See id*., at 44:3-5 ("they don't have a burden. You have the burden. All they got to do is show up and answer my questions"). This followed an erroneous argument of HCA's counsel that relator had the burden, even on matters of fair market value. *See, e.g.*, *id*., at 18:9-11 ("in order to prevail here the Relator really has to show you that there's a non-fair market value transaction in both links in the chain").[7]

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[7]At the hearing, HCA's counsel also argued, erroneously, relator was required to prove essential elements of an AKS violation "beyond a reasonable doubt." *Id*., at 17:9-10. *See United States ex rel. Cairns v. D.S. Med. LLC*, 2014 U.S. Dist. LEXIS 157574, at *2-3 (E.D. Mo. 2014) (following the rulings of other district courts, applying preponderance of evidence standard to civil False Claims Act cases predicated on AKS violations).

b. The District Court Granted Summary Judgment on AKS, Because HCA "Made Good Business Sense"

Judge Cooke did not address the "one purpose" legal standard under AKS. Nor did she discuss implications of the CIA's requirement of audits and disclosure of financial relationships with physicians. *Id.*, at 49:20-50:6; *see supra*, at 8-9.

Instead, the judge held no "specific-intent violation" could be established where HCA had legitimate business reasons for its actions. *Id.*, at 62:8.

> Whatever deal there is, whatever benefits, are not between HCA and any doctors. It's between HCA and Tegra, wanting to get a building built, that was in the regular course of their business judgment and they should be allowed to make it. [*Id.*, at 62:20-24.]

This too was urged by HCA's counsel. *See id.*, at 19:22-20:1 ("the fact that the hospital does something that it hopes and expects will result in referrals, is not a violation of [AKS] so long as there's legitimate business reasons for the arrangement that don't have anything to do with the referrals").

To Judge Cooke, "it makes good business sense to have doctors located near a medical facility," precisely because of the referrals. *Id.*, at 20:5-6. One colloquy between Bingham's trial counsel and the judge is particularly revealing:

> [MR. KRONER:] HCA put many millions into this building. Why? What was HCA's motivation to put money -- to put millions and millions of dollars into this building?
>
> THE COURT: Because they wanted to have doctors close by who would give them referrals.
>
> MR. KRONER: Exactly.
>
> THE COURT: But that's not a violation of the statute.
>
> MR. KRONER: Well, we -- we disagree.
>
> THE COURT: I mean, HCA -- HCA has decided whether there's buildings close or far that it's a good business decision ... [*Id.*, at 46:8-18.]

Absent evidence of "non-fair market value of the rent," "condition benefit" for sale profits; "physicians [] pressured to refer" or referrals "contrary to any sort of medical judgment," the court below granted summary judgment. *Id.*, at 63:1-5.

c. The District Court Granted Summary Judgment on Stark Because it Concluded HCA Did Not Intend to Benefit Physicians or Influence Referrals

With respect to Stark, the court approached its decision from the framework of the regulatory exception for indirect compensation arrangements. At the first step, it found an "unbroken chain" of financial relationships between HCA and referring physicians. *Id*., at 61:8-11. But at the second step, the court stated:

> Does the compensation, the link in the chain closest to physician vary with or take into account the volume or value of the referrals from HCA?
>
> The answer's no. [*Id*., at 61:12-15.]

In explaining her understanding of the inquiry, Judge Cooke rejected what she described as an inference relator had purportedly requested, that "a good deal for Tegra and the development of this space" must have "benefitted the doctors and the relationship between HCA and the physicians." *Id*., at 61:16-21. Earlier, she explained this view as an assumption Stark requires proof of inducement:

> But don't you have to relate back in some way the inducements to the fact that the referrals were increased based upon the inducement to rent? And is there evidence of somehow the volume, nature, quantity, size of the referrals increasing because of the inducement?[8]

Then, based on a misunderstanding of a defense exhibit,[9] without citation to specific evidence, the court concluded HCA was entitled to summary judgment:

> the record shows that the level of referrals for the individual doctors in this case was way less than 15 percent, so there was no reason for HCA to say that there was some intent on their part to influence these rental agreements or these relationships in any way. [*Id*., at 62:1-4.]

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[8]*Id*., at 39:21-25. *See also id*., at 47:1-10 ("I would agree ... HCA gave Tegra a great deal ... because they wanted to have a medical office building on their property. But there's no ... Tinkers-to-Evers- to-Chance connection ... such that it influenced the doctors").

[9]Page 4 of HCA's demonstrative exhibit listed "cash flow payouts" to referring physicians, expressed as a percentage of their total rent. Judge Cooke mistakenly believed the exhibit stated Medicare referral rates. *See id*., at 40:7-19, 42:12-19.

2. Dismissal of Aventura Claims in Second Amended Complaint

Without oral argument, Judge Cooke dismissed Bingham's Aventura claims. ECF 202. Although she previously granted leave, twice, to file a second amended complaint and thus supplement allegations, her recitation of facts relating to Aventura copies directly from her prior ruling on the first amended complaint. *Compare* ECF 202, at 1-4, *with* ECF 66, at 6-8. Bingham's actual second amended complaint, ECF 104, was mentioned only in a footnote. ECF 202, at 1-2 n.1.

As it explained, the court ignored facts alleged in the second amended complaint, because Bingham purportedly learned them through discovery on HCA. *Id*., at 7-8. Holding the Act "grants a right of action to private citizens *if* they have independently-obtained knowledge of fraud on the government,"[10] the court deemed it "impermissible" for Bingham to plead facts he did not know when he filed his first amended complaint. *Id*. (emphasis supplied). Several courts have declined to relax Rule 9(b) standards to allow discovery on deficient complaints, but Judge Cooke became the first in the country to hold a relator is precluded under Rule 9(b) from pleading facts already known and obtained through discovery.

In dismissing the first amended complaint, Judge Cooke noted Bingham had additional information to supplement his pleadings, but in her order of dismissal, none of that information was considered. Nor did the judge distinguish between information learned through HCA and information learned in the government's investigation. Instead, she assumed relator's over-redacted complaint, ECF 105, represented the extent to which relator could plead his Aventura claims without relying on information that was learned through discovery on HCA. *See infra* at 39 (addressing overlap between first and second amended complaints on core facts).

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[10]Citing §3730(e)(4)(B), the "original source" exception to a public disclosure bar. As amended, the bar excepts a relator "who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions."

F. Statement of the Facts

1. Centerpoint Scheme

In September 2004, HCA planned a replacement hospital and medical office building ("MOB") in Independence, Missouri. From the outset, HCA intended to increase hospital utilization, and thus increase claims on federal health programs, by passing remuneration to referring physicians who would lease MOB space. ECF 117, Exh. 1, at 29136-37. HCA intended to finance and subsidize the developer Tegra, but it hid those costs "off-balance-sheet." *Id*., at 29133, 29145. Disclosure could have triggered scrutiny under the CIA. ECF 104, ¶¶ 250-256.[11]

In June 2005, HCA and Tegra entered into: an unrecorded 99-year ground lease, which included a parking easement of 9.5 acres, for $1.78 million; and a development agreement, ECF 14-8, which required HCA to subsidize the MOB with parking maintenance and space leases. ECF 104, ¶¶50-56, 92. Agreement on the lease price had already been reached "early on." ECF 162-19, at 36:22–37:5.

From day one, HCA planned for Tegra to pay sale profits to physicians through "cash flow" agreements. ECF 118, Exh. 8, at 46:1-47:4. HCA controlled who was allowed in, and thus which physician groups economically beneficial to HCA would profit. Tegra manager Matt Jensen wrote:

> For the past few months we have been working closely with Dana Posey, the [HCA] physician services director, to make sure that we are **only pursuing those physicians that benefit the hospital economically.** In doing this, we have been somewhat selective with those with whom we have discussed the building. As we move forward with the project, we will likely need to broaden our view and include more physicians into this contact pool. At the same time, we will continue working with Dana **to assure that the hospital approves of those will be occupying space in the building**."
> [ECF 122, Exh. 18, at 2983 (emphasis supplied).]

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[11]Tom Ramsey, HCA's senior real estate consultant, testified independent appraisals were required of the financial relationships under the CIA. ECF 162-3, at 112:2-5. He agreed "intended tenants mostly were going to be physicians who mostly would be referral sources." *Id*., at 18:14-19:18, 163:8-15.

Jensen listed the physician groups "that benefit [HCA] economically" and reported discussions with physician interest in "ownership," even though no physician investment was contemplated. *Id.*, at 2985. Jensen used spreadsheets – showing projected tenant profits upon sale of the MOB – in sales pitches to potential physician group tenants. ECF 162-19, at 138:19-140:5.[12]

HCA funded Tegra with subsidies, well above the value of $1.78 million paid for the lease. Fair market value, including the parking easement, was $4.38 million. ECF 162-1. HCA also rented space it never intended to occupy, through "burn-off" leases, obligating HCA to pay up to $8.37 million, and ensuring strong and positive cash flow. These leases added an estimated $1.4 million to the deal. ECF Nos 162-3, at 52:6-21; 162-3; 162-4; 162-5 and 162-18, at ¶28.

HCA subsidized Tegra in several other ways. HCA provided maintenance after burn-off leases expired, ECF 162-19, at 50:12-50:14. It paid for grading, paving and parking lot improvements, city-mandated landscaping and subsequent maintenance, and off-site street access. ECF 118, Exh. 9, at 28961-62, 28965-66. Under the terms of project approval, HCA was to "be fully reimbursed by the developer" for these off-balance-sheet subsidies, ECF 117, Exh. 1, at 29139, but no record exists any of these costs were repaid.

Tegra, in turn, paid significant remuneration to referring physician tenants. First, the proposed lease rate was "at the low end of the new construction market rates." ECF 122, Exh. 18, at 2982. More significantly, physicians with cash flow agreements were paid immense sums after the MOB and parking easement sold in 2012 for $50 million. Physician tenants were paid $7.82 million in sale profits, with a list of payoffs that closely tracks physicians thought from the start would "benefit [HCA] economically". *Compare id.*, at 2985, *with* ECF 162-10.

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[12]Emails between Tegra and HCA's lawyers, often copied to Ramsey, show HCA directed the terms and conditions of the Cash Flow Participation Agreements. ECF Nos. 162-7 & 162-11; ECF 162-18, ¶37 (citing records of discussions).

HCA also arranged for direct non-cash remuneration to physicians. MOB leases contained special use restrictions; but HCA granted waivers at no charge, so referring physicians could use restricted equipment, and make more money. ECF 162-15. Similarly, HCA paid for improvements to "burn-off" lease offices it never intended to occupy, and then turned them over to referring physicians at no fee, saving them the cost of improvements. ECF 162-18, at 14-16, ¶32.

MOB physician tenants referred patients to HCA for DHS, leading to more than 154,000 claims on federal health programs and the payment to HCA of over $370 million in federal funds. ECF 162-17, at ¶6.

From the start, HCA not only knew what it was doing, it knew that what it was doing complied with neither the law nor the CIA.[13] In December 2004, HCA lawyer Barrett Sutton advised: "Obviously, no physician investors is the safest approach from a regulatory point of view." ECF 162-7, at 1. HCA went ahead with plans anyways, since "this deal started with intention of having [physician] investors." *Id*. In early 2005, Tegra became nervous about its own exposure, in the event the "off-balance sheet" finances were put back on. Internally, HCA admitted to using Tegra to enter into financial relationships with referring physician tenants, because it could not "do it." ECF 162-5, at 2 ("As we could not do it, MD participation was a major reason we invited [Tegra] to this location").[14]

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[13]In light of HCA's "regulatory problems," executives were "very thoroughly schooled" on compliance requirements. ECF 162-3, at 17:17-18:12.

[14]Rather than conduct an appraisal – as required – HCA conducted a fraudulent, non-appraisal "market rent study," without disclosing the cash flow agreements. *See* ECF 162-2; *supra*, at 11. After the fact, Sutton described the inaccuracies of the study – which had already been signed, altered and re-signed – and said it would be better to call the sale profit pay-outs "distributable cash." ECF 162-7, at 40. *See* also ECF 162-6, at 70-74, 78-80, 83-87, 96-97 (HCA rent study not an appraisal, did not consider parking improvements, burn off leases or cash flow); ECF 162-9, at 139-141, 158-159 (Holladay partner describing value of burn-off lease and previous case of HCA pressuring Bingham to alter rent study).

2. Aventura Scheme

In 2004, HCA planned to build a MOB at Aventura. ECF 104, ¶110. From the outset, it intended to use low lease rates and target "A-list" physician groups who would refer patients to Aventura. *Id.*, ¶¶111-120.[15] HCA financed and subsidized Greenfield, the developer, through a ground lease and development agreement. Initially, HCA conveyed the ground lease for $1, a parking easement at no cost, a "sponsorship" agreement, a lease agreement (for more than 20% of the building's rentable space) and a guarantee. *Id.*, ¶124.

In 2005, the lease price was increased to $1,875,000, but HCA allowed Greenfield to defer payment. *Id.*, ¶¶128-131. Even if Greenfield paid up front, it was grossly under market, taking into account land value, parking rights, use restrictions and obligations in the development agreement. *Id.*, ¶¶133-145.[16] In 2007, Greenfield sold the MOB, leasehold interest, and parking easements for approximately $25.4 million. *Id.*, ¶145. Based on substantial information – set forth in the operative pleading – Bingham believes, and therefore alleges, profits were paid to physician tenants who partnered with Greenfield. *Id.* ¶¶162-177.

In addition to indirect payments through Greenfield, HCA provided direct remuneration to referring physician tenants. This included free parking rights and benefits, *id.*, ¶¶178-197; below market rents – with even lower rates and higher improvement allowances for higher volume referrers, *id.*, ¶¶198-220; subsidized common area maintenance, *id.*, ¶¶221-233; and use permissions at no charge, *id.*, ¶¶234-246. All these measures were designed by HCA executives at headquarters, and were contrary to CIA obligations and certifications. *Id.*, ¶¶247-269, 308-316.

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[15]A reason for the Aventura MOB was to "fill it full of physicians who refer patients to the hospital." ECF 162-16, at 36:6-15. *See* ECF 104, ¶¶155-161.

[16]HCA's sponsorship agreement – developed by the same HCA executives active in the Centerpoint and Largo schemes – required HCA to provide financial support for MOB rents, guaranteeing a profit on sale. *Id.*, ¶¶146-154).

G. Legal Standards

Rulings below granting summary judgment on Centerpoint claims and dismissing Aventura claims under Rule 12(b)(6) are reviewed here *de novo*. *Shuford v. Fidelity National Prop. & Cas. Ins. Co.*, 508 F.3d 1337, 1341 (11th Cir. 2007); *Int'l Stamp Art, Inc. v. United States Postal Serv*., 456 F.3d 1270, 1273 (11th Cir. 2006) (*per curiam*); *United States ex rel. Clausen v. Lab. Corp. of Am.*, 290 F.3d 1301, 1307 n.11 (11th Cir. 2002).

"Summary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' Once the moving party has properly supported its motion for summary judgment, the burden shifts to the nonmoving party to 'come forward with specific facts showing that there is a genuine issue for trial.'" *Int'l Stamp Art*, 456 F.3d at 1273-1274 (citations omitted). Where, as here, the "movant bears the burden of proof on an issue, because, as a defendant, it is asserting an affirmative defense, it must establish that there is no genuine issue of material fact as to any element of that defense." *Id*.

Under Rule 12(b)(6), the Court accepts as true facts alleged in the operative complaint. *Clausen*, 290 F.3d at 1303 n.2. Rule 9(b) requires "circumstances constituting fraud" be stated with particularity. Relator satisfies Rule 9(b) if the complaint sets forth "facts as to time, place, and substance of [HCA's] alleged fraud, specifically the details of the [HCA's] allegedly fraudulent acts, when they occurred, and who engaged in them." *Hopper v. Solvay Pharms., Inc.*, 588 F.3d 1318, 1324 (11th Cir. 2009). Where, as here, type of fraud alleged does not depend on medical or billing content in particular claim forms, Rule 9(b) focus is on the acts giving rise to the tainted health care claims. *See United States v. Health Mgmt. Assocs*., 591 F. App'x 693, 703-05 (11th Cir. 2014).

SUMMARY OF ARGUMENT

This Court should reverse summary judgment under AKS. Below, the court erred when it required relator to negate fair market value, show bribes influenced referrals, and prove referrals against medical judgment. Sufficient record evidence exists for a jury to find HCA knowingly paid direct and indirect remuneration – including low-end rents, improved offices, restricted use waivers and huge sale profits – with the intent to induce future referrals from physician tenants.

Inducement was one purpose of the remuneration scheme. Bingham establishes wrongful intent through inference from circumstances, with direct statements, and by the fact HCA knowingly circumvented the Corporate Integrity Agreement. Judge Cooke's "one good business reason" defense turns the "one purpose" doctrine on its head. HCA cannot rely on an AKS safe harbor. Physician payments were not pursuant to a lease for use of premises, signed by the parties, set in advance, consistent with fair market value, or determined in a way that did not reflect the value HCA placed on physician tenant business. Without a safe harbor, in light of record evidence on Bingham's *prima facie* case, it was error to grant summary judgment to HCA under AKS.

This Court should also reverse summary judgment under Stark. Again, the court below erred on the law: neither intent nor inducement are elements of the law. Bingham readily meets *prima facie* burdens, by proving the financial relationships between HCA and physician tenants. Based on statutory text, as well as the logic and structure of the regulations, this Court should hold HCA has the burden of proving an indirect compensation exception. Here, substantial evidence shows an "unbroken chain" of payments, which were based on HCA's subjective valuation of the business that would be generated by MOB physician tenants.

Finally, this Court should reverse dismissal of Aventura claims. Bingham's second amended complaint satisfies the "nuanced, case by case" approach in this

Circuit to Rule 9(b). Applying the Rule, no court other than the one below has ever ignored pleaded facts because information was learned through discovery. Some courts decline to *relax* Rule 9(b) *to allow* discovery on a deficient complaint, but courts that have considered Judge Cooke's rule, have rejected it.

Allowing parties to amend based on information obtained through discovery is common and well established. Judge Cooke here declined to stay discovery, requiring relator to redouble pre-trial efforts, and expressly granted leave, twice, to supplement the allegations. No basis exists in the text of the False Claims Act or purposes of federal rules to bar pleading of discovered facts. Indeed, to limit a relator's ability to amend to meet Rule 9(b) would the Act. Here, Bingham was able to plead essential facts of the Aventura scheme on information known to him when he filed his First Amended Complaint.

In sum, it is not a "fishing expedition" with the catch already on the hook.

ARGUMENT

I. This Court Should Reverse the Grant of Summary Judgment to HCA on Bingham's Centerpoint Claims under AKS

A. Substantial Evidence Supports Bingham's *Prima Facie* Case

Under AKS, the court below assigned Bingham *prima facie* responsibilities to negate fair market value, to show bribes in fact influenced referring physicians, and to prove referrals were against medical judgment. None of these factors is part of the United States' *prima facie* burdens. *See Westmoreland*, 812 F. Supp. 2d at 80 (burden of proof on safe harbor protection lies with defendant) ; *Bartlett*, 39 F. Supp. 3d at 676 (same); *United States v. Patel*, 17 F. Supp. 3d 814, 830 (N.D. Ill. 2014) ("Whether the physician's judgment is actually compromised or costs to Medicare are actually increased in a particular instance is irrelevant"); *United States ex. rel. Nowak v. Medtronic, Inc.*, 806 F. Supp. 2d 310, 354 (D. Mass. 2011) (distinguishing AKS from medical device context, where "individual health care provider's medical judgment is an essential element").

Applying correct standards, Bingham provides more than sufficient evidence for a jury to find HCA knowingly and willingly offered and paid remuneration to physician tenants at Centerpoint, with intent to induce referrals.

1. Indirect Remuneration Was Paid to Referring Physicians

Substantial evidence demonstrates HCA paid indirect compensation to referring physician tenants. It financed and subsidized the MOB, adding millions of dollars in value through "burn-off" leases and parking rights. Through Tegra, it arranged for referring physicians to get low-end rents, improved offices, restricted use waivers and huge payments of sale profits. Judge Cooke found this evidence sufficient to demonstrate an "unbroken chain" of remuneration between doctors and HCA under Stark. ECF 195, at 61:8-11. Ignoring prohibition against indirect compensation, however, she failed to see the inevitable, if routine, sad lexicon of "Tinkers-to-Evers-to-Chance." *Id*. 47:1-10.

2. One Purpose was to Induce Referrals

Substantial evidence demonstrates one purpose of the remuneration scheme was to induce future referrals to HCA's Centerpoint hospital. In her prior ruling, Judge Cooke found Bingham's allegations sufficient to establish HCA acted "knowingly and willfully," with "an intent to induce" referrals. ECF 66, at 11-12. Those same allegations received overwhelming evidentiary support, sufficient to resist summary judgment. *See Bartlett,* 39 F. Supp. 3d at 676 (AKS covers "any arrangement where *one purpose* of the remuneration is to obtain money for the referral of services or to induce future referrals") (original emphasis); *supra*, at 2.

In this case, HCA's wrongful intent is established in three ways. First, circumstances overwhelmingly point in that direction. Wrongful intent "often must be inferred from circumstantial evidence." *United States v. Nosrati-Shamloo*, 255 F.3d 1290, 1292 (11th Cir. 2001). "Juries may use common sense to evaluate the evidence and make reasonable inferences from it." *United States v. Cunningham*,

54 F.3d 295, 299 (7th Cir. 1995). *See United States ex rel. Gonzalez v. Fresenius Med. Care N. Am.*, 761 F. Supp. 2d 442, 456 (W.D. Tex. 2010).[17]

With HCA's approval, Tegra offered and paid doctors a share of the cash flow, including sale profits. HCA provided Tegra with excess funds and subsidies, well above market value. It knew from every dollar added to Tegra's cash flow, a percentage would be paid to physician tenants. In turn, MOB physician tenants referred more than 154,000 claims, leading to over $370 million in federal funds.

Even Judge Cooke was convinced by the logic of these circumstances. Answering counsel's query as to HCA's motivation for putting "millions and millions of dollars into this building," the court stated: "Because they wanted to have doctors close by who would give them referrals." ECF 195, at 46:8-12.

Second, HCA's own documents provide direct evidence of its intent to induce future referrals. In its project approval memorandum, the hospital's development was discussed hand-in-hand with MOB's development. ECF 117, Exh. 1, at 29138. Utilization projections were based on the additional medical groups that would move into the MOB and refer patients. *Id.*, at 29136. To meet "Volume and Financial Assumptions," HCA required "admissions" (*i.e*. referrals). *Id.,* at 29148. Under the heading Volume and Financial Assumptions, HCA wrote: "a substantial time and effort will be made to redirect physician splitters to the new facility from St. Mary's Hospital of Blue Springs." *Id.*

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[17]Courts infer wrongful intent from circumstances in other contexts. *Genentech, Inc. v. Trs. of the Univ. of Pa.*, 871 F. Supp. 2d 963, 976-77 (N.D. Cal. 2012) (intent to induce patent infringement); *City Bank v. Compass Bank*, 717 F. Supp. 2d 599, 622-23 (W.D. Tex. 2010) (intent to induce contract breach); *Smith v. Lockheed-Martin Corp*., 644 F.3d 1321, 1328 (11th Cir. 2011) (discriminatory intent); *Delgado v. Lockheed-Ga. Co., Div. of Lockheed Corp.*, 815 F.2d 641, 644 (11th Cir. 1987) (same); *Standard Oil Co. v. United States*, 221 U.S. 1, 57-59 (1911) ("intent to do wrong" under common law).

Records also show intent to fill the MOB full of referring physicians. HCA considered cash flow participation agreements to be tenant "inducements." ECF 162-3, at 18:14-19:18, 163:8-15; ECF 162-7, at 35. An HCA executive admitted this purpose in reference to Aventura. ECF 162-16, at 36:6-15. HCA retained approval rights over MOB tenants, and ensured only groups who "benefit the hospital economically" were given the inducements. ECF 122, Exh. 18, at 2983. On this record of direct evidence, a jury could find an unlawful purposes.

Third, when it built the MOB "off-balance sheet," its CIA required audits and independent property managers. Because "this deal started with intention of having" physician investors, against the advise of its lawyers, HCA still arranged for doctors to enjoy cash flow from the subsidized MOB. ECF 162-7, at 1. HCA failed to disclose terms of these agreements to Holladay for appraisal. ECF 162-2. In sum, evidence of HCA's actions, taken while the hospital was governed by the CIA, is sufficient for a jury to find "knowing and willful" violations of AKS.

B. There Is No "Good Business Sense" Defense under AKS

Judge Cooke flipped the "one purpose" doctrine on its head. She agreed HCA gave Tegra a great deal, to get doctors close who would refer patients, but concluded "that was in the regular course of their business judgment and they should be allowed to make it." ECF 195, at 62:20-24. To Judge Cooke, if it "makes good business sense" it does not violate AKS. *Id.*, at 20:5-6, 37:11-12; 46:8-18. Thus, according to the court below, one unlawful purpose is insufficient to violate AKS, and one good purpose is a defense.

Not only does the district court's rule overturn the "one purpose" doctrine, it comes to the inquiry from the wrong perspective. According to Judge Cooke, it made good business sense to build the MOB – like one might want a Target or McDonald's nearby, to "get business." *Id.*, at 19:6-18. But of course, it is not *HCA's point of view* that counts. An AKS violation "cheats taxpayers who must

ultimately bear the financial burden." H. Rep. 95-393, 95th Cong., 1st Sess. at 44. Whether or not it makes money – and therefore makes "good business sense" – to pay bribes and kickbacks, and therefore "get business," it is a violation of AKS, and fraud to claim federal and state program dollars knowing that to be the case.[18]

C. HCA is Unable To Satisfy AKS Safe Harbor Requirements

To the extent there were legitimate business reasons or fair market value transactions, HCA must satisfy all of the requirements of the AKS safe harbor for space rentals, 42 C.F.R. §1001.952(b). Viewing evidence in light favorable to relator and placing the burden of proof on HCA, the hospital fails in many respects.

- Payments must be pursuant to a lease agreement, "by a lessee to a lessor *for the use of premises*." Here, cash flow agreements were not leases for use of the premises, they were separate, severable financial conveyances of interests in the building's "operating cash flow." On their face, they state they are not "part of the Lease Agreement." ECF 14-1, at 1.
- Payments must be under a lease agreement that "is set out in writing and *signed by the parties*." Here, Tegra and many doctors did not sign the cash flow agreements at the time they entered their leases. ECF 162-19, at 138:4-139:19.
- Aggregate rental charges must be "*set in advance*" and "*consistent with fair market value* in arms-length transactions." Here, cash flow payments were not set in advance. ECF 122,

[18]Judge Cooke's determination that "physicians did not receive anything other than fair market value" – resoundingly, a disputed fact – also is not a defense under AKS. *See* 70 Fed. Reg., at 4864; 69 Fed. Reg., at 32,019; *Bartlett*, 39 F. Supp. 3d at 677. Record evidence shows HCA had Tegra set leases "at the low end of the new construction market rates." ECF 122, Exh. 18, at 2982. Even if one could conclude – against the record – doctors received "fair market value," a triable issue over low rents within the market range precludes summary judgment.

Exh. 15, at 6, n.5 ("amount of sale proceeds was highly uncertain. Tenants would have been highly unlikely to be able to estimate the sale payment or in what year it would occur"). Moreover, substantial evidence precludes a finding of fair market value transactions. *Supra*, at 10, 20.

- Aggregate rental charges must not be "determined in a manner that *takes into account the volume or value of any referrals or business otherwise generated between the parties*." Here, the value of physician tenants – especially those who "benefit [HCA] economically" – and the expected resulting increase in utilization, figured prominently in HCA's consideration. ECF 122, Exh. 18, at 2983; ECF 117, at 29136-37.

Without a safe harbor, it was error to grant summary judgment under AKS.

II. This Court Should Reverse the Grant of Summary Judgment to HCA on Bingham's Centerpoint Claims under Stark

A. Stark Requires Proof of Neither Intent nor Inducement

It was error for the district court to require relator to prove HCA intended to induce referrals, and its compensation scheme caused physician tenants to refer patients. ECF 195, at 39:21-25, 61:16-21, 62:1-4. Neither of these is an element of Stark. Stark's rule is clear: the United States will not pay for DHS referred by a physician with whom HCA has a "financial relationship." This leaves no room for inquiries into intent or inducement. 42 U.S.C. §§1395nn(a)(1), (g)(1); 42 C.F.R §411.353(d); *Drakeford*, 675 F.3d at 397; *Rogan*, 517 F.3d at 453.

B. Elements of Indirect Compensation, Defined in Regulations, Apply to Exceptions, Not Relator's *Prima Facie* Case

Elements of indirect compensation constitute an exception to Stark liability, and are not part of *prima facie* burdens. *Compare United States ex rel. Baklid-Kunz v. Halifax Hosp. Med. Ctr.*, 2012 U.S. Dist. LEXIS 36304, *12-13 (M.D. Fla.

2012) (relator need not set out whether relationship is direct or indirect), *with United States ex rel. Singh v. Bradford Reg'l Med. Ctr.*, 752 F. Supp. 2d 602, 626-27 (W.D. Pa. 2010) (logical structure of Stark and regulations suggest "the proper order is to first determine whether an indirect compensation arrangement exists ... before turning to the question of whether an exception applies").[19]

Section 1395nn(h)(1)(A) does not distinguish between direct and indirect relationships. Regulations do, however. *See* 42 C.F.R. §411.354(c)(2) (defining indirect compensation arrangements). Below, the court considered the regulation's elements to be Bingham's responsibilities. For several reasons, this was in error.

First, the Stark statute, not a regulation, controls. Regulations may not narrow the ambit of a statutory proscription, absent a basis in the text. *See*, *e.g.*, *John Hancock Mut. Life Ins. Co. v. Harris Tr. & Sav. Bank*, 510 U.S. 86, 109 (1993) (regulation at odds with "Congress' words of limitations" exceeded the scope of ambiguity in statutory exemption). Here, §1395nn(h)(1)(B) refers to "any remuneration, directly or indirectly, overtly or covertly, in cash or in kind," but no statutory limitation is placed on prohibited indirect compensation arrangements, other than express exceptions. Indeed, the statute prohibits *any* non-excepted remuneration to a referring physician, indicating an intent to prevent limitations. Other statutory references to "directly" or "indirectly" concern Stark exceptions. *See* §1395nn(e)(2), (3) & (5), (i)(1)(C) & (D).

Second, Stark regulations themselves place indirect compensation schemes in the category of exceptions. Although §411.354(c)(2) defines the arrangements, nowhere else in the regulations is liability fixed on meeting that definition. Instead, indirect compensation arrangements are defined for purposes of the exception in §411.357(p). *See Baklid-Kunz*, 2012 U.S. Dist. LEXIS 36304 at *12-13.

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[19]Even under *Singh*, "there is no fair market value analysis at the first stage of determining whether an indirect compensation arrangement exists." *Id.*

Finally, it is against logic to adopt a rule requiring proof of an element as part of a *prima facie* burden that negates the possibility of a statutory exception. In meeting §411.354(c)(2)(ii), relator would need to prove compensation took into account the value of physician referrals or other business between the parties. To qualify under §411.357(p), however, HCA must show compensation received by the referring physician is "*not* determined in any manner that takes into account the volume or value of referrals or other business generated by the referring physician for the entity furnishing DHS" (emphasis supplied). If it were the United States' burden to establish the "volume or value" standard for indirect compensation arrangements, then in every case, no exception for indirect financial relationships under §411.357(p) could ever be found.

C. Substantial Evidence Shows Direct Remuneration, and an Unbroken Chain of Indirect Payments, to Referring Physicians

As set forth in the statement of facts, and recounted under the banner of AKS, substantial evidence demonstrates HCA created financial relationships through the Centerpoint MOB, resulting in direct and indirect remuneration to referring physician tenants. In addition to "burn-off" leases and parking easements, HCA arranged for referring physicians to get low-end rents, improved offices, use waivers and huge payments of sale profits. Judge Cooke found this sufficient to demonstrate an "unbroken chain" of remuneration. ECF 195, at 61:8-11.

D. HCA Took Into Account the Value of Referrals and Other Business Generated by Physician Tenants

On whomever the burden of proof is placed, substantial record evidence exists for a jury to find HCA took into account the value of referrals and other business for the hospital. From its planning, HCA intended to fund the MOB "off-balance sheet," induce physicians who would "benefit [HCA] economically" to become tenants, and to thereby meet its hospital utilization projections. HCA poured money up front into the development, ensuring it would shower referring

physicians at the other end. From a subjective perspective,[20] as Judge Cooke agreed, HCA funded the MOB because it "wanted to have doctors close by who would give them referrals." ECF 195, at 46:8-12.

These facts place HCA's financial relationships with physician tenants squarely within Stark's prohibition. *See Drakeford*, 675 F.3d at 408-409 ("compensation based on the volume or value of anticipated referrals implicates the volume or value standard"); *Singh,* 752 F. Supp. 2d at 622 ("'anticipated referrals' are a proper consideration under the Stark Act"). Contrary to the argument pressed by HCA, even fixed compensation – which does not "vary" with the volume referrals – are implicated in Stark, when considerations otherwise reflect their value. *See Drakeford*, 675 F.3d at 409; *Singh,* 752 F. Supp. 2d at 621.

E. HCA Had Knowledge of the Financial Relationships It Created

HCA not only knew about the financial relationships with physician tenants, it knew the financial relationships were subject to Stark and the CIA. HCA's own lawyers advised against having physician investors, and yet, HCA real estate executives went forward with the Centerpoint MOB scheme. Under these facts, a jury could find HCA had the requisite *scienter* to violate Stark.

F. HCA is Unable To Establish a Stark Office Space Exception

As with the AKS safe harbor, HCA is unable to find refuge in the Stark exception for "rental of office space" under §1395nn(e)(1)(A). Payments pursuant to cash flow agreements were *not* for "use of premises;" were *not* "pursuant to a lease set out in writing, signed by the parties," were *neither* "set in advance" nor "consistent with fair market value;" and *were* "determined in a manner that takes into account the volume or value of any referrals or other business generated between the parties." On its face, the Stark exception is not available to HCA.

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[20]As noted in agency commentary, declining "to revise the definition of 'indirect compensation arrangement'" and use an "objective test," under Stark the subjective "intent of the parties" controls. 73 Fed. Reg. 48434, 48696.

III. This Court Should Reverse the Dismissal of Bingham's Aventura Claims Pleaded in the Second Amended Complaint

A. Bingham's Second Amended Complaint Satisfies Rule 9(b)

In his second amended complaint (ECF 104), relator satisfies requirements of Rule 9(b). Bingham alleges the details of HCA's scheme to remunerate referring physician at Aventura, by subsidizing the MOB development through Greenfield. HCA uses Greenfield for the same scheme on other HCA hospital campuses, and this was exposed in Bingham's earlier successful *qui tam* suit in Tennessee. HCA targeted "A-list" physician groups, and funded the MOB through sub-market value transfers, parking easement, sponsorship, and its own lease for non-existent space. By HCA's own admission, a reason was to "fill [the MOB] full of physicians who refer patients to the hospital." Bingham alleges HCA passed profits to physician partners of Greenfield when the building sold for $25.4 million in 2007. Further, HCA paid physician tenants *direct* remuneration in the form of free parking rights and benefits, below market rents and improvements (which varied with the volume of referrals), common area maintenance, and use waivers.

Bingham states dates, location and substance of the fraud, satisfying the more "nuanced, case-by-case approach" under Rule 9(b) followed by the Circuits, including this Court. *See Health Mgmt.,* 591 F. App'x 693 at 704.[21]

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[21] *See United States ex rel. Duxbury v. Ortho Biotech Prods., L.P.*, 579 F.3d 13, 30 (1st Cir. 2009); *United States ex rel. Joshi v. St. Luke's Hosp., Inc*., 441 F.3d 552, 556-557 (8th Cir. 2006); *United States ex rel. Bledsoe v. Community Health Systems,* 501 F.3d 493, 506 (6th Cir. 2007); *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 190 (5th Cir. 2009); *United States ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849 (7th Cir. 2009). Twice, a more exacting standard – rejected by this Court, *see Clausen*, 290 F.3d at 1312 & n.21 – was presented to the Supreme Court, with the United States weighing in against it. *See* Brief of Solicitor General in United States *ex rel*. Nathan v. Takeda Pharmaceuticals North America, Inc., No. 12-1349, at 10, 14-16 (rigid rule would "hinder the ability of *qui tam* relators to perform the role that Congress intended them to play in the detection and remediation of fraud against the United States").

B. The District Court Erred When It Ignored Facts Alleged in Plaintiff's Second Amended Complaint

Applying Rule 9(b), no court other than Judge Cooke has ever ignored pleaded facts because information was learned through discovery. Some courts have declined to *relax* Rule 9(b) *to allow* discovery on a deficient complaint, but those cases involved pre-discovery dismissals. *E.g. United States ex rel. Atkins v. McInteer*, 470 F.3d 1350 (11th Cir. 2006); *Clausen,* 290 F.3d at 1313; *United States ex rel. Karvelas v. Melrose-Wakefield Hosp*., 360 F.3d 220, 228-31 (1st Cir. 2004). Courts that have considered the argument have rejected it.

For example, in *United States v. Omnicare, Inc*., 2013 U.S. Dist. LEXIS 75696, *17-18 n.9 (N.D. Ga. 2013), the court expressly addressed this Court's language in *Atkins*, but held neither "*Atkins* nor any other authority cited ... holds that a plaintiff is precluded from pleading facts that it already has obtained in discovery." As a result, "any allegations in the Third Amended Complaint based on facts learned in discovery in this case may, in this case, be considered." *Id*.

In *Remmes v. Int'l Flavors & Fragrances, Inc.*, 453 F. Supp. 2d 1058, 1071-72 (N.D. Iowa 2006), the court noted there is "no prohibition on the use of the material unearthed during discovery," and Rule 15 "contains no restriction on the use of information garnered through discovery in framing an amendment." *Id*.

> Therefore, in the absence of any legal authority which would permit the court to selectively exclude those portions of the Second Amended Complaint which were added following discovery and then proceed to analyze the legal sufficiency of plaintiff Remmes's fraudulent concealment claim based on his pre-discovery knowledge and allegations, the court will proceed to conduct its analysis of the Second Amended Complaint without redaction. [*Id*.]

See also United States ex rel. Knapp v. Calibre Sys., 2012 U.S. Dist. LEXIS 63456 (C.D. Cal. 2012) (relator may amend with information learned through discovery).

"Allowing parties to amend based on information obtained through discovery is common and well established." *Fru-Con Constr. Corp. v. Sacramento*

Mun. Util. Dist., 2006 U.S. Dist. LEXIS 94421, at *15-16 (E.D. Cal. 2006). *See M.H. v. Cty. of Alameda*, 2012 U.S. Dist. LEXIS 168412, at *8 (N.D. Cal. 2012) ("Courts routinely allow parties to amend their pleadings after new information comes to light during discovery"). Indeed, other courts in the same district permit such amendments. *E.g.*, *Bryson v. Berges*, 2015 U.S. Dist. LEXIS 33517 (S.D. Fla. 2015); *Maale v. Kirchgessner*, 2011 U.S. Dist. LEXIS 18506 (S.D. Fla. 2011).[22]

Here, Judge Cooke declined to stay discovery, requiring relator – suing on behalf of the United States – to redouble pre-trial efforts on a short time-line. Dismissing the first amended complaint, the court acknowledged Bingham had additional information, and narrative, to add, and it granted leave to amend, twice, over HCA's objections. Whether or not leave should have been granted is a matter under Rule 15, not Rule 9(b). *See United States ex rel. Rigsby v. State Farm Fire & Cas. Co.*, 794 F.3d 457, 466 (5th Cir. 2015) ("We do not believe that Rule 9(b) is the appropriate analytical prism through which to view the issues"). In this case, the court below granted Bingham the Rule 15 relief he requested, and HCA filed no cross-appeal of the district court's Rule 15 rulings.

No basis exists for the court's ruling in the text of the False Claims Act. In its order (ECF 202), the court conflated elements for original source status – an exception to the public disclosure bar, §3730(e)(4) – with Rule 9(b) requirements. Other than cases of public disclosure, relators need not independently know of the fraud to qualify as a "person" authorized to initiate the action under §3730(b). Public disclosure is not an issue here. Indeed, HCA made every effort to conceal MOB-related benefits made available to referring physicians.

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[22]Some courts consider the limits of what a relator knew when the initial complaint was filed, for purposes of determining subject matter jurisdiction. *See United States ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963, 969 (9th Cir. 1999); *United States ex rel. Branch Consultants, L.L.C. v. Allstate Ins.*, 782 F. Supp. 2d 248, 262-64 (E.D. La. 2011). That rationale does not apply here.

Absent a basis in statutory text, courts refuse to apply special interpretations of the rules in *qui tam* litigation. *See United States ex rel. Roberts v. QHG of Ind.*, 1998 U.S. Dist. LEXIS 23512, at *20-23 (N.D. Ind. 1998) ("Congress establishes *qui tam* provisions for the very purpose of 'enlisting private parties … to champion the government's case'; to restrict discovery based upon relator's status "would seriously weaken the *qui tam* provision"); *United States ex rel. Wang v. FMC Corp.*, 975 F.3d 1412, 1416-17 (9th Cir. 1992) (declining to apply bar to evidence publicly disclosed in *qui tam* litigation, as relators "would have little choice but to waive their right to discovery" to the detriment of the government's interest under the Act), *overruled on other grounds*, *United States ex rel. Hartpence v. Kinetic Concepts, Inc.*, 792 F.3d 1121, 1127-28 (9th Cir. 2015) (overturning *Wang*'s "third prong," like "many of our sister circuits" holding it impermissible to "graft[] onto the statute a requirement nowhere to be found in the statute's text").

Nor does a basis exist in the purposes of Rule 9(b). Those purposes consist of "alerting defendants to the precise misconduct with which they are charged and protecting defendants against spurious charges of immoral and fraudulent behavior." *Atkins*, 470 F.3d at 1359. They do not include a formalistic test of relator's ability to plead details on his first try. Indeed, that is why leave to amend under Rule 15 is freely given, and why Judge Cooke granted Bingham leave.

To the extent Rule 9(b) is to ensure adequate notice, there is no logic to denying relator use of information obtained through discovery. HCA certainly knew the nature and significance of its own discovery responses, and Bingham should be permitted to use that information to alert HCA of his claims. In fact, discovery often provides the means by which plaintiff gives notice to defendant, and in this case, Bingham answered dozens of pages of interrogatories, produced documents, and sat for deposition regarding Aventura, all of which was sufficient to advise HCA of the nature of his claims. *See* ECF 145.

HCA cannot claim it needs protection under Rule 9(b) from an inappropriate "fishing expedition" for new claims. Because of his unique status, Bingham unearthed a secret, consistent scheme by HCA, designed and implemented from its headquarters in Tennessee, to pass unlawful remuneration to referring physicians through third party developers and multiple locations. Bingham successfully prosecuted one action against HCA at Parkridge, and he mustered substantial evidence to survive summary judgment on Centerpoint claims. His Aventura allegations – covering core facts he pleaded initially – are based on detailed and particularized data. Under these circumstances, it cannot be said Bingham has brought a "strike suit." *Rigsby,* 794 F.3d at 465-67. It is not a "fishing expedition" with the catch already on the hook.[23]

Finally, it was incorrect for the court below to *assume* additional facts pleaded in the second amended complaint were learned through discovery. Even if Bingham was barred from using HCA-produced records, all of the essential elements of Bingham's Aventura claims could have been pleaded. Indeed, as demonstrated in the chart on the following page, each allegations in ECF 104 that was over-redacted by Bingham's counsel for other purposes in ECF 105, finds a parallel allegations in ECF 14, his first amended complaint.

For each of these reasons, the district court erred as a matter of law when it expressly disregarded Bingham's second amended complaint allegations. Determining this appeal under Rule 9(b), the Court should consider all facts pleaded by Bingham, and find them sufficient to survive the motion to dismiss.

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[23]Concerns over such expeditions are reduced by the discovery rule amendments in 2016, anyways. *See United States ex rel. Customs Fraud Investigations, LLC v. Victaulic* Co., 839 F.3d 242, 258-59 (3d Cir. 2016). With these added protections, courts should look more to Rule 26, than Rule 9(b), in deciding where the balance lies. In this case, worry over HCA's discovery burden is absent, as it had and took every opportunity to object to Bingham's discovery.

SAC (ECF 104)	FAC (ECF 14)
A. HCA subsidized MOB ¶¶ 123-154, 136-137 (discussing easement).	Subtitle 1 "Subsidy through Parking Easement" ¶¶106-114; ¶135.
B. HCA compensated physicians with parking rights. ¶¶ 178 - 197.	¶108 non-exclusive cross-parking agreement.
C. HCA compensated doctors through below-market rents. ¶¶198-205.	¶¶5, 6 Valuable inducements including laundering funds through developer on tenant lease terms
D. HCA compensated physicians by requiring lower rents for higher referrers. ¶¶206-210	¶6 4th bullet: "Control of the physician-tenant leases"
E. HCA directed higher improvement allowances for higher referrers. ¶¶211-220	¶¶ 138 -139 (explaining allowance subsidy directly paid by HCA).
F. HCA directly paid a portion of tenants' common area maintenance. ¶¶221 –233. G. HCA compensated physicians directly with valuable use permissions. ¶¶ 234-246.	¶5 …Valuable inducements offered and paid to referring physicians …. and other advantageous agreements… ¶6 …such as requiring … lease provisions that provided certain benefits for physician-tenants.
Aventura Hospital Claims ¶¶ 275-276	Aventura and Centerpoint hospitals claims. ¶¶167 *et seq*. Aventura Medicare Claims ¶¶171-174, 184, and ECF 14-7.
HCA designed, implemented and concealed the scheme. ¶¶ 308 - 316.	¶¶ 200-205. Also, ¶ 204.

CONCLUSION

The Court should reverse the judgment of the district court and remand for further proceedings.

. Respectfully submitted,

Dated: April 10, 2017

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7), because it contains 12,898 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect in 14 point Times New Roman.

Dated: April 10, 2017

/S/Jeremy L. Friedman
Jeremy L. Friedman

CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/S/Jeremy L. Friedman
Jeremy L. Friedman