No. 16-17059

In the United States Court of Appeals for the Eleventh Circuit

THOMAS BINGHAM, Relator, ex rel. United States of America and Florida, *Qui Tam* Plaintiff-Appellant,

■

v.

HCA INC., Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF OF APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

Due to the importance of the issues raised in this appeal, the length of the record, and the fact that this appeal essentially involves two separate sets of facts, Appellee HCA Inc. believes that oral argument would be helpful to the Court.

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STATEMENT OF SUBJECT MATTER JURISDICTION AND APPELLATE JURISDICTION

HCA concurs with Relator's statement regarding subject matter jurisdiction and appellate jurisdiction.

STATEMENT OF THE ISSUES

1. Did the district court correctly grant summary judgment in favor of HCA on Relator's Centerpoint-related claims because Relator failed to raise a genuine issue of material fact regarding purported violations of the Anti-Kickback Statute or the Stark Law.
2. Did the district court reasonably exercise its discretion in finding that Relator failed to plead fraud with the particularity required under Rule 9(b) without the benefit of discovery on Relator's Aventura-related claims.

INTRODUCTION

Relator's brief to this Court comprehensively misstates the basis of the district court's decision and ignores the fatal holes in his case that required summary judgment for the defendant. As the district court correctly recognized, Relator came forward with *no* evidence that any physician leasing office space at the Centerpoint medical office building paid less than fair market rent, and *no* evidence that the leasing terms varied in any way or took into account the volume or value of a physician's referrals to the hospital. Several contemporaneous appraisals, which are the only relevant evidence in the record, confirm that the physicians paid rents well within the fair market range. That is true even if the "cash flow participation agreements" some tenants received are counted as 1:1 reductions of the rent paid—but in reality, it is undisputed that those payments were in exchange for the tenant's decision to assume the extra expense and risk associated with signing a ten-year lease.

Lacking any evidence of non-market terms or terms that improperly varied based on referral volumes, Relator advances a variety of arguments designed to shift the burden of proof to defendant. Relator contends that he need only show that a hospital had some economic arrangement with a real estate developer, and that the developer then leased space to doctors, to defeat summary judgment and get to a jury

in a False Claims Act case—and that it is then *defendant's* obligation to prove that there was nothing improper about those arrangements. That is not the law.

The district court also committed no reversible error when it elected to ignore allegations derived from discovery when evaluating the sufficiency of Relator's Aventura pleadings under Rule 9(b). It is settled and uncontroversial that False Claims Act plaintiffs must satisfy Rule 9(b) before they are entitled to discovery. Here the district court exercised its case-management discretion to allow discovery to proceed while the court considered the defendant's motion to dismiss. There is no sound reason why that decision must transform the Rule 9(b) inquiry or give Relator a windfall from discovery to which he was not entitled.

STATEMENT OF THE CASE

A. Facts and Procedural History Related to Centerpoint

1. The Development of the Centerpoint Hospital and Medical Office Building

In 2004-2005, affiliates of HCA, Inc. (collectively, with the parent, "HCA") began developing the Centerpoint Medical Center to serve the healthcare needs of patients in Independence, Missouri and to replace two aging HCA hospital facilities. [DES117-1][1] The plan included an on-campus medical office building ("MOB" or

[1] Docket entries in the district court are referenced herein as "DE," and sealed docket entries are referenced as "DES." References to individually numbered exhibits

"Centerpoint MOB"), which would afford space for hospital-based diagnostic facilities and clinics, including an ambulatory surgery center, and office space for HCA-employed physicians, as well as independent physicians and medical practices. [*Id.*; DES117-3] HCA engaged a third-party developer, Tegra Independence Medical Surgical, L.C. ("Tegra"), to build and manage the MOB. [DES117-2] Neither Tegra nor its parent company (the Boyer Company, one of the largest healthcare real-estate development companies in the United States) have ever been referral sources for HCA. [*Id.*] Consistent with the terms of its agreement with Tegra, HCA leased a parcel of land on the Centerpoint campus to Tegra, which in turn constructed the 200,000 square-foot MOB and began leasing space in the MOB to independent physicians and physician practice groups, as well as HCA-affiliated entities, HCA-owned physician practices, and an HCA-affiliated ambulatory surgery center. [DES117-6]

The relationship between HCA and Tegra consisted of three documents:

- A Development Agreement: Tegra and HCA entered into a Development Agreement under which Tegra agreed to finance, develop, and construct the Centerpoint MOB on the hospital campus. In exchange, HCA would enter into a Ground Lease (*infra*) with Tegra for the MOB site; finance, develop and construct parking improvements for the campus; grant a parking easement in favor of MOB tenants and

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contained within sealed docket entries are designated in the same format as in Appellee's Appendix (*e.g.* "DES117-1" refers to Exhibit 1 within sealed docket entry 117).

invitees; enter numerous Space Leases (*infra*) with Tegra to house HCA-owned or affiliated practices and facilities in the new MOB; and execute an Additional Space Lease ("Burnoff Lease," *infra*) to help Tegra secure construction financing. [DES117-2]

- A Ground Lease: HCA leased to Tegra, for a term of 99 years, an improved site on the Centerpoint campus where the MOB would be constructed. The Ground Lease also contained restrictions prohibiting certain uses without HCA's prior written approval[2] and included a non-exclusive parking easement, which allowed the MOB's tenants and invitees to park anywhere on the hospital campus. The aggregate price was approximately [redacted]. [DES117-5]

- A Burnoff Lease: The Burnoff Lease provided that HCA would lease from Tegra [redacted] square feet in the MOB at an initial rate of [redacted] per square foot, which space would be released by HCA at such time as Tegra was able to secure new tenants to lease the space in the building.[3] The Burnoff Lease also specifically prohibited Tegra from having any physicians invest in the Centerpoint MOB project while the Burnoff Lease was in effect. [DES122-17, §§ 2.1, 25.20, 26]

Each of these documents obligated Tegra to lease space to tenants in the Centerpoint MOB at fair market value. [DES117-5, § 12.3; DES117-2, § 7(g); DES122-17, § 26] The Development Agreement and the Burnoff Lease both prohibited Tegra from discriminating among tenants based on the volume or value of their referrals or potential referrals. [DES117-2, § 7(g); DES122-17, § 26]

[2] For example, the Ground Lease prohibited tenants from operating certain testing or diagnostic facilities which would be duplicative of those offered by the hospital itself. [DES117-5, § 28]

[3] The Burnoff Lease's purpose was to enable Tegra to obtain construction financing by showing lenders that it had a leasing commitment for the MOB. [DES122 Ex. 17 at § 26; DES117-3]

The relationships between Tegra and the MOB tenants consisted of the following two types of arrangements:

- Space Leases: Tegra leased office space to the physician tenants, including HCA-affiliated entities, at per-square-foot net rental rates that Relator agrees were "more or less at [fair market value] terms," generally around [redacted] per square foot. The Space Leases provided for tenant improvement allowances that varied, but which were generally around [redacted] per square foot. The Space Leases also included the right to use parking on the Centerpoint campus [*See* DES117-2, pg 19]

- Cash Flow Participation Agreements ("CFPAs"): If a tenant agreed to a ten-year lease, Tegra offered a CFPA under which the tenant would receive a pro-rata share (based on square footage leased) of the MOB's operating cash flow, including proceeds from any sale of the building. The availability of a CFPA and the distribution formula had nothing to do with whether the tenant was or was not a referral source for the Hospital, or the volume or value of any referrals. [*See, e.g.*, DES123-22; DES127-46; DES129-65, pg 5; DES130-70]

In October 2012, Tegra sold the Centerpoint MOB to a third party. [DES137-9; DES130-70] The CFPAs were terminated upon the sale and 18 MOB tenants received payouts pursuant to the terms of the CFPAs. [*Id.*] Of those tenants, five were not affiliated with HCA and received total payouts of [redacted]. [DES118-8. 8; DES127-46; DES130-70; DES129-65, pg 5] Thirteen MOB tenants were HCA-owned or affiliated and received a total of [redacted]. [*Id.*] Thus, HCA itself recouped nearly [redacted] upon the sale of the Centerpoint MOB in 2012. [DES118-8, pg 164:18-23]

2. Relator's Centerpoint Allegations and the Evidence Adduced in Discovery

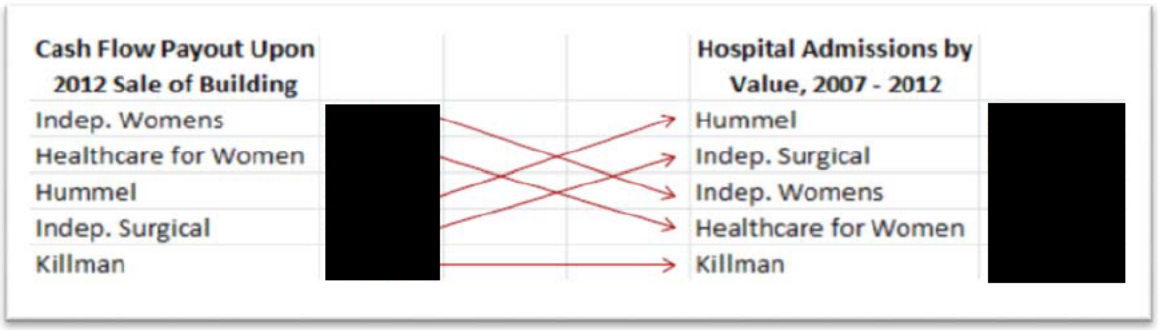
Relator filed his *qui tam* complaint on October 10, 2013, and his Second Amended Complaint ("SAC") on March 8, 2016. [DES104] Relator alleged that HCA violated the federal Anti-Kickback Statute ("AKS") and the Stark Law by subsidizing Tegra's construction and operation of the Centerpoint MOB through an "undervalued ground lease and free parking benefits, by leasing space it never occupied and never intended to occupy" and by "ensuring" that physician tenants in the MOB "would receive remuneration through [CFPAs] which included sharing the inflated profits from the sale of the building[.]" [*Id.* ¶ 107] Relator alleged that physician tenants' compensation from Tegra varied with or took into account the volume or value of their referrals because physician tenants that leased larger office spaces "generally tend[ed] to refer more business to [Centerpoint Hospital]," and (if they had agreed to a ten-year lease) also received proportionally larger payouts under the CFPAs. [*Id.* ¶ 75]

After discovery concluded, there was no dispute as to the terms of the agreements between HCA and Tegra, or the terms of the agreements between Tegra and the physician tenants that leased space in the MOB. Nor did Relator adduce any evidence on the record below to show that the relationships between HCA and Tegra, or between Tegra and the MOB tenants differed in practice from the terms of the

written agreements. And, importantly, Relator admitted that "all of the Tegra leases at the Centerpoint MOB were more or less at market FMV [fair market value] terms." [DE134-12, pg 27]

By the time HCA's Motion for Summary Judgment was briefed, Relator had abandoned his argument that the physician tenants' rental rates varied with or took into account the volume or value of their referrals because tenants who rented larger spaces tended to refer more patients.[4] At summary judgment, Relator pressed only two arguments directed at the compensation received by the physician tenants.[5] First, Relator argued that the CFPAs constituted additional compensation which had the

[4] HCA included the following chart as an exhibit at the hearing on its motion for summary judgment, which shows that the tenants with larger space leases were, in fact, not the largest referral sources:



[DE195, pg 64:5-13, Comp. Ex. 1]

[5] As discussed, *infra*, the only relevant inquiry under both the AKS and the Stark Law is the compensation received by the *physicians*. Relator's evidence and arguments directed to the compensation between HCA and *Tegra*, while disputed by HCA's substantial evidence, is immaterial.

net effect of driving the physician tenants' rental rates below fair market value. [DES159, pg 7; DES162-18, ¶ 35] Second, Relator alleged that HCA paid for improvements to the space it leased under the Burnoff Lease, and that those improvements constituted an additional economic benefit to the physician tenants who subsequently occupied those spaces. [DES159, pg 8]

Yet even after extensive discovery, Relator had no evidence to support his arguments. Relator presented no evidence to establish the purported fair-market-value range for office-space rentals in the MOB, let alone his claim that the CFPAs caused the physician tenants' rental rates to deviate from that range. Relator's presentations to the district court and on appeal both focus heavily on internal HCA letters, emails, and documents discussing various aspects of the planning and construction of the Centerpoint MOB. [*See* DES162-7] Contrary to Relator's arguments, however, these documents established that HCA personnel were highly cognizant of HCA's regulatory obligations, including under the AKS and the Stark Law, and that HCA worked with outside counsel to require that every relationship associated with the Centerpoint MOB be structured to ensure that physicians paid market rates for their leases and that the financial terms did not vary with or take into account any referrals to the hospital. [*Id.*] In fact, the documents indicate that HCA was initially opposed to allowing physician tenants to take any kind of

ownership interest in the Centerpoint MOB, including CFPAs. HCA agreed to allow Tegra to offer the CFPAs only with the proviso that no CFPAs be signed until the Burnoff Lease had expired. [*Id.* at HCA_0014340 ("HCA does not want to permit physicians contracting to share in this real estate deal so long as the burn off lease is in place")] Moreover, the documents contain no evidence that HCA played any role in setting the lease rates or determining the amounts that independent physician tenants would receive under the CFPAs. [*Id.*] None of the documents establish that the CFPAs caused the physician tenants to pay less than fair market value for the spaces they leased in the Centerpoint MOB, particularly considering the ten-year leasing commitment that tenants were required to make to participate. [*Id.*]

Relator also presented no evidence to support his assertion that HCA paid to improve the space it leased under the Burnoff Lease to benefit physician tenants. [App. Br. 21] In fact, the only record evidence that Relator points to on appeal is a paragraph in Relator's own self-authored affidavit, in which he speculates that HCA "appeared to have" paid for such improvements because "HCA/Midwest was shown as the 'owner' on the building permits . . . ." [DES162-18, ¶ 32] No evidence was presented that HCA actually paid for such improvements, or the purported value of these alleged improvements to the physician tenants.

The remainder of the evidence that Relator relied on in opposition to HCA's Motion for Summary Judgment did not go toward satisfying Relator's affirmative burden, but rather toward attempting to rebut the overwhelming evidence that *HCA* produced. For instance, HCA obtained multiple third-party opinions confirming that the consideration received by the physician tenants, accounting for any economic effect of the CFPAs, was consistent with fair market value and did not take into account the volume or value of referrals. [DE133-19; DES124-34; DES126-40] HCA engaged Holladay Properties—Relator's former employer—to conduct a Market Rent Study on the Centerpoint MOB and to determine whether the Space Leases were at fair market value, whether the lease terms were commercially reasonable, and whether the rental rates were determined in any way that varied with or took into account the volume or value of referrals. Holladay prepared an initial Market Rent Study dated January 1, 2005, in which it concluded that the fair market value range for the Centerpoint MOB was between [redacted] and [redacted] per rentable square foot. [DES126-40, pg 14] HCA later requested that Holladay refresh that Market Rent Study in June 2005 to ensure that it reflected current valuations and the final space lease terms, including the CFPAs that Tegra had by that time decided to offer to attract optional ten-year commitments from tenants. [DES124-34] The refreshed study concluded that the "concessions and inducements [*e.g.* the CFPAs]

are typical to the market place currently for the leasing of like kind general and medical office space," and that the original range of [redacted] per square foot remained accurate. [*Id.* at 14] The Space Leases Tegra executed with MOB tenants at that time required the tenants to pay [redacted] per square foot, near the very top of this range. [*See* DES123-24; DES123-26; DES125-38; DES126-39] Holladay reviewed the lease rates and terms at the Centerpoint MOB again in 2007 and certified that they were consistent with fair market value and did not take into account the volume or value of referrals. [DES125-35, pg 6]

Relator sought to create the illusion of a factual dispute by filing with his Opposition to HCA's Motion for Summary Judgment an affidavit authored by his private investigator Doris Modglin. Modglin lacked any personal knowledge. Her affidavit was laced with hearsay, and provided only her "opinions" and "suspicions" that the Holladay appraisals had been tampered with, and that the appraisers did not properly account for the value of the CFPAs in concluding that the physician tenants' arrangements with Tegra were consistent with fair market value. [DES162-2] However, Modglin's affidavit did not directly challenge – nor could it have – the ultimate conclusion of the appraisal reports that were provided to HCA, *i.e.* that the aggregate compensation received by physicians under their space leases and CFPAs was consistent with fair market value (even ignoring the tenants' ten-year

commitments), and did not vary with or take into account the volume or value of referrals.

In 2007, HCA again engaged Holladay to prepare a Standard Business and Lease Terms Memorandum ("SBLT") regarding the Centerpoint MOB. [DE133-19] Relator himself, as an employee of Holladay, performed the SBLT analysis. In the SBLT Memorandum, Relator observed that "[c]ash flow participation is currently offered to tenants" in the Centerpoint MOB, as well as two of the four comparison buildings used in his analysis.[6] [*Id.* at 6] Yet Relator did not make any adjustment to fair market value for the comparison buildings that did not offer CFPAs, thus indicating that the existence or absence of CFPAs, offered in exchange for a lengthy rental commitment, was not significant in determining the base fair market rental range. Relator concluded in the SBLT that the fair market rent of the Centerpoint MOB in 2007 was between $21.50 and $23.50 per square foot, and observed that Space Lease rates offered by Tegra at the time were $22.50. [*Id.* at 7] Relator further noted that the increase from the fair market range Holladay had found in 2005 was due to increased construction costs, not the CFPAs. [DES128-60, pg 3] Indeed,

[6] Relator, a certified appraiser, later testified at deposition that he prepared the SBLT and noted the existence of cash flow participation agreements without actually understanding what cash flow participation was. [DES125-36, pg 258:12-14]

Relator admitted in interrogatory responses that "all of the Tegra leases at the Centerpoint MOB were more or less at market FMV terms." DE134-12, pg 27]

In connection with this litigation, HCA engaged economist John Hekman, who conducted an analysis of the rent paid by independent physician tenants over the terms of their leases with Tegra. Because these lease rates were well above the low end of the fair market rent ("FMR") range, Hekman concluded that even if CFPA distributions were treated as 1:1 reductions in rent, such reductions would not have reduced rents below the fair market range. [DES122-15, ¶ 15]

HCA also presented evidence showing that Tegra, not HCA, made the decision to offer CFPAs to tenants signing long-term leases, and that HCA was not involved with the selection of the MOB tenants or the negotiation of the rental rates. [DES117-6, ¶ 6] The CFPAs, moreover, were offered to all tenants on equal terms, conditioned only on the tenant's willingness to sign a ten-year lease. [DES117-6, ¶ 22; *compare* DES123-21 *with* DES123-22] Tegra did not take into account the volume or value of any tenant's referrals to Centerpoint, nor could it have, since it was never given any information about the volume or value of prospective tenants' referrals. [DES117-6, ¶ 14] Multiple HCA-owned or affiliated entities also entered into Space Leases and CFPAs on precisely the same terms as independent physician tenants. [*Id.* at ¶¶ 20-22] One tenant—Drisko, Fee & Parkins ("Drisko")—signed a

ten-year lease but declined a CFPA. Instead, Drisko negotiated other consideration for its ten-year commitment, including a higher tenant-improvement allowance and lower annual rent increases than other tenants who had accepted CFPAs. [*Compare* DES123-23, § 2.1 and DES123-24, § 2.1 *with* DE134-5 § 2.1; *and compare* DES123-23, pg 30 and DES117-24, pg 35 *with* DE134-5, pg 33]

Thus, when discovery concluded, there was no material dispute of fact as to how the relationships between HCA and Tegra, and between Tegra and the physician tenants, were structured. Nor did Relator introduce any evidence (expert testimony or otherwise) to show that the terms of those relationships caused physician tenants at the Centerpoint MOB to receive anything greater than fair market value.

3. After Extensive Discovery, the District Court Concluded that HCA Was Entitled to Summary Judgment on the Centerpoint Claims

During the hearing on HCA's Motion for Summary Judgment, Judge Cooke focused on the evidentiary record before the court, recognizing that, for the purposes of the AKS and the Stark Law, the "key to the discussion" was the relationship between Tegra and the physician tenants—not the relationship between HCA and Tegra.[7] [DE195, pg 17:20-22] Relator's counsel agreed, conceding that "[a]ll of the[]

[7] Because Judge Cooke issued her ruling and gave reasons orally from the bench at the conclusion of the hearing, there is no written statement of reasons in the record.

individual transactions by themselves are fine" [*id.* at 27:9-10]; that HCA's merely having the "business sense" to arrange for a medical office building to be constructed nearby one of its hospitals would not be a violation of the law if "no doctor ever benefitted from any under-fair market value lease and received no financial benefit from HCA . . ." [*id.* at 29:8-11]; that "just because a deal is advantageous [to Tegra] doesn't make it a violation of the statute" [*id. at* 28:21-24]; and that it is "perfectly legal" for HCA to "cut a deal" with Tegra to construct a medical office building where it makes "good business sense" to do so, [*id.* at 37:25-38:3].

When pressed to point to evidence in the record to support Relator's contention that there was a triable issue of fact as to his claim that the physician tenants' leases deviated from fair market terms, Relator's counsel was repeatedly unable to do so.[8] Counsel could not point to any documents or opinions showing what fair market rent should have been for the physicians' space leases. Nor could counsel point to any materials in the record that showed how the lease terms actually deviated from the fair market value range set forth in the record evidence. Instead,

[8] The court tried multiple times to give counsel the opportunity to explain how physicians were allegedly compensated improperly by HCA. [*See* DE195, pg 29:12 ("where's the benefit from HCA?"); pg 33:22-25 (discussing the Burnoff Lease and asking counsel, "what I'm trying to get at is, how is that payment somehow beneficial to the physicians?"); pg 35:15-16 ("where is the evidence in the record that HCA paid for improvements for doctors' spaces?"); pg 38:8-9 ("I don't see any evidence [that physicians' rent was] not fair market value")].

Relator's counsel repeatedly referred back to the Ground Lease between HCA and Tegra to suggest that the physician tenants' compensation somehow must have exceeded fair market value because HCA "pumped about five million dollars into Tegra . . . ." [*Id.* at 27:9-14] Counsel argued that physician tenants' rental rates must have been below fair market value because "no one here in this room [has] ever gotten a lease where your landlord has given . . . three years rent as an inducement up front." [*Id.* at 48:1-5]

At the conclusion of the hearing, Judge Cooke rejected Relator's argument. The court began with the familiar principle that "the plaintiff on a motion for summary judgment has the burden of showing their *prima facie* case with record evidence" and held that Relator failed to carry that burden. [*Id.* at 60:16-19] Judge Cooke reviewed the *prima facie* elements of the AKS, holding specifically that Relator had not shown a triable issue of material fact as to the remuneration element of the AKS because the physician tenants "did not receive anything other than fair market value." [*Id.* at 62:12-13] The court continued:

> I know the plaintiff wants us to infer somehow because there were these good deals and these cash flow agreements that somehow HCA was involved. But the record indicates to the contrary. HCA made a point of looking at the appraisals, looking at the issues of the cash flow agreement, looking at other rental rates. Whatever deal there is, whatever benefits, are not between HCA and any doctors. . . . [And t]here's *no evidence of non-fair market value of the rent here*[.]

[*Id.* at 62:13-63:1]

Judge Cooke reached the same conclusion with respect to Relator's Stark Law claim. She held that Relator had failed to establish the existence of an indirect compensation arrangement between HCA and the physician tenants, as defined by the Stark Law, because the record evidence did not show that the physician tenants' compensation varied with or took into account the volume or value of referrals made by the physician tenants to HCA – a necessary element of the definition. [*Id.* at 61:8-24] Thus, Judge Cooke concluded that Relator failed to satisfy his burden of showing a genuine issue of material fact as to critical elements of his claims and therefore granted HCA's motion for summary judgment. [*Id.* at 63:12-18]

B. Facts and Procedural History Related to Aventura

Shortly after Relator's First Amended Complaint (the "FAC") was filed, the parties jointly moved the district court to stay discovery until resolution of HCA's planned motion to dismiss. [DE32] Judge Cooke denied that motion and discovery proceeded. [DE34] HCA subsequently moved to dismiss, and on January 28, 2016 Judge Cooke dismissed the Aventura-related claims in the FAC for failure to comply with Rule 9(b). [DE66] Specifically, the court concluded that Relator's Aventura allegations were purely conclusory and devoid of facts. [DE66, pg 14] Relator was given leave to amend within 7 days. [*Id.* at 14]

Relator's Second Amended Complaint ("SAC") attempted to cure the pleading deficiency the court had identified by pleading information that Relator learned only through the discovery process. The publicly-filed version of the SAC, which redacted information produced in discovery subject to the district court's protective order, had dozens of pages either partially redacted or redacted in full. [*Compare* DES104 (unredacted) *with* DE105 (redacted)] HCA moved to dismiss the SAC, arguing that the court should evaluate the sufficiency of Relator's pleading under Rule 9(b) without considering information that Relator had received only in discovery to which it was not entitled.

The district court agreed with HCA's position. The court recognized Relator's heavy reliance on facts learned through discovery, observing that "[w]ithout that information, the SAC suffers from the same infirmities" as the deficient FAC. [DE202, pg 8] The remaining allegations "do not set forth 'facts as to time, place, and substance of the defendant's alleged fraud, specifically the details of the defendant's allegedly fraudulent acts . . . .'" [*Id.*] "There is simply not enough detail for one 'to conclude, without grossly speculating, that HCA did in fact submit false claims to the government for payment.'" [*Id.*] Applying precedent from this Court, the district court held that the purposes of Rule 9(b)'s particularity requirement would be defeated if relator "does not specifically plead the minimum elements of

[his] allegation, and is able to learn the complaint's bare essentials through discovery," and thus dismissed the SAC with prejudice. [*Id.*]

SUMMARY OF ARGUMENT

The district court correctly recognized that HCA is entitled to summary judgment on Relator's Centerpoint claims because, after extensive discovery, Relator still had *no* evidence from which a reasonable jury could conclude that any physician received a better-than-market rent deal, or a deal that varied with or took into account the volume or value of any physician's referrals.

To establish an AKS violation, Relator must show that HCA knowingly and willfully made an offer or payment of remuneration for the purpose of inducing referrals. The AKS defines "remuneration" as a benefit in excess of fair market value. As the district court recognized, the record evidence presents no genuine dispute that physician tenants paid fair market value rental rates in exchange for the right to occupy space in the MOB and to park on the hospital campus. Although Relator bore the burden, he failed to present *any* evidence to the contrary.

To establish the existence of a financial relationship between HCA and the physician tenants triggering the Stark Law's referral prohibitions, Relator must present evidence that the aggregate compensation received by the physician tenants in connection with their lease arrangements with Tegra varied with or took into

account the volume or value of their referrals to HCA. Relator offered none—as the district court correctly noted, such evidence "just simply doesn't exist in this case." [DE195, pg 60:19] Of course physician tenants leasing larger spaces would receive larger revenue-sharing under their CFPA arrangements with Tegra, reflecting the larger financial commitments they made (and larger risks they assumed) in agreeing to optional ten-year lease commitments. That obvious business reality does not establish compensation varying *by referrals.*[9]

Relator's argument on appeal barely engages at all with those fundamental deficiencies in his case. Instead, Relator attempts to weave together a few out-of-context passages from HCA's internal documents with unsupported innuendo that HCA must have violated the AKS and the Stark Law because it could have "no other conceivable commercial purpose" in developing an MOB on its hospital campus. Relator also plucks out of context a few statements from the transcript of an oral hearing in an attempt to convey the impression that the district court held that a hospital can do anything that makes "good business sense." This is both incorrect

[9] HCA also presented undisputed evidence establishing that even had Relator been able to show a triable issue of fact as to the *existence* of an indirect compensation arrangement between HCA and the physician tenants, the arrangements satisfied the elements of the Stark Law's "indirect compensation" exception. Plaintiff waived any opposition to the application of this exception by failing to contest it before the district court.

and unfair to the district court, which engaged deeply with the factual record and made specific findings that Relator barely addresses on appeal, findings that are fatal to Relator's claims under a correct understanding of the law. The district court correctly understood that it is not a violation of these laws for a hospital to construct, or encourage the construction, of an MOB on its campus, so long as the leasing arrangements with physicians are at fair market value and do not vary with or take into account the level of referrals to the hospital.

Relator argues on appeal that he can survive summary judgment under the AKS simply by showing that physicians received "anything of value." This is not an accurate statement of the law, which requires a transfer of something of value for *other than fair market value*. Relator also argues that the hospital violated the Stark law. Relator's only path to do so is to show that, under Stark, the hospital/developer relationship was really an "indirect" financial relationship as defined in the law. To be deemed an "indirect" financial relationship under Stark, the physician's aggregate compensation must vary with or take into account the volume or value of his or her referrals. As set forth more fully below, relator has not shown that any physician's compensation varied with or took into account the volume or value of his or her referrals, and therefore his argument that a Stark law violation occurred is inaccurate.

With respect to Aventura, Rule 9(b)'s particularity requirement is designed to ensure that a plaintiff knows the essential facts of his claim at the time he files his complaint. Rule 9(b) is particularly important in the FCA context, where the law seeks to encourage only those with genuine, personal knowledge of alleged wrongdoing to come forward and assert claims on behalf of the United States. Allowing relators to bring vague, general, and unsubstantiated allegations and to later cure such defective pleadings with information learned in discovery would severely undermine Rule 9(b)'s purposes. This case is unusual only because the district court exercised its case-management discretion to permit discovery to begin prior to resolving Rule 12(b) motions. Having made that decision, the district court could preserve the integrity of Rule 9(b) only by disregarding information gained through discovery when evaluating the sufficiency of Relator's pleadings. A holding that district courts do not have discretion to proceed in that fashion will not help relators; it will simply constrain the district courts' case-management discretion in a manner that serves no important purpose.

ARGUMENT

I. STANDARDS OF REVIEW

This Court reviews *de novo* a district court's grant of a motion for summary judgment, *Ellis v. England*, 432 F.3d 1321, 1325 (11th Cir. 2005), as well as a district

court's grant of a motion to dismiss, *Cunningham v. Dist. Attorney's Office for Escambia Cty.*, 592 F.3d 1237, 1255 (11th Cir. 2010).

The Federal Rules of Civil Procedure require that the moving party show there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When the non-moving party bears the burden of proof at trial, the moving party need not "support its motion with affidavits or other similar material *negating* the opponent's claim" to discharge its responsibility under Rule 56. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986). Rather, the moving party may simply show that "there is an absence of evidence to support the nonmoving party's case." *Id.* On a properly supported motion for summary judgment, the burden "shifts to the non-moving party to come forward with specific facts showing that there is a genuine issue for trial." *Bailey v. Allgas, Inc.*, 284 F.3d 1237, 1243 (11th Cir. 2002).

A party opposing a motion for summary judgment may not rest on mere allegations or denials in its pleadings, but must affirmatively set forth specific facts showing there is a genuine triable issue. *Walker v. Darby*, 911 F.2d 1573, 1576–77 (11th Cir. 1990). Consideration of a summary judgment motion does not lessen the burdens on the non-moving party, which still bears the burden of coming forward

with sufficient evidence on each element that must be proved at trial. *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1080 (11th Cir. 1990).

A complaint under the False Claims Act ("FCA") must meet the heightened pleading standard of Rule 9(b), which states that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." *Hopper v. Solvay Pharm., Inc.*, 588 F.3d 1318, 1324 (11th Cir. 2009). Under Rule 12(f), a court may strike from a pleading "any redundant, immaterial, impertinent, or scandalous matter," either on motion made by a party or *sua sponte*. Fed. R. Civ. P. 12(f). A district court's decision to strike information from a pleading is reviewed for an abuse of discretion. "Under this standard, we do not disturb the district court's decision as long as it is within a range of reasonable choices and is not influenced by any mistake of law." *Bethel v. Baldwin Cty. Bd. of Educ.*, 371 F. App'x 57, 61 (11th Cir. 2010). District courts are afforded "broad discretion over the management of pre-trial activities, including discovery and scheduling." *Johnson v. Bd. of Regents of Univ. of Georgia*, 263 F.3d 1234, 1269 (11th Cir. 2001); *see also United States v. McCutcheon*, 86 F.3d 187, 190 (11th Cir. 1996) (noting the "broad discretion which is allowed a trial court to manage its own docket"). "Given the caseload of most district courts and the fact that cases can sometimes stretch out over years, district courts must have discretion and authority to ensure their cases move

to a reasonably timely and orderly conclusion." *Id.* Because district court judges have wide discretion in managing discovery, "appellate review is accordingly deferential." *Harbert Int'l, Inc. v. James*, 157 F.3d 1271, 1280 (11th Cir. 1998).

II. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT ON THE CENTERPOINT CLAIMS

A. The District Court Properly Concluded That Relator Failed To Satisfy His Burden Of Showing A Genuine Issue Of Material Fact As To His Centerpoint AKS Claims

The elements of an AKS violation are: (1) the knowing and willful paying of or offering to pay (2) remuneration (3) for the purpose of inducing referrals for any item or service for which payment may be made by a federal healthcare program. 42 U.S.C. § 1320a-7b(b)(2)(A). In granting HCA's motion for summary judgment on Relator's AKS claims, the district court held that there was no triable issue of fact as to whether any referring physicians received "anything other than fair market value," and that there was "no evidence" in the record of "non-fair market value" in the terms of physicians' office-space rentals, and therefore no remuneration. [DE195, pg 62:12-63:1] The court further held that Relator had not come forward with any evidence to create a triable issue of fact as to whether HCA acted knowingly or with the intent to induce referrals. [*Id.* at 62:9-11]

1. Relator Failed to Satisfy His Burden of Showing "Remuneration"

Under the AKS, the term "remuneration" is defined to include "transfers of items or services for free or for other than fair market value." 42 U.S.C. § 1320a-7a(i)(6); *see also* 42 C.F.R. § 1003.110; *Jones-McNamara v. Holzer Health Sys.*, 630 F. App'x 394, 400-01 (6th Cir. 2015) ("the [AKS] defines 'remuneration' as 'transfers of items or services for free or for other than fair market value'"); *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am.*, 565 F. Supp. 2d 153, 162 (D.D.C. 2008) (same); *Klaczak v. Consol. Med. Transp.*, 458 F. Supp. 2d 622 (N.D. Ill. 2006) (same).

Relator failed to present any evidence of a non-fair-market-value transfer between HCA (or Tegra) and any physician tenant. Relator introduced no evidence showing what the fair market value range for office space rentals in the Centerpoint MOB was or should have been. *See Klaczak*, 458 F. Supp. 2d at 678-79 ("Relators have not even attempted to define fair market value for [the services at issue]."). Relator did not even have evidence of what he thought the base fair market rent should be, and certainly introduced no evidence of what fair market terms for a CFPA should be. Relator obviously hoped that the district court would simply *assume* that any payments under the CFPAs would cause the physicians' net lease payments to fall below fair market terms. Yet, even if the CFPAs were simply

windfalls to the tenants, Relator would still need to proffer evidence that payments under the CFPAs caused the effective net rent to be out of step with market terms—evidence Relator never offered. Regardless, it is undisputed that the CFPA payments *were not* windfalls to the tenants. They were offered in exchange for tenants agreeing to the financial commitment (and risk) of a ten-year lease—an exchange that some tenants found attractive and others did not. Relator offered no evidence, or even theory, of what the fair market compensation to tenants should be for the added risk and expense associated with ten-year leases.

Relator also failed to provide evidentiary support for his theory that HCA illicitly paid remuneration to physician tenants by improving office space on the tenants' behalf.[10] The only evidence that Relator can point to in support of this claim is his own self-serving affidavit, which is insufficient to defeat summary judgment. *Ellis*, 432 F.3d at 1325 ("mere conclusions and unsupported factual allegations are legally insufficient to defeat a summary judgment motion").

[10] Relator argues on appeal that HCA "arranged for direct non-cash remuneration to physicians" by waiving certain use restrictions in the Space Leases. [App. Br. 21] This argument is waived because Relator failed to raise it below. In any event, Relator can point to no evidence of the value that a single tenant purportedly received by being allowed to install imaging equipment in his office space. Therefore, this argument is insufficient to reverse the grant of summary judgment.

In contrast to Relator's complete evidentiary default, HCA introduced extensive evidence showing that Centerpoint physicians did not receive anything inconsistent with fair market value: (1) the Centerpoint Space Leases were negotiated at arms' length between Tegra and physician tenants, and Relator admitted that they were "more or less" consistent with fair market value, [DE134-12, pg 27]; (2) Tegra, a real estate developer, was not in a position to receive patient referrals from physician tenants[11] [DES117-6, ¶ 12]; (3) HCA-related entities themselves leased space from Tegra on the same terms as independent physicians, undercutting any inference that independent physician referral sources received preferential arrangements, [DES117-6, ¶ 22; *compare* DES117-21 *with* DES117-22]; (4) a 2005 Market Rent Study, which took into account the CFPAs offered to long-term physician tenants, concluded that the overall rental rates offered to those tenants were consistent with fair market value and commercially reasonable [DES124-34]; (5) a 2007 SBLT Memorandum *that Relator himself authored*, which also accounted for the fact that "[c]ash flow participation is currently offered to tenants," concluded that a fair market value rental rate for the space leases was

[11] The statutory definition of "fair market value" is the "value in arms length transactions, consistent with [] general market value . . . . not adjusted to reflect the additional value the prospective lessee or lessor would attribute to the proximity or convenience to the lessor *where the lessor is a potential source of patient referrals to the lessee*." 42 U.S.C. § 1395nn(h)(3) (emphasis added).

unaffected by the existence of CFPAs, [DE133-19]; and (6) an affidavit from economist John Hekman concluded that the rental rates for the space leases at Centerpoint were within fair-market-value range even if the *ex post* value of the CFPAs is subtracted from total rent payments, [DES122-15].[12]

Relator takes issue with some of HCA's evidence on these issues. Those arguments are unpersuasive, but ultimately irrelevant. HCA had no burden to adduce evidence, and was entitled to summary judgment on the basis that Relator failed to adduce any evidence on critical elements of his case. *Celotex*, 477 U.S. at 323-25. The fact that the record evidence overwhelmingly *refutes* Relator's innuendo merely confirms that result.

Relator predictably retreats to arguing that he actually had no burden to adduce evidence of non-fair-market terms, relying on an out-of-context citation to Department of Health and Human Services ("HHS") guidance. [App. Br. 15, 25] But that guidance clearly states that "[t]he general rule of thumb is that any remuneration flowing between hospitals and physicians should be at *fair market value* for actual and necessary items furnished or services rendered based upon an arm's-length transaction . . . ." OIG Supplemental Compliance Program Guidance for Hospitals

[12] Hekman's analysis concluded that actual proceeds from the CFPAs had a net effect of reducing the rental rates by less than [redacted] per square foot. [DES122-15]

70 Fed. Reg. 4,858, 4,866 (Jan. 31, 2005) ("OIG Program Guidance"). That Guidance never suggests that payments between physicians and hospitals for real and necessary things are somehow presumptively unlawful even if the exchange is on fair market terms.

Relator also attempts to avoid his burden by arguing that he need only show the exchange of "anything of value" to satisfy the remuneration element. Courts and regulators, in delineating the *types* of exchanges that can constitute remuneration, have often observed that it can consist of "anything of value." *See Jones-McNamara*, 630 F. App'x at 400-01. But courts have repeatedly recognized that a relator cannot simply allege that *some* transaction occurred involving the exchange of "anything of value" between a hospital and a referral source, and then shift the burden to the defendant to establish the applicability of an exception. *See id.* (simultaneously observing that "'remuneration' means 'virtually anything of value'" and that the statutory definition of remuneration refers to "transfers of items or services for free or for other than fair market value"); *United States v. Narco Freedom, Inc.*, 95 F. Supp. 3d 747, 756 (S.D.N.Y. 2015) (observing that the AKS defines remuneration as "anything of value" and finding the remuneration element satisfied because referral sources had been provided residence at a rehabilitation center "at below market value"); *Klaczak*, 458 F. Supp. 2d at 678-79 ("Remuneration, for purposes

of the AKS, is defined broadly, meaning 'anything of value.' . . . In the context of the Anti-Kickback Statute, courts use 'fair market value' as the gauge of value when assessing the remuneration element of the offense."); Special Fraud Alert: Laboratory Payments to Referring Physicians, 79 Fed. Reg. 40,115, 40,116 (Jul. 11, 2014) ("[w]henever a laboratory offers or gives to a source of referrals *anything of value* not paid for *at fair market value*, the inference may be made that the thing of value is offered to induce the referral of business") (emphasis added).

Relator also spends much time arguing that HCA's relationship with *Tegra* was inconsistent with fair market value. In particular, Relator points to an expert report, authored by Thomas Scaletty, which concluded that the price Tegra paid to HCA under the Ground Lease was below fair market value. [DES162-1] Although HCA vigorously disputed this conclusion with substantial evidence of its own [*see* DES116 ¶ 9], Scaletty's appraisal is immaterial. Nothing in Scaletty's appraisal analyzed whether the Space Leases or the CFPAs between Tegra and the *physician tenants* were consistent with fair market value, or whether or not the *physician tenants*' compensation under those agreements somehow took into account the volume or value of their referrals to the Hospital. [*Id.*] HCA's relationship with Tegra is immaterial because Tegra is not, and has never been, a decisionmaker capable of referring patients to HCA. *United States v. Miles*, 360 F.3d 472, 480 (5th

Cir. 2004) (reversing AKS convictions because payments were "not made to the relevant decisionmaker as an inducement or kickback"). As the district court properly recognized, evidence that Tegra got a "good deal" is insufficient to withstand summary judgment because it is immaterial to whether *physicians* actually received anything of value at below fair-market rates. [DE195, pg 62:13-63:1]

2. Relator Also Failed To Satisfy His Burden Of Proving That HCA "Intended To Induce" Referrals.

Relator also failed to adduce evidence that HCA had intent to induce physicians to make referrals in violation of the AKS. The term "inducement" under the AKS means acting with the "intent to gain influence over the reason or judgment of a person making referral decisions." *See United States v. McClatchey*, 217 F.3d 823, 834 (10th Cir. 2000). A hospital or individual "may lawfully enter into a business relationship with a doctor and even *hope for or expect* referrals . . . so long as the hospital is motivated to enter into the relationship for legal reasons entirely distinct from its collateral hope for referrals." *Id.* (emphasis added). The AKS "does not make all conduct illegal when a hospital executive or physician has referrals in mind." *United States v. LaHue*, 261 F.3d 993, 1007-08 (10th Cir. 2001).

Relator argues that HCA's "own documents provide direct evidence of its intent to induce future referrals," because HCA's pre-construction documents projected that the Centerpoint Hospital would have a certain number of patient

admissions. [App. Br. 27] Relator also quotes out of context HCA executive Tom Ramsey, who testified in deposition that the MOB's "intended tenants mostly were going to be physicians who mostly would be referral sources." [App. Br. 19 n.11] Obviously some doctors find it convenient to have an office close to the hospital, if they anticipate practicing at the hospital and referring some patients there. Like any business, hospitals also like to have potential customers nearby. That is why, as the district court noted, it makes obvious "business sense" for MOBs to be built on or adjacent to hospital campuses. [DE195, pg 43:16-47:17]. But a hospital's awareness that having doctors nearby will be good for the hospital's business does not evidence an intent to gain referrals *by improperly paying for them*. *See McClatchey*, 217 F.3d at 834. Relator's arguments would suggest that there is a triable AKS case, by definition, against every MOB on a hospital campus in this country. Judge Cooke did not give HCA the benefit of any "good business sense defense." [App. Br. 28] She merely held Relator to the burden of showing that HCA did anything wrong, or had any improper motive.

Relator's reference to the "one purpose" test (and the fact that Judge Cooke did not mention it) is similarly a red herring. [App. Br. 28] If one purpose for paying remuneration is to unlawfully induce referrals, then there is an AKS violation.

McClatchey, 217 F.3d at 835. But Relator failed to show a triable issue as to *any* unlawful purpose.

Relator argues that HCA's "wrongful intent" must be "inferred from circumstantial evidence." [App. Br. 26-27] The uncontroverted evidence in the record, however, showed that HCA took extensive steps to ensure that the Centerpoint transactions complied with the AKS. HCA hired outside counsel to structure and negotiate the terms of the Centerpoint transactions. [*See* DES162-7] HCA contractually required Tegra to set lease rates at fair market value and prohibited Tegra from taking referrals into account or from making any CFPA payments until the Burnoff Lease had expired. [*See* DES117-2; DES117-5] Tegra negotiated the lease terms with the physician tenants at arm's length, without HCA's involvement, and no potential referral sources received more favorable terms than HCA itself received for its own affiliated practice groups (which were not referral sources). [DES117-6]

Relator's contention that HCA played a role in identifying the doctors who would become tenants is not supported by the record. The only thing that Relator can adduce is a pre-transaction statement in a letter written by Matthew Jensen, a Tegra representative who was not affiliated with HCA. Although Jensen's letter stated that he had been "working closely" with HCA's physician services director

"to make sure that we are only pursuing those physicians that benefit the hospital economically" [App. Br. 19, 28], there is no evidence that he actually *did* so. To the contrary, Jensen testified both at his deposition and in an uncontradicted affidavit that HCA had no role in either the selection of, or negotiations with, building tenants. [DES122-18; DES117-6]

Relator makes a baseless accusation that HCA "manipulated the Centerpoint market rent study" to disguise the CFPAs and "directed a Holladay employee—who did not perform the study—to alter the study conclusion, after the fact." [App. Br. 11] This argument is based solely on the inadmissible hearsay testimony of Relator's investigator, Doris Modglin, and must be disregarded. *See* Fed. R. Civ. P. 56(c)(4) (affidavits opposing summary judgment must be based on personal knowledge); *Longleaf in Vinings Homeowners Ass'n, Inc. v. QBE Ins. Corp.*, 646 F. App'x 823, 824 (11th Cir. 2016) ("affidavits that are not based on personal knowledge 'cannot raise genuine issues of fact, and thus . . . cannot defeat a motion for summary judgment'"). Modglin purports to have "contact[ed] several former Holladay [] employees" and to have drawn self-serving conclusions based on her interviews. [DES162-2, ¶ 3] That speculation has no probative value whatsoever. And even if any aspect of it were credible, there is extensive other uncontradicted evidence in the record—including Relator's own 2007 SBLT Memorandum—showing that what

the physician tenants received was consistent with fair market value, even accounting for the CFPAs.

3. Relator Failed To Satisfy His Burden Of Showing That HCA Knowingly Or Willfully Violated The AKS.

HCA also was entitled to summary judgment on the distinct and independent ground that there is no evidence that HCA either willfully or knowingly violated the AKS. In the Eleventh Circuit, to willfully violate the AKS, a defendant must know his conduct is unlawful. *United States v. Starks*, 157 F.3d 833, 837-38 (11th Cir. 1998). A defendant who reasonably believes that a transaction was at fair market value for legitimate items or services cannot be found to have "willfully" violated the law. *See United States ex rel. Barker v. Tidwell*, No. 12-CV-108, 2015 WL 3505554, *4 (M.D. Ga. Jun. 3, 2015). Relator has offered no triable evidence that HCA believed it was violating the law at any point.

B. The District Court Properly Concluded That Relator Failed To Satisfy His Burden Of Showing A Genuine Issue Of Material Fact As To His Stark Law Claims

The Stark Law prohibits referrals for certain "designated health services" (DHS), which are payable by a federal healthcare program, from physicians who have "financial relationships" with the provider to whom patients are referred. 42 U.S.C. § 1395nn(a)(1); 42 C.F.R. § 411.353(a). Regulations specify that a "financial relationship" can be either direct or indirect. 42 C.F.R. § 411.353(a); 42 C.F.R §

411.354(a)(1). If there is an intervening entity between the physician and the DHS provider, then the relationship cannot be direct, and the Stark Law is implicated only if the arrangement satisfies each element of the definition of an indirect relationship. 42 C.F.R. § 411.354(c)(2). But even when an arrangement satisfies the definition of an indirect financial relationship, the Stark Law regulations provide that referrals are not prohibited if the arrangements satisfies all of the elements of the indirect compensation exception. 42 C.F.R. § 411.357(p).

To satisfy the definition of an indirect compensation relationship, Relator must show: (1) an unbroken chain of persons or entities having financial relationships between them; where (2) a referring physician receives "aggregate compensation" from the closest link in the chain that "varies with or takes into account the volume or value of referrals or other business generated by the referring physician"; and (3) the entity providing the 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 . . . ." 42 C.F.R. § 411.354(c)(2)(i)-(iii).

The district court held that Relator failed to establish a triable case on the second and third elements, because the consideration received by physicians from Tegra did not "vary with or take into account the volume or value of the referrals

from HCA[.]" [*Id.* at 60:12-15] Correctly adhering to the Stark Law's requirement that aggregate compensation must be analyzed at the link in the chain closest to the referring physician, 42 C.F.R. § 411.354(c)(2)(ii), Judge Cooke refused Relator's invitation to speculate, without evidence, that tenant physicians' aggregate compensation must somehow have taken into account the volume or value of referrals merely because of allegations that the Centerpoint MOB was a "good deal" for Tegra. [DE195, pg 61:18]

Judge Cooke's decision clearly was correct. Relator initially theorized at the pleading stage —and Judge Cooke accepted as true—that HCA directed the biggest referrers into the largest spaces so that they would get the largest CFPA distributions. [DES66, pg 10] However, Relator abandoned this theory after discovery conclusively showed that there was no correlation between the amount of space that the physicians leased and the corresponding amounts they received under CFPAs and the volume or value of the referrals that they made to HCA. [*See generally* DES159] Indeed, HCA showed that some of the physician tenants who were the highest referrers leased the smallest spaces and received the lowest CFPA payouts.[13]

[13] Indeed, at the time of the sale of the building, only five independent physician practices had CFPAs.

See fn. 4, *supra*. Nor is there any dispute that the physician tenants' compensation arrangements were fixed, and did not vary with the volume or value of their referrals.

Moreover, there was no evidence that the physician tenants' financial arrangements with Tegra *took into account* the volume or value of their referrals. While claiming that the physician tenants paid less than they should have to occupy space in the Centerpoint MOB, Relator failed to adduce any evidence as to what they (purportedly) should have paid. And no reasonable jury could conclude, on this record, that HCA played a role in selecting who the physician tenants would be. *See supra* pp. 29-30.

Relator now argues on appeal that HCA "poured money up front into the development" of the MOB, "ensuring [Tegra] would shower referring physicians at the other end." [App. Br. 32-33] Yet because the amount that the physicians received is the relevant link in the chain of financial relationships under the Stark Law, 42 C.F.R. § 411.354(c)(2)(ii), the money that HCA purportedly "poured" into Tegra's development of the MOB is immaterial. Relator presented no evidence that physicians paid anything other than fair market value for the office spaces they occupied, or received anything under the CFPAs that was not fair market value for the ten-year leasing commitments they made.

On appeal, Relator argues that "[e]lements of indirect compensation constitute an *exception* to Stark liability, and are not part of *prima facie* burdens," [App. Br. 30] and that therefore he can survive summary judgment merely by identifying an unbroken chain of financial relationships. Once again, that effort to shift the burden of proof to defendants is contrary to settled law and common sense, and it fails for four distinct reasons.

First, it cannot be the law that proof of an unbroken chain of financial relationships is, alone, sufficient to establish a triable claim under the Stark Law. That would mean a Relator could get to a jury just by proving that doctors bought sandwiches in the cafeteria, and that the hospital had a contract with the food provider—or parked in a parking garage that the hospital hired a third-party to manage.

Second, Relator's argument is premised on a flat misreading of the applicable regulations. Although the term "indirect financial relationship" is defined in 42 C.F.R. § 411.354(c)(2) to include "indirect compensation arrangements," Relator argues that "nowhere else in the regulations is liability fixed on meeting that definition." Relator simply ignores 42 C.F.R. § 411.353(a), which expressly premises Stark liability on the existence of a "direct *or indirect financial relationship*" between a physician and a provider.

Third, Relator's argument reveals a fundamental misunderstanding about how the Stark Law and its applicable exceptions work. Relator points to the exception for "indirect compensation arrangements" set forth in 42 C.F.R. § 411.357(p) and contends that "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." [App. Br. 32] That argument is based on the false premise that the elements of the exception are identical to the elements of the definition. To the contrary, establishing a *prima facie* case for the existence of an indirect compensation arrangement requires proof that the "*aggregate* compensation" received by a referring physician varies with or takes into account the volume or value of referrals. 42 U.S.C. § 411.354(c)(2)(ii) (emphasis added). The exception, by contrast, looks only to whether the *time or unit-based* "compensation" to a referring physician varies with or takes into account the volume or value of referrals, 42 U.S.C. § 411.357(p). The Centers for Medicare & Medicaid Services (CMS) explained the significance of this distinction in the preamble to the Phase II Stark Regulations:

> [I]n determining whether these arrangements fit into the indirect compensation arrangements exception at § 411.357(p), *which does not include an aggregate requirement*, the relevant inquiry is whether the individual payments are fair market value not taking into account the volume or value of referrals or other business generated by the referring physician . . . .

Medicare Program; Physicians' Referrals to Health Care Entities With Which They Have Financial Relationships (Phase II), 69 Fed. Reg. 16,054, 16,069 (Mar. 26, 2004) (hereinafter "Phase II") (emphasis added).

Fourth, Relator argues that the controlling Stark regulations are invalid because they conflict with the Stark statute itself. [App. Br. 31] Because Relator never presented this argument to the district court, it is waived. *Denis v. Liberty Mut. Ins. Co.*, 791 F.2d 846, 848-49 (11th Cir. 1986) ("Failure to raise an issue, objection or theory of relief in the first instance to the trial court generally is fatal."); *Liberles v. Cook Cty.*, 709 F.2d 1122, 1126 (7th Cir. 1983) ("It is a well-settled rule that a party opposing a summary judgment motion must inform the trial judge of the reasons, legal or factual, why summary judgment should not be entered. If it does not do so, and loses the motion, it cannot raise such reasons on appeal.").

Regardless, this argument is meritless. HHS correctly recognized that "[t]he statute expressly contemplates that 'financial relationships' include both direct and indirect ownership and investment interests and direct and indirect compensation arrangements between referring physicians and DHS entities[.]" Medicare and Medicaid Programs; Physicians' Referrals to Health Care Entities With Which They Have Financial Relationships (Phase I), 66 Fed. Reg. 856, 864 (Jan. 4, 2001) (hereinafter "Phase I"). There is nothing in the Stark statute indicating that Congress

intended to preclude HHS from defining "indirect compensation arrangements" as it did, particularly considering the "impracticality of investigating every possible indirect financial relationship involving a referring physician" and the "unfair burden on entities furnishing DHS affirmatively to ferret out and discover potential indirect financial relationships or else risk submitting improper claims because of relationships they knew nothing about." *Id.*

Additionally, even if there were a covered indirect financial relationship under the Stark Law (which there was not), Relator identified no evidence that HCA knew or acted in reckless disregard of a compensation arrangement that took into account the volume or value of referrals. Relator argues on appeal that a "jury could find that HCA had the requisite *scienter* to violate Stark" because "HCA's own lawyers advised against having physician investors." [App. Br. 33] But again, this is a mischaracterization. The email on which Relator purports to rely, written by HCA's outside counsel, actually explained that although a transaction without physician investors is the simplest way to ensure it complies with regulatory requirements, since Tegra had always intended to have investors, HCA made the deal compliant by requiring that no physicians participate in cash flow until after the burn off lease expired. [DES162-7A] In context, it is clear that HCA's outside counsel advised HCA to do exactly what HCA and Tegra did. *See Sperber v. Nicholson*, 342 F. App'x

131, 132 (6th Cir. 2009) (remarking that "self-serving innuendo and speculation" does not suffice to survive summary judgment).

Lastly, HCA asserted the indirect compensation exception, 42 C.F.R. § 411.357(p), as an alternative ground for granting summary judgment on Relator's Stark claim. The exception protects financial arrangements where the compensation received by referring physicians is fair market value for services actually provided and not determined in any manner that takes into account the volume or value of referrals; the compensation arrangement is set forth in writing, signed by the parties, and specifies the services covered by the arrangement; and the compensation arrangement does not violate the AKS. *Id.* The record evidence showed that all of these elements were satisfied, so HCA is entitled to summary judgment under the exception. *See Welding Servs., Inc. v. Forman*, 509 F.3d 1351, 1356 (11th Cir. 2007) (court of appeals may affirm on any ground supported by the record). Indeed, Relator failed to oppose that aspect of HCA's motion below and therefore has waived the issue. *See Denis*, 791 F.2d at 848-49; *Liberles*, 709 F.2d at 1126.

C. Relator Failed to Establish a False Claims Act Violation at Centerpoint

As the district court properly recognized, if "there are no violations of Anti-Kickback Statute or the Stark Statute, there [are] no false claims." [DE195, pg 63:6-

7] Yet even if Relator could satisfy the elements of the AKS or the Stark Law, he would still be unable to satisfy the remaining elements of the FCA.

To survive summary judgment in an FCA case, the Relator must show that the defendant knowingly presented or caused to be presented a claim for payment. "With regard to scienter, a relator must show that the defendant acted 'knowingly,' which the FCA defines as either 'actual knowledge,' 'deliberate ignorance,' or 'reckless disregard.'" *United States ex rel. Phalp v. Lincare Holdings, Inc.*, 857 F.3d 1148, 1154-55 (11th Cir. 2017). Moreover, the FCA requires that a defendant act with the requisite mental state at the time that allegedly false claims are submitted. *See Gordon v. Butler*, 105 U.S. 553, 557 (1881) (fraud requires defendant to have knowledge of falsity "at the time" that false representations are made). For the reasons set forth above, there is no evidence that HCA knew or had any reason to believe that the Centerpoint MOB lease arrangements were not compliant with the AKS and the Stark Law. Accordingly, summary judgment was properly granted in HCA's favor.

III. THE DISTRICT COURT COMMITTED NO REVERSIBLE ERROR WHEN IT DISMISSED THE AVENTURA CLAIMS WITH PREJUDICE FOR FAILURE TO SATISFY RULE 9(b).

In ruling on HCA's motion to dismiss Relator's Second Amended Complaint, the district court declined to consider factual allegations that Relator was able to add

to its pleading only because of discovery that the court had permitted to proceed prior to addressing Rule 12 motions. Pursuant to Rule 12(f), Judge Cooke struck from Relator's SAC "all facts learned through discovery" finding that "[m]aterial learned through discovery is 'immaterial' because it cannot cure an FCA complaint's failure to satisfy Rule 9(b)." The court then dismissed Relator's SAC with prejudice, holding that "[w]ithout that information [learned in discovery], the SAC suffers from the same infirmities that led me to dismiss the Aventura allegations in the First Amended Complaint." [DE202].

The district court's ruling should be understood as an appropriate exercise of the court's broad discretion to manage the pace and order of proceedings, and affirmed. Judge Cooke correctly recognized that plaintiffs had supplemented their allegations with information learned only through discovery to which they were not entitled, and that they had received only because Judge Cooke made the discretionary decision to defer addressing 12(b) motions.

Rule 9(b)'s policy of requiring plaintiffs to plead allegations of fraud with particularity is well settled and applies with special force in the FCA context. *See United States ex rel. Clausen v. Lab Corp. of Am., Inc.*, 290 F.3d 1301, 1309 (11th Cir. 2002).

To state a claim under the FCA, the relator must plead "facts as to time, place, and substance of the defendants' alleged fraud, specifically, the details of the defendants' allegedly fraudulent acts, when they occurred, and who engaged in them." *United States ex rel. Sanchez v. Lymphatx, Inc.*, 596 F.3d 1300, 1302 (11th Cir. 2010). Strict adherence to Rule 9(b) is especially critical in FCA cases brought by *qui tam* relators.

> Requiring relators to plead FCA claims with particularity is especially important in light of the quasi-criminal nature of FCA violations (*i.e.*, a violator is liable for treble damages). Rule 9(b) ensures that the relator's strong financial incentive to bring an FCA claim—the possibility of recovering between fifteen and thirty percent of a treble damages award—does not precipitate the filing of frivolous suits.

United States ex rel. Atkins v. McInteer, 470 F.3d 1350, 1360 (11th Cir. 2006). Contrary to Relator's assertion that Rule 9(b) is solely intended to provide notice to defendants, it actually serves multiple important purposes, including protecting defendants from claims based on speculation, "spurious charges of immoral and fraudulent behavior," "needless[] harm[] [to] defendant's goodwill and reputation" and "baseless allegations used to extract settlements." *Id.* at 1359-60; *see also United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 232 (1st Cir. 2004) (noting that Rule 9(b) "reflects, in part, a concern that a qui tam plaintiff, who has suffered no injury in fact, may be particularly likely to file a suit as a 'pretext to uncover unknown wrongs'"), *abrogated on other grounds by Allison Engine Co. v.*

United States ex rel. Sanders, 553 U.S. 662 (2008). Allowing *qui tam* relators to amend their complaints after conducting discovery also "would mean that 'the government will have been compelled to decide whether or not to intervene absent complete information about the relator's cause of action.'" *Id.* at 231.

To achieve these purposes, courts have "repeatedly refused to allow qui tam relators to rely on later discovery to comply with Rule 9(b)'s pleading requirements." *Id.* (collecting cases). This Court has observed that Rule 9(b)'s particularity requirement would be a "nullity if the Plaintiff gets a ticket to the discovery process" without satisfying Rule 9(b). *Clausen*, 290 F.3d at 1307; *see also United States ex rel. Fla. Soc'y of Anesthesiologists v. Choudhry*, 262 F. Supp. 3d 1299 (M.D. Fla. 2017) (M.D. Fla. Jun. 14, 2017) ("Relator is not permitted to conclusorily assert that the defendants are receiving kickbacks and then pursue discovery to support its allegations."); *De-Chu Christopher Tang v. Vaxin, Inc.*, No. 13-CV-401, 2015 WL 1487063, at *3 (N.D. Ala. Mar. 31, 2015) (dismissing FCA complaint with prejudice for failure to comply with Rule 9(b) and declining to allow amendment because plaintiff was "apparently using this litigation to reveal whether fraud occurred, in an attempt to support or explain his 'suspicion' that grant money might have been misused") (internal quotes omitted); *United States ex rel. Sandager v. Dell Mktg., L.P.*, 872 F. Supp. 2d 801, 815 (D. Minn. 2012) (denying motion for

leave to amend FCA claim dismissed under 9(b); "to the extent [relator] intends to engage in discovery . . . to uncover necessary facts, such action . . . would contradict the FCA's purpose and procedure.").

A holding that district courts cannot enforce those important Rule 9(b) principles simply because discovery has begun would needlessly interfere with the court's judgment and discretion in the management of individual cases. District courts have broad discretion in controlling their dockets and managing the pretrial discovery process. This Court has previously affirmed the application of a district court's discretion under circumstances that are materially indistinguishable from the circumstances in this case. In *United States ex rel. Keeler v. Eisai, Inc.*, 568 F. App'x 783 (11th Cir. 2014), the district court dismissed a *qui tam* relator's complaint for failure to comply with the particularity requirement of Rule 9(b). The relator moved for leave to amend and file a fourth amended complaint, arguing that he had "rich, newly-discovered [evidence] of fraud that he obtained in discovery . . . ." The district court denied relator's request, holding that "allowing [relator] to use documents obtained in discovery to overcome pleading hurdles would circumvent the purpose of Rule 9(b)." *Id.* (citing *Karvelas* and *Clausen*). This Court endorsed that reasoning and affirmed for the reasons stated. *Id; see also Neel v. Fannie Mae*, No. 12-CV-311, 2014 WL 1050125, at *8 (S.D. Miss. Mar. 17, 2014) ("Plaintiffs' almost

exclusive reliance upon information obtained through discovery to defeat [the defendant's] Rule 9(b) challenge to the manner in which Plaintiffs pleaded their fraud claim is something Rule 9(b) has been interpreted to prevent."). Relator's sweeping representation that "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" [App. Br. 18], is simply incorrect.

There is no sound reason to apply Rule 9(b) differently here. If the enforceability of Rule 9(b)'s particularity requirement turned on whether discovery had already begun, the viability of many FCA claims would depend not on the extent and quality of a relator's personal knowledge of wrongdoing, but rather on the district court's judgment as to the most efficient timing of the discovery process.

Relator's position would thus severely circumscribe district courts' discretion. District courts would effectively be forced to choose between either staying discovery anytime there is a Rule 9(b) challenge, or else abandoning Rule 9(b)'s gatekeeping function altogether and allowing relators with vague or unsubstantiated claims to use discovery to fill in the gaps. There is no reason that district courts' discretion should be so narrowly cabined. And the general amendment principles outlined in Rule 15 do not constrain the district court's discretion on these matters or its authority to strike irrelevant or improper material under Rule 12(f).

Relator repeatedly mischaracterizes the authorities he cites in support of his position. First, Relator cites a number of district court authorities for the proposition that "any allegations . . . learned in discovery" may be considered for purposes of defeating a Rule 9(b) motion. [App. Br. 35 (citing *United States ex rel. Fox Rx, Inc. v. Omnicare, Inc.*, 11-CV-962, 2013 WL 2303768, at *4 n.9 (N.D. Ga. May 17, 2013)] The *Omnicare* court, however, made clear that it was not a case of a relator attempting to use discovery to overcome Rule 9(b). *Id.* Rather, the court found that the relator was simply using discovery to "bolster" its allegations—which led to the conclusion that Rule 9(b) was satisfied notwithstanding any discovery. *Id.* Relator also omits the court's express proviso that it was "not adopt[ing] a general rule that information learned in discovery in an action may be used to later seek to avoid dismissal for failure to meet the particularity requirements of Rule 9(b)." *Id.*

Most of the other cases on which Relator relies did not even involve a Rule 9(b) challenge.[14] Those courts merely permitted plaintiffs to amend complaints which were already beyond the pleading threshold.

[14] *See, e.g., Bryson v. Berges*, No. 14-CV-62323, 2015 U.S. Dist. LEXIS 33517 (S.D. Fla. Mar. 18, 2015) (granting leave to amend after case management deadline based on newly discovered facts); *M.H. v. Cty. of Alameda*, No. 11-CV-2868, 2012 U.S. Dist. LEXIS 168412, at *8 (N.D. Cal. Nov. 16, 2012) (granting leave to amend to substitute individuals for Doe defendants, add details to allegations and add state law claim); *United States ex rel. Knapp v. Calibre Sys., Inc.*, No. 10-CV-4466, 2012 WL 1577420 (C.D. Cal. May 4, 2012) (permitting relator to amend complaint to "clarify"

Finally, Relator argues that he knew the requisite information about his Aventura claims at the time of filing, and thus did not exclusively rely on discovery to plead his SAC. His brief then compares the FAC and SAC in an attempt to minimize his reliance on discovery by claiming that his allegations were there all along. [App. Br. 38] In the FAC, however, these allegations were all either wholly conclusory or made upon "information and belief." [*See* DE14, ¶¶ 103-143] In other words, without the benefit of discovery he did not have sufficient knowledge of the conclusions, innuendos, and inferences (or any particularized facts that would support them) to actually allege them. The SAC explicitly relied on, cited to, and

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claims over objections based on undue delay, not particularity); *Maale v. Kirchgessner*, No. 08-CV-80131, 2011 WL 1565912 (S.D. Fla. Feb. 18, 2011) (court found claims adequately pleaded before discovery, defendants answered and plaintiff later sought to add new defendants and claims based on discovery), *report and recommendation adopted in part and overruled in part on other grounds*, No. 08-CV-80131, 2011 WL 1549058 (S.D. Fla. Apr. 22, 2011); *Fru-Con Constr. Corp. v. Sacramento Mun. Util. Dist.*, No. 05-CV-583, 2006 WL 3733815, at *15-16 (E.D. Cal. Dec. 15, 2006) (granting motion to amend counter-claim to add new parties to contract dispute). The only authority that arguably supports Relator's proposition is dicta from a lone district court case (which did not involve a *qui tam* claim), *Remmes v. Int'l Flavors & Fragrances, Inc.*, 453 F. Supp. 2d 1058, 1071-72 (N.D. Iowa 2006). The *Remmes* court found that, notwithstanding facts developed through discovery, the plaintiff's claim still failed to satisfy Rule 9(b). *Id.* at 1077. Moreover, *Remmes* pre-dates the numerous contrary authorities. *See, e.g.*, *Keeler, Neel, supra*.

even attached the discovery materials that provided the putative basis for his allegations. [DES104] This Court should not indulge Relator's revisionist history.[15]

The district court also did not abuse its discretion in dismissing without leave to amend. Judge Cooke already permitted Relator a chance to amend using any additional facts within his knowledge. Although the original dismissal order surmised that Relator may have knowledge of additional facts sufficient to state a claim under Rule 9(b), he ultimately only added allegations based on facts learned through discovery. Moreover, all of the reasoning above regarding the use of discovery to learn the essential requirements of Rule 9(b) counsel against granting further leave to amend. *See*, *e.g.*, *Keeler*, 568 F. App'x at 804.

[15] The district court did not reach whether the full SAC (including all of the information learned in discovery) adequately stated a claim for relief under Rule 9(b). [DE202] Likewise, the district court did not reach either the public disclosure bar or the statute of limitations arguments presented by HCA in its briefing below. [*Id.*] If this Court rejects HCA's argument that the district court properly disregarded information learned in discovery to overcome Rule 9(b), then it should remand for consideration of those arguments in the first instance. *See Schwier v. Cox*, 340 F.3d 1284, 1294 (11th Cir. 2003) (concluding that when "[t]he district court did not reach [an] issue," remand was appropriate for the court to consider the issue "in the first instance").

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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I HEREBY CERTIFY that on this 16th day of January, 2018, the foregoing was filed via CM/ECF, which will serve it on:

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