

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 08-07940-RGK (SSx) Date April 22, 2011

Title UNITED STATES ex rel. SCOTT v. ACTUS LEND LEASE, LLC et al.

Present: The Honorable R. GARY KLAUSNER, UNITED STATES DISTRICT JUDGE

Sharon L. Williams

Not Reported

N/A

Deputy Clerk

Court Reporter / Recorder

Tape No.

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Not Present

Not Present

Proceedings: (IN CHAMBERS) Order Re: Home Depot, Inc.'s Motion for Reconsideration or Clarification of Order Denying Motion to Dismiss the First Amended Complaint (DE 107)

I. INTRODUCTION

On December 2, 2008, Robert Scott ("Scott")¹ and Luisa Jaro ("Jaro")² (collectively "Relators") filed a Complaint against Actus Lend Lease, LLC and its related parties ("Actus Lend Lease"), The Home Depot, Inc. and Home Depot U.S.A., Inc. (inclusively "Home Depot"), and HD Supply, Inc. and its related parties ("HD Supply") (collectively "Defendants"), alleging on behalf of themselves and the United States of America ("Government") violations of the False Claims Act ("FCA"), 31 U.S.C. § 3729 *et seq.* On April 8, 2010, the Government, a real party in interest, filed a Notice of Non-Intervention, based on the need to conduct further investigation before deciding whether to intervene.

On September 10, 2010, Relators filed a First Amended Complaint ("FAC"), alleging, under the FCA, violations of the Buy American Act of 1988 ("BAA"), 41 U.S.C. § 10a *et seq.*, as modified by the Trade Agreements Act of 1979 ("TAA"), 19 U.S.C. § 2501 *et seq.* Together, the BAA and TAA require that all materials used in the construction of any public building or work in the United States must be made in the United States or in designated countries. Specifically, Relators claim that Defendants knowingly violated the BAA and TAA by submitting false claims to the Government for: (1) foreign materials from non-designated countries used in the construction and renovation of military housing under the Military Housing Privatization Initiative ("MHPI"); and (2) products from non-designated

¹ Scott joined Actus Lend Lease as Project Manager in 1994 and worked as Vice President of Construction from 2000 to 2006. (FAC ¶¶ 9-10).

² Jaro worked for Actus Lend Lease as the Regional Controller for Hawaii from 2004 to 2006. (FAC ¶¶ 11-12).

countries sold to the Government through United States General Services Administration (“GSA”) schedule contracts and other similar contracts.

Based on these alleged violations, Relators assert the following *qui tam* FCA claims: (1) Presentation of a False or Fraudulent Claim under 31 U.S.C. § 3729(a)(1) against all Defendants; (2) Use of a False or Fraudulent Statement or Record under 31 U.S.C. § 3729(a)(2) against all Defendants; (3) Presentation of Reverse False Claims under 31 U.S.C. § 3729(a)(7) against Actus Lend Lease; (4) Presentation of a False or Fraudulent Claim under 31 U.S.C. § 3729(a)(1)(A) as amended by the Fraud Enforcement and Recovery Act of 2009 (“FERA”), Pub. L. No 111-21, 123 Stat. 1617, against all Defendants; (5) Use of a False or Fraudulent Statement or Record under 31 U.S.C. § 3729(a)(1)(B) as amended by FERA against all Defendants; and (6) Presentation of Reverse False Claims under 31 U.S.C. § 3729(a)(1)(G) as amended by FERA against Actus Lend Lease.

II. FACTUAL BACKGROUND

In the FAC, Plaintiff alleges the following facts against Home Depot:

The Home Depot, Inc. is a large home improvement retailer in the United States. (FAC ¶ 21). Home Depot U.S.A., Inc. is one of The Home Depot, Inc.’s subsidiaries. (FAC ¶ 22). A GSA schedule is a contract with the GSA that allows contractors to sell the items identified in the contract to federal government customers. (FAC ¶ 121). Once a contractor is awarded a GSA schedule contract, any federal government agency can purchase supplies that are on the GSA schedule directly from the contractor at a pre-agreed price, in accordance with other contractual terms and conditions specified in the GSA schedule contract. (FAC ¶ 121).

GSA schedule contracts are subject to the TAA, a statute that modifies the BAA. Federal Acquisition Regulation (“FAR”), 48 C.F.R. § 52.225-5. Together, the BAA and TAA require that all materials used in the construction of any public building or work in the United States must be made in the United States or in certain “designated countries.” 42 U.S.C. § 10b; 19 U.S.C. § 2512(a)(1)(A). In addition to agreeing to sell only TAA-compliant items, GSA contractors “must certify that all items offered for sale on the Schedule are compliant with the [TAA].” (FAC ¶ 122).

In July 2003, the GSA awarded Home Depot U.S.A., Inc. with GSA schedule contract GS-06F-0052N, which is currently in effect until July 2013. (FAC ¶ 129). Home Depot U.S.A., Inc.’s customers can purchase items from the store’s website or from its retail locations. (FAC ¶ 132). A typical Home Depot retail store carries approximately 35,000 to 50,000 different items. (FAC ¶ 153). At least 22,000 to 24,000 of the products Home Depot U.S.A., Inc. offered for sale are produced in China and other non-designated countries. (FAC ¶ 153). At the time Home Depot U.S.A., Inc. entered into the GSA contract, items for sale in its retail stores had been sourced by The Home Depot, Inc. from China for over a decade. (FAC ¶ 133).

Despite knowing that a high percentage of items offered for sale in its stores were not TAA-compliant, Home Depot U.S.A., Inc. falsely told federal government customers through its website that its GSA schedule contract “covers everything in [its] store” and that “[a]ll items in The Home Depot stores are on the GSA schedule.” (FAC ¶¶ 140–43). Home Depot U.S.A., Inc. kept these false statements on its website until at least 2007 and in a term sheet purporting to describe the GSA schedule contract’s terms. (FAC ¶¶ 141–42). The term sheet was linked to both Home Depot U.S.A., Inc.’s website and the Government’s online shopping website, GSA Advantage! (FAC ¶ 142). Although Home Depot U.S.A., Inc. subsequently uploaded a revised term sheet onto its website, the term sheet containing the false statements was still linked to the Government’s GSA Advantage! website as of August 2010, when Relators filed the FAC. (FAC ¶ 143).

Home Depot U.S.A., Inc. also falsely represented in the term sheet that purchases below the “micro-purchase threshold,” which is currently \$3,000, were not subject to the TAA. (FAC ¶ 145, Ex. D). However, all purchases under the GSA schedule contract are subject to the TAA because the GSA schedule contract as a whole exceeds the threshold for application of the TAA. (FAC ¶ 146).

Home Depot U.S.A., Inc. made additional false statements by directing federal government customers to “Open Market” SKU lists linked to its website, which purported to identify all non-TAA-compliant products. (FAC ¶ 165). The SKU lists “misrepresented the TAA-compliance status of items offered for sale by Home Depot” by failing to list all non-TAA-compliant products. (FAC ¶ 165).

Pursuant to the foregoing scheme, Home Depot U.S.A., Inc. systematically submitted claims for payment to the Government for products that failed to comply with the TAA. (FAC ¶¶ 113, 171–72, 121). Relators have provided a spreadsheet listing 118 representative examples of such claims. (FAC Ex. N).

On January 23, 2011, Relators filed a Stipulation of Partial Voluntary Dismissal Subject to Consent of Court and Attorney General (“Stipulation of Partial Voluntary Dismissal”), stating that they “[did] not intend to pursue FCA violations by Home Depot or HD Supply based on the . . . MHPI contracts referenced in the FAC.” (Docket Entry 100). On January 24, 2011, HD Supply filed a Motion to Dismiss the Case. The same day, Home Depot filed a Motion to Dismiss the FAC (“Motion to Dismiss”).

On January 28, 2011, the Court issued an Order Denying Defendant Home Depot’s Motion to Dismiss, stating, “The parties’ stipulation will be filed. The Court will not give an advisory opinion.” (Docket Entry 104). The Court has not yet issued orders addressing HD Supply’s Motion to Dismiss the Case or Relators’ Stipulation of Partial Voluntary Dismissal. On February 11, 2011, Home Depot filed a Motion for Reconsideration or Clarification of Order Denying Defendant Home Depot’s Motion to Dismiss.

Presently before the Court is Home Depot’s Motion for Reconsideration or Clarification of Order Denying Defendant Home Depot’s Motion to Dismiss (“Motion for Reconsideration”), pursuant to Federal Rule of Civil Procedure 54(b) and Local Rule 7-18. For the following reasons, the Court **GRANTS** Home Depot’s Motion for Reconsideration, but the Court’s decision denying Home Depot’s Motion to Dismiss remains unchanged.

III. JUDICIAL STANDARD

A. Motion for Reconsideration

Federal Rule of Civil Procedure (“Rule”) 54(b) and Local Rule 7-18 provide the standards for governing motions for reconsideration of interlocutory orders before this Court. Under Rule 54(b), “any order or other decision . . . that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action . . . and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties’ rights and liabilities.” Fed. R. Civ. P. 54(b). As long as a district court has jurisdiction over the case, it possesses the inherent procedural power to “reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient.” *City of Los Angeles v. Santa Monica Baykeeper*, 254 F.3d 882, 885 (9th Cir. 2001).

In the Central District of California, Local Rule 7-18 supplements Rule 54(b) and states that a motion for reconsideration of the decision for any motion may only be made on the following grounds:

- (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could

not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision. No motion for reconsideration shall in any manner repeat any oral or written argument made in support of or in opposition to the original motion.

C.D. Cal. R. 7-18.

B. Motion to Dismiss

A party may move to dismiss for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). In deciding a Rule 12(b)(6) motion, a court must assume that allegations in the challenged complaint are true and construe the complaint in the light most favorable to the non-moving party. *Barker v. Riverside Cnty. Office of Edu.*, 584 F.3d 821, 824 (9th Cir. 2009); *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337–38 (9th Cir. 1996). However, the court need not accept as true legal conclusions couched as factual allegations. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949–50 (2009).

To survive a motion to dismiss for failure to state a claim, a pleading must contain sufficient factual matter, accepted as true, to state a claim that is plausible on its face. *Iqbal*, 129 S. Ct. at 1949; *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547 (2007). A claim is facially plausible when there are sufficient factual allegations from which to draw a reasonable inference that a defendant is liable for the alleged misconduct. *See Iqbal*, 129 S. Ct. at 1949. Traditionally, Rule 12(b)(6) motions have been “viewed with disfavor” and rarely granted because of the liberal policy for amendment and the lesser role pleadings play in federal practice. *See Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003). Dismissal is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory. *Mendiondo v. Centinella Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008).

Claims alleging fraud or mistake must also satisfy Rule 9(b)’s heightened pleading requirement. Fed. R. Civ. P. 9(b). Dismissal of a complaint for failure to comply with Rule 9(b) is treated as a dismissal for failure to state a claim under Rule 12(b)(6). *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1107–08 (9th Cir. 2003). Rule 9(b) requires a party to plead “with particularity the time, place, and manner of each act of fraud, plus the role of each defendant in each scheme.” *Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 405 (9th Cir. 1991). Such allegations “must be ‘specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong.’” *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2002) (quoting *Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993)).

IV. DISCUSSION

A. Motion for Reconsideration

Home Depot argues that the Court’s Order Denying Defendant Home Depot’s Motion to Dismiss (“Order”) should be reconsidered because: (1) the Order was based on clerical or administrative miscommunication about the filing status of the parties’ Stipulation of Partial Voluntary Dismissal, and (2) Home Depot’s Motion to Dismiss did not request an advisory opinion. Based on Rule 54(b) and Local Rule 7-18, the Court agrees.

Rule 54(b) states that a district court may revise an interlocutory order at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities. Fed. R. Civ. P. 54(b). As long as the court has jurisdiction over the case, it possesses inherent procedural power to reconsider, rescind, or modify an interlocutory order for any cause it deems sufficient. *City of Los Angeles v. Santa Monica Baykeeper*, 254 F.3d 882, 885 (9th Cir. 2001). Local Rule 7-18 supplements Rule 54(b) and allows a court to reconsider an order based on "a manifest showing of a failure to consider material facts presented to the Court before such decision." C.D. Cal. R. 7-18.

On September 10, 2010, Relators filed a FAC, alleging that Home Depot violated two categories of claims under the FCA: (1) claims in connection with projects under the MHPI ("MHPI claims"), and (2) claims in connection with GSA schedule contracts ("GSA schedule contract claims"). On January 23, 2011, Relators filed a Stipulation of Partial Voluntary Dismissal, stating that they "[did] not intend to pursue FCA violations by Home Depot or HD Supply based on the . . . MHPI contracts referenced in the FAC." (Docket Entry 100). One day later, on January 24, 2011, Home Depot filed a Motion to Dismiss, seeking to dismiss all claims asserted against it, including both the MHPI claims and the GSA schedule contract claims. (Docket Entry 103). On January 28, 2011, the Court issued its Order, stating, "The parties' stipulation will be filed. The Court will not give an advisory opinion." (Docket Entry 104).

The Court entered its interlocutory Order in error. Relators stipulated to the voluntary dismissal of all MHPI claims against Home Depot, but Relators' GSA contract claims against Home Depot still remain. Thus, Home Depot's Motion to Dismiss did not request an advisory opinion and requires a decision on the merits.

Based on the foregoing, the Court **GRANTS** Home Depot's Motion for Reconsideration. However, as explained below, the Court's decision denying Home Depot's Motion to Dismiss remains unchanged.

B. Motion to Dismiss

In light of Relators' Stipulation of Partial Voluntary Dismissal of Relators' MHPI claims, Home Depot moves to dismiss the entire FAC as to Home Depot under Rules 12(b)(6) and 9(b). Specifically, as to Relators' remaining GSA schedule contract claims, Home Depot asserts that: (1) Relators have failed to plead a "false claim for payment" under the FCA; (2) Relators have failed to allege an actionable "false statement"; and (3) Relators have not adequately alleged claims against The Home Depot, Inc. The Court disagrees.

Based on Rules 12(b)(6) and 9(b), the Court analyzes each of Home Depot's arguments below.

1. False Claims

Home Depot claims that Relators fail to allege an actionable false claim under the FCA. The Court disagrees.

a. Rule 12(b)(6)

To establish an explicitly false claim under the FCA, the plaintiff bears the burden of proving that: (1) the defendant presented or caused to be presented for payment or approval a claim; (2) the claim was false or fraudulent; and (3) the defendant did so knowingly. 31 U.S.C. § 3729(a)(1), *as amended* § 3729(a)(1)(A); *United States v. Mackby*, 261 F.3d 821, 826 (9th Cir. 2001). Proof of damage to the Government is not required. *Bly-Magee*, 236 F.3d at 1017; *United States ex rel.*

Hagood v. Sonoma Cnty. Water Agency, 929 F.2d 1416, 1421 (9th Cir. 1991).

First, the defendant must have presented, or caused to have been presented, a claim. The FCA defines a “claim” to include any request for payment. 31 U.S.C. § 3729(c). Relators allege that Home Depot U.S.A., Inc. systematically submitted claims for payment of products sold to the Government under GSA schedule contract GS-06F-0052N. (FAC ¶ 113, 171–72, 221).

Second, the claim must have been false or fraudulent. 31 U.S.C. § 3729(a)(1), *as amended* § 3729(a)(1)(A). In the Ninth Circuit, goods or services that do not conform to contract specifications, laws, or regulations are considered false or fraudulent. *E.g.*, *Mackby*, 261 F.3d at 821; *United States v. Nat’l Wholesalers*, 236 F.2d 944 (9th Cir. 1956). Relators allege that Home Depot U.S.A., Inc.’s claims for payment under GSA schedule contract GS-06F-0052N were false because the products sold did not comply with the TAA, as the products were not made in the United States or in designated countries. (FAC ¶ 113, 171–72, 221). Relators are not required to identify representative examples of false claims to support every allegation, but the “use of representative examples is one means of meeting the pleading obligation.” *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010). Relators have provided a spreadsheet listing 118 representative examples of such false claims. (FAC Ex. N). Each of the 118 examples specifically identify each claim’s FPDS Procurement ID, Date, Contract Amount, US Gov’t Agency, Item Sold, Home Depot SKU, Non-TAA Country of Origin, and whether the product is currently for sale on Home Depot’s website. (FAC Ex. N). Additionally, Relators identify the non-TAA-compliant items that were falsely excluded from Home Depot’s Open Market SKU lists, which purported to identify all non-TAA-compliant products. (FAC ¶¶ 145–46, 165–67, 169, Ex. N).

Home Depot claims that Relators fail to allege a false claim for payment because Home Depot’s claims for payment did not explicitly misrepresent compliance with the TAA, but this argument is unavailing. A false claim “can take many forms, the most common being claim for goods or services not provided.” *United States v. Kitsap Physicians Serv.*, 314 F.3d 995, 1002 (9th Cir. 2002). A typical example is a defendant that charges the Government for more than what was provided. *See, e.g., United States v. Northrop Corp.*, 59 F.3d 953 (9th Cir. 1995). Requesting payment for goods or services that are of lesser quality than those for which the Government contracted or that do not meet contractual requirements or specifications can also constitute false claims for payment. *See, e.g., United States v. Mackby*, 261 F.3d 821 (9th Cir. 2001); *United States ex rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402, 1410 (9th Cir. 1995); *United States v. Nat’l Wholesalers*, 236 F.2d 944 (9th Cir. 1956). Moreover, the other courts that have addressed this narrow issue held that claims submitted to the Government in violation of contractual BAA or TAA provisions and certifications are actionable under the FCA. *See, e.g., United States v. Rule Indus., Inc.*, 878 F.2d 535 (1st Cir. 1989); *United States ex rel. Folliard v. CDW Tech. Servs., Inc.*, 722 F. Supp. 2d 37 (D.D.C. 2010). Relators specifically allege that Home Depot was required by statute, contract, and certification to comply with the TAA in selling products to the Government. (FAC ¶¶ 122–24, 138–39). Relators claim that instead, Home Depot submitted claims for unallowable products, which were completely different from what the Government had agreed to pay for. (FAC ¶¶ 113, 125, 158, 171–72, 221, Ex. N). Hence, Relators have adequately pleaded false claims for payment.

Moreover, other circuits have held that claims submitted to the Government in violation of contractual BAA or TAA provisions and certifications are actionable under the FCA. *See, e.g., United States v. Rule Indus., Inc.*, 878 F.2d 535 (1st Cir. 1989); *United States ex rel. Folliard v. CDW Tech. Servs., Inc.*, 722 F. Supp. 2d 37 (D.D.C. 2010).

Third, the defendant must have presented the false claim knowingly. The FCA defines “knowingly” to include actual knowledge, deliberate ignorance, or reckless disregard. 31 U.S.C. §

3729(b)(1)(A). Relators allege that Home Depot knowingly presented the false claims for payment to the Government. (FAC ¶ 139). Relators assert that although Home Depot knew that its GSA schedule contract required it to exclude all non-TAA-compliant items from sale to the United States and that it had certified that it would only offer products from the United States and designated countries, Home Depot knowingly failed to institute any mechanism to block the sale of non-TAA-compliant items to the United States through GSA schedule contract GS-06F-0052N. (FAC ¶ 139). At the time Home Depot U.S.A., Inc. entered into its GSA schedule contract, items in its retail stores had been sourced by The Home Depot, Inc. from China, a non-designated country, for over a decade. (FAC ¶¶ 36, 125, 133). Home Depot also has a sourcing office in India, another non-designated country. (FAC ¶ 134).

Assuming Relators' allegations are true, as is required for Rule 12(b)(6) motions, Relators have stated a claim for false claims under the FCA.

Additionally, Relators state a cause of action for false claims under the FCA based on the implied false certification theory. To establish an implied false certification under the FCA, the plaintiff must prove that: (1) the defendant explicitly undertook to comply with a law, rule, or regulation that is implicated in submitting a claim for payment; (2) the claims were submitted; and (3) the defendant was not in compliance with that law, rule, or regulation. *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010).

First, Relators allege that Home Depot U.S.A., Inc. undertook to comply with the TAA in order to obtain its GSA schedule contract. (FAC ¶¶ 122–23, 138–39). Relators state that Home Depot U.S.A., Inc. also explicitly certified that the products it was offering for sale were either U.S.-made or designated-country end products as defined by the TAA. (FAC ¶¶ 122, 124, 139). Second, Relators allege that Home Depot U.S.A., Inc. submitted claims to the Government under the GSA schedule contract. (FAC ¶¶ 3, 113, 171–72, 178, 221). Third, Relators state that Home Depot U.S.A., Inc. submitted the claims even though it had not complied with the relevant contract, statute, or regulations by selling products from China and other non-designated countries. (FAC ¶¶ 125, 158, 171–72, Ex. N).

Thus, Relators have sufficiently alleged the elements necessary to plead both an implied false certification claim or an explicitly false claim under the FCA.

b. Rule 9(b)

Relators have also satisfied Rule 9(b)'s heightened pleading requirement. The FCA is an anti-fraud statute. 31 U.S.C. § 3729(a); *United States v. Neifert-White Co.*, 390 U.S. 228, 233 (1968); *Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2002). As such, in the Ninth Circuit, complaints brought under the FCA must fulfill the requirements of Rule 9(b). *Bly-Magee*, 236 F.3d at 1018. Defendants accused of defrauding the federal government have the same protections as defendants accused of fraud in other contexts. *Id.* Rule 9(b) requires a party to plead "with particularity the time, place, and manner of each act of fraud, plus the role of each defendant in each scheme." *Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 405 (9th Cir. 1991).

Relators allege that Home Depot submitted false claims during the course of Home Depot U.S.A., Inc.'s GSA schedule contract, valid from July 2003 to the present. (FAC ¶ 129). Where a claim pleads a scheme to submit false claims instead of one fraudulent transaction, "use of representative examples . . . is one way of meeting the pleading obligation" under Rule 9(b). *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010). In the FAC, Relators identify 118 representative examples of false claims by date. (FAC Ex. N).

Relators state that the locations of the false claims were Home Depot U.S.A., Inc.'s requests to the Government for payments under the GSA schedule contract. (FAC ¶¶ 113, 171–72, Ex. N).

In terms of the specific content, Relators allege that Home Depot submitted false claims for payments of products that were non-TAA-compliant and thereby not allowable under the terms of the GSA schedule contract. (FAC ¶¶ 113, 138, 158, 221). Relators further allege that the claims were false because Home Depot U.S.A., Inc. had previously certified that it would offer only products made in the United States or in designated countries but later made claims for items that it knew to be non-compliant. (FAC ¶¶ 113, 170–71, 221, Ex. N).

Finally, Relators allege that the parties who made, or caused to be made, false claims and statements are Home Depot U.S.A., Inc. or The Home Depot, Inc. (FAC ¶¶ 3, 21, 22, 113, 140–43, 145–47, 165–67, 171–73, 221). If the defendant is a corporation, Rule 9(b) requires a claimant to identify the corporate party involved, but when particular evidentiary matters are exclusively within the defendant's knowledge, the claimant is not required to identify specific individuals who may have engaged in the alleged fraudulent activities. *See United States ex rel. Bledsoe v. Comm'y Health Sys., Inc.*, 501 F.3d 493, 506 (6th Cir. 2007); *Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993); *Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1439 (9th Cir. 1987); *Strom ex rel. United States v. Scios, Inc.*, 676 F. Supp. 2d 884 (N.D. Cal. 2009); *United States ex rel. Roby v. Boeing Co.*, 184 F.R.D. 107, 110–11 (S.D. Ohio 1998). Because Relators are former employees of Actus Lend Lease, not employees of Home Depot, they lack insider knowledge as to the allegedly fraudulent claims. (FAC ¶¶ 9–12). As such, by naming the corporations involved in the alleged fraud, Relators satisfy the party-identification pleading requirement.

Thus, Relators' FAC describes the time, place, content, and parties to the alleged false claims with sufficient particularity under Rule 9(b).

2. False Statements

Home Depot claims that Relators fail to allege an actionable false statement under the FCA. The Court disagrees.

a. Rule 12(b)(6)

To establish a false statement under the FCA, the plaintiff bears the burden of proving that: (1) the defendant made or used a record or statement; (2) the record or statement was false; (3) the defendant knew it was false; and (4) the record or statement was material to the false or fraudulent claim. 31 U.S.C. § 3729(a)(2), *as amended* § 3729(a)(1)(B). Proof of damage is not necessary to establish liability. *Bly-Magee v. California*, 236 F.3d 1014, 1017 (9th Cir. 2001); *United States ex rel. Hagood v. Sonoma Cnty. Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991).

First, the defendant must have made or used a record or statement. A variety of types of statements or records may support the cause of action. *See, e.g., Shaw v. AAA Eng'g & Drafting, Inc.*, 213 F.3d 519, 530–31 (10th Cir. 2000); *United States ex rel. Lamers v. City of Green Bay*, 998 F. Supp. 971, 986, 989 (E.D. Wis. 1998), *aff'd*, 168 F.3d 1013 (7th Cir. 1999). Relators allege that Home Depot's website stated, "The Home Depot GSA contract GS-06F-0052N provides walk in/walk out convenience and covers everything in our store." (FAC ¶ 141). Relators include an archived version of the website dated March 17, 2007, showing this statement. (FAC Ex. B). Relators also include an archived version of the website dated March 26, 2006, showing the same statement. (FAC Ex. C).

Relators also assert that Home Depot created a term sheet for its GSA contract, the very first

line of which states, “All items in The Home Depot stores are on the GSA Schedule.” (FAC ¶ 142). This term sheet was linked to Home Depot’s website and Home Depot’s profile on the GSA Advantage! website. (FAC ¶ 142). Relators include this three-page term sheet as an exhibit. (FAC Exs. D, G). As of the filing date, the term sheet was still linked to the GSA Advantage! website. (FAC ¶ 143, Ex. E).

Furthermore, Relators allege that after Home Depot changed its website to no longer state that the GSA contract covered “everything in [the] store,” Home Depot’s Open Market SKU lists purported to include all non-TAA-compliant products. (FAC ¶ 155). Home Depot’s contract term sheets directed customers to the Open Market lists in order to find any items not included in the GSA contract. (FAC ¶ 165).

Second, the statement or record must have been false. Relators allege that the statement on Home Depot’s website, “The Home Depot GSA contract GS-06F-0052N provides walk in/walk out convenience and covers everything in our store,” is untrue. (FAC ¶¶ 140–41). Relators allege that the statement on Home Depot’s term sheet, “All items in The Home Depot stores are on the GSA Schedule,” is also untrue. (FAC ¶¶ 140, 142–44). Additionally, Relators claim that the statement on Home Depot’s website, purporting to identify all non-TAA-compliant products in its Open Market SKU lists, is false because the lists fail to include many non-TAA-compliant items. (FAC ¶ 165). Hence, Relators have successfully pleaded false statements.

Third, the defendant must have made or used the false record or statement knowingly. The FCA defines “knowingly” to include actual knowledge, deliberate ignorance, or reckless disregard. 31 U.S.C. § 3729(b)(1)(A). Relators allege that “[a]t all times relevant to the complaint, Home Depot knew that a large proportion of the products it offered for sale were non-TAA compliant.” (FAC ¶ 139). Relators contend that Home Depot knew that the GSA schedule contract required it to exclude all non-TAA-compliant items from sale to the Government, and that it had certified that it would only offer end products from the United States and designated countries. (FAC ¶ 139). Relators state that despite having this knowledge, Home Depot “knowingly failed to institute any mechanism to preclude or block the sale of non-TAA-compliant items to the United States via its GSA schedule contract.” (FAC ¶ 139).

Fourth, the false record or statement must be material to the false or fraudulent claim. The FCA defines “material” to mean “having a natural tendency to influence, or being capable of influencing, the payment or receipt of money or property.” 31 U.S.C. § 3729(b)(4). To establish materiality in the Ninth Circuit, “the question is merely whether the false certification—or assertion, or statement—was relevant to the government’s decision to confer a benefit.” *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 997 (9th Cir. 2010) (quoting *United States ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1173 (9th Cir. 2006)). Moreover, it is the “potential effect” of a false statement that determines materiality, not whether it actually influenced the United States to make a payment. *United States v. Bourseau*, 531 F.3d 1159, 1171 (9th Cir. 2008). Relators allege that compliance with the BAA and TAA is required by statute, regulation, and contract. (FAC ¶¶ 113–17). Federal statutes and regulations prohibit the government from purchasing non-compliant items: (1) the BAA, 41 U.S.C. § 10a, requires that “only [BAA-compliant items] . . . shall be acquired for public use”; (2) the TAA, 19 U.S.C. § 2512(a)(1)(A), requires “the President . . . [to] prohibit the procurement . . . [of non-TAA-compliant items]”; and (3) the FAR, 48 C.F.R. § 52.225-5, requires a “[c]ontractor . . . [to] deliver . . . only U.S.-made or designated country end products.” Compliance with such regulations is a condition of payment. (FAC ¶¶ 123–24). As such, Home Depot’s alleged failure to comply was material to the Government’s payments to Home Depot.

Thus, Relators have sufficiently alleged the elements necessary to plead false statements under the FCA.

b. Rule 9(b)

Relators have also satisfied Rule 9(b)'s heightened pleading requirement. Because the FCA is an anti-fraud statute, in the Ninth Circuit, complaints brought under the FCA must fulfill the Rule 9(b)'s requirements. *Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2002). Rule 9(b) requires a party to plead "with particularity the time, place, and manner of each act of fraud, plus the role of each defendant in each scheme." *Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 405 (9th Cir. 1991).

Relators allege that Home Depot's false statements took place during the course of Home Depot U.S.A., Inc.'s GSA schedule contract, which was entered into in July 2003. (FAC ¶ 129).

In terms of the location, Relators claim that Home Depot made false statements on its website until at least March 2007. (FAC ¶¶ 140–41). Additional false statements were allegedly included in Home Depot's term sheet, which was linked to the website and is still linked to the Government's GSA Advantage! website as of August 2010. (FAC ¶¶ 142–3, 145–46, Ex. D). Furthermore, Relators allege that Home Depot's Open Market SKU lists, which ranged in date from July 2007 to July 2010, misrepresented non-compliant products as compliant and were linked to Home Depot's website as well. (FAC ¶¶ 151–52, Ex. H).

As to the manner, Relators allege that Home Depot U.S.A., Inc. falsely stated that the GSA schedule contract covered everything in its store. (FAC ¶¶ 140–41, Exs. B, C). Home Depot U.S.A., Inc. also allegedly stated that "[a]ll items in The Home Depot stores are on the GSA schedule" and that purchases below the micro-purchase threshold were not subject to the TAA. (FAC ¶¶ 142–3, 145–46, Ex. D). Relators claim that these statements were false because the GSA schedule contract did not cover many non-TAA-compliant items in Home Depot's store and purchases under the GSA contract were subject to the TAA regardless of the amount. (FAC ¶¶ 122–25, 139–40, 146). Additionally, Relators allege that Home Depot's Open Market SKU lists also were false statements because they misrepresented the TAA-compliance status of items offered for sale by failing to include many non-TAA-compliant items that were actually sold to the Government. (FAC ¶¶ 122–25, 139–40).

As to the parties, Relators allege that Home Depot U.S.A., Inc. and The Home Depot, Inc. made, or caused to be made, the false statements. (FAC ¶¶ 3, 21, 22, 113, 140–43, 145–47, 165–67, 171–73, 221).

Thus, Relators' FAC describes the time, place, content, and parties to the alleged false statements with sufficient particularity under Rule 9(b).

3. *The Home Depot, Inc.*

Home Depot also contends that Relators have failed to adequately allege claims against The Home Depot, Inc. The Court disagrees.

FCA liability is not limited to those who directly present false claims or make false statements to the Government, but also extends to anyone who "causes [a false claim or statement] to be presented," 31 U.S.C. § 3729(a)(1), or who "knowingly . . . causes to be made or used[] a false record or statement to get a false or fraudulent claim paid or approved," *Id.* § 3729(a)(2).

In the FAC, Relators state that during the relevant time period under the GSA schedule contract, July 2003 to the present, The Home Depot, Inc. was the parent company and the alter ego of Home Depot U.S.A., Inc., the party to the GSA schedule contract. (FAC ¶¶ 21–22, 129). Home

Depot U.S.A., Inc. sells The Home Depot, Inc.'s products. Relators claim that during this time period, Home Depot U.S.A., Inc. had "one or more officers in common with The Home Depot, Inc." (FAC ¶¶ 130). Additionally, Relators allege that The Home Depot, Inc. generally "dominated, directed, managed[,] and controlled the operators of" each of its subsidiaries, including Home Depot U.S.A., Inc. (FAC ¶¶ 130, 183, 225). As such, Relators allege that The Home Depot, Inc. "authorized and approved" Home Depot U.S.A., Inc.'s false claims and statements. (FAC ¶¶ 130, 225). Relators further allege that The Home Depot, Inc. "authorized and approved" false claims and statements with regard to other GSA schedule contracts as well, including GS-06F-0080M, held by Maintenance Warehouse America Corp. and HD Supply, which were also subsidiaries at the time. (FAC ¶¶ 26, 182-83, 225).

Home Depot contends that Relators have not satisfied Rule 9(b)'s requirements because Relators make certain allegations on "information and belief." Although Relators have made certain allegations "on information and belief" with respect to The Home Depot, Inc., such allegations may be considered for purposes of Rule 9(b) if accompanied by facts upon which the belief is founded. *Wool v. Tandem Computers Inc.*, 818 F.2d 1433, 1439 (9th Cir. 1989).

Because Relators have alleged that The Home Depot, Inc. had notice of its subsidiaries' false claims and statements, approved the false claims and statements, had knowledge of its own precise role in the conduct, and was the "alter ego" of its subsidiaries, Relators have satisfied Rule 9(b).

Thus, Relators' FAC should not be dismissed under Rule 12(b)(6) or Rule 9(b).

V. **CONCLUSION**

In light of the foregoing, Home Depot's Motion for Reconsideration is **GRANTED**. However, the Court's decision denying Home Depot's Motion to Dismiss remains unchanged. Home Depot's Motion to Dismiss is **DENIED**.

IT IS SO ORDERED.

Initials of
Preparer

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slw
