UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *EX REL.* DR. GABRIEL FELDMAN, Plaintiff, v. THE CITY OF NEW YORK, Defendant.	Case No. 09 Civ. 8381 (JSR)
UNITED STATES OF AMERICA, Plaintiff, v. THE CITY OF NEW YORK, Defendant.	

MEMORANDUM IN SUPPORT OF THE CITY OF NEW YORK'S
MOTION TO DISMISS THE UNITED STATES OF AMERICA'S COMPLAINT

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Defendant The City of New York (the "City") respectfully submits this Memorandum in Support of its Motion to Dismiss the Complaint-In-Intervention of the United States of America, Doc. No. 8 (the "Complaint")[1] pursuant to Federal Rules of Civil Procedure 12(b)(6) and 9(b).

PRELIMINARY STATEMENT

The Government asserts this case is about false claims for payment of federal funds. But the Complaint does not particularize a single claim for payment to the Government by the City or anyone else, let alone a specific claim or statement that is somehow false or fraudulent. Nor has the Government alleged that the City or any of its employees benefited financially or otherwise from this so-called "fraud" through, for example, allegations of embezzlement, use of funds for other-than-the-stated purposes, or skimming. Rather, in a pleading built on sweeping generalizations despite the Government's broad pre-lawsuit investigative authority in these types of cases, the Government has alleged a theory of fraud that is not fraud, and has taken the shocking position that the City should turn a blind eye to elderly, infirm New Yorkers that are unable to take care of themselves without assistance.

According to the Complaint, the City engaged in fraud when it acted under State law to authorize personal care services for vulnerable New Yorkers who needed help performing the most basic of everyday functions—like using the bathroom, changing clothes, and eating. The Government alleges that this fraud took the form of nothing more than technical violations of certain New York State (not federal) paperwork requirements. There is no allegation that anyone ever falsely certified compliance with these technical State requirements, or that the Government relied on such non-existent certifications. In an oversimplification of the decision-making

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[1] Defendant will move separately, on or before February 14, 2011, pursuant to Federal Rule of Civil Procedure 12(b)(1), 12(b)(6), and 9(b), to dismiss the Relator's Complaint for lack of subject matter jurisdiction and for failure to state a claim.

process, the Government also alleges that unnamed City officials, by authorizing personal care services for certain New Yorkers, improperly overrode recommendations of doctors who are contracted by the City to review paperwork (and who do not actually see patients) even when such recommendations were contrary to a treating professional's recommendations or contrary to law. While the Complaint tries to provide motive for this fraud by suggesting that the City did not cover the cost of the authorized personal care services, that is factually incorrect. The City has always contributed to these Medicaid costs. The Government has filed a lawsuit essentially claiming that the City defrauded itself by authorizing personal care services for New Yorkers whose medical conditions, in the view of the United States Attorney, did not require the level of services ultimately deemed appropriate for specific patients. That is not fraud.

This lawsuit underscores the challenge confronted by the City in administering a personal care services program that operates within a complex framework of agencies, regulations, administrative law decisions, judicial injunctions, and various other federal and state directives. Faced with its obligation to adhere to the federal principles of community-based care set out in *Olmstead v. LC ex rel. Zimring*[2] and *Mayer v. Wing*[3]—under which the City must provide necessary care without unnecessary and potentially life-threatening interruption[4]—case workers administer the personal care services program so that no one is left without appropriate services they need to survive and be supported in their community. Congress has left the states with

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2 527 U.S. 581 (1999).

3 922 F. Supp. 902 (S.D.N.Y. 1996).

4 *See* Letter from Cindy Mann, Director, Centers for Medicare & Medicaid Services (May 20, 2010), *available at* https://www.cms.gov/smdl/downloads/SMD10008.pdf ("[U]njustified institutional isolation. . . is a form of unlawful discrimination under the ADA" and the states must therefore "help transition individuals from institutional to community settings and maintain their community living status.").

authority to administer the personal care services program at issue. *See* 42 U.S.C. § 1396d(a)(24) (2006) (granting states power to authorize personal care services); 42 C.F.R. § 440.167 (personal care services to be authorized "in accordance with a plan of treatment or (at the option of the State) otherwise authorized for the individual in accordance with a service plan approved by the State"). New York has delegated part of that responsibility to the City. N.Y. Comp. Codes R. & Regs., tit. 18 § 505.14 (2007) . There is often no easy or perfect answer to personal care—but the answer is certainly not to allow the United States Attorney to police state regulatory compliance or second guess the patient-specific decisions made within the state administrative apparatus.

The misguided nature of this suit is manifest by reference to the public record concerning Patients "A" and "D", cited in the Complaint. Patient A is the named plaintiff in a class action challenging the amount and timing of the personal care services she received. In December 2010, the First Department reinstated her class complaint. *See Coleman v. Daines*, 913 N.Y.S.2d 83, 88 (App. Div. 1st Dep't 2010) . The Government is improperly asking this Court to act as a super-reviewer of the appropriate level of care for Patient A. Similarly, Patient D won her "fair hearing" and a State administrative law judge ordered the City to authorize the level of care that the Government challenges as too much in its Complaint. *See* Fair Hearing No. 5014053H (Sept. 19, 2008) (attached hereto as Exhibit A, with personal identifying information redacted). Again, the Government is asking this Court to police technical compliance with the State regulatory regime through the FCA by reviewing state decisions. This inter-governmental dispute about personal care services is simply not appropriately resolved through expensive, time-consuming False Claims Act ("FCA") litigation at taxpayer expense.

SUMMARY OF THE ARGUMENT

The case law uniformly holds that the FCA is not an appropriate vehicle for policing technical compliance with administrative regulations, or second-guessing judgments about medical necessity, which is exactly what the Complaint seeks to do. The Complaint's cause of action under 31 U.S.C § 3729(a)(1) (2000) requires the Government to plead facts with the particularity required by Rule 9(b) showing that defendant (1) made a claim, (2) to the United States government, (3) that is false or fraudulent, (4) knowing of its falsity, and (5) seeking payment from the federal treasury. *See Mikes v. Straus*, 274 F.3d 687, 695 (2d Cir. 2001). The cause of action under 31 U.S.C § 3729(a)(1)(B) (Supp. 2009) requires that in addition to the foregoing, a false record or statement by the defendant that is material to the false claim be pled with particularity. None of these pleading requirements are satisfied by the Complaint.

First, a false "claim" is the *sine qua non* of a claim under the False Claims Act. A claim is "any request or demand, whether under a contract or otherwise, for money or property" from the Government. 31 U.S.C. § 3729(c). The Complaint does not describe any demand by the City—or any other person—for payment by the Government. This complete failure to allege the specifics of even a single cost report, or bill, or sheet of paper that was submitted to the Government for funding renders the Complaint legally deficient.

Second, if the City's "authorization" of personal care services is the "claim" alleged by the Government within the meaning of the FCA (although it is plainly not such a claim), then the Complaint only asserts generally that the City transmitted "false authorizations" to the State of New York. *See* Compl. ¶ 28. Section 3729(a)(1) does not address this circumstance. It only addresses claims presented to an "officer or employee of the United States Government." The

State of New York is neither an "officer" nor an "employee" of the United States. Therefore, no claim has been stated under Section 3729(a)(1).

Third, the Complaint fails to plead with particularity how any "claim" or statement was "false or fraudulent." *See* Argument, Section II.A.3, *infra*. A "false or fraudulent" claim is aimed at extracting money the Government otherwise would not have paid. It requires a lie. No lie is identified anywhere in the Complaint. Allegations of regulatory non-compliance standing alone do not state a cause of action under the FCA. Especially in an area as fraught with peril as determining whether to deprive aid to elderly and sick people, alleged technical violations and differing judgment calls, without more, cannot be knowingly "false" for purposes of liability under the FCA. Further, medical issues concerning levels of care are not appropriately resolved in an FCA case because falsity under the False Claims Act does not mean scientifically untrue; it means a lie. The significance of this pleading requirement cannot be overstated, especially here where, for example, the City was ordered by a State administrative law judge to authorize the services for Patient D the Government now claims should not have been authorized, and the Government is quibbling with the level of services authorized to Patient A that she says were insufficient and are currently the subject of class action litigation in New York Supreme Court. *See Coleman*, 913 N.Y.S.2d at 86-88.

Fourth, no facts are alleged to plausibly assert that the City acted with the requisite scienter—"the knowing presentation of what is known to be false." *See* Argument, Section II.B, *infra*. The City and Government are on the same side of the equation, both as funders of the services at issue. The Government's apparent contention that City must have acted with scienter based on seven cherry-picked instances of allegedly missing paperwork is not plausible when there is no allegation (and there could be no allegation) that the seven elderly, infirm and ill

individuals who indisputably qualify for Medicaid would not have been authorized to receive services they were authorized for if the paperwork had been present. It simply does not make sense to allege, as the Government does here without any factual support, that the City intended to rip itself off.

Finally, the New York common law causes of action for negligence, unjust enrichment and "payment by mistake of fact" fail as well. *See* Argument, Section III, *infra*. No common law negligence claim for the conduct alleged exists. Further, the City has absolute immunity from tort liability for discretionary governmental functions. The authorization of personal care services at issue is a discretionary governmental function. The City is immune from tort liability. Both unjust enrichment and "payment by mistake of fact" require that defendant have received a monetary benefit from plaintiff. These causes of action fail because the Complaint does not allege that the City received a dime from the Government.

For these reasons, as explained in more detail below, the Complaint should be dismissed with prejudice.

BACKGROUND

I. Personal Care Services for Elderly and Disabled New Yorkers

Medicaid provides medical assistance to low income individuals and individuals with disabilities. 42 U.S.C. § 1396; Compl. ¶ 10. At all relevant times, the costs of Medicaid were borne by the Government, the State, and the City according to statutory formulas. Compl. ¶ 16 ("Prior to 2006, Medicaid's PCS Program was funded . . . 25% by the City."); L. 2005, ch. 58, Pt. C. (describing amount localities pay for Medicaid expenses); *see also* N.Y. Soc. Serv. L. § 368-a.[5] The Personal Care Services Program ("PCS Program") is part of Medicaid, administered

[5] For a summary of the mechanics of this legislation, please see Medicaid Institute,

in New York City through the City's Human Resources Administration ("HRA"), and regulated entirely by the State.[6] Compl. ¶ 15. The PCS Program provides non-institutional, long term care options to help the elderly or disabled remain at home. PCS Program services include cleaning, shopping, grooming, toileting, walking, transferring and/or feeding, based on an individual's needs. Compl. ¶¶ 13-14. These services can be provided for a few hours a week or for as much as 24-hours per day, 7 days a week. *Id.* ¶ 14. The 24-hour per day level of care at issue here may be provided through "sleep-in" service, where a single personal care aid provides daytime services and then sleeps in the client's home, or, if required by a client's needs, "split-shift" or continuous services are provided by more than one aide, who does not sleep while in the home. *Id.* Half of PCS Program participants are more than 80-years old. Medicaid Institute, *Overview of Medicaid Long-Term Care Programs in New York* (Apr. 2009), Ch. 3 at 6, *available at* http://www.medicaidinstitute.org/assets/599. One element of that regulatory scheme is section 505.14 of title 18 of the N.Y. Comp. Codes R. & Regs. Section 505.14 gives the City discretion in authorizing 24-hour personal care services in accordance with the state regulatory regime. N.Y. Comp. Codes R. & Regs. tit. 18 § 505.14(a)(4). The regulations describe certain paperwork to support the City's determination. *See id.* § 505.14(b). A body of administrative

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Understanding the New State/County Paradigm (2006), at 7, *available at* http://www.medicaidinstitute.org/assets/398.

6 The Complaint rests on no federal statutory, regulatory or contractual requirements—none. In fact, 143 words of federal regulations define personal care services, 42 C.F.R. § 440.167, in accordance with the general delegation of authority to be given to the states for the administration of Medicaid. 42 U.S.C. § 1396d(a)(24). Federal regulations provide that PCS can be provided at the option of and as approved by the State. *See generally Kuppersmith v. Dowling*, 710 N.E.2d 660, 662 (N.Y. 1999) (PCS federal regulatory scheme "confers broad discretion on participating States to determine the extent of services provided"); *Carter v. Gregoire*, 672 F. Supp. 2d 1146, 1151 (W.D. Wash. 2009) ("In promulgating the 'personal care services' rule, CMS clearly expressed its intent to allow states flexibility in designing their Medicaid programs.").

law, and rulings from the State and federal courts also guide the City's decision-making. *See M.K.B. v. Eggleston*, 445 F. Supp. 2d 400, 405-06 (S.D.N.Y. 2006) (Rakoff, J.) (describing State oversight of City's administration of Medicaid benefits); *Long v. Perales*, 568 N.Y.S. 2d 657, 658-59 (App. Div. 2d Dep't 1991) (State's fair hearing determinations are *stare decisis* and binding on the City) .

The essence of the Complaint is that the City authorized and reauthorized PCS care in violation of State regulations. Compl. ¶ 42. The Complaint boils down to two items of alleged regulatory non-compliance: First, the Government alleges that "administrators have overrul[ed] LMD determinations concerning the appropriate level of care."[7] *Id.* ¶ 29. Second, the Government says the paperwork required by State (not federal) regulation to substantiate the City's authorization was allegedly not timely reviewed. *Id.* at ¶¶ 33-34. The Complaint identifies seven "Patients" and quibbles with the authorized level of care. No "claim" is identified with respect to any patient and no false or fraudulent statement is identified either. Rather, the Complaint expresses the Government's unhappiness with the City's determinations as to the appropriate level of care for these individuals.[8]

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[7] The Complaint refers to the "local medical director" or "LMD", which it defines as a physician who provides services under contract to HRA through the New York County Health Services Review Organization, or "NYCHSRO". Compl. ¶¶ 8, 15. The LMD reviews paperwork for the City. He does not see patients and he is not a Medicaid recipient's treating physician. A body of administrative law subjects his recommendations to review on a totality of the circumstances basis. *See Long*, 568 N.Y.S.2d at 670.

[8] The Government's legal analysis of reauthorizations, among other things, appears to be wrong, particularly in that it disregards the greater legal/regulatory context in which the PCS Program operates. In *Mayer v. Wing*, 922 F. Supp. 902, 910-12 (S.D.N.Y. 1996), this Court relied on the U.S. Constitution to enjoin the City and State of New York from reducing 24-hour PCS services absent one of five factors. The *Mayer* injunction was largely codified in N.Y. Comp. Codes R. & Regs. tit. 18 § 505.14(b)(5)(v)(c)(1-10). Basically, the City must be able to prove an applicable "change" in circumstances before reducing services. Absent the ability to prove such a "change", the City must reauthorize

ARGUMENT

I. Standard of Law

Rule 8 requires a complaint allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "The plausibility standard . . . asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). It is "context-specific," requiring the reviewing court "to draw on its judicial experience and common sense." *Id.* at 1950. "[A]lthough a court must accept as true all of the allegations contained in a complaint, that tenet is inapplicable to legal conclusions, and [t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009) (citation and internal quotations omitted).

Here, the Government's two causes of action under the False Claims Act must also be pled with the particularity required by Rule 9(b). *See Wood ex rel. U.S. v. Applied Research Assocs, Inc.*, 328 F. App'x 744, 747 (2d Cir. 2009). Rule 9(b) requires plaintiff to: "(1) specify the statements that [the plaintiff] contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *United States v. Huron Consulting Grp., Inc.*, No. 09 Civ. 1800 (JSR), 2011 WL 253259, at *2 (S.D.N.Y. Jan. 24, 2011) ("*Huron II*"). Pleading a general methodology of alleged fraud "by example" and without corresponding and particularized detail does not satisfy Rule 9(b). *See United States ex rel. Branigan v. Bassett Healthcare Network*, 234 F.R.D. 41, 45 (N.D.N.Y.

24-hour PCS services. *Id.*; *Mayer*, 922 F. Supp. at 912. The Complaint completely ignores this legal requirement. Therefore, even if everything the Complaint factually alleges about Patients D, E, F and G is true, 24-hour PCS had to be reauthorized to comply with the applicable law. Nothing in the Complaint establishes the actual ineligibility of Patients D, E, F and G for 24-hour PCS.

2005). And, Rule 9(b) pleadings cannot be based upon information and belief, *id.* at 44[9], as the Complaint is here, *see* Compl. ¶ 2. Indeed, the Court can immediately dismiss the FCA causes of action on that basis alone.

II. The Complaint Does Not State a Claim Under the False Claims Act for Which Relief Can Be Granted

A. The Complaint Does Not State a Cause of Action Under Section 3729(a)(1) [10]

To plead a claim under Section 3729(a)(1), the Government must allege facts with particularity showing that defendant "(1) made a claim, (2) to the United States government, (3) that is false or fraudulent, (4) knowing of its falsity, and (5) seeking payment from the federal treasury." *United States ex rel. Kirk v. Schindler Elevator Corp.*, 601 F.3d 94, 113 (2d Cir. 2010) (quoting *Mikes*, 274 F.3d at 695), *cert. granted*, 131 S. Ct. 63 (2010). The Complaint fails to plead facts sufficient to meet each requirement.

1. The Complaint Does Not Plead Facts Showing That the City Made a Claim Seeking Payment From the Federal Treasury

"The submission of a claim is . . . the *sine qua non* of a False Claims Act violation." *United States ex rel. Clausen v. Laboratory Corp. of America, Inc.*, 290 F.3d 1301, 1311 (11th Cir. 2002). A "claim" is defined for these purposes as "any request or demand, whether under contract or otherwise, for money or property from the Government." 31 U.S.C. § 3729(c) (2000); *Mikes*, 274 F.3d at 695 (citation omitted). The Complaint does not identify any claim by the City for payment from the Government. Nor could the Complaint identify any claim (or the

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[9] The only exception to the rule is where facts are peculiarly within the opposing party's knowledge. *Id.* at 45. The exception plainly does not apply here where the Government contends a false claim was submitted to the Government. The Government has the allegedly false claim and the allegedly false statement. The Government's Complaint must identify them with the particularity required by Rule 9(b).

[10] Section 3729(a)(1) was materially amended on May 20, 2009. The Complaint asserts a claim under the pre-amended version of the statute, which the City addresses herein.

required who, what, where and when of a specific demand for payment[11]) because the City is not even alleged to have made claims for the 24-hour PCS at issue. Rather, the City effectively pays a portion of the claims made by 24-hour PCS service providers. *See supra* at 7. Accordingly, "there simply is no 'claim' under the FCA" by the City to sustain a section 3729(a)(1) cause of action.

Here, the Government's theory just does not fit under Section 3729(a)(1), which requires that the defendant present a claim to the Government for payment. *See United States ex rel. Atkins v. McInteer,* 470 F.3d 1350, 1358 (11th Cir. 2006) (finding complaint "failed to meet the minimum pleading requirements for the *actual presentment of any false claims*") (citation omitted); *Karvelas*, 360 F.3d at 232 (1st Cir. 2004)) ("[P]resentation of a false or fraudulent claim to the government is a central element of every False Claims Acts case."); *Clausen*, 290 F.3d at 1312 (holding that plaintiff's "failure to allege with any specificity if—or when—any actual improper claims were submitted to the Government is indeed fatal to his complaint"); *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 785 (4th Cir. 1999) ("The statute attaches liability, not to the underlying fraudulent activity or to the government's wrongful payment, but to the '*claim for payment.*' Therefore, a central question in False Claims Act cases is whether the defendant ever presented a 'false or fraudulent claim' to the government.") (emphasis added); *United States ex. rel. Shaver v. Lucas Western Corp.*, 237 F.3d 932, 933 (8th Cir. 2001) ("Even assuming the truth of Shaver's allegation that Lucas 'knew' Shaver would

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11 "[D]etails concerning the dates of the claims, the content of the forms or bills submitted, their identification numbers, the amount of money charged to the government, the particular goods or services for which the government was billed, the individuals involved in the billing, and the length of time between the alleged fraudulent practices and the submission of claims based on those practices" is required in these circumstances. *Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 232-33 (1st Cir. 2004)); *see also United States ex rel. Williams v. Bell Helicopter Textron, Inc.*, 417 F.3d 450, 454 (5th Cir. 2005)

submit such bills to Medicare, Lucas cannot be said to have 'caused' Shaver's medical bill claims to be submitted to the government."); *United States ex rel. Finney v. Nextwave Telecom, Inc.*, 337 B.R. 479, 488 (S.D.N.Y. 2006) (finding failure to identify a claim to constitute a "defect" that is "fatal" to the complaint); *United States ex rel. Sterling v. Health Ins. Plan of Greater New York, Inc.*, No. 06 Civ. 1141 (PAC), 2008 WL 449448, at *6 (S.D.N.Y. Sept. 30, 2008) ("Section 3729(a)(1) mandates that the defendant must actually present the claim to the Government to be liable."). Accordingly, the Complaint should be dismissed. *See, e.g., United States v. Huron Consulting Group, Inc.*, No. 09-Civ-1800 (JSR), 2010 WL 3467054, at *3 (S.D.N.Y. Aug 25, 2010) ") ") ("*Huron I*") (dismissing FCA complaint where claims not identified in complaint).[12]

2. The Complaint Does Not Plead Presentment to an Officer or Employee of the United States Government

The Complaint fails to plead presentment of a claim to an officer or employee of the United States. Even if a "claim" within the meaning of the FCA is found in the Complaint (which it is not), the Complaint only asserts that the City transmitted "false authorizations" to the State of New York. *See* Compl. ¶ 28. Section 3729(a)(1) only addresses claims presented to an "officer or employee of the United States." The State of New York is neither an "officer" nor an "employee" of the United States. Therefore, no claim has been stated under Section 3729(a)(1).[13]

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12 The City submits that the Court's approach to Rule 9(b) in FCA cases in *Huron I* is correctly applied here. The "relaxed" standard of *Huron II* does not apply.

13 The significance of the "federal officer or employee" requirement in the pre-2009 FCA under which the Government brings this suit is illustrated by Congress' decision to remove that language in the 2009 FCA amendments. *See* S. Rep. No. 111-10, at *10 (2009) ("By removing the offending language from section 3729(a)(1), which requires a false claim be presented to 'an officer or employee of the Government, or to a member of the Armed Forces,' the bill clarifies that direct presentment is not required for liability to

3. The Complaint Does Not Plead A False and Fraudulent Claim With Sufficient Particularity

The Complaint fails to plead with particularity how any "claim" was "false or fraudulent." A "false or fraudulent" claim is "aimed at extracting money the Government otherwise would not have paid." *Mikes*, 274 F.3d at 696; *United States ex rel. Gross v. AIDS Research Alliance-Chicago*, 415 F.3d 601, 604-05 (7th Cir. 2005) (Rule 9(b) requires plaintiff to plead how fraudulent acts caused the Government to pay out money). Allegations of nothing more than regulatory non-compliance, standing alone, do not state a cause of action under the FCA. *See Mikes*, 274 F.3d at 699; *United States ex rel. Godfrey v. KBR, Inc.*, 360 F. App'x 407, 412 (4th Cir. 2010) (rejecting plaintiff's contention that "failure to meet staffing or other contractual requirements can support an FCA claim on its own"); *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1019 (7th Cir. 1999) ("[T]he FCA is not an appropriate vehicle for policing technical compliance with administrative regulations."); *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266 (9th Cir. 1996) ("Violations of laws, rules, or regulations alone do not create a cause of action under the FCA."). And, "medical issues concerning levels of care" like those at issue here are best not resolved in an FCA case. *Mikes*, 274 F.3d at 700.

This is because falsity under the False Claims Act "does not mean 'scientifically untrue'; it means 'a lie.'" *United States ex rel. Morton v. A Plus Benefits, Inc.*, 139 F. App'x 980, 982 (10th Cir. 2005) (unpublished opinion) (citations omitted); *see United States ex rel. Jones v. Brigham and Women's Hosp.*, No. 07-11481-WGY, 2010 WL 4502079, at *6 (D. Mass. Nov.

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attach."); 31 U.S.C. § 3729(a)(1)(A) ("[A]ny person who (1) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval . . . is liable . . . ."). However, having chosen to bring this action under the pre-amendment statute requiring presentment to a "federal officer or employee" the Government cannot sustain its claim because no such presentment has been alleged.

10, 2010) ("Expressions of opinion, scientific judgments, or statements as to conclusions about which reasonable minds may differ cannot be false.") (citations omitted); *United States ex rel. Dugan v. ADT Sec. Servs., Inc.*, No. DKC 2003-3485, 2009 WL 3232080, at *15 (D. Md. Sept. 29, 2009) ("The FCA, at a minimum requires proof of an objective falsehood.") (internal quotation and citation omitted); *United States. ex rel. Smith v. New York Presbyterian Hosp.*, 06 Civ 4056, 2007 WL 2142312, at *6 (S.D.N.Y. July 18, 2007) (dismissing FCA claims "because [the plaintiff's] allegations [were] devoid of the detail required to put defendants on notice of the particular fraudulent bills alleged "); *Boisjoly v. Morton Thiokol, Inc.*, 706 F. Supp. 795, 810 (D. Utah 1988) (finding that False Claims Act requires statement of fact that can be said to be either true or false).

No lie is identified anywhere in the Complaint. All it says is that "[u]pon information and belief, the City improperly authorized services for a substantial percentage of the thousands of Medicaid beneficiaries receiving [24-hour care through the PCS program], resulting in damages to the United States." Compl. ¶ 2. The examples of Patients A-G in paragraphs 29 to 42 of the Complaint provide no more meaningful detail. The Complaint does not identify any lie that the Government relied on and caused it to make a payment it would not have otherwise made, the speaker, or to whom the statement was made and when. The failure to identify any lie requires dismissal under Rule 9(b). *See Wood*, 328 F. App'x at 747 (affirming dismissal of complaint that does not include "a single identifiable record or billing submission they claim to be false, or give a single example of when a purportedly false claim was presented for payment by a particular defendant at a specific time"); *see also United States ex rel. Doe v. Dow Chem. Co.*, 343 F.3d 325, 329 (5th Cir. 2003) (affirming dismissal of False Claims Act claim that listed only "the approximate time and place" of the alleged violations, but failed to "explicitly state

[when] alleged false representations were made," what those false representations were, or who made them); *Karvelas*, 360 F.3d at 235 ("[Plaintiff's] failure to identify with particularity any actual false claims that the defendants submitted to the government is, ultimately, fatal to his complaint."). The significance of this requirement cannot be understated, especially in light of the fact that the Complaint alleges the City submitted false claims in a case in which the order of the State administrative law judge was to authorize the contested services for Patient D.

B. The Theory of Fraud Asserted in the Complaint Is Not Plausible – Scienter Has Not Been Adequately Pled

Missing from the Government's allegations is the *why* of the alleged fraud. There is no indication in the Complaint (other than the Government's *ipse dixit*) that the City authorized 24-hour PCS to defraud the Government. The Complaint does not provide a plausible basis for inferring that the City acted with scienter—"the knowing presentation of what is known to be false." *United States ex rel. Kreindler & Kreindler v. United Tech. Corp.*, 985 F.2d 1148, 1156 (2d Cir. 1993) (internal citations omitted).[14] The City and Government are on the same side of the equation, both as funders of 24- hour PCS. When a personal care services provider bills "Medicaid" for 24-hour PCS, Compl. ¶ 28, the City, the State, and the Government all pay. *See supra* at 7. This reality accounts for the fundamental flaw in the Complaint and the failure here to adequately plead scienter. *Cf. Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1130 (2d Cir. 1994) ("In looking for a sufficient allegation of motive, we assume that the defendant is acting in

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[14] Rule 9(b) permits a plaintiff to generally allege a defendant's mental state. However, the complaint must allege facts that show the court their basis for inferring that the defendants acted with "scienter." *Wood*, 328 Fed. App'x at 747 ("[W]hile Rule 9(b) permits scienter to be demonstrated by inference, this must not be mistaken for license to base claims of fraud on speculation and conclusory allegations. An ample factual basis must be supplied to support the charges."). "Mere negligence" or an "innocent mistake" does not support a FCA violation. *United States ex rel. Resnick v. Weill Med. Coll. of Cornell Univ.*, No. 04 Civ. 3088 (WHP), 2010 WL 476707, at *6 (S.D.N.Y. Jan. 21, 2010).

his or her informed economic self-interest."); *Duncan v. Pencer*, No. 94 Civ. 0321 (LAP), 1996 WL 19043, at *10 (S.D.N.Y. Jan. 18, 1996) (to overcome a "highly unlikely and counter-intuitive conclusion" the plaintiff must allege "facts from which one could infer [a] manifestly economically irrational behavior"); *Lamers*, 168 F.3d at 1019 (finding that without financial motive on the part of the City for the alleged deception, "no reasonable inference" of knowing misrepresentation could be made). It simply does not make sense to allege, as the Government does here, that the City intended to rip itself off.

Further, the Government's apparent contention that City must have acted with scienter based on seven instances of allegedly missing paperwork is not plausible when there is no allegation that the seven elderly, infirm and ill individuals who indisputably qualify for Medicaid would not have been authorized for the services they were authorized for if the allegedly missing paperwork had been present. *See United States ex rel. Pervez v. Beth Israel Med. Ctr.*, No. 01 Civ. 2745, 2010 WL 3543457, at *7 (S.D.N.Y. Sept. 13, 2010) (granting motion to dismiss and noting that "where the allegedly culpable conduct at issue is at a somewhat greater remove" from the medical provider submitting a claim, the complaint must "describe adequately a plausible basis for attributing knowledge or deliberate ignorance").

C. The Complaint Fails to State a Cause of Action Under Section 3729(a)(1)(B)

To plead a Section 3729 (a)(1)(B))[15] claim, the plaintiff must allege that: (1) defendant

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15 In 2009, 31 U.S.C. § 3729(a)(1)(B) was created to amend 31 U.S.C. § 3729(a)(2). The amendment provides, in part that "it shall take effect as if enacted on June 7, 2008, and apply to all claims under the False Claims Act (31 U.S.C. § 3729 *et seq.*) that are pending on or after that date...." *See Schindler Elevator Corp.*, 601 F.3d at 113 (discussing retroactivity); *see also Pervez*, 2010 WL 3543457, at *8 n.38 ("The Second Circuit, however, has assumed in at least one case, without significant discussion, that the amendment applies retroactively to all legal claims pending before a court on or after June 7, 2008."). The City will challenge the retroactive application of the Section 3729(a)(1)(B) at a later stage of this litigation, if necessary.

made, or caused to be made, a false or fraudulent record or statement, (2) defendant knew it to be false or fraudulent, and (3) it was material to a claim. 31 U.S.C. § 3729(a)(1)(B); *Pervez*, 2010 WL 3543457, at *4 . Thus, for both a Section 3729(a)(1) and Section 3729(a)(1)(B) cause of action there must have been a "claim". Under Section 3729(a)(1)(B) a record or statement material to that claim must have been false or fraudulent and the defendant must have known that the claim or statement was false or fraudulent and the false record or statement must have been material to the claim. *Pervez*, 2010 WL 3543457, at *5.

The Government's claim under Section 3729(a)(1)(B) fails for the same reasons as its claim under Section (a)(1), as set forth above. It also fails to satisfy the additional Section (a)(1)(B) requirements because no false record, certification or statement has been identified, and no facts have been pled to show that the record, certification or statement was used for the purpose of causing a false claim to be paid, or did in fact cause a claim to be paid. *See Mikes*, 274 F.3d at 696) (requiring a link between "the wrongful activity to the government's decision to pay"); *Gross*, 415 F.3d at 604 (Rule 9(b) requires plaintiff to plead how fraudulent acts caused the Government to pay out money). The failure to plead any of these elements with particularity warrants dismissal of the Government's cause of action under Section 3729(a)(1)(B).

III. The New York Common Law Causes of Negligence, Unjust Enrichment and Payment Under Mistake of Fact Fail as a Matter of Law

A. The Complaint Fails to State a Cause of Action for Negligence Because the City Has Absolute Immunity

No common law negligence claim for the conduct alleged exists. Further, under New York law, the City has absolute immunity from tort liability for discretionary governmental functions. *See McLean v. City of New York*, 905 N.E.2d 1167, 1171 (N.Y. 2009) (discretionary acts may never be a basis of tort liability); *Lauer v. City of New York*, 733 N.E.2d 184, 187 (N.Y.

2000) ("[D]iscretionary acts—meaning conduct involving the exercise of reasoned judgment—may not result in the municipality's liability even when the conduct is negligent."). The authorization of PCS is a discretionary governmental function. *See, e.g.*, *Post v. County of Suffolk*, No. 2009-07730, 2011 WL 181742, at *2 (App. Div. 2d Dep't Jan. 18, 2011) (finding authorization of PCS a discretionary act entitled to immunity); *DeGraffe v. City of New York*, 907 N.Y.S.2d 436, at *4 (Table) (N.Y. Sup. Ct. Jan. 8, 2010) (same). Therefore, the City has absolute immunity from tort liability for the allegedly improper authorizations and reauthorizations described in the Complaint. Dismissal of the negligence cause of action here is entirely consistent with the "rationale for the rule" of immunity as explained by the New York Court of Appeals: "exposing municipalities to tort liability would be likely to render them less, not more, effective in protecting their citizens." *McLean*, 905 N.E.2d at 1174; *see also Pelaez v. Seide*, 810 N.E.2d 393, 401 (N.Y. 2004) (lawsuits could impel governments to withdraw or reduce their protective services).[16] Allowing the Government to second-guess level of service determinations under a negligence standard that are already subject to an administrative review process and then (at the claimant's request) an Article 78 proceeding in New York Supreme Court will not help protect the citizens of New York and has no basis in New York law.

B. The Complaint Fails to State a Cause of Action for Unjust Enrichment

Even assuming no immunity, the Complaint fails to state a claim for unjust enrichment. To plead a cause of action of unjust enrichment, the Government must allege facts showing (1) that City was enriched, (2) at the Government's expense, (3) such that equity and good

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[16] Even if the City did not have absolute immunity, the Complaint alleges no facts on which to rest a "special duty" running from the City to the Government. *See McLean*, 905 N.E.2d at 1171 (government not liable for non-discretionary acts without showing government owed plaintiff "special duty").

conscience require restitution. *Whitman Realty Grp., Inc. v. Galano,* 838 N.Y.S.2d 585, 592-93 (App. Div. 2d Dep't 2007) (citing *Kaye v. Grossman*, 202 F.3d 611, 615-616 (2d Cir. 2000); *see Nakamura v. Fujii,* 677 N.Y.S.2d 113, 116 (App. Div. 1st Dep't. 1998) ("To state a cause of action for unjust enrichment, a plaintiff must allege that it conferred a benefit upon the defendant, and that the defendant will obtain such benefit without adequately compensating plaintiff therefor."). No such facts are pled in the complaint. "[W]hether [defendant was] enriched involves only whether [it] received money." *United States v. Sforza*, No. 00 Civ. 1307 (AGS), 2000 WL 1818686, at *6 (S.D.N.Y. Dec. 12, 2000). No money was allegedly received by the City based on the 24-hour PCS authorizations at issue. Rather, based on the allegations in the Complaint, the authorizations cost the City money.[17] Therefore the unjust enrichment cause of action fails as a matter of law. *See Reprosystem B.V. v. SCM Corp.*, 727 F.2d 257, 264 (2d Cir. 1984) (refusing to find unjust enrichment where no bestowal of benefit on defendant).

C. The Complaint Fails to State a Cause of Action for Payment Under Mistake of Fact

A cause of action for Payment under Mistake of Fact requires the Government to plead facts showing that it made payments received by defendant, under an erroneous belief that was material to its decision to pay. *See United States v. Incorporated Village of Island Park*, 888 F. Supp. 419, 451, 453 (E.D.N.Y. 1995).[18] The cause of action requires that the defendant have

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17 Even if some unspecified, alternative programs exist in which the Government imagines the City might have a greater financial responsibility, that is too "amorphous and indirect" a benefit to state a claim for unjust enrichment. *United States v. Incorporated Village of Island Park*, 888 F. Supp. 419, 452 (E.D.N.Y. 1995) (denying unjust enrichment claim where no direct benefits flowed to defendants).

18 Under New York law, this action is referred to as an action for money had and received. *Parsa v. State*, 474 N.E.2d 235, 238 (N.Y. 1984). It is essentially identical to unjust enrichment. *Matter of Estate of Witbeck*, 666 N.Y.S.2d 315, 317 (App. Div. 3d Dep't 1997). Even assuming the existence of a separate federal common law claim, the direct

received financial payments from the plaintiff. *See Goldfine v. Sichenzia*, 902 N.Y.S.2d 117, 117 (App. Div. 2d Dep't. 2010) (dismissing claim where no money was allegedly received). The Government's claim for payment under mistake of fact fails as a matter of law because it has not alleged that any payment was actually received by defendant. The City cannot be held liable for payment under mistake of fact for funds it is not alleged to have received. *Incorporated Village of Island Park*, 888 F. Supp. at 419 is instructive. There, the court refused to allow a cause of action for erroneous payment of funds against municipal defendants, when the municipal defendants did not receive monetary payments flowing from a federal benefits program. The "indirect and unquantifiable" benefits the municipal defendants allegedly received from the mere existence of the program could not support a claim for payment under mistake of fact. *Id.* at 452. Because the Government fails to allege that the City received any payment from the Government's disbursement of PCS funds, the cause of action for Payment under Mistake of Fact must be dismissed.

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receipt of money is still required. *See United States ex rel. Purcell v. MWI Corp.*, 520 F. Supp. 2d 158, 173 (D. D.C. 2007) ("Payment by mistake . . . only lies against a defendant to whom a benefit (money) was actually paid."); *United States v. Hawley*, 544 F. Supp. 2d 787, 816 (N.D. Iowa 2008) ("Restitution plainly cannot be obtained from someone who did not receive the excessive payment."), *rev'd on other grounds*, 619 F.3d 886 (8th Cir 2010); *United States v. Albinson*, Civ. No. 09-1791 (DRD), 2010 WL 3258266, at *19 (D.N.J. Aug. 16, 2010) (denying claim where defendant received no money from the government).

CONCLUSION

For the foregoing reasons, the Government's complaint should be dismissed with prejudice and the City awarded such other and further relief as the Court deems just and proper.

Dated: February 8, 2011

Respectfully submitted,

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