United States Court of Appeals,
Tenth Circuit.

UNITED STATES of America EX REL. Donald LITTLE and Kurosh Motaghed, Plaintiffs-Appellees,
v.
TRIUMPH GEAR SYSTEMS, INC., Defendant-Appellant.

No. 16-4152

FILED September 18, 2017

Appeal from the United States District Court for the District of Utah, (D.C. No. 2:12-CV-00922-DAK)

Attorneys and Law Firms

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Before TYMKOVICH, Chief Judge, LUCERO and MORITZ, Circuit Judges.

Opinion

MORITZ, Circuit Judge.

This appeal arises from the efforts of several whistleblowers to navigate the procedural minefield of the False Claims Act (FCA). *See* 31 U.S.C. §§ 3729-3733. In 2012, Joe Blyn commenced this FCA action by filing a sealed complaint in the district court. The complaint named Donald Little as Blyn's counsel of record. Months later, Little filed an amended complaint that named himself and a third person, Kurosh Motaghed, as the sole relators.[1] Blyn was excised from the caption—and the rest of the amended complaint—without explanation.

Defendant Triumph Gear Systems, Inc. (Triumph) moved to dismiss Little and Motaghed's claims. Triumph argued that their claims are barred by the FCA's first-to-file rule, which prohibits new relators from intervening in a pending FCA action. *See* § 3730(b)(5). The district court denied Triumph's motion, and Triumph appeals. Because we conclude that Little and Motaghed's entry into the action violated § 3730(b)(5), we reverse.

I

Triumph is a government contractor that manufactures aerospace gear systems. Blyn worked as an independent contractor for Triumph, and he alleges that he witnessed instances of fraud on the United States by Triumph. In October 2012, Blyn filed a sealed complaint in the district court claiming that Triumph violated the FCA. The complaint named Blyn and three John Does as relators. And the complaint identified Little as Blyn's counsel of record, but not as a relator.

In July 2013, Blyn vanished from the action. Little filed an amended complaint that made no mention of Blyn or the John Does, either in the caption or elsewhere. Inexplicably, in several instances, Little seems to have simply substituted his name for Blyn's without regard for the resulting incongruities. For example, Paragraph 24 of the complaint alleges that "[o]n September 6, 2006, Relator Joseph Blyn went down to heat treat and verified in person that the inspection requirements for gear inspection" were "not being carried out." App. 22. Paragraph 24 of the amended complaint makes an identical allegation, but substitutes attorney Little for Blyn.[2] And while the docket sheet indicates that the original complaint was "filed by Joe Blyn," the amended complaint was "filed by Donald Little [and] Kurosh Motaghed." App. 4. Oddly, none of the amended complaint's substantive allegations pertain to Motaghed, despite his status as a putative relator.

After the United States declined to intervene, the district court unsealed the amended complaint. Little and Motaghed amended the complaint twice more, and Triumph moved to dismiss the third amended complaint on multiple grounds. As relevant to this appeal, Triumph argued that the district court lacked jurisdiction over Little and Motaghed's claims under the FCA's first-to-file rule. Under that rule, when a relator brings a qui tam action under the FCA, "no person other than the [g]overnment may [1] intervene or [2] bring a related action based on the facts underlying the pending action." § 3730(b)(5). Triumph maintained that when Little filed the amended complaint, he and Motaghed effectively intervened as new relators and replaced Blyn.

The district court disagreed. Relying on our decision in *United States ex. rel. Precision Company v. Koch Industries, Inc.*, 31 F.3d 1015 (10th Cir. 1994), the district court reasoned that § 3730(b)(5)'s bar on "interven [ing]" applies only to interventions under Federal Rule of Civil Procedure 24—and not to additions or substitutions accomplished through Federal Rule of Civil Procedure 15. The district court concluded that Little and Motaghed entered the action through a Rule 15 amendment and, accordingly, aren't barred by § 3730(b)(5). The district court rejected Triumph's additional grounds for dismissal and denied Triumph's motion.

The district court certified for interlocutory appeal its order denying Triumph's motion to dismiss. We granted Triumph's petition for permission to file this interlocutory appeal.

After the appeal was docketed, Little and Motaghed filed a motion in this court to amend the third amended complaint. Their proposed fourth amended complaint would add Blyn as a plaintiff.

II

Triumph argues on appeal that the district court lacked jurisdiction over Little and Motaghed's claims. Because Triumph's argument presents questions of subject matter jurisdiction and statutory interpretation, our review is de novo. *Niemi v. Lasshofer*, 770 F.3d 1331, 1344 (10th Cir. 2014); *Precision*, 31 F.3d at 1017.

The FCA permits a qui tam plaintiff to "bring a civil action ... for the [plaintiff] and for the United States

[g]overnment." § 3730(b)(1). If the suit ultimately yields damages for the government, the relator generally shares in the award. *See* § 3730(d)(1)-(3). Congress intended this private cause of action to "encourage those with knowledge of fraud to come forward." *United States ex rel. Fine v. MK-Ferguson Co.*, 99 F.3d 1538, 1546 (10th Cir. 1996). But to prevent parasitic and duplicative lawsuits, the FCA imposes an important constraint on qui tam actions: the first-to-file rule. *See Grynberg ex rel. United States v. Exxon Co., USA* (*In re Nat. Gas Royalties Qui Tam Litig.*), 566 F.3d 956, 961 (10th Cir. 2009) ("The first-to-file bar thus functions both to eliminate parasitic plaintiffs who piggyback off the claims of a prior relator, and to encourage legitimate relators to file quickly by protecting the spoils of the first to bring a claim.").

The rule provides that when a qui tam plaintiff brings an action under the FCA, "no person other than the [g]overnment may [1] intervene or [2] bring a related action based on the facts underlying the pending action." § 3730(b)(5). Triumph argues that Little and Motaghed are "person[s]" who "intervene[d]" in Blyn's action. *Id.* And because § 3730(b)(5) is "a jurisdictional limit on the courts' power," *Grynberg*, *United States ex rel. v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1278 (10th Cir. 2004), accepting Triumph's argument would spell the end of Little and Motaghed's claims.[3]

The success of this argument turns on the meaning of the word "intervene" in § 3730(b)(5). In the FCA context, the Supreme Court has defined "intervention" as "the requisite method for a nonparty to become a party to a lawsuit." *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 933, 129 S.Ct. 2230, 173

L.Ed.2d 1255 (2009); *see id.* (defining intervention as "[t]he legal procedure by which ... a third party is allowed to become a party to the litigation" (alterations in original) (quoting Black's Law Dictionary 840 (8th ed. 2004))). Under that broad formulation, intervention takes place when a non-party becomes a party—regardless of the mechanism by which that occurs.

Rigidly applying that definition here would make for an easy resolution. Before the amended complaint was filed, Little and Motaghed weren't parties. After its filing, they were. Thus, under *Eisenstein*'s definition, they intervened—and the first-to-file rule would bar their claims. *See Grynberg*, 390 F.3d at 1278. But we aren't writing on a blank slate; our analysis must account for this court's decision in *Precision*, 31 F.3d 1015. There, we held that two new relators didn't "intervene" in violation of § 3730(b)(5) when the original plaintiff added the relators through a Rule 15 amendment. *Id.* at 1017-18. Here, the district court applied *Precision* and determined that Little and Motaghed didn't intervene.

We conclude that *Precision* isn't controlling here. There, a corporate entity named Precision brought a qui tam action against defendant Koch Industries. After the district court ruled that Precision wasn't the "original source" of the allegations set forth in the complaint,[4] Precision amended its complaint to add two individual relators. *Id.* at 1016. The new relators were Precision's sole stockholders. *Id.* The district court dismissed the amended complaint, reasoning in part that the new relators intervened in violation of § 3730. *Id.* at 1017.

We reversed, explaining that

> the focal point for proper analysis is the word "intervene" contained in § 3730(b)(5). Is that word to be interpreted in its narrow, [Rule 24] plain legal meaning, or should it be granted greater breadth, as defendants suggest, to include any form of joinder? Our judgment tells us the statute implies intervention of the types set forth in Rule 24(b)(2), and the addition of parties does not constitute intervention.

Id.; *see id.* at 1019 (reversing dismissal).[5] And because the new relators in *Precision* entered the action through a Rule 15 addition—and not a Rule 24 intervention—we concluded that they didn't "intervene" as § 3730(b)(5) uses that term. *Id.* at 1016-17.[6] *Precision* thus established a dichotomy between addition and traditional intervention: in this circuit, § 3730(b)(5) permits the former, but not the latter.[7]

But Little and Motaghed can't rely on *Precision*'s narrow exception to the first-to-file rule, because they didn't enter this action through a Rule 15 addition.[8] Rule 15 provides that "[a] party may amend its pleading once as a matter of course within ... 21 days after serving it." Fed. R. Civ. P. 15(a)(1)(A). Although the Rule doesn't define the term "amend," we've held that "Rule 15(a) governs the addition of a party." *Precision*, 31 F.3d at 1018. On that basis, the district court concluded that Rule 15 governed the amended complaint because Triumph hadn't yet been served with the original complaint. We don't disagree that Little and Motaghed met the Rule's timing requirement. But under the Rule, the right to amend

lies solely with "[a] *party*." Fed. R. Civ. P. 15(a)(1) (emphasis added); *see Intown Props. Mgmt., Inc. v. Wheaton Van Lines, Inc.*, 271 F.3d 164, 169 (4th Cir. 2001) ("Rule 15 allows liberal amendment by *parties*, not nonparties...."). Blyn was the sole named plaintiff in the original complaint. Little and Motaghed, as non-parties, had no right to amend the complaint under Rule 15.[9]

Yet amend it they did. The docket sheet indicates that the amended complaint was "filed by Donald Little [and] Kurosh Motaghed." App. 4. The original complaint, by contrast, was "filed by Joe Blyn." *Id.* Nothing in the amended complaint indicates that Blyn filed it—or that he was even aware of it. His name appears nowhere in it. In fact, the complaint's Blyn-specific allegations morph into allegations about Little in the amended complaint. And Blyn didn't file a notice to the court or a motion of any kind. He simply disappeared from the action.

On appeal, Blyn submits a declaration accompanying Little and Motaghed's motion to amend the third amended complaint. In that declaration, Blyn asserts that he amended the complaint to allow Little and Motaghed to proceed as named plaintiffs after he left the case. We decline to consider that statement on appeal because Blyn failed to first present it to the district court. *See Allen v. Minnstar, Inc.*, 8 F.3d 1470, 1474 (10th Cir. 1993) ("[T]he only proper function of a court of appeals is to review the decision below on the basis of the record that was made before the district court." (quoting *Jones v. Jackson Nat'l Life Ins. Co.*, 819 F.Supp. 1385, 1387 (W.D. Mich. 1993))).

It's unclear what procedural mechanism Little and Motaghed employed to enter the action. But it wasn't a Rule 15 addition—or an addition of any kind. Nor could it have been, because Little and Motaghed weren't parties and thus had no power to amend the complaint. That distinguishes this case from *Precision*, where the *existing plaintiff* added the new relators. *See Precision*, 31 F.3d at 1018 ("Precision filed an amended complaint which simply added William Koch and William Presley as plaintiffs."). And because Little and Motaghed didn't tread *Precision*'s narrow pathway for would-be relators, they intervened in violation of the first-to-file rule.

Our conclusion that the first-to-file rule bars their claims would seemingly require us to reverse the district court's order denying Triumph's motion to dismiss. § 3730(b)(5); *Grynberg*, 390 F.3d at 1278. But Little and Motaghed advance four arguments against dismissal. First, they argue that they were parties to the original complaint—and therefore didn't intervene—because they were two of the three John Does. Second, they maintain that Federal Rule of Civil Procedure 17 precludes dismissal of their claims. Third, they contend that their claims can't be dismissed without consent of the United States Attorney General. Finally, they assert that the first-to-file rule isn't jurisdictional. None of these arguments save Little and Motaghed's claims from dismissal.

First, Little and Motaghed seek to rely on the caption and text of the original complaint, which referred generally to John Doe plaintiffs. Little and Motaghed argue, as they did below, that they "started as John Doe plaintiffs and, with Blyn, amended the Complaint

to reveal their identities while the case was under seal." Aplee. Br. 5. Because they were already parties, Little and Motaghed contend, they didn't intervene by filing the amended complaint. They merely "reveal[ed] their identities." *Id.*

But even assuming that Little and Motaghed were, in fact, two of the John Does—an assumption Triumph disputes—that fact wouldn't protect their claims from the first-to-file rule. The Federal Rules of Civil Procedure "make no provision for suits by persons using fictitious names or for anonymous plaintiffs." *Nat'l Commodity & Barter Ass'n, Nat'l Commodity Exch. v. Gibbs*, 886 F.2d 1240, 1245 (10th Cir. 1989) (per curiam); *see* Fed. R. Civ. P. 10(a) ("The title of the complaint must name all the parties."). True, we have "[i]n certain limited circumstances ... permitted a plaintiff to proceed using a fictitious name." 886 F.2d at 1245. But in those circumstances—which don't exist here[10]—the parties must make a "request to the district court for permission to proceed anonymously." *Id.* Otherwise, "the federal courts lack jurisdiction over the unnamed parties, as a case has not been commenced with respect to them." *Id.*; *see W.N.J. v. Yocom*, 257 F.3d 1171, 1172-73 (10th Cir. 2001) (dismissing case for lack of jurisdiction because "plaintiffs failed to request permission from the district court before proceeding anonymously").

Little and Motaghed neither sought nor received the district court's permission to appear anonymously. Thus, even assuming they were two of the three John Does, the original complaint failed to "commence[ ]" the action "with respect to them." *Nat'l Commodity & Barter Ass'n, Nat'l Commodity Exch.*, 886 F.2d at 1245.

And any subsequent commencement with respect to them that might have been achieved when they filed the amended complaint was an intervention barred by the first-to-file rule. *See* § 3730(b)(5).

Next, Little and Motaghed argue that Rule 17 authorized them to belatedly substitute themselves into the action. Specifically, they cite Rule 17(a)(1)(3), which provides that

> court[s] may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest.

We decline to affirm on this basis. First, Little and Motaghed waived this argument by failing to raise it in their opening brief. *See United States v. Ibarra-Diaz*, 805 F.3d 908, 933 (10th Cir. 2015). Second, even if we were inclined to address this late-blooming argument, we would reject it on the merits. Rule 17 prevents a district court from "dismissing an action for failure to name the real party in interest" without first giving that party leave to substitute into the action. *Esposito v. United States*, 368 F.3d 1271, 1274 (10th Cir. 2004). For example, if a wrongful death suit is filed in the decedent's name, but the action should have been filed by the decedent's spouse, Rule 17 permits the spouse to substitute for the decedent. *See id.* at 1274-75, 78. But here, no one contends that Blyn—the original plaintiff—wasn't a real party in interest. And Triumph

didn't move to dismiss on that basis. Accordingly, we can't retroactively construe Little and Motaghed's substitution as an attempt to avoid dismissal for "failure to name the real party in interest"—the only situation to which Rule 17 applies. Fed. R. Civ. P. 17 (a)(1)(3).

Next, Little and Motaghed contend that their claims can't be dismissed without consent of the United States Attorney General. They base this argument on § 3730(b)(1), which states that an FCA qui tam action "may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting." This provision "allows the government to resist [unfavorable settlements] and protect its ability to prosecute matters in the future." *Searcy v. Philips Elecs. N. Am. Corp.*, 117 F.3d 154, 160 (5th Cir. 1997). In light of that purpose, § 3730(b)(1) only prohibits an FCA relator from voluntarily dismissing his complaint without consent. *See Brown v. Sherrod*, 284 Fed.Appx. 542, 543 (10th Cir. 2008) (unpublished) ("The consent of the Attorney General is required only where the plaintiff seeks a voluntary dismissal of the action, not where the district court grants a defendant's motion to dismiss for failure to state a claim."); *Minotti v. Lensink*, 895 F.2d 100, 103-04 (2d Cir. 1990) (same).

Here, Blyn didn't seek to voluntarily dismiss his complaint. Nevertheless, Little and Motaghed suggest that the amended complaint functioned as a de facto voluntary dismissal by divesting the district court of jurisdiction. In essence, Little and Motaghed propose a new rule: any pleading that ultimately leads to a court-ordered dismissal counts as a motion to voluntarily

dismiss in the context of § 3730(b)(1). But they cite no authority in support of their theory; indeed, the cases they cite appear to foreclose such an expansive reading of § 3730(b)(1). *See, e.g.*, *United States ex rel. Shaver v. Lucas W. Corp.*, 237 F.3d 932, 934 (8th Cir. 2001) ("[W]e interpret this provision to mean the Attorney General's consent is required only where the relator seeks a voluntary dismissal...."). And instead of acknowledging this inconsistency and attempting to justify their proposed rule, Little and Motaghed seem to assume that we'll adopt that proposed rule without question. We decline to do so. *Cf. Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1031 (10th Cir. 2007) (refusing to address argument because party "failed to provide arguments or authorities in support of" its position).

Finally, Little and Motaghed argue that the first-to-file rule isn't jurisdictional but, instead, is a non-jurisdictional rule that "bears only on whether a qui tam plaintiff has properly stated a claim." Aplee. Br. 15 (emphasis omitted) (quoting *United States ex rel. Heath v. AT & T, Inc.*, 791 F.3d 112, 121 (2015)). And based on that assertion, Little and Motaghed contend that the order the district court certified for appeal "does not involve a controlling issue of law ... as required by 28 U.S.C. § 1292(b)." Aplee. Br. 12; *see* § 1292(b) (permitting party to take interlocutory appeal from an order when district court certifies that order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation").[11]

Little and Motaghed acknowledge our previous holding that the first-to-file rule is jurisdictional. *Grynberg*, 390 F.3d at 1278 (holding that first-to-file rule "is a jurisdictional limit on the courts' power to hear certain duplicative qui tam suits"). But they contend that *Grynberg* was superseded by the Supreme Court's intervening decision in *Gonzalez v. Thaler*, which clarified the distinction between jurisdictional rules and claim-processing rules. 565 U.S. 134, 141-42, 132 S.Ct. 641, 181 L.Ed.2d 619 (2012).

But even assuming that *Gonzalez* invalidated our previous ruling in *Grynberg*—a question we don't reach—we reject Little and Motaghed's assertion that the district court's certified order doesn't involve a controlling question of law. If the first-to-file rule were non-jurisdictional, Little and Motaghed's violation of the rule would nevertheless afford a basis for dismissal. *See Heath*, 791 F.3d at 119 ("Even if the district court wrongly characterized its dismissal as jurisdictional, we could sustain that judgment for failure to state a claim under Rule 12(b)(6)."). Our conclusion that Little and Motaghed violated the first-to-file rule thus "materially advance[s] the ultimate termination of the litigation." § 1292(b).

We therefore reject Little and Motaghed's four arguments against dismissing their claims.

III

After this appeal was docketed, Little and Motaghed filed a motion in this court to amend the third amended complaint. Their proposed amendment would rename Blyn as a plaintiff. Little and Motaghed note that their

motion isn't a concession that the district court lacked jurisdiction over their claims. But they assert that if we conclude the first-to-file rule bars their claims—as we do—then adding Blyn back into the action would correct this purported jurisdictional defect.

As authority for their proposed amendment, Little and Motaghed cite 28 U.S.C. § 1653, which provides that "[d]efective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts."[12] But § 1653 doesn't allow for the type of amendment Little and Motaghed propose. The statute "addresses only incorrect statements about jurisdiction that actually exists, and not defects in the jurisdictional facts themselves." *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 831, 109 S.Ct. 2218, 104 L.Ed.2d 893 (1989). In other words, § 1653 doesn't "empower federal courts to amend a complaint so as to produce jurisdiction where none actually existed." *Id.* For that reason, § 1653 doesn't permit the addition of a party to create jurisdiction. *See Mills v. Maine*, 118 F.3d 37, 53 (1st Cir. 1997) ("The unequivocal rule of *Newman-Green* is that section 1653 does not authorize the addition or elimination of parties in order to create jurisdiction where jurisdiction does not exist.").

Little and Motaghed acknowledge this limitation of § 1653. But they argue that they don't seek to create jurisdiction where none existed. Because the district court had jurisdiction over Blyn's claim in the original complaint, they contend, the proposed amendment would merely correct their error of omitting Blyn from the amended complaint.

But as Triumph notes, the amended complaint—not the original complaint—is the starting point for the

jurisdictional determination. *See Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 473-74, 127 S.Ct. 1397, 167 L.Ed.2d 190 (2007) ("[W]hen a plaintiff files a complaint in federal court and then voluntarily amends the complaint, courts look to the amended complaint to determine jurisdiction."). It's thus irrelevant whether the district court had jurisdiction over Blyn's claim in the original complaint. Even assuming the district court lacked jurisdiction over Little and Motaghed's claims in the amended complaint, § 1653 doesn't authorize an amendment to create jurisdiction. *See Newman-Green*, 490 U.S. at 831, 109 S.Ct. 2218.

We thus deny Little and Motaghed's motion to amend the third amended complaint. And because our denial doesn't rely on Blyn's declaration in support of the motion, we deny as moot Triumph's motion to strike the declaration.

* * *

Little and Motaghed intervened in this action when they filed the amended complaint. That intervention was barred by the FCA's first-to-file rule. Accordingly, we reverse the district court's order denying Triumph's motion to dismiss.

Footnotes

1Although the United States is the real plaintiff in interest in FCA actions, a private party may serve as a qui tam plaintiff—called a relator—on the government's behalf. *See* § 3730(b)(1); *United States ex rel. Milam v. Univ. of Tex. M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 50 (4th Cir. 1992).

2When we asked Little and Motaghed's counsel at oral argument to explain these rote substitutions, he

responded only that he didn't draft the amended complaint.

3The parties dispute whether § 3730(b)(5) is a jurisdictional rule or a claim-processing one. *Compare Grynberg*, 390 F.3d at 1278, *with Gonzalez v. Thaler*, 565 U.S. 134, 141-42, 132 S.Ct. 641, 181 L.Ed.2d 619 (2012) (clarifying distinction between those classifications). But as we discuss below, none of the issues before us turn on this distinction. Thus, we decline to resolve this issue.

4If the allegations of fraud in an FCA complaint were publicly available when the complaint was filed, the relator must show that he was "an original source" of the information. Otherwise, the court must dismiss the relator's claims (unless the government opposes dismissal). *See* § 3730(e)(4)(A).

5When we decided *Precision*, Rule 24(b)(2) was substantially similar to the current Rule 24(b)(1)(B). The current Rule provides that "[o]n timely motion, the court may permit anyone to intervene who ... has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B).

6We question whether our holding in *Precision* remains good law in light of the Supreme Court's subsequent decision in *Eisenstein*. The Supreme Court's broad definition of "intervention" as the "method for a nonparty to become a party to a lawsuit," 556 U.S. at 933, 129 S.Ct. 2230, seems to include Rule 15 addition. But because we ultimately conclude that Little and Motaghed's entry into this action doesn't satisfy even *Precision*'s narrower definition of "intervene," we need not decide whether *Eisenstein* "invalidates our previous analysis." *United States v. Brooks*, 751 F.3d

1204, 1209 (10th Cir. 2014) (quoting *United States v. Shipp*, 589 F.3d 1084, 1090 n.3 (10th Cir. 2009)).

7Triumph argues that under *Precision*, newly added parties must be "related" to the original party to satisfy the first-to-file rule. Aplt. Br. 13; *see Precision*, 31 F.3d at 1017-18 ("[W]hen § 3730(b)(5) speaks of intervention, it means to prohibit parties unrelated to the original plaintiff from joining the suit to assert a claim based on the same facts relied upon by the original plaintiff."). And according to Triumph, Little and Motaghed are "unrelated" to Blyn. Aplt. Br. 33. We need not decide whether *Precision* imposed a relatedness requirement on new parties. At a minimum, Precision established that the entry of new parties violates § 3730(b)(5) unless it's accomplished by addition. And we conclude below that Little and Motaghed didn't enter this action through a Rule 15 addition.

8Although we use the word "addition" in this discussion, Blyn's exit from the action and Little and Motaghed's entry into it may be better described as a "substitution." But because Rule 15 covers both procedures, that distinction doesn't change our analysis. *See United States ex rel. Ritchie v. Lockheed Martin Corp.*, 558 F.3d 1161, 1166 (10th Cir. 2009) ("Motions to add or substitute parties are considered motions to amend and therefore must comply with Rule 15(a).").

We also note that their "substitution" doesn't fit within any of the circumstances provided for in Rule 25. *See* Fed. R. Civ. P. 25 (allowing for substitution in the case of death, incompetency, or transfer of interest, and for public officers who leave office). Accordingly, we need not decide how the first-to-file rule interacts with Rule 25 substitutions.

The district court's contrary conclusion appears to conflict with its own prior recognition that Blyn was the original complaint's only relator. *Compare* App. 115 ("[T]he original [c]omplaint was filed under seal with Mr. Blyn as the sole relator."), *with id.* ("Because Relators had not yet served the [c]omplaint on [Triumph], Relators' right to amend *their* [*c*]*omplaint* once as a matter of course had not yet terminated." (emphasis added)).

10We permit anonymity only when there are "significant privacy interests or threats of physical harm implicated by the disclosure of the plaintiff's name." *Nat'l Commodity & Barter Ass'n, Nat'l Commodity Exch.*, 886 F.2d at 1245. Little and Motaghed's alleged fear of retaliation by their employer doesn't meet that standard. *See id.* (explaining that anonymity "has not been permitted when only the plaintiff's economic or professional concerns are involved").

11Accepting Little and Motaghed's assertion would arguably present a basis for dismissing this appeal—not for affirming. *Cf. Kennedy v. St. Joseph's Ministries, Inc.*, 657 F.3d 189, 197 (4th Cir. 2011) (King, J., dissenting) (explaining that appellate court can "dismiss [a] § 1292(b) appeal if it becomes apparent that review was improvidently granted"). But they make this argument in their brief—not in a motion to dismiss—and thus impliedly present it as a basis to affirm the district court's order. In any event, because we reject their argument, this distinction is moot.

12In ruling on Little and Motaghed's motion, we need not decide whether the first-to-file rule is jurisdictional. *See supra* Part II; *Grynberg*, 390 F.3d at 1278. If it is not, § 1653 doesn't apply and we would deny the motion

on that basis. If it is, we would deny the motion for the reasons discussed in the text.

United States District Court,
D. Utah, Central Division.

United States of America ex rel. Joe Blyn, Donald Little, and Kurosh Motaghed, Plaintiffs,
v.
Triumph Group, Inc.; Triumph Gear Systems, Inc.; Jeff Frisby; and Carla Bowman, Defendants.

Case No. 2:12-CV-922-DAK
Signed 04/26/2016

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MEMORANDUM DECISION AND ORDER

DALE A. KIMBALL, United States District Judge

This matter is before the court on the Defendant Triumph Gears Systems, Inc.'s (TGS's) Motion to Dismiss the Third Amended Complaint. A hearing on the matter was held on April 6, 2016. At the hearing, Plaintiffs were represented by Edward McConwell and Donald Little. TGS was represented by Douglas Baruch, Aaron Tucker, and Jason Boren. Before the hearing, the court carefully considered the memoranda and other materials submitted by the parties. Since

taking the matter under advisement, the court has further considered the law and facts relating to the matter. Now being fully advised, the court renders the following Memorandum Decision and Order.

BACKGROUND

This is a False Claims Act ("FCA") case concerning allegedly nonconforming gears manufactured by TGS for use by the United States on its civilian and military aircraft. Triumph Group, Inc. is the parent company of TGS. The Complaint was filed on October 1, 2012 by attorney Donald E. Little on behalf of *qui tam* relator, Joe Blyn. On July 25, 2013, an Amended Complaint was filed, removing Joe Blyn as the relator and adding as relators Donald E. Little and Kurosh Motaghed (the "Relators"). Mr. Little had been a lawyer for TGS's predecessor company (Rolls Royce North America) and was involved in the process of selling Rolls-Royce Gear Systems to the Triumph Group. Mr. Motaghed also worked for Rolls Royce and subsequently for TGS as the Director of Information Technology.

On September 3, 2014, the United States filed its Notice of Election to Decline Intervention, and the Amended Complaint was unsealed on the same day. Soon after the case was unsealed, Defendants filed their first Motion to Dismiss, arguing that the Amended Complaint did not meet either the notice pleading standard under Federal Rule of Civil Procedure 8(a) ("Rule 8(a)") or the heightened pleading requirements of Federal Rule of Civil Procedure 9(b) ("Rule 9(b)") that are applicable to FCA claims. Therefore, they moved to dismiss under Federal Rule of Civil Procedure 12(b)(6).

Instead of filing a response to Defendants' motion and without seeking leave of court or obtaining a stipulation from Defendants, on January 26, 2015, Relators filed a First Substantive Amended Complaint ("Second Amended Complaint"). In response to Relators' improperly filed Second Amended Complaint, Defendants filed a Motion to Strike or Dismiss the Second Amended Complaint. Even though Defendants correctly argued that the filing of the Second Amended Complaint was improper, the court considered the Second Amended Complaint in deciding whether to dismiss this action for failure to state a claim. Defendants filed a second Motion to Dismiss arguing that the Second Amended Complaint still did not meet either the notice pleading standard under Rule 8(a) or the heightened pleading requirements of Rule 9(b). The court granted Defendants' second Motion to Dismiss without prejudice finding that Relators failed to state a plausible claim under Rule 8(a) because they failed to (a) specify any cause of action, (b) reference any FCA provision that TGS allegedly violated, (c) identify the elements for any cause of action, or (d) link any of their disparate and conclusory grievances to any FCA cause of action. The court also found that the Second Amended Complaint failed under Rule 9(b) because it failed (a) to identify a single false claim submitted to the government, (b) to explain what was false about any supposed claim, (c) to identify the violation of a specific contractual provision and that compliance with that provision was necessary for the government to pay a claim for payment, and (d) to allege when the unspecified claims purportedly were submitted or who was allegedly involved in the purported fraud. The court's order also clarified that any FCA violation prior to October 1, 2006, is time barred and dismissed

Triumph Group, Jeff Frisby, and Carla Bowman from the action.

In response to the court's order, Relators submitted a Third Amended Complaint. TGS filed a Motion to Dismiss claiming that Relators did not cure the issues with the Second Amended Complaint. Relators responded by attempting to show how each of the issues has been cured, and TGS submitted a reply.

DISCUSSION

TGS moves the court to dismiss the Third Amended Complaint pursuant to Rules 8(a), 9(b), 12(b)(1), and 12(b)(6) of the Federal Rules of Civil Procedure. TGS argues that the Relators have not cured the pleading deficiencies that were present in the dismissed complaints. TGS also argues that the court lacks jurisdiction over Relators' claims and that Relators lack standing to pursue this case because of the "first-to-file" bar and other statutory requirements under the FCA. According to TGS, Relators also focus on events that took place prior to the October 1, 2006, date even though the court has already determined that date sets the outer limits of liability based on the FCA's six-year statute of limitations. The court will address each of TGS's arguments for dismissal.

THE FALSE CLAIMS ACT FIRST-TO-FILE BAR

TGS moves for the court to dismiss the action pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of jurisdiction because Relators have failed to comply with the FCA's first-to-file provision. Relators claim that

they were among the original Plaintiffs but that they were initially listed as John Does.

The FCA specifically limits that ability of private parties to bring *qui tam* suits on behalf of the United States. One jurisdictional limitation[1] is the so-called "first-to-file" bar, 31 U.S.C. § 3730(b)(5) (2012), which states, "When a person brings [a *qui tam*] action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." *See also Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1278 (10th Cir. 2004) (stating that the False Claim Act's first-to-file bar "is a jurisdictional limit on the court's power to hear certain duplicative qui tam suits"). The Tenth Circuit interprets the "intervene" portion of the first-to-file bar strictly to only prohibit intervention under Federal Rule of Civil Procedure 24. *See U.S. ex rel. Precision Co. v. Koch Industries, Inc.*, 31 F.3d 1015, 1017 (10th Cir. 1994) ("Our judgment tells us the statute implies intervention of the types set forth in Rule 24(b)(2), and the addition of parties does not constitute intervention. ... Because Rule 24(b)(2) existed long before the enactment of § 3720(b)(5), we must presume Congress was aware of the accepted meaning of 'permissive intervention' and intended to employ that meaning when the statute was written.").

The Tenth Circuit has also concluded that "[a] motion to add a party is governed by [Federal Rule of Civil Procedure] 15(a)" and should be considered "a motion to amend." *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1365 (10th Cir. 1993) (quoted in *Precision*, 31 F.3d at 1018); *see also U.S. ex rel. Ritchie v. Lockheed Martin Corp.*, 558 F.3d 1161, 1166 (10th Cir. 2009) ("Motions to add or

substitute parties are considered motions to amend and therefore must comply with Rule 15(a)."). In terms of amendments that add parties, the Tenth Circuit adheres to the following philosophy expressed by the Supreme Court: "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley v. Gibson*, 355 U.S. 41, 48 (1957); *see also Travelers Indem. Co. v. United States ex rel. Construction Specialties Co.*, 382 F.2d 103, 105-06 (10th Cir. 1967). To further this purpose, the Tenth Circuit seeks to give Rule 15 "full fealty" instead of mere "lip service." *Travelers*, 382 F.2d at 106.

The relevant portion of Rule 15 provides:

> A party may amend its pleading once as a matter of course within: (A) 21 days after serving it, or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

Fed. R. Civ. P. 15(a)(1). The annotations to the 2009 amendment to Rule 15 speak of a "right to amend once as a matter of course" and explain how the amendments to Rule 15 "make three changes in the time allowed to make one amendment as a matter of course." Fed. R. Civ. Proc. 15(a) advisory committee's note to 2009 amendment. Each of the changes is described in terms of when the right to amend as a matter of course "terminates." *Id.* In other words, the filing of a pleading

is accompanied by a right to amend once as a matter of course, and that right remains with the party that filed the pleading until the right is terminated by one of the time limits described in Rule 15(a)(1). As long as the plaintiff in a case makes a single amendment to a pleading before the right to amend is terminated by one of the Rule 15(a)(1) time limits, "plaintiffs [are] entitled to the amendment as a matter of right." *Precision*, 31 F.3d at 1019.

In this case, the original Complaint was filed under seal with Mr. Blyn as the sole relator. Before the Complaint was unsealed and before the United States decided whether to intervene, the First Amended Complaint was filed removing Mr. Blyn as a relator and substituting Messrs. Little and Motaghed as relators. The amendment to the Complaint came almost nine months after service on the United States but before service on the Defendants, and the amendment substituted relators instead of merely adding parties. Despite these unique aspects to the amendment in this case, the principles espoused by the Tenth Circuit still lead to the conclusion that the amendment was proper.

Plaintiffs have a right to amend a complaint until "21 days after serving it." Fed. R. Civ. P. 15(a)(1)(A). Although Relators technically served the Complaint on the Government, *see* 31 U.S.C. § 3730 (2012) ("A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to [Rule 4(i)] of the Federal Rules of Civil Procedure."), the service referred to in the Federal Rules of Civil Procedure (including in Rule 15) is service of the Complaint by the plaintiff on the defendant, *see*, *e.g.*,

Fed. R. Civ. P. 4(b) ("If the summons is properly completed, the clerk must sign, seal, and issue it to the plaintiff for service on the defendant. A summons—or a copy of a summons that is addressed to multiple defendants—must be issued for each defendant to be served."). Because Relators had not yet served the Complaint on the Defendants, Relators' right to amend their Complaint once as a matter of course had not yet terminated. Their right to amend included the right to add or substitute parties. Relators exercised their right to amend while the Complaint was still sealed, so TGS experienced no prejudice from the amendment because it had not yet been served on TGS and discovery had not yet begun.

The parties in this case spent a significant portion of their arguments on the first-to-file bar discussing whether it was appropriate to include John Does as possible relators in the original Complaint and whether Messrs. Little and Motaghed were in fact two of the named John Doe relators. Because the court has concluded that Messrs. Little and Motaghed could be substituted as relators in this action through the plaintiff's right to amend once as a matter of course, the arguments about the suitability of John Doe relators in an FCA case and the identity of two of the possible John Doe relators are irrelevant.

Citing to reasoning in *United States ex rel. Precision Co. v. Koch Industries, Inc.*, TGS also claims that only "related" parties are allowed to be added to an FCA case as relators. *See* 31 F.3d at 1017-1018. TGS fails to recognize that the discussion on related parties in the *Precision* case is in the context of Rule 24(b)(2) intervention and simply aided the court in concluding

that "the district court erred in holding the addition of the individual plaintiffs violated § 3730(b)(5)." *Id.* The court did not conclude that only related parties could be added through amending the pleading, which is the situation in this case.

Therefore, the court concludes that the Relators in this FCA case had a right to amend the Complaint to substitute plaintiffs once as a matter of course before the Complaint was unsealed and before the United States decided whether it would intervene in the case.

STANDING UNDER THE FALSE CLAIMS ACT

According to TGS, this suit should also be dismissed because Relators lack standing for two major reasons. First, section 3730(c)(3) provides that, "[i]f the Government elects not to proceed with [a *qui tam*] action, the person who *initiated* the action shall have the right to conduct the action." 31 U.S.C. § 3730(c)(3) (2012) (emphasis added). TGS argues that the statute limits standing in this case to Mr. Blyn. Second, section 3730(b)(2) requires "[a] copy of the complaint and written disclosure of substantially all material evidence and information the person possesses" to be served on the government. 31 U.S.C. § 3730(b)(2) (2012). TGS argues that, although Mr. Blyn complied with section 3730(b)(2), neither Mr. Little nor Mr. Motaghed complied with that provision, which TGS argues warrants dismissal.

Although TGS focuses on the language in section 3730(c)(3) referring to "the person who initiated the action," another provision in the same statute uses different language to describe the same person. The

statute states that the Government is required to "notify the court that it declines to take over the action, in which case *the person bringing the action* shall have the right to conduct the action." 31 U.S.C. § 3730(b)(4)(B) (2012) (emphasis added). Referring to this and other language in the FCA statute, the Tenth Circuit has clarified that, "[a]lthough written in the singular, there is nothing within the text of the statute suggesting the remedies it provides are limited to only one plaintiff. At least, there is no direct provision creating that limitation." *Precision*, 31 F.3d at 1018. Similarly, there is nothing in the text of the statute suggesting only the first named person can have the right to conduct an FCA action. Taken together, these provisions and interpretations suggest that the statute is referring to the named relator or relators in the operative complaint. Therefore, the court concludes that "the person bringing the action" and "the person who initiated the action" in the FCA statute refer to the properly named relator or relators in the operative complaint.

As discussed above, Relators properly amended the original Complaint to substitute Messrs. Little and Motaghed for Mr. Blyn as relators before the Government decided whether to intervene and before the Complaint was unsealed and served on TGS. Because the amendment was proper, Messrs. Little and Motaghed are the named relators on the operative complaint in this case. Therefore, they have standing to conduct this action.

In terms of whether Relators complied with the required service of all material evidence and information on the government, the court notes that,

although the identities of the relators changed after the Complaint was amended, the substance of the allegations remained the same. Therefore, the government still likely had "substantially all material evidence and information" that Relators possessed and that the Government needed to make an informed decision about whether to intervene. The court concludes that, because the purpose of the statutory provision was still being met, the substitution of relators did not affect Relators' standing in this case. Accordingly, the court concludes that Messrs. Little and Motaghed have standing to conduct this action.

THE FALSE CLAIMS ACT STATUTE OF LIMITATIONS

In a previous order in this case, the court clarified that the FCA's six-year statute of limitations, 31 U.S.C. § 3731(b)(1) (2012), at a minimum, bars any claims based on purported violations occurring before October 1, 2006. TGS argues that the vast majority of the Third Amended Complaint's allegations relate to events that predated October 1, 2006, and only conclusory speculation connects these events to issues that may have occurred thereafter. Therefore, TGS argues that Relators have failed to connect any of these allegations to a timely FCA claim.

TGS is correct that any claims for payment from the United States submitted by TGS before October 1, 2006, are outside the statute of limitations. Courts have generally been hesitant to apply the concept of "continuing violation" that arises in employment discrimination law contexts to FCA claims. *See, e.g., United States ex rel. Wynne v. Blue Cross and Blue*

Shield of Kan., Inc., No. 05–4035, 2006 WL 1064108, at *9 (D. Kan. Apr. 21, 2006) (finding "no support for plaintiff's contention that a 'continuing violation' theory applies to FCA claims"); *Pakter v. N.Y.C. Dep't of Educ.*, No. 08-CV-7673, 2010 WL 1141128, at *6 (S.D.N.Y. Mar. 22, 2010) (finding that the "continuing violation doctrine" does not bring "discrete acts that occurred [outside the statute of limitations]" within the limitations period). In the FCA context, each claim for payment is a discrete event that independently does or does not fall within the statute of limitations. *See Weslowski v. Zugibe*, 14 F. Supp. 3d 295, 305 (S.D.N.Y. 2014) ("[E]ven if the continuing-violation doctrine applied to Plaintiff's FCA retaliation claim, that claim is untimely with respect to all of the events the Complaint alleges occurred before [the statute of limitation bar]."). This is in contrast to claims, such as allegations of a hostile work environment, in which several connected events together constitute a single claim. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 117 (2002) ("A hostile work environment claim is composed of a series of separate acts that collectively constitute one 'unlawful employment practice.' ").

Even though claims for payment before October 1, 2006, are outside of the statute of limitations, and, therefore, Relators cannot recover for allegations based on those claims, conduct that occurred before October 1, 2006, may still be relevant to allegations of false claims for payment that occurred after October 1, 2006, as background evidence. *See id.* at 113 ("Nor does the statute bar an employee from using prior acts as background evidence to support a timely claim."). If the pre-October 1, 2006, conduct helps to establish a scheme for false claims for payment from the United States,

then the conduct may still be included and considered in the pleading as background information. Therefore, the court will still consider pre-October 1, 2006, conduct described in the pleading to the extent that it provides background for the alleged scheme of presenting false claims for payment to the United States after October 1, 2006. However, the court will not consider allegedly false claims for payment before October 1, 2006, in determining whether Relators have stated a claim upon which relief can be granted.

FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Because "[r]ule 8(a)'s mandate, that plaintiffs provide a 'short and plain statement of the claim showing that the pleader is entitled to relief,' has been incorporated into both the 9(b) and 12(b)(6) inquiries," *U.S. ex rel. Lemmon v. Envirocare of Utah, Inc.*, 614 F.3d 1163, 1171 (10th Cir. 2010) (citations omitted), the court will not separately analyze whether Relator's Third Amended Complaint meets the requirements of Rule 8(a). Instead, the court will consider whether those requirements were met as it analyzes the Third Amended Complaint under Rules 12(b)(6) and 9(b).

On a motion to dismiss under Rule 12(b)(6), the court "accept[s] as true all well-pleaded factual allegations in the complaint and views them in the light most favorable to the plaintiff." *Burnett v. Mortgage Elec. Registration Sys., Inc.*, 706 F.3d 1231, 1235 (10th Cir. 2013). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

To survive a motion to dismiss an FCA claim based on express false certifications, plaintiffs must sufficiently allege (1) that defendants "knowingly submitted legally false requests for payment to the government," (2) "that the government paid the requests," (3) that "the requests contained a false statement," and (4) "that the statement was material to the government's decision to pay." *Lemmon*, 614 F.3d at 1170. "[A]n express-false-certification claim can arise from any false statement that relates to a claim" and does not require "certification of compliance with a *particular* contractual term." *Id.* at 1171 (internal quotations and citations omitted). In terms of materiality, "materiality does not require a plaintiff to show conclusively that, were it aware of the falsity, the government would not have paid. Rather, it requires only a showing that the government *may* not have paid." *Id.* at 1170.

In this case, Relators allege that each of TGS's contracts referenced in the Third Amended Complaint contain Federal Acquisition Regulations (FAR) provision 52.246-2. By its terms, FAR 52.246-2 requires TGS to "provide and maintain an inspection system acceptable to the Government" and to "tender to the Government for acceptance only supplies that have been inspected in accordance with the inspection system and have been found by [TGS] to be in conformity with contract requirements." FAR 52.246-2(b) (2015). The same provision provides that, if the government discovers and rejects nonconforming supplies from TGS, the government can require TGS to remove, replace, or correct the supplies, or the government can terminate the contract with TGS. FAR 52.246-2(h) (2015).

To certify compliance with the inspection requirements in the FAR, Relators allege that TGS submits Certificates of Conformance with products it sends to the government. The Certificates of Conformance expressly state that TGS has inspected its products and certifies that the products meet the government's specifications. Specifically, the Certificates of Conformance state, "These materials or parts were produced in conformance with all contractually applicable customer or government specifications." Relators allege that TGS submits Certificates of Conformance to the government that falsely claim that TGS has inspected its products and ensured that the products meet the government's specifications when, in reality, TGS has not performed the inspections and the products do not meet the specifications. Relators allege that, due to limitations with the gear-hardening process and the failure of TGS to use monitoring and testing software, TGS is incapable of ensuring that its products meet the required specifications. Despite not being able to ensure the products meet the specifications, Relators allege that TGS "hot stamps" the Certificates of Conformance without completing the required inspections. Relators further argue that TGS officials at the highest levels, including TGS's president, are aware of and require this practice of hot stamping Certificates of Conformance.

Taking Relators' allegations as true, as the court must on a motion to dismiss, the court concludes that TGS has sufficiently stated a claim for relief that is plausible on its face. Relators allege that TGS submitted false Certificates of Conformance to the government with its products, that the government paid for those products, that the Certificates of Conformance contained the false

statements that inspections had been performed and that the products met specifications, and that the contractual language "explicitly state[s] that if [TGS] fails to live up to ... its contractual obligations [to perform inspections on its products and ensure the products meet the government's specifications] the government might refuse or reduce payment." *Lemmon*, 614 F.3d at 1170. Therefore, the court concludes that Relators have stated a claim for relief that is plausible on its face.

FAILURE TO PLEAD FRAUD WITH PARTICULARITY

Because "a false or fraudulent claim for payment" is an element of an FCA claim, 31 U.S.C. § 3729(a) (2012), Federal Rule of Civil Procedure 9(b)' s "heightened pleading requirements apply to actions under the FCA," *U.S. ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 726 (10th Cir. 2006). "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). The purpose of Rule 9(b) is "to afford defendant fair notice of plaintiff's claims and the factual ground upon which they are based" and "to give adequate notice to an adverse party and enable that party to prepare a responsive pleading." *Lemmon*, 614 F.3d at 1172 (citations omitted). Although "pre-*Twombly* cases required plaintiffs pursuing claims under the FCA to plead the who, what, when, where, and how of the alleged claim," the current standard is that "claims under the FCA need only show the specifics of a fraudulent scheme and provide an adequate basis for a reasonable inference that false claims were submitted as part of that scheme." *Id.*

(internal quotation marks and citations omitted). Even though Rule 9(b) heightens the standard for pleading in FCA cases, "the precise details of individual claims are not, as a categorical rule, an indispensable requirement of a viable [FCA] complaint." *United States ex rel. Heath v. AT&T, Inc.*, 791 F.3d 112, 126 (D.C. Cir. 2015). Although portions of the Third Amended Complaint are difficult to understand, Relators have provided sufficient information in short and plain statements to meet the requirements of Rules 8(a) and 9(b). Because Relators are alleging that TGS participated in a fraudulent scheme, Relators are not required to provide precise details about individual claims. Relators are only required to show specifics of the fraudulent scheme and provide an adequate basis for the court to reasonably infer that false claims for payment were submitted to the government.

According to the Third Amended Complaint, TGS acted under the direction of its president to falsely certify on Certificates of Conformance that its products were inspected and met government specifications when the products were neither inspected nor met specifications. Relators refer to this false certification as "hot stamping" the Certificates of Conformance. Specifically, Relators allege that TGS produced gears based on legacy drawings, which had tolerances that were physically impossible to meet due to a known phenomenon in the case depth hardening process. Despite not being able to meet the contract-required specifications, TGS still sold the gears to the government with Certificates of Conformance that stated that the gears met all contract-required specifications. Relators allege that the government relied on the information in the Certificates of

Conformance when making the decision to pay for the gears.

After the tolerances on the drawings were relaxed through an engineering change order, Relators allege that the new process required very careful monitoring of the manufacturing process for heat-hardened gears and very careful testing, which could only be performed using a computer system designed to monitor every phase and detail of the manufacturing process. Although TGS installed and began to use a computer system called Factory Net to monitor the manufacturing process, Carla Bowman, President of TGS, led efforts to bypass portions of the Factory Net monitoring and eventually, on September 8, 2006, ordered Relator Motaghed to completely turn off and remove tracking by the computer system after it exposed deviations from the standards related to heat treatment and testing of gears. Once the computer system was removed, Relators allege that TGS lacked the ability to perform the inspections required by the engineering change order and returned to falsely certifying to the government that its products had been inspected and met specifications. Relators further allege that the government relied on these certifications to determine whether to pay for the gears.

Based on those specific allegations, Relators allege that whether TGS is relying on the legacy drawings, in which case their process is not capable of meeting specifications, or TGS is using the specifications approved under the engineering change order, in which case TGS is not capable of performing the required monitoring and testing, TGS is falsely certifying that it

is performing the required inspections and that its products are meeting specifications. Therefore, Relators allege that TGS sent gears to the government with false Certificates of Conformance from at least 2006 to 2011. If the specifics of the scheme described above are true, which the court must assume on a motion to dismiss, then the court can reasonably infer that false claims for payment were submitted to the government as part of that scheme.

The court concludes that Relators have afforded TGS with adequate fair notice of its claims and the factual ground upon which they are based to enable TGS to prepare a responsive pleading. Therefore, Relators have pleaded their claims with sufficient particularity to meet the purpose of Rule 9(b) and to survive TGS's Motion to Dismiss the Third Amended Complaint.

CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED that TGS's Motion to Dismiss the Third Amended Complaint is DENIED.

Footnotes

1Circuit Courts are currently split on whether the first-to-file bar under the False Claims Act is jurisdictional. Although most Circuit Courts, including the Tenth Circuit, treat the bar as jurisdictional, the District of Columbia Circuit has recently held that the first-to-file bar is not jurisdictional. *See U.S. ex rel. Heath v. AT&T, Inc.*, 791 F.3d 112, 119 (D.C. Cir. 2015) ("The first-to-file bar is not jurisdictional.").

United States ex rel. Blyn v. Triumph Grp., Inc., No. 2:12-CV-922-DAK, 2016 WL 1664904, at *1–8 (D. Utah Apr. 26, 2016), reconsideration denied, motion to certify appeal granted, No. 2:12-CV-922-DAK, 2016 WL 3546244 (D. Utah June 23, 2016)

Filed: 10/16/2017
United States Court of Appeals Tenth Circuit
No. 16-4152

UNITED STATES OF AMERICA ex rel. DONALD LITTLE and KUROSH MOTAGHED,
Plaintiffs - Appellees,
v.
TRIUMPH GEAR SYSTEMS, INC., Defendant - Appellant.

ORDER

Before TYMKOVICH, Chief Judge, LUCERO, and MORITZ, Circuit Judges.

Appellees' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk