

**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

UNITED STATES ex rel. LINDA TROMBETTA,	)	
	)	
Plaintiff,	)	Case No. 96 C 226
v.	)	
	)	
EMSCO BILLING SERVICES, INC., et al.,	)	Judge Joan B. Gottschall
	)	
Defendants.	)	

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UNITED STATES ex rel. LINDA AND JAMES FREEMAN,	)	
	)	
Plaintiffs,	)	Case No. 99 C 151
v.	)	
	)	
NATIONAL EMERGENCY SERVICES, INC.,	)	Judge Joan B. Gottschall
	)	
Defendant.	)	

**ORDER**

In these two related *qui tam* suits, plaintiffs allege widespread overbilling of state and federal government agencies for medical services. A group of defendants moves to dismiss several of the claims against them for lack of jurisdiction and for failure to state fraud claims with sufficient particularity. For the reasons set forth below, the motion is denied.

**I. Background**

On January 11, 1996, relator Linda Berline (now Trombetta) filed under seal a *qui tam* suit against eighteen corporate and three individual defendants. She alleged that defendants violated the False Claims Act ("FCA"), 31 U.S.C.A. §§ 3729-33 (West Supp. 2002), by submitting and receiving payment on inflated bills for emergency room physician services

provided to Medicare and Medicaid patients. The basic scheme was to systematically “upcode” visits as more serious than they actually were. Trombetta also alleged that defendants overbilled for procedures and submitted bills based on incomplete medical documentation. Almost exactly three years later, Linda and James Freeman filed a *qui tam* suit under the FCA against several of the same defendants and a new defendant, National Emergency Services, Inc. (“NES, Inc.”). The Freemans’ complaint involved essentially the same alleged scheme but was limited to overbilling for emergency room visits by Medicaid patients. After a long investigation, the United States filed a notice of election to intervene in part in the Trombetta case on December 17, 2001. Shortly thereafter, Trombetta filed an amended complaint adding as defendants NES, Inc. and National Healthcare Services, Inc.

Trombetta’s amended complaint consists of six counts, all of which are asserted against all defendants and cover the period “from at least June 1989 through June 1998”: (1) fraudulent billing of Medicaid for emergency room visits in violation of the FCA; (2) fraudulent billing of Medicare for emergency room visits in violation of the FCA; (3) fraudulent billing of Medicare and Medicaid for emergency room *procedures* in violation of the FCA; (4) the same facts underlying Count I alleged to violate the Illinois Whistleblower Reward and Protection Act (“IWRPA”), 740 ILCS 175/1 et seq.; (5) fraudulent billing of Medicaid for emergency room procedures in violation of the IWRPA; and (6) unjust enrichment

The government filed its own complaint on March 4, 2002, naming as defendants only EMSCO Billing Services, Inc., NES, Inc., NES Holdings, Inc. (“NES Holdings”), Robert D. Tetik, and Bonnie L. Tetik. The government’s complaint is directed toward emergency room visits, not procedures, and is divided into eleven separate counts: (1) an FCA claim against

Robert Tetik for Medicaid bills sent to the Illinois Department of Public Aid (“IDPA”) from 1990 through 1997; (2) an FCA claim against Bonnie Tetik for Medicaid bills sent to the IDPA in 1990 and 1991; (3) an FCA claim against NES, Inc. and NES Holdings for Medicaid bills sent to the IDPA from October 1, 1994 through December 1997; (4) an FCA claim against Robert Tetik for Medicaid bills sent to Maine Medicaid from at least 1995 through 1996; (5) an FCA claim against NES, Inc. and NES Holdings for the same; (6) an unjust enrichment claim and (9) a mistake of fact claim against Robert Tetik for both Medicaid and Medicare funds; (7) an unjust enrichment claim and (10) a mistake of fact claim against Bonnie Tetik for the same; and (8) an unjust enrichment claim and (11) a mistake of fact against NES, Inc. and NES Holdings for the same. Shortly thereafter, the government filed a notice of election to intervene in the Freeman action to the extent it asserted claims against NES, Inc. A group of defendants has moved to dismiss the claims against them

## II. Analysis

### A. The Freemans’ Claims Against NES, Inc.

Citing the original Trombetta complaint, defendant NES, Inc. moves to dismiss the claims asserted against it by the Freemans on the ground that those claims are barred by the “first-to-file” rule contained in 31 U.S.C.A. § 3730(b)(5). That section provides: “When a person brings an action under this subsection, no other person than the Government may intervene or bring a related action based on the facts underlying the pending action.” *Id.* This

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<sup>1</sup>Specifically, the moving defendants (or “defendants” for purposes of this opinion) are EMSCO Billing Services, Inc., EMSCO Management Services, Inc., NES, Inc., NES Holdings, Inc., NES Midwest, Inc., National Healthcare Services, Inc., and Allan Rappaport.

argument fails for the simple reason that the Trombetta complaint includes no allegations concerning NES, Inc. The Freemans *were* the first to file any claim against NES, Inc

To be sure, “[a] later case need not rest on precisely the same facts as a previous claim to run afoul of the statutory bar,” *United States ex rel. LaCorte v. SmithKline Beecham Clinical Labs., Inc.*, 149 F.3d 227, 232 (3d Cir. 1998), and the Medicaid overbilling schemes described in the Trombetta and Freeman complaints largely overlap. But by connecting NES, Inc. to the scheme, the Freemans introduced new essential allegations of fact that appear to have substantially increased the potential total recovery. That another corporation was involved and may also have bilked the government is exactly the kind of information the disclosure of which the *qui tam* provisions of the FCA were designed to promote. *See id.* at 234 (“The 1986 amendment, which introduced the current version of section 3730(b)(5), sought to achieve ‘the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own.’”) (quoting *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994)); *cf. Cooper v. Blue Cross & Blue Shield, Inc.*, 19 F.3d 562, 566 (11th Cir. 1994) (“The allegations of widespread . . . fraud made in sources in which [the defendant] was not specifically named or otherwise directly identified are insufficient to trigger the jurisdictional bar.”). This was not a matter of mere detail; this was a new material fact. Perhaps the government could reasonably have been expected to discover NES, Inc.’s role based on the Trombetta complaint. But perhaps not. There were literally scores of related corporate entities. Despite active participation in the investigation, it apparently took Trombetta four and a half years to figure out how NES, Inc. fit into the puzzle.

**B. Trombetta's Non-Intervened Claims Against NES, Inc.**

Next, NES, Inc. argues that Trombetta's non-intervened claims against it should be dismissed for lack of subject matter jurisdiction because they are based upon the Freeman complaint. The statutory basis for this argument is the following provision:

No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, . . . unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C.A. § 3730(e)(4)(A). Trombetta argues in response that the Freeman complaint includes none of the "allegations or transactions" underlying her non-intervened claims. Indeed, the Freeman complaint focuses solely on fraudulent *Medicaid* bills for emergency room *visits*, whereas Trombetta's non-intervened claims deal with visits billed to *Medicare* and the overbilling of both Medicaid and Medicare for *procedures*. Trombetta was the first and only person to alert the government to the latter types of fraud.

Still, the Freemans, as observed above, were the first to allege that NES, Inc. was involved in the continuation of some of EMSCO's Medicaid billing practices. Trombetta's non-intervened claims against NES, Inc. rest on the closely related premise that NES, Inc. continued and expanded other of EMSCO's billing practices. But even assuming that the Freeman complaint constituted a public disclosure of NES, Inc.'s role in the various types of alleged fraud, there is no indication in the present record that Trombetta actually derived any information from the Freeman complaint. The un rebutted affidavit of her attorney indicates that she learned of NES, Inc.'s role from her participation in the investigation and the stock purchase agreement documenting the acquisition of EMSCO, not from the Freeman complaint. The Seventh Circuit

has adopted the minority view that “based upon” in this context means actually derived from. *United States ex rel. Mathews v. Bank of Farmington*, 166 F.3d 853, 863 (7th Cir. 1999). Timing alone does not suffice, and that is all NES, Inc. has offered.

C. Federal Rule of Civil Procedure 9(b)

Federal Rule of Civil Procedure 9(b) provides that “[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” In other words, plaintiffs alleging fraud generally must describe “the who, what, when, where, and how.” *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir. 1990). Still, Rule 9(b) does not require a plaintiff to plead evidence and is to be read in conjunction with Rule 8, which requires a short and plain statement of the claim. *Tomera v. Galt*, 511 F.2d 504, 508 (7th Cir. 1975); *Fujisawa Pharm. Co. v. Kapoor*, 814 F. Supp. 720, 726 (N.D. Ill. 1993). Where the allegedly fraudulent statements are numerous and occurred over a long period of time, the requirements of Rule 9(b) are less stringently applied. *Id.*; 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1298, at 647 (2d ed. 1990). All of the moving defendants argue that Trombetta’s non-intervened allegations fail to state a claim for fraud with sufficient particularity.<sup>2</sup>

First, defendants contend that Trombetta has failed to adequately delineate each defendant’s role in the allegedly fraudulent activities—the “who,” as it were. This contention is not convincing for several reasons. Most fundamentally, Trombetta alleges that each and every one of the defendants engaged in each and every one of the alleged fraudulent practices. This is

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<sup>2</sup>Rule 9(b) applies to claims brought under the FCA. *United States ex rel. Garst v. Lockhead Integrated Solutions Co.*, 158 F. Supp. 2d 816, 820 (N.D. Ill. 2001). Neither side discusses whether Rule 9(b) also applies to IWRPA claims and claims of unjust enrichment. For present purposes, this court assumes that it does.

not a case where the plaintiff vaguely asserts that a statement was made without identifying which of several, unrelated defendants made the statement. *See FTC v. Hayes*, No. 96 CV 2162, 1997 WL 416380, at \*2 (E.D. Mo. Feb. 18, 1997) (“The FTC . . . has not vaguely asserted that the alleged misconduct was committed among the various defendants. To the contrary, the FTC specifically alleges that each and every defendant . . . engaged in all of the deceptive acts or practices named in the Complaint.”). To the extent any residual ambiguity remains, the moving defendants, which consist of closely related corporations and their sole owner and CEO, “can most likely sort out their involvement without significant difficulty.” *Jepson, Inc. v. Makita Corp.*, 34 F.3d 1321, 1329 (7th Cir. 1994). The touchstone of federal pleading, even under Rule 9(b), is sufficient notice so that defendants can fairly respond to the allegations against them. 5 Wright & Miller, *supra*, § 1298, at 648. In the case at bar, Trombetta has pled the “who” with ample particularity. *See Semtner v. Med. Consultants, Inc.*, 70 F.R.D. 490, 497-98 (W.D. Okla. 1997) (rejecting defendants’ Rule 9(b) argument where the *qui tam* relator alleged that “all of the defendants” were involved in a detailed scheme to falsify emergency room bills submitted to the government).

Trombetta also adequately identifies the “what.” This is not a case of one or two isolated misrepresentations that could be fully described in a short and plain pleading. Rather, Trombetta alleges that defendants’ billing practices were intentionally and systematically flawed, resulting in hundreds of thousands of false claims and millions of dollars of overpayments during a nine-year period. Given the magnitude of the purported schemes, the amended complaint does an admirable job of outlining the various fraudulent techniques allegedly employed by defendants. With respect to the Medicare emergency room visits claim, for example, Trombetta points to

several specific disparities between the defendants' coding practices and the Medicare guidelines. And although she was not required to plead evidence, her amended complaint includes excerpts from memoranda and meeting minutes to substantiate her allegations that defendants followed a practice of billing for Medicare patients based on incomplete documentation and systematically overbilled Medicaid and Medicare for procedures. Trombetta specifies the content of the alleged misrepresentations with ample particularity.

On this score, defendants complain that Trombetta has not identified even one fraudulent bill which was submitted to the government. How this could possibly assist defendants in understanding the nature and scope of Trombetta's claims is a mystery. Trombetta has done better than point to a single fraudulent bill—she has explained how several specific billing practices led to hundreds of thousands of fraudulent bills. *See United States ex rel. McCarthy v. Straub Clinic & Hosp., Inc.*, 140 F. Supp. 2d 1062, 1068 (D. Haw. 2001). Even if a particular example would be helpful, the critical documents, Trombetta argues, lie exclusively in defendants' control. To require her to predict their contents before discovery has commenced would be absurd. *See Jepson*, 34 F.3d at 1328 (“Specificity requirements may be relaxed, of course, when the details are within the defendant's exclusive knowledge.”). The moving defendants counter with several cases stating that Rule 9(b)'s strictures should not be relaxed for FCA claims because the government has the relevant documents, *see, e.g., United States ex rel. Clausen v. Lab. Corp. of Am.*, 290 F.3d 1313, 1314 (11th Cir. 2002); *United States ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304, 308 (5th Cir. 1999), but defendants do not dispute Trombetta's suggestion that, although the bills themselves may be in the hands of

government agencies, specific instances of fraud could be identified only by comparing the bills with the corresponding medical charts, which remain in defendants' exclusive control

As for "when," Trombetta dates the alleged misrepresentations between June 1989 and June 1998. The EMSCO companies are alleged to have been involved from the beginning; the NES defendants from September 1994. With a fraudulent scheme of this magnitude, more particularity than this as to the dates of specific misrepresentations cannot reasonably be required. *See 5 Wright & Miller, supra*, § 1298, at 647 ("When the issues are complicated or the transactions cover a long period of time, courts tend to require less of the pleader."). Trombetta left defendants' employ in June 1995—she cannot be expected to recall the exact dates of particular bills. *See McCarthy*, 140 F. Supp. 2d at 1068 ("The court does not expect two former employees, whose employment was terminated almost two years ago, to remember each date.") The "how" and "where" are likewise adequately pled. Trombetta explains the mechanics of Medicaid and Medicare reimbursement, including the particular agencies responsible for administering each program. The place of business of each defendant, from which one can reasonably infer the fraudulent bills were sent, is specifically alleged.

Defendant Rappaport's various arguments as to why the claims against him should be dismissed overlook an obvious point: in her amended complaint, Trombetta defines the term "the NES defendants" to include Rappaport. (Am. Compl. at 2.) In light of this fact, the allegations against him are, if anything, more detailed than those lodged against the other moving defendants. Rappaport alone is alleged to be guilty on an alter ego theory in addition to a direct liability theory. There can be little question that the direct claim against Rappaport is pled with sufficient particularity. (*Id.* ¶ 52 ("[T]he . . . NES defendants knowingly and intentionally

submitted claims to the Medicare Intermediary that were based on the wrong criteria and were not supported by the documentation in the patient's medical records."); *id.* ¶ 53 ("[T]he NES defendants also followed a practice of billing for Medicare patients based on incomplete medical documentation."); *id.* ¶ 57 ("The . . . NES defendants also knowingly and intentionally submitted false claims to IDPA and Medicare due to improper coding of emergency room procedures."); *id.* ¶ 60 ("After acquiring the EMSCO companies in September[] 1994, the NES defendants continued all of the above-described practices designed to defraud Medicare and Medicaid.") According to Trombetta's amended complaint, Rappaport himself submitted false claims pursuant to each of the alleged scams. Whether Trombetta will be able to substantiate these allegations is a question for another day. She has pled fraud against Rappaport with sufficient particularity.

### **III. Conclusion**

For all of the foregoing reasons, defendants' motion to dismiss is denied in its entirety.

ENTER:

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JOAN B. GOTTSCHALL  
United States District Judge

DATED: December 5, 2002