IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA ex rel. PAUL E. ATKINSON	:	CIVIL ACTION
v.	:	
PENNSYLVANIA SHIPBUILDING COMPANY, FIRST FIDELITY BANK, N.A., AND SUN SHIP, INC.	:	NO. 94-7316

MEMORANDUM AND ORDER

YOHN, J. August , 2000

The plaintiff has filed this qui tam[1] action, brought pursuant to the False Claims Act[2] ("FCA" or the "Act"), 31 U.S.C. §§ 3729-30, for the alleged submission of false claims to the

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[1]"Qui tam is short for the Latin phrase qui tam pro domino rege quam pro se ipso in hac parte sequitur, which means 'who pursues this action on our Lord the King's behalf as well as his own." Vermont Agency of Natural Resources v. United States ex rel. Stevens, 120 S. Ct. 1858, 1860 (2000); see also Black's Law Dictionary, 1251 (6th ed. 1990). "Qui tam actions are 'brought on behalf of the government by a private party, who receives some part of the recovery awarded as compensation for his efforts.'" United States Dept. of Housing & Urban Dev. ex rel. Givler v. Smith, 775 F. Supp. 172, 174 n.1 (E.D. Pa. 1991) (citations omitted).

[2]The FCA "was passed in 1863 as a result of investigations of the fraudulent use of government funds during the Civil War," see United States v. Neifert-White Co., 390 U.S. 228, 232 (1968), and has been in existence, in one form or another, since that time. See United States ex rel. Dunleavy v. County of Delaware, 123 F.3d 734, 738 (3d Cir. 1997). The FCA "sets out civil and criminal penalties for persons who knowingly submit false claims to the government." Dunleavy, 123 F.3d at 738. "Congress intended that the False Claims Act . . . and its qui tam action would help the government uncover fraud and abuse by unleashing a 'posse of ad hoc deputies to uncover and prosecute frauds against the government.'" Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 784 (4th Cir. 1999) (quoting United States ex rel. Milam v. University of Tex. M.D. Anderson Cancer Ctr., 961 F.2d 46, 49 (4th Cir. 1992)).

Pursuant to the FCA, an action may be commenced against the alleged false claimant by the government itself, or, as in this case, by a private person in the form of a "qui tam civil action 'for the person and for the United States Government' against the alleged false claimant, 'in the name of the Government.'" See Stevens, 120 S. Ct. at 1860.

United States Navy in connection with a Navy shipbuilding contract for the construction of oil tanker ships. Paul E. Atkinson ("plaintiff" or "relator") alleges that Sun Ship Inc. ("Sun Ship"), Pennsylvania Shipbuilding Co. ("Penn Ship"), and First Fidelity Bank, N.A. ("Fidelity"; collectively the "defendants"), conspired to defraud, and did defraud, the Navy by getting false claims and reverse false claims paid or allowed in connection with the Navy shipbuilding contract.

In total, Atkinson's second amended complaint ("Compl." or "complaint") alleges fourteen claims against the defendants. See Compl. ¶¶ 103-17. The plaintiff's first claim alleges that the defendants conspired to defraud the government through the submission of false claims and reverse false claims to the Navy. See id. ¶ 104. The remaining thirteen claims allege that the defendants directly violated the FCA by submitting, or causing to be submitted, false claims or reverse false claims to the Navy. See id. ¶¶ 105-17.

Pending before the court are the defendants' motions to dismiss the plaintiff's complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) and for failure to plead fraud with particularity as required by Federal Rule of Civil Procedure 9(b). See Penn Ship Inc.'s Motion to Dismiss and Memorandum of Law (Doc. No. 85); Sun Ship Inc.'s Motion to Dismiss and Memorandum of Law (Doc. No. 84); First Fidelity Bank, N.A.'s Motion to Dismiss and Memorandum of Law (Doc. No. 83). This opinion addresses all of the motions to dismiss for failure to state a claim upon which relief can be granted filed by the defendants.[3] The court has carefully considered the motions to dismiss for failure to state a claim filed by Penn Ship, Sun

[3]Unless otherwise noted, any reference throughout this opinion to the defendants' "motions to dismiss" refers to the defendants' motions to dismiss for failure to state a claim under Rule 12(b)(6).

Ship, and Fidelity, and the plaintiff's response in opposition to those motions, as well as the defendants' replies thereto. For the reasons stated below, the court will grant Sun Ship's and Fidelity's respective motions to dismiss the plaintiff's complaint in its entirety, and will grant in part and deny in part Penn Ship's motion to dismiss for failure to state a claim upon which relief can be granted. All of the claims dismissed are dismissed without prejudice, and the plaintiff is granted leave to amend those claims within twenty days of the date of the court's order assuming that he can do so within the confines of Rule 11.

I. BACKGROUND

A. FACTUAL BACKGROUND

According to the plaintiff's allegations set forth in his complaint, which I must accept as true for the purposes of deciding this motion, see Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994), the facts of this case are as follows.

In late 1980, Sun Ship, which had previously been a leader in the shipbuilding industry, decided to abandon this line of business. See Compl. ¶¶ 17-19. In abandoning shipbuilding, Sun Ship's parent company, Sun Company ("Sun"), recorded a considerable loss reserve in 1980 due to operating losses and the "permanent termination of ship construction." See id. ¶¶ 20-21. As a result of this loss reserve, Sun received substantial tax benefits. See id. ¶ 22. To maintain its tax write-off, however, Sun had to actually terminate its shipbuilding operations. See id. ¶ 23. Sun Ship had a backlog of shipbuilding obligations, however, which it could not discontinue without suffering severe financial obligations. See id. ¶ 24. Sun Ship decided, therefore, to continue building ships through other entities, which appeared to be independent, but were actually under the control of Sun Ship. See id. ¶ 25.

In 1981, Sun Ship announced its intention to sell its shipbuilding facilities at the Chester Shipyard (the "Chester Yard"). See id. ¶ 27. On November 21, 1981, Theodore A. Burtis, the Chairman of Sun at the time, announced that Sun Ship intended to sell the Chester Yard to Edward E. Paden. Paden was the Chairman of Levingston Shipbuilding Co. of Orange, Texas ("Levingston"). See id. ¶ 28. This announcement did not reveal that Paden was financially unstable and was dependent upon, and subject to the control of, Sun Ship. See id. ¶ 31.

Prior to the announcement of the intended sale of the Chester Yard in November, 1981, Paden had sought Sun Ship's help in obtaining Navy work for Levingston. See id. ¶ 29. Sun Ship and Paden agreed that Sun Ship would assist Levingston in obtaining Navy work and that Paden would assume Sun Ship's shipbuilding operations and complete Sun Ship's backlog of shipbuilding obligations. See id. Pursuant to this agreement, the sale of the Chester Yard to the Paden-controlled companies took place on February 8, 1982. See id. ¶ 30.

The sale agreement provided that three separate Paden companies would receive title to a section of the Chester Yard.[4] See id. ¶¶ 32-34. The first Paden company to obtain part of the Chester Yard was Penn Ship, which received some of the "acreage, buildings and equipment, along with a huge floating crane or derrick known as the Sun 800." See id. ¶ 32. Another Paden company, Delaware Drydock & Ship Repair ("DDSR"), received the remainder of the buildings, equipment, and real estate, with the exception of the Chester Yard's floating drydock. See id. ¶ 33. A third Paden company, Maritime Offshore Equipment Leasing Co. ("MOEL"), purchased the floating drydock. See id. ¶ 34. Upon the transfer of the drydock, MOEL immediately leased

[4]These Paden companies were all owned by one parent company, Paden, Inc., later known as Capital Marine Corporation ("CMC"). See Compl. ¶ 30. CMC consisted of three groups of companies: (1) PSC and DDSR; (2) the Levingston group; and (3) MOEL. See Compl. ¶ 34 n.3.

it to Levingston and gave Sun Ship a security interest in the drydock and the drydock lease to Levingston. See id. In return for all of this property, Sun Ship received promissory notes totaling eighteen million dollars from the three Paden companies. See id. ¶¶ 32-35.

By the time of the sale of the Chester Yard to Paden in February, 1982, Levingston and Paden were in severe financial trouble. See id. ¶ 36. Recognizing that Levingston was in a dire financial situation and not wanting to get back its shipbuilding facilities, which could have jeopardized its tax write-off, Sun Ship placed restrictive covenants in the sale agreements which prohibited Penn Ship and its affiliates from: (1) guaranteeing the obligations of Levingston; (2) making loans to Levingston; or (3) investing in Levingston. See id. In the spring of 1984, Paden sold fifty-two percent of his share of ownership of CMC to City Capital Corp., which was controlled by Thomas C. Weller, Jr., Leland Moore, and Ronald J. Stevens (the "Weller Group"). See id. ¶ 37.

In 1984, the Navy solicited bids for the construction of oil tanker ships ("Oilers" or "Tankers"). See id. ¶ 38. Penn Ship sought this Navy contract (the "Oiler Contract"). See id. In the course of Penn Ship's efforts to obtain this contract, "Sun [Ship] and [Penn Ship] deceived the Navy into concluding that [Penn Ship's] financial condition was better than it in fact was, and, in particular, concealed from the Navy the extent of Levingston's financial weakness and the consequences of that weakness to [Penn Ship]." See id. ¶ 39. Specifically, Sun Ship and Penn Ship concealed from the Navy, through the use of false financial statements, "the extent to which Sun [Ship], contrary to the express terms of restrictive covenants in the [Chester] Yard Sale, was permitting Paden to use [Penn Ship's] assets to prop up the failing Levingston long enough to forestall its bankruptcy until after the Oiler contract was awarded to [Penn Ship]." See id.

The threat of a Levingston bankruptcy was important to whether the Navy would award the Oiler Contract to Penn Ship because Levingston held a lease on the floating drydock, a piece of equipment essential for the successful completion of the Oiler Contract at the Chester Yard.[5] See id. ¶ 41. Thus, if Levingston declared bankruptcy, there would be a "significant risk that the drydock would be transferred to a Levingston creditor and physically removed from the Chester Yard for use elsewhere, thereby rendering performance of Oiler construction by [Penn Ship] at the Chester Yard impossible." See id. Consequently, Paden and the Weller Group, with Sun Ship's consent, transferred ownership of the drydock to another Paden company that was not subject to the consequences of a Levingston bankruptcy. See id. ¶ 42.

Moreover, Penn Ship began, in secret, to infuse capital into Levingston "to avoid a [Levingston] bankruptcy which would have disclosed the financial insolvency of the Paden companies." See id. ¶ 43. Sun Ship and Penn Ship agreed "to prop up Levingston financially with [Penn Ship's] assets, in the hope that they could forestall a Levingston bankruptcy until the Oiler Contract was awarded to [Penn Ship]." Id. ¶ 45. In order to accomplish this, Sun Ship ignored the restrictive covenants in the Chester Yard sale agreements and permitted Penn Ship and CMC to infuse capital into Levingston. See id. ¶ 43. By September 30, 1984, Levingston owed Penn Ship $1,181,364 in long-term indebtedness, and Penn Ship's financial statement of that date reflects this indebtedness. See id. ¶¶ 43-44. This financial statement did not, however, provide for any loss allowance in respect of the receivable. See id.

[5]As explained above, another Paden company, MOEL, had leased the floating drydock to Levingston shortly after the transfer of the Chester Yard to the Paden companies in 1982. See Compl. ¶ 40.

In addition, documents that were executed on August 28, 1995, and backdated to December 31, 1984, indicate that Penn Ship guaranteed CMC's obligations to two insurance companies, Texas Employer's Insurance Association ("TEIA") and Employer's Casualty Company ("ECC"). See id. ¶ 47. These obligations involved the Workers' Compensation insurance premiums and other related expenses of Levingston. See id. ¶ 48. Penn Ship did not disclose its guarantees of Levingston's insurance debts on its financial statement of December 31, 1984. See id. ¶¶ 49-50.

Penn Ship submitted its bid to build ten ships for the Oiler Contract in the form of a Best and Final Offer to the Navy on December 21, 1984. See id. ¶ 38. In total, the Navy received five bids for the Oiler Contract. See id. ¶ 57. Penn Ship's bid was substantially lower than the other four bids submitted to the Navy. See id. Penn Ship's bid, however, did not include the cost of architectural and naval drawings necessary for the construction of the Oilers.[6] See id. ¶ 60.

Before awarding the contract to Penn Ship, the Navy requested security to protect it against reprocurement costs in the event of a default by Penn Ship. See id. ¶ 61. To address the Navy's concerns, the Chairman of Penn Ship, Thomas Weller ("Weller"), sent a letter on March 15, 1985, to a member of the team responsible for analyzing the contract bids for the Navy (the "Weller letter"). See id. ¶ 64. In the letter, and the accompanying Trust Indenture, Weller proposed to secure the Navy through the creation of a trust, the beneficiary of which was to be the Navy. See id. ¶ 62. The trust assets were to be security interests in some of the Chester Yard properties, and Fidelity was to be appointed as the trustee. See id. Additionally, the Weller letter

[6]The next lowest bidder was Avondale Industries, Inc. ("Avondale"), which submitted a bid of over one hundred and fifty million dollars more than Penn Ship's target price. See Compl. ¶ 58. Avondale had already built four Oilers for the Navy under a different contract. See id.

falsely stated that: (1) "significant cost overruns" were a "highly unlikely event"; (2) the Trust Indenture was "irrevocable"; and (3) the Trust assets would consist of a security interest in the entire Penn Ship facility at the Chester Yard. See id. ¶ 65.

On March 26, 1985, the Navy accepted the Trust Indenture, which was signed by Penn Ship, DDSR, and MOEL. See id. ¶ 66. The Trust Indenture imposed on Penn Ship the task of recording the security instruments comprising the res of the Trust. See id. ¶ 70. Penn Ship, however, never recorded those instruments. See id. In addition, Fidelity never insisted that Penn Ship record the instruments, did not record the instruments itself, and did not inform the Navy of Penn Ship's failure to record. See id.

On May 6, 1985, the Navy entered into the Oiler Contract with Penn Ship, but the Oiler Contract only required the construction and delivery of two Oilers to the Navy.[7] See id. ¶ 75. The Oiler Contract also gave the Navy the option of ordering two additional Oilers from Penn Ship. See id. Upon the award of the Oiler Contract to Penn Ship, the Trust Indenture became immediately effective. See id.

In February, 1986, the Navy exercised its option to order a third Oiler from Penn Ship. See id. ¶ 76. One year later, the Navy exercised its option under the contract to order a fourth Oiler. See id. ¶ 77.

In late 1987, Penn Ship informed the Navy that it was having financial difficulties and that payments owed to subcontractors were overdue. See id. ¶ 78. On May 17, 1988, Penn Ship reported to the Navy that it had reached a tentative agreement with Avondale to transfer the two

[7]As noted above, the original bid solicitation was for the construction of nine Oilers. The actual contract awarded to Penn Ship, however, was for the construction of only two ships.

option Oilers to Avondale. See id. ¶ 79. On June 16, 1988, the Navy signed Modification P00005, which deleted the two option Oilers from the Oiler Contract. See id. ¶ 80. The Navy then entered a separate contract with Avondale to complete the option Oilers. See id.

On January 26, 1989, Penn Ship and the Navy entered into Modification P00011, which permitted the Navy to make advance payments to Penn Ship of up to seventeen million dollars and provided that the floating drydock would act as security for the reimbursement of the advance payments. See id. ¶ 83.

Shortly after Penn Ship and the Navy entered into Modification P00011, Penn Ship disclosed to the Navy that it was unable to complete work on the Oiler Contract. See id. ¶ 84. On August 24, 1989, the Navy and Penn Ship signed Modification P00017 (the "Default Modification"). See id. ¶ 85. The Default Modification held Penn Ship in default and agreed that the contract would be transferred to another shipyard for completion. See id. Pursuant to the terms of the Default Modification, the Trust Indenture was terminated and Penn Ship was released from liability under the contract, with the exception of certain reprocurement costs and other liabilities for which Penn Ship was still responsible. See id. In exchange for the release of liability, the Default Modification provided that the Navy would receive an additional two million dollar security interest in the floating drydock, a subordinated mortgage on some of the real estate and buildings that had previously been mortgaged to Fidelity under the Trust Indenture, and a preferred ship mortgage on the floating derrick. See id. ¶¶ 86, 88. These security interests were meant to guarantee that Penn Ship would utilize its best efforts to sell the collateral so that a portion of the proceeds of the sale could be applied to the reprocurement costs incurred as a result of the default. See id.

Penn Ship did not use its best efforts to sell the land and buildings or the floating derrick during the relevant thirteen-month period. See id. ¶ 89. Instead, on October 18, 1989, Weller and Penn Ship formed Maritime Capital Corp. ("MCC"). See id. Then, after the thirteen-month period expired, Penn Ship sold the floating derrick to MCC. See id. The bill of sale from Penn Ship to MCC, which was signed by Weller, represented that the "seller had good title free and clear of any liens and encumbrances." See id. ¶ 93. In fact, this was untrue due to the Navy's lien on the derrick. See id.

On July 25, 1991, MCC sold the derrick to Donjon Marine Co. Inc. ("Donjon"), a purchaser in good faith for value and without knowledge of the Navy's unrecorded lien on the derrick. See id. ¶ 94. The bill of sale to Donjon also contained a false warranty that MCC owned the derrick "free and clear of all liens and encumbrances, a representation which was false because of the Navy's continuing, though unrecorded lien, and a representation necessary to induce Donjon to buy the derrick." See id.

On January 13, 1992, Penn Ship and the Navy entered into Modification P00020 to the Oiler Contract. See id. ¶ 96. Pursuant to Modification P00020, the Navy fully released Penn Ship of all contractual liabilities under the Oiler Contract. See id. The Oilers were never completed and are now worth only their scrap value, which is approximately two million dollars. See id. ¶ 97.

B. PROCEDURAL HISTORY

In 1992, Atkinson and Eugene Schorsch brought their first qui tam action against Penn Ship and Fidelity for FCA violations. See Memo. of Law in Support of Defendant Sun Ship, Inc.

to Dismiss the Second Amended Compl. ("Sun Ship's Memo.") at 2. This initial action was amended once and then dismissed without prejudice. See id.

On December 5, 1994, Atkinson and Schorsch filed under seal this second qui tam action against Penn Ship and Fidelity. See Compl. (Doc. No. 1). On February 23, 1995, the file was sealed for evaluation of the complaint by the United States Attorney General. See Court Order, Feb. 23, 1995 (Doc. No. 4). The government then requested, and received, 11 separate extensions of time within which to inform the court of its determination of whether to intervene in the action. See Court Orders (Doc. Nos. 6, 8, 10, 12, 14, 16, 20, 22, 24, 26, 28). The final extension gave the United States until June 6, 1997, to inform the court of its decision of whether to intervene in the matter. See Court Order, May 13, 1997 (Doc. No. 28). On June 5, 1997, Atkinson and Schorsch filed an amended complaint, which was also under seal, and which added Sun Ship as a defendant. See Amended Compl. (Doc. No. 29). The next day, the government notified the court of its decision not to intervene in the action. See Notice of Election to Decline Intervention (Doc. No. 30).

On October 21, 1997, the court ordered the amended complaint unsealed and served on all of the defendants. See Court Order, Oct. 21, 1997 (Doc. No. 41). The plaintiffs requested, and received, several extensions of time within which to serve the amended complaint on the defendants so they could obtain an attorney. See Court Orders (Doc. Nos. 45, 47, 49). The court eventually ordered the plaintiff to effectuate service on the defendants on or before October 15, 1998. See Court Order, Sept. 17, 1998 (Doc. No. 49).[8]

[8]The court also issued an order that the court would, on its own initiative, dismiss the case without prejudice as to all defendants unless the plaintiffs showed good cause for their failure to serve the defendants by November 15, 1998. See Court Order, Oct. 28, 1998 (Doc. No. 50). The

Sun Ship and Fidelity each filed separate motions to dismiss the amended complaint.[9] See Motion by Sun Ship, Inc. to Dismiss Amended Complaint (Doc. No. 51); First Fidelity Bank's Motion to Dismiss Amended Complaint (Doc. No. 61). On December 14, 1998, the court placed this action in the special management track, denied the motions to dismiss without prejudice, and ordered the plaintiffs to file a second amended complaint by January 4, 1999. See Court Order, Dec. 14, 1998 (Doc. No. 73). Atkinson then timely filed a second amended complaint.[10] See Second Am. Compl (Doc. No. 77).

The defendants all requested, and received, extensions on the time within which they were to file motions to dismiss. See Court Order, February 1, 1999 (Doc. No. 81). On or before March 5, 1999, all of the defendants named in the second amended complaint filed motions to dismiss the complaint for failure to state a claim and failure to plead fraud with particularity as required by Federal Rule of Civil Procedure 9(b). See Motion by First Fidelity to Dismiss Second Amended Complaint (Doc. No.83); Motion by Sun Ship to Dismiss Second Amended Complaint (Doc. No. 84); Motion by Penn Ship to Dismiss the Second Amended Complaint (Doc. No. 85). While the motions were under consideration, the Supreme Court addressed the issue of whether a private citizen has standing to litigate claims of fraud upon the government.

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court did not, however, dismiss the action for failure to effect service.

[9]The court granted an unopposed motion by Penn Ship which extended Penn Ship's time to respond to the amended complaint until 30 days after the court's order granting or denying the plaintiff's motion for leave to file a second amended complaint. See Court Order, November 5, 1998 (Doc. No. 54).

[10]Atkinson is the only plaintiff named in the second amended complaint. According to a Stipulation and Order dated June 21, 1999, Schorsch has officially withdrawn as a plaintiff/relator in this case. See Court Order, June 21, 1999 (Doc. No. 94).

As a result the court placed this action in civil suspense awaiting a decision of the Supreme Court which might moot this action. After the Supreme Court decided that a private citizen does have standing in qui tam actions, this action was removed from civil suspense on July 17, 2000.[11]

II. STANDARD OF REVIEW

Pending before the court are motions to dismiss for failure to state claims upon which relief can be granted under Rule 12 (b)(6) of the Federal Rules of Civil Procedure. The purpose

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[11]It should be noted that in addition to the motions to dismiss for failure to state a claim, all three defendants have also filed with the court separate motions to dismiss for lack of subject matter jurisdiction. See Sun Ship's Motion to Dismiss Second Amended Complaint (Doc. No. 102); First Fidelity's Motion to Dismiss (Doc. No. 104); Penn Ship's Motion to Dismiss (Doc. No. 105). Originally, pursuant to a stipulation approved by the court, the plaintiff had until December 1, 1999, to file a response to these motions and the defendants had until December 22, 1999, to file any memoranda in reply.

This past term, the Supreme Court granted certiorari in the case of Vermont Agency of Natural Resources v. United States ex rel. Stevens, to determine "whether a private individual may bring suit in federal court on behalf of the United States against a State (or state agency) under the False Claims Act, 31 U.S.C. §§ 3729-3733." Stevens, 120 S. Ct. at 1860. On November 19, 1999, the Supreme Court issued an order directing the parties in Stevens to file supplemental briefs addressing the additional question of whether a private citizen has standing under Article III to litigate claims of fraud upon the government. The Court held oral argument on these issues on November 29, 1999.

In light of the Stevens case pending before the Supreme Court, on December 6, 1999, I placed this matter into civil suspense. See Court Order, Dec. 6, 1999 (Doc. No. 107). On that same date, I denied the pending motions to dismiss for lack of subject matter jurisdiction without prejudice to the right of the parties to refile the same by letter request after the disposition of the Supreme Court case in Stevens. See Court Order, Dec. 6, 1999 (Doc. No. 106). In Stevens, the Supreme Court held, inter alia, that a private individual does have standing under Article III to sue in federal court on behalf of the United States under the FCA. See Stevens, 120 S. Ct. at 1865. Following the Stevens decision, therefore, I ordered the case removed from the civil suspense file and returned to the current docket for final disposition. See Court Order, July 17, 2000 (Doc. No. 109). On July 27, 2000, pursuant to a stipulation by the parties approved by the court, the plaintiff was given until August 18, 2000, to file a brief in opposition to the motions to dismiss for lack of subject matter jurisdiction. See Court Order, July 27, 2000 (Doc. No. 110). Thus, because the motions to dismiss for lack of subject matter jurisdiction are not yet fully briefed, this opinion addresses only the motions to dismiss the plaintiff's complaint for failure to state a claim pursuant to Rule 12(b)(6).

of a Rule 12(b)(6) motion is to test the legal sufficiency of the complaint. See Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987). In deciding a motion to dismiss, the court must "accept as true all allegations in the complaint and all reasonable inferences that can be drawn from them after construing them in the light most favorable to the [non-moving party]." Jordan, 20 F.3d at 1261. At this stage of the litigation, then, "[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). In deciding a motion to dismiss, a district court also may consider exhibits attached to the complaint and matters of public record. Pension Benefit Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993), cert. denied, 510 U.S. 1042 (1994). Moreover, "a court may consider an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document." Id. (citations omitted).

III. DISCUSSION

A. FALSE CLAIMS ACT

In his second amended complaint, the plaintiff has alleged violations of 31 U.S.C. §§ 3729(a)(2)-(4), (7). These statutory sections impose liability on a person or entity who does any of the following:

> (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the government;
> (3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;
> (4) has possession, custody, or control of property or money used, or to be used by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt; [or]
> . . . .
> (7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government.

31 U.S.C. §§ 3729(a)(2)-(4), (7) (Supp. 1999). If liability is found, the defendant is "liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person . . . ."[12] Id.

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[12]Penn Ship argues that a plaintiff is required to allege damages in order to state a claim under the FCA. See Memo. in Support of Motion of Defendant Pennsylvania Shipbuilding Co. to Dismiss the Complaint ("Penn Ship's Memo.") at 11. Indeed several courts have agreed with Penn Ship's argument. See United States ex rel. Showell v. Philadelphia AFL, CIO Hosp. Ass'n, No. 98-1916, 2000 WL 424274, at *5-6 (E.D. Pa. Apr. 18, 2000) (citing United States ex rel. Stinson, Lyons, Gerlin & Bustamante P.A. v. Provident Life & Accident Ins. Co., 721 F. Supp. 1247, 1259 (S.D. Fla. 1989)); Wilkins ex rel. United States v. Ohio, 885 F. Supp. 1055, 1058 (S.D. Ohio 1995) (citing Stinson, 721 F. Supp. at 1259); Stinson, 721 F. Supp. at 1259; Blusal Meats, Inc. v. United States, 638 F. Supp. 824, 827 (S.D.N.Y. 1986), aff'd, 817 F.2d 1007 (2d Cir. 1987). Controlling Supreme Court authority, however, makes it clear that a plaintiff need not allege damages in order to state a claim under the FCA. See Rex Trailer Co. v. United States, 350 U.S. 148, 154 (1956) (noting that, under the predecessor to the current FCA, "there is no requirement, statutory or judicial, that specific damages be shown" (citing United States ex rel. Marcus v. Hess, 317 U.S. 537, 552 (1943)), abrogated on other grounds as recognized by, United States v. Sanchez-Escareno, 950 F.2d 193, 198 (5th Cir. 1991), cert. denied, 506 U.S. 841 (1992); see also United States v. Kensington Hosp., 760 F. Supp. 1120, 1127-28 (E.D. Pa. 1991) (examining Rex Trailer and Hess). Thus, to state a claim for liability under the FCA, a plaintiff need not allege specific damages in his complaint.

As part of its argument that damages must be alleged in order to find a violation of the FCA, Penn Ship also contends that the FCA requires a plaintiff to allege loss causation. See Penn Ship's Memo. at 12. Penn Ship's contention is incorrect. It is true that a plaintiff must prove loss causation to recover damages under the FCA. See United States v. Hibbs, 568 F.2d

To state a claim for a violation of section 3729(a)(2), known as a false statement violation, a plaintiff must demonstrate:

> (1) that the defendant made, used, or caused to be made or used, a record or statement to get a claim against the United States paid or approved; (2) the record or statement and the claim were false or fraudulent; (3) the defendant knew that the record or statement and the claim were false or fraudulent . . . .

Stinson, 721 F. Supp. at 1259; see also United States v. Warning, No. 93-4544, 1994 WL 396432, at *3 (E.D. Pa. July 26, 1994).

To state a claim under the FCA for conspiracy, pursuant to section 3729(a)(3), a plaintiff must show: "(1) that the defendant conspired with one or more persons to get a false or fraudulent claim allowed or paid by the United States, and (2) that one or more conspirators performed any act to get a false or fraudulent claim allowed or paid." United States v. Hill, 676 F. Supp. 1158, 1173 (N.D. Fla. 1987) (citing Blusal Meats, 638 F. Supp. at 828).

347, 350 (3d Cir. 1977) ("To recover damages here, the United States must show these elements . . . [a false statement] which has resulted in damages sustained by 'reason of' the [false statement]."); United States v. Board of Educ., 697 F. Supp. 167, 172 (D.N.J. 1988) ("The False Claims Act allows the United States to recover only damages for harm actually sustained due to defendants' fraudulent acts."). The FCA provides, however, for two separate civil remedies and the recovery of damages is only one of them. The other remedy is the imposition of a civil penalty of $5,000 to $10,000 per violation. See 31 U.S.C. § 3729(a). This remedy is available regardless of whether the government suffered any actual injury. See Rex Trailer Co., 350 U.S. at 154 (citing Hess, 317 U.S. at 552; United States v. Rohleder, 157 F.2d 126, 129 (3d Cir. 1946)); United States ex rel. Schwedt v. Planning Research Corp., 59 F.3d 196, 199 (D.C. Cir. 1995); Kensington Hosp., 760 F. Supp. at 1127-28. Accordingly, loss causation is not an element that must be pleaded in order to state a claim for a violation of the FCA.

Penn Ship also argues that materiality is an element of an FCA violation that must be pleaded. See Penn Ship's Memo. at 11-12. In a recent case, the Third Circuit expressly refused to decide whether the FCA contains a materiality requirement, noting that any fraud complained of in that case was material. See United States ex rel. Cantekin v. University of Pittsburgh, 192 F.3d 402, 415 (3d Cir. 1999). I also refuse to decide whether the FCA contains a materiality requirement at this early stage of the proceedings.

The elements of a claim brought pursuant to section 3729(a)(4) include: "(1) possession, custody, or control of property or money used, or to be used, by the government, (2) delivery of less property than the amount for which the person receives a certificate or receipt, (3) with intent to defraud or willfully to conceal the property." United States v. Dyncorp, 136 F.3d 676, 681 (10th Cir. 1998).

Finally, a claim under section 3729(a)(7), known as the "reverse false claims" provision of the statute, requires proof: "(1) that the defendant made, used, or caused to be used a record or statement to conceal, avoid, or decrease an obligation to the United States; (2) that the statement or record was false; [and] (3) that the defendant knew that the statement or record was false . . . ." Stinson, 721 F. Supp. at 1259.

Additionally, the plaintiff must demonstrate that the defendant acted knowingly for most section 3729 violations. To establish this element of knowledge, the plaintiff must show "that the defendant (1) had actual knowledge that it submitted a false or fraudulent claim for payment or approval, (2) acted in deliberate ignorance of the truth or falsity of its claim, or (3) acted in reckless disregard of the truth or falsity of its claim." See United States v. The Parsons Co., 195 F.3d 457, 464 (9th Cir. 1999) (citing 31 U.S.C. § 3729(b) (West 1999); Wang v. FMC Corp., 975 F.2d 1412, 1420 (9th Cir. 1992). Moreover, the statute explicitly states that no proof of specific intent to defraud is necessary to establish knowledge. See 31 U.S.C. § 3729(b). "The gist of the violation is not an intent to deceive but the knowing presentation of a claim, record or statement that is either 'fraudulent' or 'false' and the requisite intent is the knowing presentation of what is 'known to be false' or 'a lie.'" Wilkins, 888 F. Supp. at 1059 (citing Wang, 975 F.2d at 1421). Thus, the scienter requirement under the FCA is liberal. See Gold v. Morrison-Knudsen Co., 68

F.3d 1475, 1477 (2d Cir. 1995), cert. denied, 517 U.S. 1213 (1996). The standard is not so liberal, however, that allegations of mere negligence or innocent mistake are sufficient to satisfy the element of knowledge for a violation of the FCA. See Hindo v. University of Health Sciences, 65 F.3d 608, 613 (7th Cir. 1995); Showell, 2000 WL 424274, at *6; Plywood Prop. Assocs. v. National Flood Ins. Program, 928 F. Supp. 500, 509 (D.N.J. 1996).

Finally, courts have interpreted the FCA broadly, finding that the Act was intended "to reach all types of fraud, without qualification, that might result in financial loss to the Government." Neifert-White Co., 390 U.S. at 232. As a result, courts have held that "when the contract or extension of government benefit was obtained originally through false statements or fraudulent conduct," there is liability for each claim submitted to the government under that contract. Harrison, 176 F.3d at 787 (citing United States ex rel. Marcus v. Hess, 317 U.S. 537, 543-44 (1943), as the "most prominent" case in which FCA liability was imposed for fraudulently inducing the government to enter into a contract). Therefore, under the FCA, a government contractor is liable for every claim submitted under a contract if the contract was fraudulently obtained, even if the work is performed to government specifications and at the agreed price. See Harrison, 176 F.3d at 788.

B. FAILURE TO PLEAD WITH PARTICULARITY

1. Federal Rule of Civil Procedure 9(b)

Federal Rule of Civil Procedure 9(b) mandates that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.

Malice, intent, knowledge, and other condition of mind of a person may be averred generally." Fed. R. Civ. P. 9(b). In the Third Circuit, the Rule 9(b) standard, however, is "a generous one" that is applied by the courts with "some flexibility." See Blue Line Coal Co. v. Equibank, 683 F. Supp. 493, 497 (E.D. Pa. 1988) (citations omitted); see also Rolo v. City Investing Co. Liquidating Trust, 155 F.3d 644, 658 (3d Cir. 1998) (observing that courts in the Third Circuit apply Rule 9(b) with "some flexibility and should not require plaintiffs to plead issues that may have been concealed by the defendants") (citing Christidis v. First Pennsylvania Mortgage Trust, 717 F.2d 96, 100 (3d Cir. 1983)). As the Third Circuit has explained, "focusing exclusively on [Rule 9(b)'s] 'particularity' language is 'too narrow an approach and fails to take account of the general simplicity and flexibility contemplated by the rules." Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 742 F.2d 786, 791 (3d Cir. 1984), cert. denied, 469 U.S. 1211 (1985) (citing Christidis, 717 F.2d at 100)). Instead, the court must read Rule 9(b) in conjunction with Federal Rule of Civil Procedure 8, which requires the plaintiff to allege a "short and plain statement of the claim," and which provides that averments in pleadings shall be "simple, concise, and direct." See United States v. Metzinger, No. 94-7520, 1996 WL 412811, at *4 (E.D. Pa. July 18, 1996) (citing Fed. R. Civ. P. 8(a)(2), (e); In re Catanella and E.F. Hutton & Co., Inc. Sec. Litig., 583 F. Supp. 1388, 1397-98 (E.D. Pa. 1984)). Therefore, in this circuit, to satisfy the particularity requirement for pleading fraud, the plaintiff must plead with particularity the "circumstances of the alleged fraud in order to place the defendants on notice of the precise misconduct with which they are charged, and to safeguard defendants against spurious charges of immoral and fraudulent behavior." See Seville, 742 F.2d at 791.

The Rule 9(b) pleading requirement certainly is satisfied if the plaintiff alleges the "date, place or time" of the allegedly fraudulent conduct. See id. The plaintiff need not plead the "date, place or time" of the fraud, however, if the plaintiff is able to "use alternative means of injecting precision and some measure of substantiation into their allegations of fraud." See id.

Moreover, although Rule 9(b) requires the circumstances constituting fraud to be stated with particularity, it also states that "[m]alice, intent, knowledge, and other condition of mind of a person may be averred generally." Fed. R. Civ. P. 9(b). Thus, all elements of the plaintiff's FCA claims under sections 3729(a)(2) and (a)(7) must be pleaded with particularity except the knowledge with which a defendant is alleged to have committed the violative acts.[13] See Gold,

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[13]Penn Ship contends that, contrary to the clear language of Rule 9(b), the knowledge element of sections 3729(a)(2) and (a)(7) must also be alleged with particularity and cites as support for this proposition In re Burlington Coat Factory Securities Litigation, 114 F.3d 1410 (3d Cir. 1997). In Burlington Coat, the Third Circuit required heightened pleading of scienter in the case of a securities fraud action. See id. at 1418 (explaining that in a securities fraud case "[w]hile state of mind may be averred generally, plaintiffs must still allege facts that show the court their basis for inferring that the defendants acted with 'scienter'"). Penn Ship now requests that the court extend the rationale of Burlington Coat to include pleadings of knowledge under the FCA. I decline to do so for two reasons. First, the rationale stated for the rule in Burlington Coat related specifically to securities fraud action. In explaining its holding, the court reasoned that "[p]ublic companies make large quantities of information available to the public . . . [and] [l]arge volumes of disclosure make for a high likelihood of at least a few negligent errors." Id. The court then explained that it was necessary to require the plaintiff to allege some facts to demonstrate their basis for alleging an intent to defraud because to hold otherwise would "allow plaintiffs and their attorneys to subject [public] companies to wasteful litigation based on the detection of a few negligently made errors found subsequent to a drop in stock price . . . ." Id. That same rationale does not apply to this case brought under the FCA. Second, the scienter requirement under Section 10(b) of the Securities Exchange Act requires the plaintiff to show that the defendant acted with the intent to defraud. See id. at 1418-19; see also Black's Law Dictionary, 1345 (6th ed. 1990) (explaining that "scienter" as applied under the Securities Exchange Act "refers to a mental state embracing intent to deceive, manipulate or defraud"). Intent to defraud, however, is not an element of the relevant sections of the FCA at issue here. See United States v. DiBona, 614 F. Supp. 40, 43 (E.D. Pa. 1984) (citing United States v. Rohleder, 157 F.2d 126 (3d Cir. 1946)). Instead, under these sections of the FCA, the plaintiff need only plead that the defendant acted knowingly. See id. For these reasons, I decline to

68 F.3d at 1477 (noting approvingly that to satisfy Rule 9(b) the plaintiff in an FCA action was not required to particularize the defendants' scienter but was required to plead "with particularity the specific statements or conduct giving rise to the fraud claim").

The requirement that the circumstances constituting the fraud be pleaded with particularity remains in effect even if one of the circumstances that must be pleaded with particularity—e.g., falsity—turns on a defendant's specific intent. For example, if a defendant is accused of making the false statement "I promise to perform under the contract," the only way such a statement could be false is if the defendant did not, in fact, intend to perform under the contract at the time he made the statement. See United States ex rel. Lamers v. City of Green Bay, 998 F. Supp. 971, 987 (E.D. Wisc. 1998) ("Any promise to perform is not only a prediction but a statement of existing intent, and thus capable of misrepresentation"), aff'd, 168 F.3d 1013 (7th Cir. 1999);see generally United States v. Shah, 44 F.3d 285 (5th Cir. 1995). If the falsity of a statement that was made to get a fraudulent claim approved turns on what a defendant intended, that intent—or facts giving rise to a strong inference of that intent—must be pleaded with sufficient particularity to satisfy the requirements of the first sentence of Rule 9(b). See Bower v. Jones, 978 F.2d 1004, 1012 (7th Cir. 1992) (requiring allegations of objective manifestations of intent not to perform contract for a claim of promissory fraud to survive a motion to dismiss and recognizing that the absence of this requirement would allow every breach of contract action to become a fraud action); cf. In re Burlington Coat, 114 F.3d at 1418 (applying this particularity standard to allegations of scienter in a securities fraud case). To allow otherwise would be to

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extend Burlington Coat's heightened pleading standard to the pleading of knowledge under the FCA.

allow plaintiffs to do an end run around Rule 9(b)'s particularity requirement—to allow plaintiffs to survive a motion to dismiss a claim of an FCA violation with nothing more than general allegations of intent not to perform and actual nonperformance of a government contract.[14]

2. Applicability of Federal Rule of Civil Procedure 9(b) to the FCA

Here, the plaintiff does not dispute that his allegations of direct violations of the FCA must be pleaded with particularity as required by Rule 9(b).[15] See Plaintiff's Memo. of Law in Opposition to Motions to Dismiss ("Plaintiff's Opp.") at 34-39. Instead, the plaintiff argues that his allegations of direct FCA violations are sufficiently particular to satisfy the "appropriately 'generous' standard" applied by courts in this circuit. See id. at 36.

The plaintiff does, however, contest the application of the Rule 9(b) particularity standard to count one of the complaint, which alleges that the defendants conspired to defraud the Navy through the submission of false claims. See Plaintiff's Opp. at 39-40 (arguing that "such specificity is not even applicable to the conspiracy counts").

In general, the particularity requirements of Rule 9 do not apply to civil conspiracy claims. See Rose v. Bartle, 871 F.2d 331, 336 (3d Cir. 1989); see also Tunstall v. Exolon Corp.,

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[14]Note that the specific intent that is required to be pleaded with particularity is not the specific intent to defraud that the FCA makes clear need not be pleaded with particularity nor even proved. See 31 U.S.C. § 3729(b). Instead, in the falsity example above, the specific intent that must be pleaded particularly is whatever intent makes the statement false, not any specific intent to defraud.

[15]Indeed, it is well-established that Rule 9(b) applies to qui tam actions brought under the FCA. See e.g., Cooper v. Blue Cross & Blue Shield of Fla., 19 F.3d 562, 568 (11th Cir. 1994); United States ex rel. Detrick v. Daniel F. Young, Inc., 909 F. Supp. 1010, 1019 n.26 (E.D. Va. 1995); United States ex rel. Robinson v. Northrop Corp., 149 F.R.D. 142, 144 (N.D. Ill. 1993); Juliano v. Federal Asset Disposition Ass'n, 736 F. Supp. 348, 353 (D.D.C. 1990), aff'd, 959 F.2d 1101 (D.C. Cir. 1992); United States ex rel. McCoy v. California Med. Review, Inc., 723 F. Supp. 1363, 1372 (N.D. Cal. 1989).

No. 92-3770, 1993 WL 58760, at *2 (E.D. Pa. March 2, 1993) (observing that Rule 9(b) pleading requirements are not applicable to claims for civil conspiracy). The question becomes more complicated, however, when the action involves a civil conspiracy to defraud. In that case, it is clear that the underlying fraud action must be pleaded with particularity, see supra, but it is less certain what pleading standard should be applied to the actual allegations of conspiracy (i.e., whether the elements of the conspiracy, such as the allegation of an agreement, must be pleaded with specificity).

In Rose v. Bartle, 871 F.2d 331 (3d Cir. 1989), the Third Circuit considered whether a claim for a civil RICO conspiracy needed to be pleaded with specificity. See id. at 366-67. The court determined that although the underlying elements of fraud are subject to the heightened pleading standard of Rule 9(b), the allegations "of conspiracy are measured under the more liberal . . . [Fed. R. Civ. P. 8(a)] pleading standard." See id. at 366;see also Smith v. Berg, No. 99-2133, 1999 WL 1081065, at *2 n.1 (E.D. Pa. Dec. 1, 1999) (applying Rule 9(b) to the allegations of fraud in the civil RICO claim, but not to the civil RICO conspiracy claim); Emcore Corp. v. PriceWaterhouseCoopers LLP, 102 F. Supp. 2d 237, 264 (D.N.J. 2000) (refusing to apply Rule 9(b) pleading standard to a claim for a civil RICO conspiracy). According to the Rose court, the allegations of conspiracy "must be sufficient to 'describe the general composition of the conspiracy, some or all of its broad objectives, and the defendant's general role in that conspiracy.'" See Rose, 871 at 336 (citations omitted). Furthermore, two courts in this district that have considered this question as it relates to a conspiracy claim under the FCA both concluded that the heightened pleading requirements are not to be applied to the allegations of the FCA conspiracy. See United States v. Metzinger, No. 94-7520, 1996 WL 53002, at *3 (E.D.

Pa. Sept. 17, 1996) (holding that, unlike the allegations of direct violations of the FCA, conspiracy to defraud under the FCA need not be pleaded with particularity); United States v. Warning, No. 93-4541, 1994 WL 396432, at *5 (E.D. Pa. July 26, 1994) (same). Accordingly, in those cases, the court required the plaintiff to plead with specificity the allegations of direct violations of the FCA (because those allegations sounded in fraud), but did not require the same heightened particularity for the allegations concerning the composition and objectives of the conspiracy. As I agree with the reasoning set forth in these cases, I conclude that the plaintiff is required to allege the underlying fraud with particularity, but the allegations of the conspiracy need only satisfy the notice pleading standards of Rule 8. Therefore, to survive a motion to dismiss on the conspiracy claim, the plaintiff's complaint need only "describe 'the general composition of the conspiracy, some or all of its broad objectives, and defendant's general role in that conspiracy." See Rose, 871 at 336 (citations omitted).[16]

C. INDIVIDUAL COUNTS

[16]The court is aware that other circuit courts, as well as a few lower court decisions in this circuit, have concluded that when a plaintiff is alleging a conspiracy to defraud so that the "conspiracy alleged is directly linked to the fraud allegations," the allegations must be pleaded with particularity pursuant to the requirements of Rule 9(b). See Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 790 (4th Cir. 1999) (holding that a conspiracy claim under the FCA failed because, among other things, it was not pleaded with particularity as required by Rule 9(b)); Hayduk v. Lanna, 775 F.2d 441, 443 (1st Cir. 1985) (applying Rule 9(b) particularity requirements to claim for conspiracy to defraud); Segal v. Gordon, 467 F.2d 602, 607 (2d Cir. 1972) (same); Robison v. Carter, 356 F.2d 924, 925 (7th Cir. 1966) (same); Kronfeld v. First Jersey Nat'l Bank, 638 F. Supp. 1454, 1468 (D.N.J. 1986) (same); Klein v. Council of Chem. Ass'ns, 587 F. Supp. 213, 226-27 (E.D. Pa. 1984) (same); see also Palladino v. VNA of Southern NJ, No. 96-2252, 1999 WL 793393, at *6 (D.N.J. June 30, 1999) (applying the Rule 9(b) pleading standard to a conspiracy claim under the FCA). I decline to follow these decisions, however, and instead conclude that the requirements of Rule 9(b) apply only to the plaintiff's allegations of the underlying fraud, and not the elements of conspiracy.

1. Count One: Conspiracy

In count one of his complaint, the plaintiff alleges that "[a]ll defendants are liable to plaintiffs for conspiring to defraud the Government by carrying false and fraudulent claims and reverse false claims allowed or paid in violation of 31 U.S.C. § 3729(a)(3)." See Compl. ¶ 104.

As explained above, to state a claim for conspiracy under the FCA, a plaintiff must allege a conspiracy with one or more persons to get a false or fraudulent claim allowed or paid by the government, as well as an overt act in furtherance of the conspiracy. See Hill, 676 F. Supp. at 1173 (citing Blusal Meats, 638 F. Supp. at 828). "The essence of a conspiracy under the Act is an agreement between two or more persons to commit a fraud." Stinson, 721 F. Supp. at 1259 (citing Blusal Meats, 638 F. Supp. at 828). An agreement to commit a lawful act by lawful means, however, is not actionable. See El Amin, 26 F. Supp. 2d at 164-65 (holding that there was no actionable claim for conspiracy because all of the activities alleged consisted "of entirely lawful pursuits" and, therefore, could not constitute a conspiracy to defraud). If the plaintiff is able to show a conspiracy to commit a fraud or crime the defendants are liable for every action taken in furtherance of the conspiracy by any of the co-conspirators. See id. at 165 ("[A]n overt act need not be pleaded against each defendant in a conspiracy, because a single overt act by one of the conspirators can support a conspiracy claim, even on the merits.").

The threshold issue in this case, therefore, is whether the plaintiff has sufficiently alleged an agreement between any of the defendants. See Stinson, 721 F. Supp. at 1259. I will first examine whether the plaintiff's complaint alleges an agreement between Sun Ship and any other defendant. To make this determination, it is necessary to examine the allegations in the plaintiff's complaint concerning Sun Ship.

The plaintiff's complaint alleges two agreements between Sun Ship and Penn Ship. First, the plaintiff avers that Penn Ship and Sun Ship agreed that Sun Ship would assist Penn Ship in obtaining Navy work. See id. at ¶¶ 29-30. This allegation, however, does not support a finding that there was any agreement to defraud. Indeed, the allegations amount to nothing more than an agreement to act lawfully, which is not an actionable claim for an FCA conspiracy. See El Amin, 26 F. Supp. 2d at 164-65.

Second, the plaintiff alleges that Sun Ship agreed to release Penn Ship from its restrictive covenants to permit Penn Ship to infuse money into Levingston to delay Levingston's impending bankruptcy until Penn Ship received the Oiler Contract from the Navy. See id. at ¶¶ 45-47. This allegation also is not an allegation of an illegal or fraudulent agreement. To make this conduct fraudulent or criminal, the plaintiff would have to allege that Sun Ship knew that the inevitable consequence of releasing Penn Ship from its restrictive covenants was that Penn Ship would fraudulently conceal its loans to Levingston from the Navy. The plaintiff's complaint is devoid of any such allegations. Instead, the plaintiff requires the court to make a large inferential leap that Sun Ship's releasing Penn Ship from restrictive covenants was the functional equivalent of misleading the Navy through the submission of fraudulent financial statements. Thus, the complaint is lacking the fundamental allegations necessary to show how the agreement was fraudulent, and without allegations of an agreement to defraud, the claim must be dismissed. See United States ex rel. Sanders v. East Alabama Healthcare Auth., 953 F. Supp. 1404, 1410 (M.D. Ala. 1996) (noting that absent an allegation of an agreement among the parties allegedly involved in the conspiracy the section 3729(a)(3) claim must be dismissed for failure to state a claim); Wilkins, 885 F. Supp. at 1063 (holding that conclusory allegations of an agreement are

insufficient to state a claim for conspiracy under section 3729(a)(3)); Stinson, 721 F. Supp. at 1259 (dismissing conspiracy claim because the complaint was "void of any allegations of an agreement and thus fails to state a claim under section 3729(a)(3)"). Although it is true that the plaintiff need only satisfy the notice pleading requirements of Rule 8 for the allegations of the conspiracy, the plaintiff's complaint fails even under this liberal standard. By not so much as alleging an agreement to do something illegal, or to do something legal by illegal means, the plaintiff fails to give the defendants notice of the precise misconduct with which they are charged. Thus, because the complaint lacks any allegations supporting an agreement to commit a

fraudulent act entered into by Sun Ship and any other defendant,[17] the court will dismiss the claim for conspiracy against Sun Ship under the FCA without prejudice.[18]

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[17]Even if the plaintiff's conspiracy claim against Sun Ship were pleaded adequately, which it is not, Sun Ship argues that this claim is barred by the applicable statute of limitations. The plaintiff and Sun Ship both agree that a six-year statute of limitations applies to this case. See Sun Ship's Memo. at 15; Plaintiff's Opp. at 34. Sun Ship argues that the statute of limitations bars the action because the alleged conspiracy achieved its "goal" when the Oiler contract was awarded to Penn Ship on May 6, 1985, and the claim was not brought within six years of that date. See Sun Ship's Memo. at 15. The plaintiff, on the other hand, contends that he alleges a conspiracy "to maintain that contractual relationship so as, inter alia, to obtain the payments occasioned by the false claims . . . ." See Plaintiff's Opp. at 34. Therefore, the plaintiff contends that the statute of limitations did not begin to run until after all of the payments were made under the contract. See id.

The court may consider a statute of limitations defect in a motion to dismiss "where the complaint facially shows noncompliance with the limitations period and the affirmative defense [of a statute of limitations defect] appears on the face of the pleading." Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1384 n.1 (3d Cir. 1994). Therefore, if it is clear from the face of the plaintiff's complaint that the statute bars the action, then the complaint shall be dismissed.

In this case, to determine whether the statute of limitations bars the conspiracy claim, the main inquiry is when the statute began to run. In the Third Circuit, the statute of limitations period for a civil conspiracy "runs from each overt act causing damage." See Wells v. Rockefeller, 728 F.2d 209, 217 (3d Cir. 1984), cert. denied, 471 U.S. 1107 (1985); Drum v. Nasuti, 648 F. Supp. 888, 903 (E.D. Pa. 1986), aff'd, 735 F.2d 1348 (3d Cir. 1984) ("[I]n making this assessment, courts distinguish between continuing unlawful acts, and continued ill effects from an original violation"). Therefore, in this circuit, "[f]or each act causing injury, a claimant must seek redress within the prescribed limitations period." See Wells, 728 F.2d at 217. The decision of whether the plaintiff has sought redress within the limitations period for each act causing injury can not be determined based on the allegations in the plaintiff's complaint. As a result, further development of the record is necessary before the court can determine whether the statute of limitations period for this conspiracy claim bars the action.

[18]Because I have concluded that the plaintiff fails to state a claim for conspiracy, it is unnecessary to decide, at this time, whether Sun Ship is correct in its contention that section (a)(3) does not impose liability for a reverse false claims conspiracy. See Sun Ship's Memo. at 17. For the same reason, it is unnecessary to determine whether, if such a claim does exist, it would be applied retroactively so as to impose liability for a reverse false claims conspiracy arising out of conduct occurring before 1986. See id. at 15-16.

Turning now to the claim of conspiracy against Fidelity, the threshold inquiry is whether the plaintiff has sufficiently alleged an agreement to defraud the government entered into by Fidelity. Examining the plaintiff's allegations in the light most favorable to the plaintiff, I find that the plaintiff has not alleged sufficiently such an agreement to defraud the government. Although the plaintiff does claim that Fidelity never recorded the Navy's security interests, he does not claim, in any more than a conclusory fashion, that this was the result of any agreement to defraud. See Compl. ¶¶ 70, 104. Indeed, any agreement alleged against Fidelity is alleged in an entirely conclusory fashion. See id. ¶ 104. The complaint does not even make clear whether the plaintiff is alleging that Fidelity conspired with Sun Ship, Penn Ship, or some other unknown entity. See id. ¶¶ 70-75, 104. Thus, the plaintiff's allegations of an agreement to conspire on the part of Fidelity are woefully insufficient.

In the plaintiff's response to the motions to dismiss, he argues that "the Complaint alleges agreement among all the parties and, in fact, active participation. Fidelity's breach of duty, and its multiple acts in connection therewith, constituted such participation." Plaintiff's Opp. at 31. It may be true that the allegations sufficiently plead the commission of overt acts by Fidelity. These allegations, however, do not alleviate the plaintiff's task of also pleading a vital part of the conspiracy, that is, the existence of an agreement to defraud. Here, there is no allegation that Fidelity agreed with another defendant to defraud the government. Thus, the court will dismiss the conspiracy claim against Fidelity.

For the same reasons that the court finds that the complaint does not state a claim for conspiracy against Sun Ship or Fidelity, the court finds that the complaint does not contain sufficient allegations of an agreement between Penn Ship and any other person or entity to

defraud the government. Thus, the plaintiff's complaint also fails to state a claim against Penn Ship for conspiracy. Accordingly, the conspiracy claims against the defendants will be dismissed without prejudice and the plaintiff shall be granted leave to amend this count.

2. Count Two: Penn Ship's September 30, 1984, Financial Statement

In count two, the plaintiff alleges that Penn Ship and Sun Ship "knowingly made, used, or caused to be made or used a false record or statement, namely, [Penn Ship's] financial statement for the fiscal year ending September 30, 1984, to get false or fraudulent claims paid or approved in violation of 31 U.S.C. § 3729(a)(2)." Compl. ¶ 105. Specifically, the plaintiff alleges that although this statement reflected the fact that Levingston owed Penn Ship a significant amount of money, the statement did not contain the loss allowance required by generally accepted accounting principles ("GAAP") and was, thus, a false statement. See id. ¶¶ 44, 105. This allegation is not, however, sufficiently particular under Rule 9(b) to allow the survival of this claim.

In Christidis v. First Pa. Mortgage Trust, 717 F.2d 96 (3d Cir. 1983), a fraud action in which the acts alleged were fraudulent only because they violated GAAP, the Third Circuit held that in such a case Rule 9(b) requires a plaintiff to allege with particularity what specific provisions of GAAP were violated and the manner in which the violation occurred.[19] See id. at 100; Shapiro v. UJB Fin. Corp., 964 F.2d 272, 284 (3d Cir.) (noting, with approval, the court's

[19]The facts in this case are distinguishable from the facts in In re Craftmatic Sec. Litig. v. Kraftson, 890 F.2d 628 (3d Cir. 1989). The Third Circuit in In re Craftmatic approved the application of a relaxed Rule 9(b) standard when the facts on which fraud turned were "peculiarly within the defendant's knowledge or control." See id. at 645. Here, the plaintiff does not contend that the facts giving rise to the alleged fraud in count two were "peculiarly within the defendant's knowledge or control," but rather, were dependent solely on GAAP. Thus, In re Craftmatic does not dictate the result here.

holding in Christidis that the fraud claim would be dismissed in large part "because of failure to identify accounting or auditing standards"), cert. denied, 506 U.S. 934 (1992); In re Ikon Office Solutions, No. 98-CV-4286, 1999 WL 734578, at *13 n.18 (E.D. Pa. Sept. 14, 1999) (acknowledging the Third Circuit's holding in Christidis); see also In re Midlantic Corp. Shareholder Litig., 758 F. Supp. 226, 233 n.3 (D.N.J. 1990) (noting that the holding in Christidis was dependent on falsity turning only on a violation of GAAP). Count two contains the same kinds of allegations as those in Christidis, and, thus, must satisfy the same particularity requirements. The plaintiff claims that Penn Ship's September 30 financial statement was false solely because it violated GAAP. As Penn Ship correctly argues, the plaintiff makes no mention, however, of which particular provisions of GAAP were violated nor the manner in which the violations occurred. See Penn Ship's Memo. at 17 n.13. Hence, count two's allegations of falsity fail to satisfy the particularity requirements of Rule 9(b) as set forth in Christidis.

In its motion to dismiss, Sun Ship contends that there is another separate reason to dismiss count two against Sun Ship. Sun Ship argues that these direct claims consist of allegations of fraud based on nondisclosure, and that there can be no liability for failure to disclose information absent a duty to disclose. See Sun Ship's Memo. at 18-24. The essence of Sun Ship's argument is that it did not defraud the Navy itself, it merely was aware of the fraud perpetrated on the Navy by Penn Ship and failed to disclose this fraud. See id. Sun Ship argues that it cannot be liable for failing to disclose the fraudulent acts committed by another unless it had an affirmative obligation to disclose this information, which it did not have. See id.

As support for this proposition, Sun Ship relies substantially on a decision from a court in this district, United States ex rel. Piacentile v. Wolk, No. 93-5773, 1995 WL 20833, at *4 (E.D.

Pa. Jan. 17, 1995). In particular, Sun Ship points to the finding in Wolk that "[m]ere inaction is not enough to constitute a violation of the False Claims Act." See Sun Ship's Memo. at 22 (quoting Wolk, 1995 WL 20833, at *4). The decision in Wolk, however, is distinguishable from the case at hand.

In Wolk, the United States brought an FCA action against three defendants, Wolk, Miller, and Advanced Care Associates ("Advanced Care"). See Wolk, 1995 WL 20833, at *1. Miller and Wolk owned Advanced Care, which was a corporation engaged in the business of selling medical equipment. See id. The plaintiff in Wolk alleged that employees of Advanced Care, acting on the instructions of Wolk, had submitted false claims for payment under the Medicaid program. See id. The allegations involving Miller alleged that he knew about the submission of false documents to the government and failed to "[take] steps to ensure that Advanced Care discontinued the practice." Id. It was also alleged Miller knew that Wolk had destroyed evidence in the case. See id.

Wolk and Miller both moved to dismiss the plaintiff's complaint for failure to state a claim. See id. at *2. The court denied Wolk's motion, but granted Miller's motion to dismiss. See id. at *3-4. The court held that Miller could not be held liable for his individual actions "based simply on the allegations that he knew of the fraud and the record destruction." See id. The court explained that the plaintiff had "alleged no actions on the part of defendant Miller that constitute 'presenting, or causing to be presented' a false or fraudulent claim. Mere inaction is not enough to constitute a violation of the False Claims Act." Id. at *4.

Unlike the defendant Miller in Wolk, Sun Ship did not merely know about the fraud committed by Penn Ship and fail to disclose it. Here, the plaintiff alleges that Sun Ship did act

by releasing Penn Ship from its restrictive covenants. The issue, therefore, is whether these actions by Sun Ship caused the submission of false claims so as to trigger liability under section 3729(a)(2) of the FCA. See 31 U.S.C. § 3729(a)(2).

As discussed above, the plaintiff's complaint includes allegations that, among other things, Sun Ship released Penn Ship from restrictive covenants to permit Penn Ship to infuse capital into the failing, and imminently bankrupt, Levingston. See Compl. ¶¶ 45-47. These allegations fail to establish that Sun Ship in any way "made, used or caused to made or used" false statements by Penn Ship to cause Penn Ship to submit claims to the Navy. Nowhere in the complaint is it alleged, much less with the particularity required by Rule 9(b), how the actions of Sun Ship caused Penn Ship to make misrepresentations to the Navy. The plaintiff fails to allege how the release of restrictive covenants by Sun Ship caused Penn Ship to submit false claims. Thus, although the plaintiff may have alleged that Sun Ship caused some of the circumstances that led to the submission of false claims, the plaintiff has not pleaded with adequate specificity any allegations that Sun Ship caused the submission of false claims.[20]

For all of the foregoing reasons, the court will grant Penn Ship's and Sun Ship's motions to dismiss count two and will dismiss this count without prejudice.

3. Count Three: Penn Ship's December 31, 1984, Financial Statement

[20]The typical situation in which a defendant is held liable for "causing" another party to submit a false claim occurs when a subcontractor submits false information to a prime contractor who, in turn, submits the claim to the government. See, e.g., United States v. Bornstein, 423 U.S. 303 (1976). In such a case, it is no defense that the subcontractor did not itself submit the false claim to the government; it caused the submission and, thus, is liable under the FCA. See id. at 313. That is simply not the case here.

In count three, the plaintiff alleges that Penn Ship and Sun Ship "knowingly made, used, or caused to be made or used a false record or statement, namely, [Penn Ship's] interim financial statement for the period ending December 31, 1984, to get false or fraudulent claims paid or approved in violation of 31 U.S.C. § 3729(a)(2)." Compl. ¶ 106. Specifically, the plaintiff alleges that this December financial statement was false because it did not reflect Penn Ship's guarantees of over four million dollars of CMC's debts that existed on December 31, 1984, and that disclosure of these guarantees would have jeopardized Penn Ship's chances of being awarded the Oiler Contract.[21] See id. at ¶¶ 47-49. Count three survives as it relates to Penn Ship, but does not as it relates to Sun Ship.

As stated earlier at greater length, in order to state a claim for a violation of section 3729(a)(2), a plaintiff must allege with particularity that a defendant used a false or fraudulent statement to get a false or fraudulent claim approved or paid by the government. See Stinson, 721 F. Supp. at 1259; Fed. R. Civ. P. 9(b). The plaintiff must also claim that the defendant did those acts knowingly, but such knowledge may be averred generally. See Fed. R. Civ. P. 9(b).

With respect to count three, the plaintiff has alleged that Penn Ship used a false statement—i.e., the December 31, 1984, financial statement—to deceive the Navy into approving the Oiler Contract. See Compl. ¶¶ 47-49. The plaintiff has also alleged that this use occurred with Penn Ship's knowledge. See id. ¶ 106. The court finds that the plaintiff makes these allegations, including those concerning the falsity of the financial statement, with sufficient

[21]Penn Ship's contention that the guarantees did not exist until the summer of 1985 and, hence, did not belong on the December 31, 1984, financial statement, see Penn Ship's Memo. at 17-18, deals with contested issues of material fact not properly considered in deciding a motion to dismiss.

particularity to satisfy the requirements of Rule 9(b) and to place Penn Ship on notice as to the specific bad acts with which it is being charged. Thus, the plaintiff has stated a claim against Penn Ship upon which relief can be granted in count three, and, consequently, I will deny Penn Ship's motion to dismiss with respect to count three.

I will, however, grant Sun Ship's motion to dismiss this count. As with count two, the averments do not allege how Sun Ship "caused" Penn Ship to submit false claims to the Navy. See supra Part III.C.2. For this reason, I will grant Sun Ship's motion to dismiss count three and will dismiss without prejudice this count against Sun Ship.

4. Count Four: The Best and Final Proposal

In count four, the plaintiff claims that Penn Ship and Sun Ship "knowingly made, used, or caused to be made or used a false record or statement, namely, [Penn Ship's] Best and Final Proposal, to get false or fraudulent claims paid or approved in violation of 31 U.S.C. § 3729(a)(2)." Compl. ¶ 107. Specifically, the plaintiff alleges that Penn Ship deliberately and knowingly understated its estimated costs in the Best and Final Proposal it submitted to the Navy to get the Oiler Contract and points to the omission of the potentially significant cost of architectural and naval drawings for the ships, as well as the cost of any delay associated with preparing such drawings, as an example of this understatement.[22] See id. ¶¶ 59-60, 107. Further,

[22]Penn Ship contends that the drawings cost allegations concern an omission only of the cost of preparing the drawings, not the cost of purchasing the drawings from Avondale, which had already built four identical Oilers and prepared such drawings. See Penn Ship's Memo. at 15. Penn Ship's interpretation of the plaintiff's allegations, while legitimate, is not the only reasonable interpretation. The complaint states that Penn Ship's "proposal omitted the cost of architectural and naval drawings for the Oilers—millions of dollars—or the incremental delay required to prepare such drawings and the additional financial consequences of that delay." Compl. ¶ 60. Construing the plaintiff's allegations concerning the drawings in the light most favorable to him, as I must when considering a motion to dismiss, I find that the plaintiff claims

the plaintiff contends that the Navy relied on the Best and Final Proposal and the numbers contained therein when it awarded the Oiler Contract to Penn Ship. See id. ¶ 60.

As Penn Ship correctly notes, see Penn Ship's Memo. at 14-15, the plaintiff's general claims of deliberately understated estimated costs are not sufficiently particular to allege falsity under the Rule 9(b) standard. His specific allegations regarding the falsity of the omission of the cost of drawings do, however, meet the particularity requirements of Rule 9(b). Thus, the plaintiff has alleged with sufficient particularity that Penn Ship knowingly used its Best and Final Proposal, a statement that contained false information, to get the Navy to approve its bid for the Oiler Contract and award the job to Penn Ship. The court finds that the plaintiff has stated a claim against Penn Ship upon which relief can be granted in count four and will deny Penn Ship's motion to dismiss as it relates to that count.

This claim as alleged against Sun Ship, however, cannot survive. As with counts two and three, there are no factual allegations in the plaintiff's complaint concerning how Sun Ship "caused" Penn Ship to submit a false statement in the form of the Best and Final Proposal. Accordingly, I will dismiss count four without prejudice as to Sun Ship.

5. Count Five: The Weller Letter

In count five, the plaintiff claims that the March 15, 1985, letter from Penn Ship's Chairman, Thomas Weller, to the Navy violated section 3729(a)(2) because it was a false statement that was knowingly used to get a fraudulent claim approved by the government. See Compl. ¶¶ 64, 108. The plaintiff contends that the Weller Letter was a false statement for three

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the omission of the cost of obtaining drawings by any means, whether by preparation or purchase.

reasons: (1) Weller stated that significant cost overruns were highly unlikely despite the fact that such overruns were likely and expected; (2) Weller stated that the trust that would be created by the Trust Indenture would be "irrevocable," as Penn Ship and the Navy understood that word, when the trust to be created by the Trust Indenture was clearly not irrevocable; and (3) Weller stated that the security interest that would represent the res of the trust would cover "the entire Penn Ship facility" while, in fact, it would omit seven acres of property housing, among other things, administrative offices. See id. ¶¶ 65, 68. The plaintiff alleges that all of these false statements were intended to, and actually did, induce the Navy to accept the Trust Indenture and award the Oiler Contract to Penn Ship instead of re-opening bidding to include performance bonds. See id. ¶¶ 64, 66. Penn Ship argues that the three statements complained of were not false or, alternatively, that falsity was not alleged with sufficient particularity. See Penn Ship's Memo. at 19-21. For the reasons explained below, the court holds that the plaintiff has stated claims upon which relief can be granted with sufficient particularity in all parts of count five. Consequently, Penn Ship's motion to dismiss as it relates to that count will be denied.

a. Significant Cost Overruns Are Highly Unlikely

With respect to the statement regarding the likelihood of significant cost overruns, Penn Ship contends that the plaintiff's allegations concerning this statement simply revisit the earlier, insufficiently particular allegations that Penn Ship deliberately understated its expected costs in its Best and Final Proposal. See id. at 20. This statement about the likelihood of significant cost overruns could refer to the previous general allegations of understatement, but it could also refer to the previous particular allegations that Penn Ship deliberately omitted the cost of drawings from its Best and Final Proposal. Considering the plaintiff's allegations in the light most

favorable to him, as I must, I find that he claims that the Weller Letter's statement that significant cost overruns were highly unlikely was false because the cost of the drawings had not been included in the Best and Final Proposal and would, when paid, represent a significant cost overrun. Thus, the plaintiff alleges that a significant cost overrun was not only likely but virtually inevitable given the necessity of obtaining drawings before building the Oilers.

Penn Ship's concerns that this allegation represents a second claim for the same false statement remain, though, regardless of whether the falsity is due to general or particular allegations of cost overruns. The plaintiff's allegation is not, however, that Weller simply resubmitted the Best and Final Proposal. Instead, he claims that Weller reaffirmed the truth of the earlier falsehood as further inducement to get the Navy to accept the Trust Indenture and award the Oiler Contract to Penn Ship instead of re-opening bidding. See Compl. ¶¶ 64, 66. In other words, the plaintiff alleges that had Weller failed to confirm his belief in the accuracy of Penn Ship's Best and Final Proposal, the Navy would have re-opened bidding. This allegation of an FCA violation can, thus, be distinguished from the earlier allegations about the Best and Final Proposal. As a result, the court finds that the plaintiff has alleged with sufficient particularity that Weller knowingly made this false statement regarding the likelihood of cost overruns to fraudulently induce the Navy to award Penn Ship the Oiler Contract.

b. The Trust to Be Created Will Be Irrevocable

With respect to Weller's statement that the trust to be created by the Trust Indenture would be irrevocable, Penn Ship argues that the trust was an irrevocable trust because it could not be revoked after its creation and, thus, that this statement was not false. See Penn Ship's Memo. at 20-21. If the word "irrevocable" was used in its legal sense in the Weller Letter, then

Penn Ship is correct that the statement was true because a trust is irrevocable unless the power to revoke it is expressly reserved, and no such reservation is alleged. See Restatement (Second) of Trusts § 330 (1957). If, however, a different meaning were ascribed to the word "irrevocable," then the statement might, in fact, be false.

In his complaint, the plaintiff alleges that the fact that the trust would be "irrevocable" meant that, in the event of a default, the trust protected the Navy's rights under the Oiler Contract to enter Penn Ship's property and use its equipment, including the floating derrick, to complete construction of the ships.[23] See Compl. ¶ 68. Given the fact that the drydock was both essential to the construction of the Oilers at the Chester Yard and a unique item, see Compl. ¶¶ 33, 68, if the trust allowed the drydock to be sold and removed from the Chester Yard, the trust would not be "irrevocable" under the meaning alleged by the plaintiff. The plaintiff makes just such a claim regarding the provisions of the proposed trust: it would create a fifteen day period between a default event and foreclosure, thereby allowing the drydock to be sold and removed and leaving the Navy with a security interest in the proceeds of the sale of the drydock but not the drydock itself. See id. ¶ 65(ii). Thus, the plaintiff's complaint does contain allegations that Weller's statement regarding the irrevocability of the proposed trust was false. The court finds that the plaintiff has alleged with sufficient particularity that Weller knowingly made a false statement as to the proposed trust's irrevocability to trick the Navy into accepting the Trust Indenture and awarding the Oiler Contract to Penn Ship.

c. The Security Interest Will Be in the Entire Facility

[23]Whether the word "irrevocable" was actually used in the Weller Letter in its legal sense, as argued by Penn Ship, or in the sense alleged by the plaintiff is an issue of fact not properly considered by the court at this time.

Finally, Penn Ship claims that the Weller Letter's statement that the trust's security interest would be "in the entire Penn Ship facility" was not false despite the fact that the property subject to the security interest did not actually contain seven acres of Penn Ship property, including the space housing administrative offices. See Penn Ship's Memo. at 21. To support this contention, Penn Ship makes two arguments. First, Penn Ship claims that the meaning of the phrase "the entire Penn Ship facility" on its face excludes those seven acres because that property did not contain "ship repair or construction facilities." Id. Second, Penn Ship contends that even if the phrase on its face did not exclude the property in question, the meaning of the phrase must depend on the metes and bounds description contained in the Trust Indenture that accompanied the Weller Letter. See id. Although Penn Ship's interpretation of the phrase "the entire Penn Ship facility" is reasonable, the plaintiff's interpretation is also reasonable—that the property in question was included in the description "the entire Penn Ship facility" on its face and that the metes and bounds description did not clearly communicate to the Navy the omission of the seven acres.[24] Given the fact that I must consider the allegations in the light most favorable to the plaintiff, I conclude that he has alleged with sufficient particularity that Weller knowingly made a false statement regarding the scope of the security interest protecting the Navy in the event of a Penn Ship default in order to fool the Navy into accepting the Trust Indenture and awarding the Oiler Contract to Penn Ship instead of re-opening bidding.

6. Count Six: The Trust Indenture

[24]Whether the phrase "the entire Penn Ship facility" included or excluded the seven acres is a question of fact not properly considered at this time.

In count six, the plaintiff claims that "[Penn Ship] and Fidelity knowingly made, used, or caused to be made or used a false record or statement, namely, the Trust Indenture, the security interests of which they intended not to be perfected, to get false or fraudulent claims paid or approved, in violation of 31 U.S.C. § 3729(a)(2)." Compl. ¶ 109. Specifically, the plaintiff alleges that although Penn Ship had no intention of carrying out its promise, Penn Ship promised in the Trust Indenture to perfect the Navy's security interest in a successful attempt to get the Navy to approve the Trust Indenture and award Penn Ship the Oiler Contract instead of re-opening the bidding to include performance bonds.[25] See id. ¶¶ 70, 109.

The falsity of Penn Ship's statement regarding its promise to perfect the Navy's security interest turns on whether Penn Ship intended to carry out this promise at the time it was made. See Lamers, 998 F. Supp. at 987. Consequently, Penn Ship's intent—or facts sufficient to give rise to a strong inference of this intent—at the time it made this promise must be pleaded with particularity. See supra Part III.B.1. Penn Ship argues that the complaint simply does not contain any facts from which an inference of Penn Ship's intent not to perform at that time can be drawn. See Penn Ship's Memo. at 21-22. The court agrees.

The plaintiff offers allegations that Penn Ship mortgaged the floating derrick, in which the Navy had a security interest under the Trust Indenture, to Fidelity in December, 1986, after a previous mortgage was satisfied. See Compl. ¶ 73. Because the Navy's security interest in the derrick had not been perfected, Fidelity's perfected interest under the mortgage became senior to

[25]The complaint does not, in so many words, allege a promise on the part of Penn Ship to perfect the Navy's security interest. It does, however, claim the functional equivalent: that Penn Ship created and signed a Trust Indenture "that imposed on [Penn Ship] the task of recording those [security] instruments." Compl. ¶ 70.

the Navy's interest. See id. A reasonable inference from these allegations is that the second mortgage either would not have been made or would not have been for as much if the Navy's security interest had been perfected and, thus, senior to the interest created by any second mortgage. Although these allegations are sufficient to give rise to a strong inference that in December, 1986, Penn Ship intended not to fulfill its promise to perfect the Navy's security interest, they are insufficient to give rise to the inference that Penn Ship possessed that intent one and one-half years earlier when the Trust Indenture was drafted and accepted. See generally Shah, 44 F.3d at 293 n.14 (acknowledging that mere nonperformance of a promise does not give rise to an inference of an intent not to perform at the time the promise was made absent the existence of other factors such as the passage of only a short period of time between the promise to perform and the failure to perform). Because Penn Ship's promise to perform is false only if Penn Ship possessed the intent not to perform at the same time that it made the promise, and because the plaintiff has made no allegation that Penn Ship possessed the requisite intent at that time, the court holds that the plaintiff has failed to plead the falsity of the alleged false statement with the requisite particularity. As a result, I will grant Penn Ship's motion to dismiss with respect to count six and will dismiss count six as it relates to Penn Ship without prejudice.

For the same reason, this claim fails to state a claim against Fidelity because there are no allegations that any promise to perform made by Fidelity was false at the time it was made.[26] Thus, I will also grant Fidelity's motion to dismiss with respect to count six and will dismiss this count as it relates to Fidelity without prejudice.

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[26]It is unclear from the complaint that the Trust Indenture contained a promise to perform on Fidelity's part. Because count six fails for another reason to state a claim against Fidelity on which relief can be granted, I do not reach this issue.

7. Count Seven: Failure to Perfect the Navy's Security Interest

In count seven, the plaintiff claims that Penn Ship and Fidelity violated section 3729(a)(4) because they had control over property to be used by the Navy, and, with the intent to defraud the Navy, they delivered to the Navy less property than the amount for which the Navy received a receipt. See Compl. ¶¶ 70, 110. Specifically, the plaintiff alleges that the Trust Indenture was effectively a receipt issued by Penn Ship and Fidelity to the Navy for the delivery of perfected security interests but that Penn Ship and Fidelity delivered no more than the unperfected security interests. See id. ¶¶ 70, 110.

The plaintiff's allegations, however, reveal a misunderstanding of the elements required for a violation of section 3729(a)(4). The plaintiff claims that Penn Ship and Fidelity issued a fraudulent receipt to the Navy, not that the Navy gave Penn Ship and Fidelity a receipt that did not accurately reflect the amount and kind of property that was delivered to the Navy by Penn Ship and Fidelity. The cases to consider the elements of a section 3729(a)(4) violation are clear that the plaintiff must show that a receipt was issued by the government to the defendant, not the other way around. See United States ex rel. Aakhus v. Dyncorp, Inc., 136 F.3d 676, 681 (10th Cir. 1998); Stinson, 721 F. Supp. at 1259. Because the plaintiff has made no allegation that the government issued any kind of receipt to Penn Ship or Fidelity in recognition of property delivered by Penn Ship and Fidelity, an essential element of an FCA claim under section 3729(a)(4), the court has no choice but to find that the plaintiff has not stated a claim in count seven upon which relief can be granted. Therefore, the court will grant Penn Ship's and Fidelity's motions to dismiss with respect to count seven and dismiss count seven without prejudice.

8. Counts Eight and Nine: Inducement of First and Second Option Exercises

Counts eight and nine are essentially the same. In both counts eight and nine, the plaintiff claims that Penn Ship violated section 3729(a)(2) because it knowingly made a false statement to the Navy in both Modification P00001 and Modification P00003 to reassure the Navy of Penn Ship's ability to build the Oilers and to induce the Navy to order another Oiler. See Compl. ¶¶ 76-77, 111-12. Specifically, the plaintiff contends that in signing these modification documents on behalf of Penn Ship, Penn Ship's President, Ronald Stevens, confirmed that the terms of the Best and Final Offer were bona fide when, in fact, the terms of the Best and Final Offer were not.[27] See id. ¶¶ 76-77, 111-12. Having already concluded that the plaintiff pleaded sufficiently particular allegations of falsity in the Best and Final Proposal to allow the survival of an FCA claim based on that falsity, see supra Part III.C.4, as well as the survival of an FCA claim against Penn Ship based on a later statement confirming the accuracy of the terms of the Best and Final Proposal, see supra Part III.C.5, the court finds that the falsity of the statement in the modifications confirming for a second time the truth of the terms of the Best and Final Proposal was pleaded with sufficient particularity to survive a Rule 9(b) inquiry. Because all other elements of a section 3729(a)(2) violation have been pleaded with sufficient particularity, the

[27]The truth or falsity of statements on which the Navy is alleged to have relied in agreeing to these modifications, see Compl. ¶¶ 76-77, is not necessarily relevant to the falsity of the statements complained of in the operative paragraphs of counts eight and nine. See id. ¶¶ 111-12. The false statements complained of are the modification documents themselves. See id. Thus, absent allegations that the modification documents contained those statements—such as the allegation in paragraphs 111 and 112 that signing the modification documents re-represented the bona fide nature of the Best and Final Proposal—counts eight and nine do not allege an FCA violation based on the falsity of those statements. See id. ¶¶ 111-12.

court holds that the plaintiff has stated claims upon which relief can be granted in counts eight and nine and will deny Penn Ship's motion to dismiss with respect to these two counts.

9. Counts Ten and Eleven: Modifications 5 and 11

Counts ten and eleven are also essentially the same. In both of these counts, the plaintiff claims that Penn Ship violated sections 3729(a)(2) and (a)(7) because it knowingly made a false statement to the Navy in both Modification P00005 and Modification P00011 to get the Navy to release Penn Ship from its obligation to build the two extra Oilers and/or to get the Navy to continue making payments for the construction of the two original Oilers.[28] See Compl. ¶¶ 80-81, 83, 113-14. Specifically, the plaintiff alleges that each Modification constituted a promise by Penn Ship to complete work on the two original Oilers for a certain price and that Penn Ship had no intention of completing that work when it made these promises. See id. ¶¶ 81, 113-14. The court finds that the plaintiff has not pleaded the falsity of these promises with sufficient particularity to allow the survival of these claims.

As in count six, the falsity of Modifications P00005 and P00011 turns on Penn Ship's intent at the time it entered into those agreements. Penn Ship's promises to build the two original Oilers for a specific price were false only if it intended not to perform at the time it made those promises. See Lamers, 998 F. Supp. at 987. Because the falsity of these statements turns on Penn Ship's specific intent, Rule 9(b) requires the plaintiff to allege with particularity that

[28]As in counts eight and nine, see supra, the truth or falsity of statements on which the Navy is alleged to have relied in agreeing to these modifications, see Compl. ¶ 82, is not necessarily relevant to the falsity of the statements complained of in the operative paragraphs of counts ten and eleven. See Compl. ¶¶ 113-14. Thus, absent allegations that the modification documents contained those statements, counts ten and eleven do not allege an FCA violation based on the falsity of those statements.

intent or facts sufficient to give rise to a strong inference of that intent. See supra Part III.B.1. The plaintiff fails to do so. Although he alleges generally that Penn Ship possessed such intent when it entered into the modifications, the plaintiff makes no particular claims regarding Penn Ship's intent or facts sufficient to lead to any inference that Penn Ship possessed this intent. See Compl. ¶¶ 81, 113-14. For this reason, the plaintiff does not allege the falsity of the false statements with the particularity required by Rule 9(b). Because an element of both section 3729(a)(2) and (a)(7) violations is a false statement, the plaintiff's failure to plead that element with particularity is fatal to his claims in counts ten and eleven Therefore, the court will grant Penn Ship's motion to dismiss with respect to counts ten and eleven and will dismiss those counts without prejudice.

10. Count Twelve: The Default Modification

In count twelve, the plaintiff claims that Penn Ship violated sections 3729(a)(2) and (a)(7) because it knowingly made a false statement to the Navy both to trick the Navy into paying storage fees for the partially constructed Oilers and to reduce Penn Ship's obligation to pay some of the Navy's reprocurement costs. See Compl. ¶¶ 87-90, 115. Specifically, the plaintiff alleges that in a security agreement entered into pursuant to the Default Modification, Penn Ship promised to use its best efforts over a period of thirteen months to sell its assets, including the floating derrick, with half of the proceeds going to pay up to five million dollars of the Navy's reprocurement costs. See id. ¶ 88. Further, the plaintiff states that this promise was a false statement because, at the time it made the promise, Penn Ship had no intention of carrying out

that promise and using its best efforts to sell the floating derrick during the thirteen month period.[29] See id. ¶ 89.

Again, the falsity of Penn Ship's promise depends on Penn Ship's specific intent at the time it made that promise. Thus, in order to satisfy Rule 9(b) and plead the statement's falsity with particularity, the plaintiff must particularly allege Penn Ship's intent not to perform or sufficient facts to give rise to a strong inference of such intent. See supra Part III.B.1. He has done so. To support his allegation that Penn Ship did not use its best efforts to sell the floating derrick during the thirteen month period, the plaintiff claims that Penn Ship set up a dummy corporation less than two months after it entered into the security agreement and modification. See Compl. ¶ 89. Further, he states that Penn Ship sold the floating derrick to this dummy corporation less than five months after the end of the thirteen month period and that the dummy corporation resold the derrick to a third party shortly after recording its bill of sale. See id. ¶¶ 92, 94. Although mere nonperformance of a promise will not give rise to an inference of an intent not to perform the promise at the time the promise was made, nonperformance coupled with other factors, such as the passage of only a short time between the promise and nonperformance, will give rise to such an inference. See Shah, 44 F.3d at 293 n.14. Penn Ship's creation of the dummy corporation does not constitute nonperformance in and of itself, but it is alleged to be the first step in a scheme that resulted in nonperformance. See Compl. ¶¶ 88, 92, 94. The short

[29]Penn Ship argues that even if this promise were false, such falsity would have been immaterial because the security agreement provided for the calculation of Penn Ship's payment toward the Navy's reprocurement costs as a percentage of one of two equivalent numbers: the sale price of Penn Ship's property sold during the thirteen month period and the liquidation value as determined at the end of the thirteen month period. See Penn Ship's Memo. at 25. Although the agreement may have provided for the calculation using one number or the other, the equivalence of the numbers is an issue of fact not properly considered by the court at this time.

period of time between the promise and what the plaintiff alleges to be the first step in a scheme not to perform the promise, considered in a light most favorable to the plaintiff, is sufficient to give rise to the inference that Penn Ship did not intend to use its best efforts to sell the floating derrick when it promised to do so. Therefore, I find that the plaintiff has pleaded the falsity of Penn Ship's statement with enough particularity to satisfy Rule 9(b). Because the plaintiff has pleaded all other elements of section 3729(a)(2) and (a)(7) violations in count twelve with sufficient particularity, I find that he has stated a claim on which relief can be granted and will deny Penn Ship's motion to dismiss this count.

11. Counts Thirteen and Fourteen: Bills of Sale of the Floating Derrick

Counts thirteen and fourteen are essentially the same. In counts thirteen and fourteen, the plaintiff claims that Penn Ship violated section 3729(a)(7) because it knowingly made, and caused to be made, a false statement in each of two bills of sale of the floating derrick in order to conceal its obligation to pay the Navy's reprocurement costs. See Compl. ¶¶ 93, 116-17. Specifically, he contends that Penn Ship represented to the buyers that the derrick was free of any liens when, in fact, the derrick was still subject to a lien held by the Navy. See id. ¶¶ 93-94, 116-17.

Penn Ship argues that counts thirteen and fourteen must fail because no submissions, inaccurate or otherwise, were ever made to the Navy. See Penn Ship's Memo. at 25 n.19. Penn Ship is correct. Although the language of the FCA does not require the false statements referred to in sections 3729(a)(2) and (a)(7) to be made to the government, at least one court has noted "that in order to have a 'reverse false claim,' the government has to be made aware of the false statement, misrepresentation or misleading omission in some fashion." Wilkins, 885 F. Supp. at

1064. I agree with this statement. Consequently, because the plaintiff has made no allegations whatsoever that the Navy was made aware of Penn Ship's false statement, I find that he has not stated a claim upon which relief can be granted. As a result, I will grant Penn Ship's motion to dismiss with respect to counts thirteen and fourteen and will dismiss those counts without prejudice.

IV. CONCLUSION

The court finds that the plaintiff has failed to state a claim as to any count alleged against either Sun Ship or Fidelity. Accordingly, the court will grant Sun Ship's motion to dismiss (Doc. No. 84) and Fidelity's motion to dismiss (Doc. No. 83). The court finds that the plaintiff has stated a claim against Penn Ship for counts three, four, five, eight, nine and twelve of the plaintiff's complaint. Thus, Penn Ship's motion to dismiss (Doc. No. 85) will be denied as to counts three, four, five, eight, nine and twelve. Penn Ship's motion to dismiss will be granted as to all other counts brought against Penn Ship in the plaintiff's complaint. All counts dismissed will be dismissed without prejudice and the plaintiff shall be granted leave to amend within twenty days of the court's order. However, the court notes that the plaintiff filed two complaints in the original action and has now filed three complaints in this action. Thus, the third amended complaint to be filed will constitute the plaintiff's sixth attempt at pleading the cause of action. If another motion to dismiss is filed, the plaintiff is advised that it is very unlikely that any further amendments will be permitted. Therefore, the plaintiff should take great care in his next pleading to meet all of the objections set forth herein as well as any other objections raised by the defendants in their motions to dismiss which have merit but which the court did not need to resolve at this juncture.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA ex rel. PAUL E. ATKINSON	:	CIVIL ACTION
v.	:	
PENNSYLVANIA SHIPBUILDING COMPANY, FIRST FIDELITY BANK, N.A., AND SUN SHIP, INC.	:	NO. 94-7316

ORDER

AND NOW, this day of August, 2000, upon consideration of defendant Penn Ship Inc.'s Motion to Dismiss and Memorandum of Law (Doc. No. 85), defendant Sun Ship Inc.'s Motion to Dismiss and Memorandum of Law (Doc. No. 84), defendant First Fidelity Bank, N.A.'s Motion to Dismiss and Memorandum of Law (Doc. No. 83), plaintiff's Memorandum of Law in Opposition to Motions to Dismiss (Doc. No. 90), as well as the defendants' replies thereto (Doc. Nos. 91 -93), IT IS HEREBY ORDERED AND DECREED that:

1. Penn Ship's motion to dismiss is GRANTED IN PART AND DENIED IN PART. With respect to counts one, two, six, seven, ten, eleven, thirteen, and fourteen of plaintiff's Second Amended Complaint, Penn Ship's motion to dismiss is GRANTED and those counts are hereby DISMISSED WITHOUT PREJUDICE as they relate to defendant Penn Ship. Leave to amend those counts within twenty (20) days of the date hereof is GRANTED. With respect to counts three, four, five, eight, nine, and twelve of plaintiff's Second Amended Complaint, Penn Ship's motion to dismiss is DENIED.

2. Sun Ship's motion to dismiss is GRANTED. As they relate to Sun Ship, counts one through four of plaintiff's Second Amended Complaint are hereby DISMISSED WITHOUT PREJUDICE, and leave to amend those counts within twenty (20) days of the date hereof is GRANTED.

3. Fidelity's motion to dismiss is GRANTED. As they relate to Fidelity, counts one, six, and seven of plaintiff's Second Amended Complaint are hereby DISMISSED WITHOUT PREJUDICE, and leave to amend those counts within twenty (20) days of the date hereof is GRANTED.

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William H. Yohn, Jr., J.