IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

UNITED STATES OF AMERICA, Plaintiff, *ex rel*. MARIO HUMBERTO FIGUEROA and ELMER ARNULFO FIGUEROA, Plaintiffs-Relators, v. COVAN WORLD-WIDE MOVING, INC and COLEMAN AMERICAN MOVING SERVICES, INC. Defendants.	)	CA No. 3:12-cv-01144-JFA

Plaintiff's Response in Opposition to Defendants' Motion to Dismiss Intervenor Complaint

Plaintiff, the United States of America, by and through its undersigned attorneys, hereby files this memorandum in opposition to Defendants' motion to dismiss the Intervenor Complaint. The Intervenor Complaint seeks to recover damages arising under the False Claims Act (FCA), 31 U.S.C. §§ 3729 et seq. as well as common law fraud, breach of contract, unjust enrichment, and disgorgement claims. See Dkt. No. 37. Defendants Covan World-Wide Moving, Inc. (Covan) and Coleman American Moving Services, Inc. (Coleman) argue dismissal is warranted because (1) the United States has failed to plead fraud with sufficient particularity, (2) that the "intracorporate conspiracy doctrine" bars the United States' conspiracy claim, and (3) that the Intervenor Complaint lacks plausibility. See Defs.' Mem., Dkt. No. 45-1.

This motion should be denied. First, Defendants' theory of what is required to plead fraud with particularity for the purpose of Rule 9(b) of the Federal Rules of Civil Procedure far

exceeds the requirements of the rule and would transform its modest guarantee of fair notice into a shield for the most egregious violations against the public fisc.

Second, Defendants' understanding of the plausibility requirement imposed by Rule 8 of the Federal Rules of Civil Procedure is entirely untethered from the reasoning employed in the cases explaining what constitutes a plausible claim. Those cases merely require a court to ask whether the pleader is capable of making factual assertions that give rise to an inference of wrongdoing. See Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), and Ashcroft v. Iqbal, 556 U.S. 662 (2009). When the answer is "yes," as it is here, the pleader has stated a plausible claim.

Moreover, Defendants particularity and plausibility arguments are both premised on the mistaken assertion that the Intervenor Complaint is "conclusory" and runs afoul of Rules 8 and 9(b) because it fails to specifically identify and plead each and every false claim at issue in this case. As set forth below, Defendants misunderstand and misstate the relevant legal inquiry. The Intervenor Complaint provides Defendants with a detailed description of the fraudulent scheme, how it is perpetrated, the United States' basis for knowing about the scheme, and specific examples of false claims submitted for payment. But even assuming, for the sake of argument, that this is insufficient, under the Fourth Circuit's holding in United States ex rel. Nathan v. Takeda Pharmeceuticals. North America, Inc., 707 F.3d 451 (4th Cir. 2013), a FCA claim is pled with plausible particularity when the pleader identifies specific examples of fraudulent claims in the complaint. The United States has pled accordingly.

Finally, Defendants' reliance on the intracorporate corporate conspiracy doctrine is premature and not grounds for dismissal. The doctrine should be asserted in a responsive

pleading as an affirmative defense so that the Court can rule on it once a fuller factual record has been developed.

Accordingly, the United States respectfully submits that the Defendants' motion should be denied in its entirety.

FACTUAL AND PROCEDURAL BACKGROUND

This action was filed under seal on April 30, 2012 by Plaintiffs-Relators Mario Humberto Figueroa and Elmer Arnulfo Figueroa (the Figueroas). On November 13, 2013, the United States filed a notice of intervention and the next day the Court entered an Order partially lifting the seal. Order, Dkt. No. 30. On December 11, 2013, the United States filed its Intervenor Complaint, detailing Defendants' fraudulent billing scheme whereby the United States Armed Forces is systematically overcharged for the transportation of household goods and personal property of United States service members made necessary by the relocation and deployment of service members at home and abroad. Dkt. No. 37.

Specifically, the Intervenor Complaint alleges that the Defendants provide transportation services as part of the Defense Personal Property Program (DP3) which relocates service members' household goods, unaccompanied baggage, privately owned vehicles, and other personal belongings. Id. at ¶ 11. This requires Defendants' employees to travel to the service member's home, pack their belongings into wooden crates, and load them onto trucks whereupon they are transported to a warehouse for weighing. Id. at ¶¶ 20-21. At the warehouse, the crates are weighed and the weights are recorded on a certified weight certificate. Id. at ¶ 22. Eventually, all of the crates in a shipment are loaded into a tractor-trailer container, trucked to a port, loaded onto a freight ship, and shipped to their final destination. Id. at ¶ 25. Defendants are compensated for their services based on the weight and density of the shipments as recorded on a

certified weight certificate. Id. at ¶¶ 12-14. These certified weight certificates are used to generate government bills of lading (GBLs) which are submitted to the United States for payment. Id. ¶¶ 12-14, 22-24, 46-47.

The Intervenor Complaint explains that the Defendants have systematically defrauded the United States by falsifying weight certificates and invoices by increasing the weight of shipping crates by a small amount in order to increase the overall shipment weight and density. Id. at ¶¶ 29-30. The United States has confirmed the existence of this scheme in a number of ways.

First, the Figueroas were told by management at Coleman's Augusta, Georgia warehouse to falsely increase the weights recorded on weight certificates and that the instruction to "get weights up" was a directive "from the main office." Id. at ¶¶ 31-34, 57. When the Figueroas refused, Coleman's managers instructed the Figueroas to submit weight certificates directly to them rather than to the billing clerk. Id. at ¶ 41. The Figueroas witnessed three different managers falsifying weight certificates. Id. at ¶¶ 41-45. This fraud is evidenced, in part, by the discrepancy between the weights on fraudulent weight certificates and invoices and shipment weights recorded on warehouse "locator cards" created by the Figueroas. Id. ¶¶ 52-53. So far, the United States has identified 437 instances of fraud evidenced by locator card discrepancies. Id. ¶ 54.

Second, the United States has corroborated the Figueroas' allegations through interviews with other employees at the Augusta warehouse, including the individual responsible for using the fraudulent weight certificates to create fraudulent invoices. Id. at ¶ 51. One of Defendants' managers described how another corporate manager instructed him on how to falsify weight certificates by increasing the weight of each crate by a small amount. Id. at ¶ 58.

Third, the United States has confirmed the existence of specific shipments with fraudulent weights originating in Augusta and elsewhere. The Intervenor Complaint provides six examples of shipments invoiced in excess of their actual weight: three originating in Augusta, Georgia; one originating in Fort Rucker, Alabama; one originating in Alexandria, Virginia; and one originating in Jacksonville, Florida. Id. at ¶¶ 48-50, 62-64. These shipments are identified by the name of the shipper, date, origin and destination locations, and GBL number. Id.

Fourth, in addition to these specifically identified shipments, the United States' investigation while this case was under seal discovered a Joint Personal Property Shipping Office (JPPSO) in Pearl Harbor, Hawaii that has been reweighing shipments from shippers throughout the United States. Id. ¶ 60. The Pearl Harbor JPPSO reweighs reveals that Defendants' shipments consistently overbilled the United States by 9-10% of the actual weight of the shipment. Id. ¶ 61. Another government database similarly revealed nearly 80% out of a sample of 650 of Defendants' shipments selected for reweigh that were overbilled by an average of approximately 9%. Id. ¶ 65. Back at the Augusta warehouse, the Figueroas were similarly able to confirm by reweighing crates shipped into the Augusta location that Defendants' other locations were likewise fraudulently increasing shipment weights. Id. at ¶¶ 41-44.

Defendants fraud is believed to have cost United States taxpayers millions of dollars since Defendants and their affiliate carriers have billed the federal government $723 million since just 2009. Id. at ¶ 66.

In response to these allegations, Defendants moved for dismissal pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Dkt. No. 45.

ARGUMENT

Defendants' motion should be denied in its entirety because the Intervenor Complaint provides Defendants ample notice of their fraudulent scheme such that the allegations are both particular and plausible. Below, the United States first explains why Defendants' Rule 8 and 9(b) arguments should be rejected before considering why Defendants' intracorporate conspiracy doctrine argument should also be rejected.

I. The Intervenor Complaint provides Defendants with ample notice of the claims in this action because it describes the who, what, where, and how of Defendants' fraud through allegations by a pleader with knowledge of these facts.

The legal sufficiency of a complaint is measured by whether it meets the general rules of pleading set forth in Rule 8, the special rules of pleading set forth in Rule 9, and Rule 12(b)(6)'s requirement that a complaint state a claim for which relief can be granted. Francis v. Giacomelli, 588 F.3d 186, 192 (4th Cir. 2009). Typically, this merely requires that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief[.]" Fed. R. Civ. P. 8(a)(2). This general rule has been construed to include a plausibility requirement that asks whether the pleader has pled "enough factual matter (taken as true) to suggest" that the alleged illegality occurred. See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-56 (2007). However, when "alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). Rule 9(b)'s particularity requirement applies to FCA claims which, at their essence, sound in fraud. Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 783-84 (4th Cir. 1999) (Harrison I). Together, these pleading requirements ensure a defendant receives "adequate notice of the nature of a claim being made against him." Francis, 588 F.3d at 192.

A. Defendants' misconstrue and misstate Rule 9(b)'s particularity requirement.

The purpose of Rule 9(b)'s heightened pleading requirement is to guard defendants from frivolous actions (and the reputational injuries that arise from them), ensure that "the defendant has sufficient information to formulate a defense[,]" and "to eliminate fraud actions in which all the facts are learned after discovery." Harrison I, 176 F.3d at 784; see also Nathan, 707 F.3d at 456. The rule accomplishes this objective by requiring that the "circumstances" of the fraud be stated as to "the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." United States ex rel. Wilson v. Kellogg Brown & Root, Inc., 525 F.3d 370, 379 (4th Cir.2008) (quoting Harrison I, 176 F.3d at 784). "These facts are often referred to as the 'who, what, when, where, and how' of the alleged fraud." Id. (quoting United States ex rel. Willard v. Humana Health Plan of Texas Inc., 336 F.3d 375, 384 (5th Cir. 2003)). Accordingly,

> A court should hesitate to dismiss a complaint under Rule 9(b) if the court is satisfied (1) that the defendant has been made aware of the particular circumstances for which she will have to prepare a defense at trial, and (2) that plaintiff has substantial prediscovery evidence of those facts.

Harrison I, 176 F.3d at 784.

The Intervenor Complaint meets this standard. As set forth more fully above, it describes Defendants' scheme (the fraudulent increase of shipment weights), the manner in which it is perpetrated (falsifying weight certificates and billing records), and the individuals responsible for furthering it (management and warehouse employees). Defendants argue that the Intervenor Complaint fails to meet Rule 9(b)'s particularity requirement based on their belief the United States (1) must plead each and every false claim made under Defendants' scheme, (2) has made "conclusory allegations" as to Defendants' knowledge of the fraud, and (3) has made allegations

concerning time, place, and manner that are "woefully lacking[.]" See generally, Defs.' Mem., 3-9. These arguments are considered in turn.

Defendants' primary theory in support of dismissal argues that the Intervenor Complaint lacks particularity because it fails to specifically identify each fraudulent submission for payment. For example, Defendants' complain that "closely read, the Intervenor Complaint identifies with particularity only six shipments […]." Defs.' Mem., 5-6, see also id. at 8-9 (suggesting the United States should have specifically identified each false claim). In other words, Defendants' construe the "time, place, and content" pleading requirement to require each individual shipment for which Defendants' falsified weight certificates and billing records be specifically pled. Doing so would entail *pleading* a detailed accounting of hundreds of thousands of military shipments. This is a misapplication of the rule.

Federal courts have never construed the requirements of Rule 9(b) to bar a claim unless the United States could plead each transaction that resulted in a loss under the fraudulent scheme. For example, in U.S. ex rel. Ellis v. Sheikh, 583 F. Supp. 2d 434 (W.D.N.Y. 2008), a doctor was accused of falsifying patient records and using inappropriate billing codes in a systematic effort to increase his federal insurance program billings. Id. at 436-37. The doctor sought dismissal pursuant to Rule 9(b), but the district court disagreed, explaining:

> First of all, there can be little doubt that *defendants were on notice as to the nature of the claims brought against them*. In fact, the complaint sets out in some detail and with great specificity the allegations concerning the inaccurate billing, the improper use of the CPT Codes and the requirements for utilizing such codes.

Id. at 438 (emphasis added). The district court further reasoned that the case before it was "not a case where a party is seeking, through discovery, to determine whether fraudulent actions have taken place[,]" but one involving "an almost daily pattern of fraudulent billing which occurred over a two-year period[.]" Id. at 438-39. The court found sufficient particularly in the allegations

because the plaintiff had provided examples "illustrative of defendants' pattern of fraudulent activity." Id. at 438-39.

The question here is whether, upon discovery of a potentially vast and complex fraud scheme, the United States must identify each individual false claim in its pleading. Defendants ask the Court to answer this question affirmatively, but doing so would create a perverse incentive whereby the larger the fraud perpetrated by a FCA defendant, the more difficult it would become to bring the wrongdoer into court to answer for it. Just last month the Fourth Circuit rejected similar reasoning in a FCA bid-rigging case against a number of international moving companies (including Covan International, one of the Defendants' affiliate entities). In United States ex rel. Daniel Heuser v. Gosselin World Wide Moving, N.V., Slip Op. No. 12-1494 (4th Cir. Dec. 19, 2013), the Fourth Circuit categorically rejected the notion that vast fraud schemes resulting in large civil penalties under the FCA ran afoul of the Eighth Amendment's prohibition against excessive punishment, reasoning:

> It was inevitable, we suppose, in view of the vast number of government contracts — many of prodigious size and sophistication — that we would confront FCA actions involving thousands of invoices, thus exposing culpable defendants to millions of dollars of liability for civil penalties. *We are entirely comfortable with that proposition.* When an enormous public undertaking spawns a fraud of comparable breadth, the rule set forth in Harrison I helps to ensure what we reiterate is the primary purpose of the FCA: making the government completely whole. See [U.S. ex rel. Harrison v. Westinghouse Savannah River Co., 352 F.3d 908, 923 (4th Cir. 2003) (Harrison II)].
>
> The district court's methodology cannot be said to have furthered that statutory purpose. *Indeed, an award of nothing at all because the claims were so voluminous provides a perverse incentive for dishonest contractors to generate as many false claims as possible*, siphoning ever more resources from the government.

Id. at pp. 39-40 (emphasis added). While Heuser was, admittedly, contemplating the FCA's civil penalties provision, the Court's reasoning is nonetheless instructive as cautioning against

construing FCA cases in a manner that creates a perverse incentive for the most egregious offenders. Like the up-coding scheme in Ellis, the gravamen of the allegation here is that Defendants fraudulently increase each shipment's weight by increasing the weight of each crate in a shipment by a small and hopefully undetectable amount. It cannot possibly be correct that the pleading burden in a case such as this one is exponentially higher because the scope of the wrongdoing is so vast. See § I(B), infra (explaining why it's not in the context of Rule 8 as discussed in U.S. ex rel. Nathan v. Takeda Pharm. N. Am., Inc., 707 F.3d 451 (4th Cir. 2013)).

In support of their position to the contrary, Defendants primarily rely on selective quotations from U.S. ex rel. Karvelas v. Melrose-Wakefield Hospital., 360 F.3d 220 (1st Cir. 2004). Defendants' memorandum in support of their motion states:

> In *qui tam* actions, specificity with regard to "'time, place, and content' of the alleged false or fraudulent representations, means that a relator must provide details that identify particular false claims for payment that were submitted to the government." Karvelas, 360 F.3d at 232-33. The particular details that the Karvelas court was looking for were as follows:
>
> > [D]etails concerning the dates of the claims, the content of the forms or bills submitted, their identification numbers, the amount of money charged to the government, the particular goods or services for which the government was billed, the individuals involved in the billing, and the length of time between the alleged fraudulent practices and the submission of claims based on those practices.
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> Id. at 233.

Defs.' Mem., 6 (brackets and block quote in original). But Defendants' reliance on Karvelas is misplaced since they have selectively quoted the First Circuit's opinion in a manner that misrepresents the reasoning actually applied in that case. Quoted accurately and in its entirety, the First Circuit was merely explaining what is already set forth above here, namely, that:

> *In a case such as this*, details concerning the dates of the claims, the content of the forms or bills submitted, their identification numbers, the amount of money

> charged to the government, the particular goods or services for which the government was billed, the individuals involved in the billing, and the length of time between the alleged fraudulent practices and the submission of claims based on those practices *are the types of information that may help a relator to state his or her claims with particularity.*

Karvelas, 360 F.3d at 233 (text omitted by Defendants' memorandum in italics). Contrary to Defendants' suggestion, the specifics discussed by the First Circuit are not mandatory facts that must necessarily be pled in order to meet Rule 9(b)'s mandate, they are merely examples "that *may* help a relator state his or her claim with particularity." Id. (emphasis added). This conclusion is obvious based on the very next sentence of the Karvelas Court's opinion which was also omitted from the Defendants' submission to this Court:

> These details *do not constitute a checklist of mandatory requirements that must be satisfied by each allegation included in a complaint*. However, like the Eleventh Circuit, we believe that "some of this information for at least some of the claims must be pleaded in order to satisfy Rule 9(b)." [United States ex rel. Clausen v. Lab. Corp. of Am., Inc., 290 F.3d 1301, 1312 n.21 (11th Cir.2002), cert. denied, 537 U.S. 1105 (2003)].

Id. (emphasis and long form bracket citation added). The fundamental problem with the complaint in Karvelas was that the plaintiff-relator *admittedly*, "did not set forth the specifics ... of any one single cost report, or bill, or piece of paper that was sent to the Government to obtain funding." Id.

By comparison, here, the very facts that Defendants deride as insufficient provide precisely the sort of demonstrative heft necessary to meet the particularity threshold. For example, Defendants admit that the United States has pled six specific instances of shipments billed in excess of their actual weight. See Defs.' Mem., 5. The Intervenor Complaint identifies these shipments by the name of the service member, date of the shipment, origin and destination location, and the precise GBL number which identifies the specific contract and claim at issue. Int. Compl. ¶¶ 48-50, 62-64. Under a proper reading of Karvelas, these are *precisely* the details

the court there was looking for when attempting to discern whether Rule 9(b)'s particularity requirement was met. Cf. Defs.' Mem., 6.

In addition to Karvelas, Defendants also rely on U.S. ex rel. Garst v. Lockheed-Martin Corp., 328 F.3d 374 (7th Cir. 2003), which, together, Defendants contend stand for the proposition that "courts demand detailed, specific, and actual accounts of individual false claims submissions; not a generalized description of an underlying criminal scheme." Defs.' Mem., 7. But here again, Defendants demonstrate a troubling lack of candor with respect to the proposition for which Garst actually stands. Defendants' memorandum states, without explanation:

> In [Garst, 328 F3d at 376], the Court explained that the Complaint should, as to each count:
>
> > (1) identify specific false claims for payment or specific false statements made in order to obtain payment; (2) if a false statement is alleged, connect that statement to a specific claim for payment and state who made the statement to whom and when; and (3) briefly state why those claims or statements were false.
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> (Emphasis added).

Defs.' Mem., 6-7 (underline in original, bracket short form citation added). While Defendants represent this quotation as the definitive standard this Court should apply here, an even cursory review of the Seventh Circuit's opinion paints an entirely different picture.

In Garst, a FCA relator alleged that Lockheed submitted false claims by "over-promising and under-performing" on a government contract. Garst, 328 F.3d at 375-76. After investigating the claim, the United States declined to intervene. Id. As the Seventh Circuit explained:

> Garst's complaint did not allege any specific fraud, leading Lockheed to move for its dismissal. […] Before the district court could act on Lockheed's motion, Garst filed an amended complaint. At 16 pages and 71 paragraphs, it was 50% longer than the initial complaint—but, the district judge concluded, no better. The court dismissed it for failure to plead fraud with particularity […]. The district court

> observed that Garst had not given any specific example of a fraudulent claim. The judge permitted Garst to try again but reminded him of the need to allege "the who, what, when, where, and how: the first paragraph of any newspaper story." See DiLeo v. Ernst & Young, 901 F.2d 624, 627 (7th Cir.1990). The judge instructed Garst to file an organized and concise document.
>
> Garst's second amended complaint ballooned to 74 double-spaced pages with 198 paragraphs. Concise it was not. Before Lockheed could respond, Garst filed a third amended complaint, which broke the scale at 109 pages containing 345 numbered paragraphs; this document had 74 attachments, many of them lengthy. Lockheed asked the district judge to dismiss this complaint for failure to plead fraud with particularity, as Fed. R. Civ. P. 9(b) requires, and for the omission of any "short and plain statement of the claim", as Fed. R. Civ. P. 8(a)(2) contemplates. These rules are not in conflict: it is possible to write a short statement narrating the claim—which is to say, the basic grievance—even if Rule 9(b) requires supplemental particulars. But the district judge concluded that this complaint is so sprawling as to be essentially incomprehensible (a Rule 8 problem) and that despite the bloat it lacks details outlining fraud (a Rule 9 shortcoming). Instead of dismissing this complaint, the judge directed Garst to file a more definite statement. To make sure that Garst knew exactly what was needed, the judge explained that the statement "should be brief and should as to each count: (1) identify specific false claims for payment or specific false statements made in order to obtain payment; (2) if a false statement is alleged, connect that statement to a specific claim for payment and state who made the statement to whom and when; and (3) briefly state why those claims or statements were false" (underlining in original).

Id. at 376 (bracketed ellipses added). Understood in its proper context, the portion of the opinion selectively quoted by Defendants was merely the district court's effort to elicit a properly pled claim from a relator that was not really alleging deceit but merely inefficiency and poor performance.

Defendants' rely on the district court's instruction to the recalcitrant relator as demonstrative of the United States' failure to adequately plead time, place, and content. See Defs.' Mem., 6-7. But this conclusion is inapposite to Garst's very instruction. In affirming the district court's eventual dismissal, the Seventh Circuit likewise threw up its hands at the relator's inability to comply with Rule 8(a)'s requirement that "parties [ ] make their pleadings straightforward, so that judges and adverse parties need not try to fish a gold coin from a bucket

of mud." Id. at 378. In other words, Garst reaffirms the adequacy of the pleadings here—a detailed narrative of the scheme supported by specific examples.

Finally, Defendants suggest that the United States has failed to adequately plead knowledge. See Defs.' Mem. 4-5. This assertion is mistaken since Rule 9(b) explicitly exempts state of mind from the particularity requirement. "Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b). Nevertheless, Defendants argue that:

> [i]n applying the Iqbal standard to the *mens rea* elements of Rule 9(b), the Fourth Circuit has held that conclusory allegations reciting legal standards such as "known by them to be false when made," without more, are entirely insufficient to survive a motion to dismiss under Rule 12(b)(6). See Mayfield v. NASCAR, 674 F.3d 369, 377-78 (4th Cir. 2012).

Defs.' Mem., 5. But once again, Defendants' conclusion bears no relationship to the authority offered in support. Mayfield v. NASCAR, 674 F.3d 369 (4th Cir. 2012), was not a fraud action but a defamation suit brought by a NASCAR driver after NASCAR suspended him and announced that the suspension was the result of two failed drug tests. Id. at 373-74. Defendants' cited quotation[1] of the Fourth Circuit's opinion refers, not to the general requirements for pleading fraud, but to the constitutional requirement that a defamation plaintiff prove actual malice. See id. at 377-78. The driver's claim of actual malice was facially deficient because his selection for drug testing was random and NASCAR was merely stating the fact that he failed two tests. Id. at 378. But this reasoning has absolutely no bearing on the question here. To the

[1] There is no such quotation in the Fourth Circuit's opinion. Presumably Defendants are referring to the following passage from the opinion which quotes from the driver's brief:

> To begin with, Appellants' assertion that Appellees' statements "were known by [them] to be false at the time they were made, were malicious or were made with reckless disregard as to their veracity" is entirely insufficient. This kind of conclusory allegation—a mere recitation of the legal standard—is precisely the sort of allegations that Twombly and Iqbal rejected.

Id. at 378 (brackets in original).

contrary, the opinion clearly states that "Rule 9(b) ensures there is no heightened pleading standard for malice, but malice must still be alleged in accordance with Rule 8—a 'plausible' claim for relief must be articulated." Id. at 377.

In light of the foregoing, the Court should reject Defendants' arguments and conclude that the United States has met its Rule 9(b) particularity requirement.

B. Defendants' misunderstand what constitutes a plausible factual allegation.

While Rule 8 merely requires "a short and plain statement of the claim showing that the pleader is entitled to relief[,]" Fed. R. Civ. P. 8(a)(2), doing so means pleading enough factual matter taken as true to "allow[ ] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Twombly, 550 U.S. at 556-57 (defining "facial plausibility"). Defendants argue that the Intervenor Complaint lacks plausibility, as explained by the Supreme Court's decisions in Twombly and Iqbal, and thus should be dismissed. See Defs.' Mem., 12-15 (challenging Counts III, IV & VI). Like Defendants' particularity argument, Defendants' plausibility theory turns almost exclusively on their assumption that satisfying Rule 8's plausibility standard requires the United States to plead each fraudulent shipment at issue here. For example, Defendants complain that "the Government only identifies six allegedly overweight shipments" and that they "are unable, from the face of the Intervenor Complaint, to determine which contracts with the United States were allegedly breached[.]" Id. at 12 & 15 (respectively). Because Defendants' theory misconstrues what constitutes a plausible pleading, this argument should be rejected.

A proper understanding of the plausibility requirement necessarily turns on what constitutes a well-pled fact versus a mere legal conclusion. A fact is "well pled" when the pleader has some basis for the truth of the allegation, or an inference in support thereof, usually

(though not always) arising from the pleader's personal knowledge. This conclusion is obvious from the Supreme Court's reasoning in Twombly and Iqbal. In Twombly, the Court considered whether allegations of an anti-trust conspiracy amongst telecommunications companies met Rule 8's pleading requirements and explained that meeting this standard "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action[.]" Id. at 554-56. In dismissing the case, the Court held that:

> stating [an anti-trust conspiracy] claim requires a complaint with enough factual matter (taken as true) *to suggest that an agreement was made*. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading state; *it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement*. And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.

Id. (internal quotations omitted) (emphasis added). The Twombly Court reasoned that the plaintiffs' conspiracy allegations were not predicated on any factual allegations because the plaintiff themselves had no knowledge of any illegal agreement. See id. at 550-51. Instead, plaintiffs relied solely on the *perception* of parallel action by the telecom companies as evidence that an agreement existed. See id.

Similarly, in Iqbal a detainee filed a Bivens action against the United States Attorney General and FBI Director (and other federal officers) alleging racial discrimination in violation of his constitutional rights. Iqbal, 556 U.S. at 666. After recognizing that Twombly was motivated by the "antitrust principles implicated by the complaint" in that case, the Iqbal Court first looked to the plaintiff's burden to plead allegations of racial discrimination by these high-ranking government officials *themselves*. Id. at 675-78. Unlike the other federal agents, the plaintiff's allegations concerning the Attorney General and FBI Director's conduct were not based on his personal knowledge. See id. at 668-69. In other words, like the telecom defendants

in Twombly, the plaintiff in Iqbal was not in a position to allege any facts that would give rise to an inference that two high-ranking government officials directed race-based conduct at him personally, thus requiring dismissal of those defendants. Id. at 676-77, 682-83.

In short, Twombly and Iqbal merely ask whether it is *possible* for the pleader to allege facts in support of his claim. When the answer is "yes," a claim meets Rule 8's plausibility requirement. Applying that same reasoning here, the United States has met its burden in the Intervenor Complaint. Here, the Court's task merely entails first assuming the veracity of each factual allegation and then asking whether these allegations support an inference of wrongdoing. Respectfully, they do. Moreover, as the Court reviews the factual allegations, it should ask whether the United States is in a position to make a plausible allegation or whether, like the Twombly plaintiffs, it relies on assumptions. This task should pose little difficulty here since, as set forth above, the Intervenor Complaint not only describes Defendants' fraudulent scheme, but also describes the United States' basis for knowing about that scheme. This Court can rely on the Figueroas' personal knowledge, interviews with Defendants' employees, the ongoing locator card audit, the JPPSO Pearl Harbor findings, and the six specifically named shipments as grounds for denying this motion. Even if the Court is skeptical as to whether these allegations are actually true, the allegations here are still certainly more than adequate to nudge the United States' claims "across the line from conceivable to plausible." See Iqbal, 556 U.S. at 680; Twombly, 550 U.S. at 554-56.

Finally, if there were any doubt whether the Intervenor Complaint meets the plausibility standard, the Fourth Circuit's decision in United States ex rel. Nathan v. Takeda Pharmeceuticals. North America, Inc., 707 F.3d 451 (4th Cir. 2013), simplifies the analysis considerably by holding that a FCA pleading can satisfy the particularity requirement by alleging

specific false claims presented for payment. Id. at 457. In Nathan, the Court considered whether a pharmaceutical company sales manager stated a plausible claim that her employer presented or caused to be presented false claims for payment by federal insurance programs. Id. at 453-54. More specifically, the sales manager alleged that the pharmaceutical company marketed an off-label[2] drug to physicians in an effort to replace one of its approved drugs with a soon-to-expire patent with the more lucrative off-label drug. Id. at 454-455. The sales manager alleged that this marketing scheme caused false claims to be presented for payment by federal insurance programs, thus triggering FCA liability. Id. The Fourth Circuit considered whether the sales manager had plausibly alleged that the pharmaceutical company caused false claims to be presented. Id. at 454.

The Nathan Court rejected the sales manager's contention that she plausibly pled presentment by merely "allege[ing] the existence of a fraudulent scheme that supports the inference that false claims were presented to the government for payment." Id. at 456. The Court reasoned that Rule 9(b)'s particularity requirement

> does not permit a False Claims Act plaintiff merely to describe a private scheme in detail but then to allege simply *and without any stated reason for his belief that claims requesting illegal payments must have been submitted, were likely submitted* or *should have been submitted* to the Government. Rather, Rule 9(b) requires that *some indicia of reliability* must be provided in the complaint to support the allegation that an actual false claim was presented to the government. Indeed, without such plausible allegations of presentment, a relator not only fails to meet the particularity requirement of Rule 9(b), but also does not satisfy the general plausibility standard of Iqbal.

Id. at 456-57 (quoting United States ex rel. Clausen v. Lab. Corp. of Am., 290 F.3d 1301, 1313 (11th Cir. 2002)) (internal quotations and citations omitted) (emphasis added). What made the

[2] Prescriptions written for medical uses not approved by the Food and Drug Administration or included in federal health insurance programs' approved compendia are not reimbursable under federal insurance programs are typically referred to as "off-label" uses. Id. at 454 & n.2.

sales manager's claim lacking "some indicia of reliability" was not that she failed to detail *every* instance in which the pharmaceutical company caused a false claim to be presented, but that she failed to allege *any* such instance.[3] With this reasoning in mind, the Court adopted a bright line rule, holding that

> when a defendant's actions, as alleged and as reasonably inferred from the allegations, could have led, but need not necessarily have led, to the submission of false claims, a relator must allege with particularity that specific false claims actually were presented to the government for payment.

Id., at 457. In other words, when an inference of presentment does not necessarily flow from the facts alleged, a FCA relator can cross that threshold by pleading specific false claims to show that presentment did occur. Accordingly, even if the Court finds the Intervenor Complaint's description of the fraud and explanation as to the basis of those facts insufficiently plausible, the identification of six specific GBLs presented in excess of their actual weight plausibly establishes that Defendants made false claims.

In light of the foregoing, Defendants' particularity and plausibility arguments should be rejected and this motion should be denied.

II. The intracorporate conspiracy doctrine is not grounds for dismissal on the pleadings.

Finally, Defendants' contend that the United States' FCA conspiracy claim (Count II) should be dismissed pursuant to the intracorporate conspiracy doctrine. Defs.'Mem., 9-12. The

[3] This is not to say that the Court categorically rejected the possibility that a FCA claim could be plausibly alleged in the absence of particularized allegations of specific false claims. Instead, the Court distinguished United States ex rel. Grubbs v. Kanneganti, 565 F.3d 180 (5th Cir.2009) (allowing a claim that identified dates of services but no actual bills), and United States ex rel. Duxbury v. Ortho Biotech Prods., L.P., 579 F.3d 13, 30 (1st Cir.2009) (claim alleging the dates and amounts sought from Medicare was sufficient), explaining that "[b]ased on the nature of the schemes alleged in many of those cases, specific allegations of the defendant's fraudulent conduct necessarily led to the plausible inference that false claims were presented to the government." Nathan, 707 F.3d at 457.

intracorporate conspiracy doctrine holds that where a conspiracy requires an agreement of two or more persons, agents of a corporation cannot form a conspiracy with the corporation since they are effectively one and the same individual. See Buschi v. Kirven, 775 F.2d 1240, 1251-52 (4th Cir. 1985) (describing the doctrine). Defendants' argument turns on the United States' allegations that the fraud here is a "company-wide scheme" and that Covan and Coleman are "effectively one and the same company operating in conjunction with numerous subsidiary affiliates." Defs' Mem., 9-10 (quoting Int. Compl. ¶¶ 7 & 75). Accepting these allegations as true, so the argument goes, requires dismissal because Defendants are essentially one juridical person and thus lack the necessary second individual with whom a conspiracy might be formed.

This argument is premature because the intracorporate conspiracy doctrine is an affirmative defense that must be pled, not raised as a defect in pleading. This is clear from this Circuit's cases applying the doctrine. For example, in Buschi v. Kirven, 775 F.2d 1240 (4th Cir. 1985), the Fourth Circuit ruled on the defendant's entitlement to the defense based on the record at summary judgment. See id. at 1253. In R. Ernest Cohn, D.C., D.A.B.C.O. v. Bond, 953 F.2d 154 (4th Cir. 1991), the Fourth Circuit affirmed application of the doctrine at summary judgment, expressly noting that the district court had "sufficient information before [it] to determine that the [alleged co-conspirator employees] were immune." Id. at 159. Likewise in United States ex rel. DRC, Inc. v. Custer Battles, LLC., 376 F. Supp. 2d 617 (E.D. Va. 2005) rev'd on other grounds 562 F.3d 295 (4th Cir. 2009), the district court ruled on the FCA defendant's intracorporate conspiracy defense at summary judgment. See id. at 651-52.

Defendants should be permitted to assert the doctrine in their responsive pleading and the United States should be afforded any opportunity to conduct discovery concerning the Defendants' corporate structures and operations. After a factual record is developed (and the

United States has had an adequate opportunity to determine whether additional defendants should be joined), the Court can better decided as to whether, in fact, Defendants are essentially the same corporation such that the doctrine should apply here. But since a party has no pleading obligation to anticipate a defense, failure to do so is not grounds for dismissal. See Gomez v. Toledo, 446 U.S. 635, 640 (1980) (burden of pleading affirmative defense was with the defendant and plaintiff had no burden to anticipate or circumvent it in pleading). Accordingly, Defendants' reasoning should be rejected and this motion should be denied.

CONCLUSION

For the reasons set forth above, the United States respectfully submits that the Defendants' motion to dismiss should be denied in its entirety.

Respectfully submitted by,

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