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Defendant Christi R. Sulzbach ("Sulzbach") files this Memorandum of Law in Support of her Motion for Summary Judgment and respectfully shows the Court as follows:

**I.  
INTRODUCTION**

This case is the second case filed by the United States under the False Claims Act ("FCA") for damages allegedly resulting from the payment of claims submitted by North Ridge Medical Center ("North Ridge") from 1994 to 1999. The first case was brought against North Ridge and its owner, Tenet Healthcare Corporation ("Tenet"), in 2001 and was settled in 2004. The current case was filed in 2007 against Sulzbach, Tenet's former general counsel.

In both cases, the Government has alleged that certain physician employment agreements entered into by North Ridge in 1993 and 1994 violated the Stark Law; that as a result, North Ridge was prohibited from accepting referrals from those doctors; that Medicare reimbursement claims for services rendered to patients referred to North Ridge by those doctors were therefore illegal and thus "false claims"; that Tenet was obligated under the terms of a 1994 Corporate Integrity Agreement to disclose the issues concerning the North Ridge physician contracts after they were surfaced by a Tenet employee, Tony Bennett, in early 1997; that Tenet, under Sulzbach's direction, failed to disclose the issues and that thereafter Sulzbach falsely certified Tenet's compliance with the Corporate Integrity Agreement in annual compliance reports. The causes of action in the earlier and later suits are almost identically worded and the damages sought the same.

Why then would the United States have waited until 2007 to file the same case against Sulzbach it filed against Tenet and North Ridge six years earlier? According to the Government, until it obtained certain privileged documents from Tenet in 2006 that purportedly established Sulzbach had been advised by an outside law firm in 1997 that the North Ridge contracts were illegal, the United States lacked essential evidence that Sulzbach had "knowingly" submitted false certifications. Therefore, claims the Government, this case—filed a decade after the events at issue—is not barred by limitations.

This contention is fatally defective for two reasons. First, it is a complete contrivance for the Government to contend that it did not believe it had a basis prior to 2006 to allege that Sulzbach had *knowingly* submitted false certifications. One of the issues in the first case was whether Tenet had knowingly violated the False Claims Act. In its effort to prove that Tenet had

acted knowingly, the Government told this Court that Sulzbach was told in 1997 of the Stark Law concerns at North Ridge, that she did not require Tenet to disclose them to the Government, and that she then made false sworn certifications to the Government. The United States argued that Tenet was bound by *Sulzbach's knowledge*. Is the Government now saying it had no basis to make this argument to this Court? There is of course law that precludes parties from taking inconsistent positions to suit their particular litigation needs *du jour*.

Second, as we will show in great detail, discovery has confirmed that Sulzbach was in fact *never advised* by outside counsel that the contracts were illegal. If, as the United States has argued, it needed evidence of that advice in order to have a justifiable basis for suing Sulzbach, then, based on the undisputed evidence, it has no justifiable basis to pursue this case.

But even were this case not time-barred, summary judgment would still be appropriate on the merits for numerous independent reasons. First, Sulzbach's certifications cannot, as a matter of law, give rise to False Claims Act violations. Second, the Government lacks both factual evidence and a sound legal basis to support its claim that Sulzbach knowingly made a false statement. Third, even if it could establish a knowingly false statement, the Government lacks essential evidence under the False Claims Act that Sulzbach made such statements for the purpose of causing false claims to be paid or of avoiding an obligation owed to the United States, or that she caused others to present false claims.

This case is an unfortunate example of what can happen when one shoots first and asks questions later. Unquestionably angered by what was mistakenly viewed as evidence that Sulzbach had been advised in 1997 by outside counsel that the physician contracts at issue were illegal, the Department of Justice brought suit against a United States citizen without proper factual investigation, legal analysis or appropriate consideration of the Government's own prior representations to this very Court. It is time to put this matter to rest.

## **II. FACTUAL BACKGROUND**

### **A. In 1994, National Medical Enterprises and HHS Enter Into One of the Initial Healthcare Corporate Integrity Agreements**

The origins of this case date back more than fifteen years. In June 1994, National Medical Enterprises, Inc. ("NME"), an indirect owner of scores of acute care hospitals and psychiatric facilities, resolved a civil and criminal dispute with the United States concerning its psychiatric facilities and the subsidiary entity responsible for managing those facilities. (Def.'s

Statement of Undisputed Facts ¶ 2 ("SOF")<sup>1</sup>.) As part of the settlement, on June 29, 1994, NME and the Department of Health and Human Services ("HHS") entered into what is believed to be the very first healthcare corporate integrity agreement ("CIA"). (*Id.*)

Under the CIA, NME implemented a company-wide compliance program, with Sulzbach, then NME's Associate General Counsel, appointed as its Corporate Integrity Program Director. (CIA, App., Ex. 2; SOF ¶ 3.) Among other things, starting in June 1995 and continuing through June 1999, NME was required to submit annual compliance reports to HHS detailing the company's compliance efforts. Sulzbach was responsible for overseeing the preparation of these reports and was required to certify under oath that to the best of her knowledge and belief the company was in compliance with the terms of the CIA and other federal program legal requirements. (SOF ¶ 4.)

Since 1994, HHS has entered into more than 1,000 CIAs. (OIG 30 Year Retrospective at 38, App., Ex. 4.) Over time, HHS has developed a substantial infrastructure to negotiate, monitor and provide guidance concerning CIAs. The Office of Inspector General ("OIG"), through its Chief Counsel, is responsible for developing and monitoring CIAs and for developing and providing compliance program guidance. (*Id.* at 38-39; Morris Dep. 15:12-15:22.) All CIAs and related documents dating back to 2000 can be found on the website and generally provide a template for future CIAs. (*See* HHS-OIG, Corporate Integrity Agreements Document List, [http://oig.hhs.gov/fraud/cia/cia\\_list.asp](http://oig.hhs.gov/fraud/cia/cia_list.asp) (last visited October 21, 2009).) And the HHS website contains voluminous information about CIAs, including substantial interpretative guidance.

But back in 1994, there was no template for CIAs, no infrastructure within HHS for developing compliance programs, and no published guidance to interpret CIA provisions. (OIG 30 Year Retrospective at 36-39; SOF ¶ 8; Morris Dep. 11:13-12:7, 16:1-17:16, 19:14-21:6, 31:10-31:22, 53:20-54:5.) In fact, there apparently were no corporate integrity agreements at all until HHS suggested one to NME in April 1994 as a condition for HHS agreeing not to exclude NME from participating in Medicare on a going-forward basis. (Morris Dep. 30:5-31:22; Sulzbach Dep. 18:20-20:2, 162:25-163:1; Letter from Eileen T. Boyd to Charles F. Ruff (April 8, 1994), App., Ex. 37.)

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<sup>1</sup> Pursuant to Local Rule 7.5.C, this motion is accompanied by a statement of material facts that are not in dispute. When possible, Defendant will refer the Court to her statement of facts and the deposition testimony and documents cited therein when citing to the record.

The CIA between NME and the Government was negotiated from scratch. Documents located from those negotiations reveal that one of the many provisions negotiated was paragraph 11, which imposed certain self-reporting obligations on NME if it became aware of credible evidence of misconduct. A draft version of the CIA sent by HHS to NME's counsel, the late Chuck Ruff, called upon NME to report any credible evidence of misconduct that may constitute a violation of civil or criminal law. (SOF ¶ 6.) The final agreement, however, contained a qualifier—while NME was required to disclose credible evidence of all possible violations of criminal law, it was only obligated to disclose possible *material* violations of civil law. (CIA at ¶ 11.) Contemporaneous documentation states that this provision was "heavily negotiated" with the Government unwilling to agree to the materiality qualifier for potential criminal matters. (SOF ¶ 6.)

Although in later years, HHS began to provide specific definitions of what constituted a "material violation," NME's CIA contained no such definition.<sup>2</sup> (SOF ¶ 7.) Moreover, it would be the better part of a decade after 1994 before HHS began to provide published guidance concerning its interpretation of CIA provisions.<sup>3</sup> (SOF ¶ 8.) According to Lew Morris, the long-time Chief Counsel to OIG, prior to the publication of that guidance, parties seeking information as to how HHS would interpret CIA provisions would have needed to speak to the OIG official responsible for monitoring that party's CIA. (SOF ¶ 9.) For NME, that person was at one time Steve Davis, an OIG attorney. (*Id.*)

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<sup>2</sup> OIG has admitted that "[o]ver time, CIAs have evolved into more sophisticated and detailed documents." (OIG 30 Year Retrospective at 39.) Current day CIAs contain standardized language on reporting obligations and define what is meant by "material" for reporting purposes. (SOF ¶ 7.)

<sup>3</sup> This 2002 guidance included a question and answer relating to what constituted a "material violation" sufficient to trigger reporting obligations. (OIG, "Frequently Asked Questions Related to Corporate Integrity Agreements" (July 19, 2002), at SUL 218, App., Ex. 7.) At least prior to then, there was widespread industry confusion as to what constituted "material" misconduct for reporting purposes throughout the 1990s. HHS-OIG held three government-industry roundtable discussions on CIA issues from 1999 to 2001. The report from the first roundtable includes a section discussing "the definition of a 'material deficiency' triggering reporting requirements to the OIG and the fact that the standard has evolved over time." ("Building a Partnership for Effective Compliance" Report (April 2, 1999), at SUL 204, App., Ex. 38.) The report noted that the "definition is still somewhat subjective," and that "[a]lthough some participants desired more certainty regarding what matters would trigger reporting, there was no concurrence on how to reach that goal." (*Id.*) The report from the July 30, 2001 roundtable also had a section on "Disclosure of Material Deficiencies" that similarly noted confusion regarding the standard. ("Building a Partnership for Effective Compliance" Report (July 30, 2001), at SUL 214, App., Ex. 39.)

Sometime after the CIA was entered into, Sulzbach and NME's outside counsel, Tom Holliday, met with Davis at HHS in Washington for the purpose of insuring that there was a common understanding of how NME was to proceed under the CIA. One of the issues discussed was how to define and apply the materiality standard with respect to possible civil violation disclosures. (SOF ¶ 10-11.) Both Sulzbach and Holliday recall that Davis agreed the standard to be applied was akin to what the company used for determining whether something needed to be disclosed in SEC filings. (SOF ¶ 12.) That well-established standard is whether the information would be of the magnitude that a hypothetical investor in the company would consider the information to be relevant to his investment decision. (SEC Staff Accounting Bulletin No. 99 (August 12, 1999), at 2-4 (citing *TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)).)

For his part, Davis recalls meeting with Sulzbach in Washington, thinks she had a female "assistant" with her and does not recall meeting Holliday, admits that a purpose of the meeting might have been to discuss how OIG was interpreting NME's obligations under the CIA, but says that he cannot recall anything said at the meeting. (SOF ¶ 13.) Davis also claims that at the time he "didn't know how to define material" as used in the CIA. (Davis Dep. 67:12-68:7.) Even as of 1997, when Tenet is alleged to have failed to make the disclosure of a possible "material" violation, Davis claims that OIG was "still in the infantile stage . . . of developing and monitoring these compliance plans" and that the definition of "material" was "still being developed." (*Id.* 61:17-63:21.)

**B. NME Acquires North Ridge; Tony Bennett Later Raises Legal Concerns Regarding Pre-Acquisition North Ridge/LCS Physician Agreements**

In the early 1990s, the common wisdom in healthcare was that hospitals should create networks of primary care physicians to deal with the expected managed care revolution. (Steigman *Barbera* Dep. 33:10-53:7.) Many hospitals owned by American Medical Holdings, Inc. ("AMI"), including North Ridge in Fort Lauderdale, signed primary care physicians to employment agreements. (SOF ¶ 15.) In 1993 and early 1994, North Ridge entered into a number of physician employment agreements and the physicians employed by North Ridge thereafter practiced under the name "Lauderdale Clinical Services" or "LCS." (SOF ¶ 15.) It is certain of those agreements that the Government contends violate the Stark Law.

In early 1995, NME acquired AMI and then changed its name to Tenet. (SOF ¶ 14.) As a result of the AMI acquisition, Tenet acquired AMI's hospitals, including North Ridge, and

inherited AMI's physician employment arrangements, including the LCS contracts. To manage its employed physicians, Tenet created Tenet Physician Services ("TPS") in March 1995. (Brown *Barbera* Dep. 13:9-17:15.)

In 1995, following the AMI acquisition, Tenet employed the McDermott law firm to review the inherited physician agreements, including the LCS agreements. No significant problems were identified with respect to the LCS agreements, although some minor modifications were recommended. (SOF ¶ 16.) The LCS agreements were again reviewed by McDermott in 1996 as part of a regular cycle of compliance reviews conducted by that law firm for Tenet, and in accordance with the company's obligations under the CIA to ensure that such agreements complied with applicable (and ever-changing) regulatory requirements. Again, no major issues were discovered. (*Id.*)

In 1996, Tenet hired Sal Barbera to head TPS-Florida, which was responsible for the Florida physician arrangements. Part of Barbera's responsibilities was to improve the financial performance of the Florida practices, including the LCS practices, which were losing an unacceptable amount of money. (SOF ¶ 17.) Barbera was terminated for poor performance after about six months on the job, and, after a disagreement arose concerning his severance, he filed a wrongful termination suit in January 1997, claiming he was fired for attempting to raise the issue of whether certain of the contracts were illegal. (*Id.*)

In January 1997, Tenet acquired OrNda Corporation ("OrNda"), another owner of acute care hospitals, increasing the number of hospitals owned by Tenet to nearly 130 and its number of employed physicians to over 1,000. (SOF ¶ 35-36; Sulzbach Dep. 81:8-81:12.) Jeff Heinemann had been responsible for managing OrNda's physician practices and had worked on restructuring OrNda's physician employment agreements.<sup>4</sup> (Heinemann *Barbera* Dep. 27:19-28:24, 39:4-40:24.) Following that acquisition, Tenet hired Heinemann to run TPS, and he was tasked with attempting to restructure the Tenet physician contracts. Among the first group of contracts he focused on were the LCS agreements. (SOF ¶ 19.)

Shortly after Heinemann took charge of TPS, Tony Bennett, the chief financial officer of TPS-Florida, sent Heinemann a memorandum dated February 24, 1997, and entitled "Legal

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<sup>4</sup> By 1997, it was apparent that the expected dramatic shift to managed care had not occurred as anticipated and hospitals and others across the country who had employed physicians were losing vast sums on those contracts and looking to restructure or terminate them. (SOF ¶ 19; Heinemann *Barbera* Dep. 41:7-41:15.)

Concerns related to LCS practices" (the "Bennett Memo"). In the memo, Bennett laid out concerns he had that certain of the LCS contracts might be in violation of the Stark Law. Heinemann forwarded the Bennett Memo to Sulzbach, and shortly thereafter she met with Bennett to learn more about his concerns. (SOF ¶ 20-21.)

**C. McDermott, Will & Emery Looks Into Bennett's LCS Concerns, Does Not Reach a Conclusion that LCS Agreements are Illegal**

Sulzbach tasked Tenet's regular outside healthcare counsel, Don Goldman at McDermott, to look into the concerns expressed by Bennett and by Barbera in his wrongful termination lawsuit. (SOF ¶ 22.) While in Florida on another physician matter in late March 1997, Sulzbach and Holliday met with Bennett, with Goldman participating by telephone. At the meeting, Bennett elaborated on his concerns. (SOF ¶ 21.)

Goldman then asked a second-year McDermott associate, Myla Reizen, to review and analyze the Florida physician contract files, including the LCS agreements. (SOF ¶ 23.) Based solely upon a review of the contract files, Reizen prepared for Goldman's review a May 1997 draft report analyzing the potential Stark Law concerns regarding the LCS contracts as well as other Florida physician agreements. (SOF ¶ 24.) The document drafted by Reizen, and a slightly revised draft dated June 1997, have become known as the "McDermott Report."

According to Goldman, the McDermott Report was never finalized or sent to Tenet. (SOF ¶ 27-28.) He testified that significant additional work would have been necessary to reach any definitive conclusions as to whether any of the LCS contracts (which had been previously reviewed by McDermott in 1995 and 1996) were illegal. (SOF ¶ 28-29.)

In mid-June 1997, a conference call took place between Goldman, Heinemann, Heinemann's superior, Barry Schochet, and Sulzbach. There was some discussion during that call about the Stark Law concerns regarding the LCS contracts. However, none of the call participants recalls Goldman ever expressing an opinion that the contracts were illegal. (SOF ¶ 31-32.) In fact, such an opinion would have been welcome news to Tenet as it provided grounds to terminate the contracts if the doctors did not agree to restructure them.<sup>5</sup> (SOF ¶ 33.) However, Goldman has testified that he never reached such a conclusion. Lacking something

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<sup>5</sup> In fact, Bennett himself testified that he, Barbera, and others at TPS had discussed that advice from legal counsel that the contracts were illegal would have given them an easy way out of the contracts. (Bennett Dep. 61:23-62:19, 64:21-65:21.)

more definitive, Tenet, proceeded with Heinemann's efforts to try to get the doctors to agree to restructure their agreements. (*Id.*)

**D. Tenet Does Not Disclose Bennett's LCS Concerns Due to Lack of Materiality; Sulzbach Certifies CIA Compliance**

Paragraph 11 of the CIA called for disclosure of "any credible evidence of misconduct that management has reasonable grounds, after appropriate inquiry, to believe . . . *may* constitute a material violation of the civil law rules and regulations governing, federally funded health care programs." (CIA ¶ 11 (emphasis added).) Thus, Tenet's disclosure obligations concerning the LCS issues did not turn on McDermott's failure to reach a conclusion as to whether the contracts were illegal.

Yet, Tenet did not in the spring of 1997 disclose the issues raised concerning the LCS contracts to the Government. Tellingly, at about that same time, Sulzbach went to the Department of Justice to make a disclosure about a different South Florida physician contract issue involving doctors at Hialeah-Miami Springs Hospital. (SOF ¶ 37-39.) Why would that be? The answer lies in the 1994 negotiations concerning paragraph 11 of the CIA, as well as the subsequent discussion with Steve Davis of HHS.

The agreement reached by NME and the Government called for the company to disclose *all* suspected violations of criminal law and *material* violations of civil law governing federally funded health care programs. (CIA ¶ 11.) The physician issue disclosed by Sulzbach concerned a possible *criminal* kickback to the Hialeah-Miami Springs physicians. Because of the possible criminal violations, the duty to disclose was clear and was carried out. (SOF ¶ 38-39.)

The issues raised by Bennett, on the other hand, involved possible violations of *civil* law. Thus, Sulzbach had to assess the materiality of the allegations in order to determine whether disclosure was required under the CIA. The LCS issues concerned a small group of primary care doctors who were among the many physicians utilizing North Ridge Medical Center, and a relative handful of the more than one thousand physicians employed by Tenet. (SOF ¶ 36; Sulzbach Dep. 173:4-177:22.) North Ridge was only one of the approximately 130 hospitals owned at the time by Tenet, a company with operating revenues in 1997 of \$8.7 billion. (SOF ¶ 35.) Applying the SEC standard she understood to be applicable based upon her discussion with Steve Davis, Sulzbach, to the best of her belief at the time, did not believe the potential violations were material and thus disclosure of the LCS issues was not made. (SOF ¶ 40.)

The 1997 Annual Compliance Report was due in late June 1997. As was true for the other Annual Compliance Reports, Sulzbach certified that Tenet, "to the best of [her] knowledge and belief, is in material compliance with the terms of the Corporate Integrity Agreement" as well as certain applicable legal requirements. (SOF ¶ 41-42.) She did so fully believing that Tenet had no legal obligation to disclose the North Ridge/LCS issues. (SOF ¶ 40.) The 1998 Annual Compliance Report contains the same certification, again notwithstanding the lack of disclosure of the LCS issues. (SOF ¶ 42.) It is these certifications upon which this case is based, with the Government claiming that Sulzbach knew or should have known the certifications were false.

**E. Sal Barbera Files *Qui Tam* Action Asserting Bennett's LCS Concerns; United States Intervenes in 2001 and Alleges that Sulzbach Knew of the Concerns, Believed they were Valid and then Made False Sworn Certifications of Compliance**

In May 1997, Sal Barbera filed under seal a second lawsuit, this one a *qui tam* action under the False Claims Act against North Ridge and Tenet. The case was centered on the very issues raised by Bennett (who formerly reported to Barbera) in his memo. (SOF ¶ 25.)

In May 2000, as part of the Government's investigation into Barbera's allegations, the Government took Bennett's deposition. He testified that he had expressed his concerns to Heinemann orally and in the Bennett Memo, that the Memo was sent to Sulzbach, and that Sulzbach had both called and met with Bennett to discuss his concerns and assured him that she would look into them. (SOF ¶ 46.) Thus, based on what it learned in the Bennett deposition and in other discovery, no later than May 2000, the Government was aware that (1) Bennett had presented his concerns regarding the LCS contracts to Sulzbach, Tenet's Compliance Program Director, (2) the concerns expressed by Bennett were also set forth in the complaint filed in the Barbera *qui tam* lawsuit in May 1997, (3) Sulzbach had not notified HHS of the potential violations raised by Bennett, and (4) notwithstanding the lack of notice to HHS, in both June 1997 and June 1998 Sulzbach had certified Tenet's material compliance with its obligations under the CIA and applicable federal law.<sup>6</sup>

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<sup>6</sup> It took the Government roughly four years of investigation to decide whether to intervene, and when it did so, the Government adopted only some of Barbera's claims. (SOF ¶ 47.) As a further reflection of the complexity of a Stark Law analysis of physician agreements, following the close of discovery another three years later, the Government informed the defendants that it would not pursue the claims as to several of the physicians

[Footnote continued on next page]

From the very outset of the *Barbera* case, the Government placed special emphasis on Bennett's analysis and his efforts to alert others at Tenet about the issues, particularly Sulzbach:

In this memorandum, Bennett quoted from the Stark II statute, *using bold face print on the language dealing with fair market value and relationship of compensation to referrals*. Bennett stated that, in his view, the arrangements were *not commercially reasonable*. *Shortly after sending his memo, Bennett also presented his concerns in a meeting with **Tenet counsel*** [i.e. Sulzbach].

(United States' Intervention Complaint, filed June 22, 2001 in *U.S. ex rel. Barbera v. Tenet Healthcare Corp.*, Case No. 97-6590, at ¶ 120 (emphasis added).) The Government further complained, as it does here, that notwithstanding the receipt of this information from Bennett, Tenet failed to prevent North Ridge from submitting illegal claims and failed to notify the Government of these issues in its annual compliance reports prepared under Sulzbach's supervision:

*Despite all of these warnings, Tenet continued to allow its subsidiaries to engage in unlawful financial relationships with North Ridge Medical Center physicians, it allowed North Ridge Medical Center to continue billing Medicare for referrals generated by these physicians, . . . and it has failed to mention the issue in any of the annual Compliance Reports that it submitted to the Department of Health and Human Services.*

(*Id.* at ¶ 121 (emphasis added).)

As the *Barbera* case proceeded, the Government made no effort to disguise its belief that Sulzbach, although not a defendant in that case, had acted wrongfully—repeatedly referring to her conduct in its effort to prove that Tenet bore responsibility for any purported false claims submitted by North Ridge. For example, when it sought to compel the production of various privileged documents, *including the McDermott Report*, the Government invoked the crime-fraud exception and pointed directly at Sulzbach's meeting with Bennett as proof that Tenet, through Sulzbach, *knowingly violated the Stark Law*:

[T]he Government has identified a great deal of evidence that Tenet knew that it was violating the Stark Statute and that *its attorneys were directly and personally involved in this unlawful conduct*. . . . For example, . . . a February 1997 memorandum by Tenet executive Tony Bennett to his supervisor . . . explained *accurately and in detail* why the contracts at issue violated the Stark Statute. Mr.

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[Footnote continued from previous page]

identified in its intervention complaint. (Letter from David T. Cohen to Thomas C. McGraw (November 26, 2003), App., Ex. 40.)

Bennett has testified that he met with *two senior Tenet attorneys* for several hours to discuss his memo, and that he was led to believe that they would address his concerns. . . . Mr. Bennett's supervisor also testified that he referred Mr. Bennett's memo to a *senior Tenet attorney* and relied on **her** to address them. . . . ***Mr. Bennett's memo warning that the contracts at issue violated the Stark Statute was clear, specific, and legally and factually correct.*** The fact that Tenet subsequently terminated or renegotiated all of these contracts indicates ***Tenet counsel recognized Mr. Bennett's concerns were valid.*** . . .

(United States' Reply Brief in Support of Revised Motion to Compel, filed August 18, 2003 in *U.S. ex rel. Barbera v. Tenet Healthcare Corp.*, Case No. 97-6590, at 5-6 (emphasis added) ("United States' *Barbera* Compel Reply"), App., Ex. 41.)<sup>7</sup>

The Government then specifically attacked Sulzbach for failing to disclose to the Government the issues raised by Bennett:

[W]hen Tony Bennett began voicing concerns that the contracts were illegal, *senior Tenet lawyers* met with him, assured him that they would address his concerns, and then ***allowed the company to continue billing the Government unlawfully without making any disclosure to the Government.*** This is exactly the type of conduct that the *crime-fraud* exception was designed to expose.

*Id.* at 6 (emphasis added). In other words, over six years ago the Government was making *the very same contentions* that it makes now in this case—that Sulzbach knowingly failed to disclose the LCS Stark Law issues and knowingly failed to prevent North Ridge from continuing to bill Medicare for patients referred by those physicians.

In its *Barbera* Pre-Trial Brief, the Government went even further. One of the issues in the *Barbera* case was whether the defendants had "knowingly" submitted false claims. The Government lawyers once again aimed straight at Sulzbach, claiming her personal knowledge supported their claim that Tenet had knowingly violated the Stark Law:

Later documents indicate that the ***defendants had actual knowledge*** that their relationships with the Doctors violated the Stark Law. . . . In his memo, CFO Bennett explained not only what the Stark Law prohibited and required, but how he believed the actions taken by North Ridge may have violated the statute. The evidence will show that shortly after sending this memo to Mr. Heinemann, CFO Bennett was requested to, and did, ***discuss his concerns with Christi Sulzbach***, Tenet's then Associate General Counsel and Corporate Integrity Program

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<sup>7</sup> Although not submitted to Tenet by McDermott, a copy of the draft report ended up at Tenet's corporate headquarters. Myla Reizen, the McDermott associate who drafted the report, was later hired by Tenet and she brought a copy with her among the papers she carried over to Tenet. The Government first learned about the McDermott Report when Tenet listed it on a privilege log in the *Barbera* case. (SOF ¶ 43.)

Director. Nevertheless, even after the meeting, Tenet continued to bill Medicare for millions of dollars in claims in violation of the Stark Law. . . .

(United States' Pre-Trial Brief, filed December 8, 2003 in *U.S. ex rel. Barbera v. Tenet Healthcare Corp.*, Case No. 97-6590, at 26 (emphasis added) ("United States' *Barbera* Pre-Trial Brief"), App., Ex. 42.) The Government then specifically accused Sulzbach of making false certifications under the CIA—the very same certifications that lie at the heart of this case: **"These false certifications include sworn statements filed by Tenet Healthcare Corporation's Corporate Integrity Program Director and Assistant General Counsel. Tenet Healthcare Corporation is legally bound by the actions of those employees."**<sup>8</sup> (*Id.* at 35.)

**F. The Government Gets the McDermott Report in 2006 and Then Sues Sulzbach, Contending the Case Was Timely Filed Because Until it Received the Report, It Lacked Evidence that Sulzbach Knew Her Certifications Were False**

The *Barbera* case settled in early 2004. Tenet made no admission of liability and the Government reserved its right to sue individuals such as Sulzbach for the same claims. In 2006, Tenet settled an unrelated dispute with the Government. As a condition to the 2006 settlement, the Government required Tenet to turn over certain privileged documents, including the two drafts of the McDermott Report and a July 31, 1997 memo from Sulzbach to Heinemann that directed Heinemann to implement unspecified "corrective actions" identified by McDermott. (United States' Opp'n to Mot. to Dismiss at 8-10.)

After receiving the McDermott Report, Government lawyers advised counsel for Sulzbach of their intention to file this suit, but invited her attorneys to meet with them first. After that meeting took place in May 1997, the suit was filed in September 2007. The Report was the clearly-stated reason for filing the suit, but the Government chose not to make any effort

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<sup>8</sup> The Government's statements implicating Sulzbach are buttressed by those of Barbera, who parroted the Government's claims in a companion motion to compel: "***Sulzbach***, as Tenet's in-house counsel and compliance officer, was *personally involved* . . . in evaluating Bennett's concerns about the legality of the LCS physician contracts. ***Sulzbach*** chose not to discharge her duty to report those concerns to the government notwithstanding a Corporate Integrity Agreement mandating that Tenet reveal such information . . . . Those decisions enabled Tenet to violate the Corporate Integrity Agreement and facilitated the perpetuation of Tenet's fraud on the United States." (Relator Sal A. Barbera's Reply Brief in Support of His Motion to Compel, filed August 18, 2003 in *U.S. ex rel. Barbera v. Tenet Healthcare Corp.*, Case No. 97-6590, at 5 (emphasis added), App., Ex. 43.)

to confirm with Goldman, Reizen, or anyone else that the Report had been submitted to Tenet, let alone reviewed by Sulzbach, before filing the case.

Sulzbach immediately moved to dismiss the case based upon the statute of limitations. While she knew that the Report had not been completed or submitted and that the contention that she had been advised by McDermott that the contracts were illegal was false, Sulzbach could not challenge these factual allegations in a motion to dismiss. Rather, citing to the Government's public record contentions in the *Barbera* case, Sulzbach argued that regardless of what McDermott might have advised her, the Government had many years earlier concluded and contended that that she had wrongfully failed to disclose the LCS issues and thus had submitted false certifications of CIA compliance. Thus, the Government could not claim to have just recently discovered its causes of action.

Ignoring the fact that in *Barbera* it had based its argument that Tenet had acted knowingly on Sulzbach's purported *knowing misconduct*, in its opposition to the motion to dismiss the Government argued that it was justified in delaying suit against Sulzbach because during *Barbera* "it lacked evidence that Sulzbach *personally* had *knowingly* caused false claims to be submitted to the United States." (United States' Opp'n to Mot. to Dismiss at 1 (emphasis in original).) The Government then represented that the documents produced in the 2006 settlement provided the evidence that Sulzbach acted knowingly because they showed McDermott had advised her the LCS contracts were illegal:

The documents provided by Tenet disclosed to the government *for the first time* that in 1997 and 1998, when Ms. Sulzbach submitted signed certifications to the United States representing that Tenet was "in material compliance with . . . federal legal requirements," *she personally knew these statements were false, because she had been advised by outside counsel that the physician contracts at issue in this case were illegal . . . .* Because the government did not have evidence that defendant Sulzbach herself had knowingly made false statements and knowingly submitted false claims to the government more than three years before it filed suit, the government's complaint was timely filed . . . .

(*Id.* at 1-2 (emphasis added).) The Government went on to state:

Based on [this] new evidence obtained in 2006 showing that defendant Sulzbach knew at the time she executed her 1997 and 1998 certifications that Tenet was, in fact, in violation of the Stark statute—*because she was so advised by outside counsel*, and because she subsequently directed that the offending contracts be revised—the government filed the instant action.

(*Id.* at 10 (emphasis added).<sup>9</sup>)

**G. Discovery Has Confirmed that Sulzbach Did Not Receive the McDermott Report and Was Never Advised by Outside Counsel that the LCS Contracts Were Illegal**

Over the past several months, the Government has taken the depositions of the McDermott lawyers principally involved in the drafting of the Report and in advising Tenet on the LCS issues, as well as the Tenet employees, including Sulzbach, who dealt with McDermott on these issues. While the passage of twelve years has rendered it impossible to specifically recall every detail of every conversation, the testimony has been tellingly consistent on certain key points:

- The McDermott Report never advanced beyond the stage of an internal draft. It was based solely on a review of contract files and more work—such as interviewing those involved in the contract negotiations to learn why the physicians were employed, how their compensation was determined and what others in the market were paying to their employed physicians—was necessary before any final conclusions could be reached as to whether the contracts complied with the Stark Law. (SOF ¶ 28; Goldman Dep. 62:12-62:23, 149:19-154:23; Reizen Dep. 80:25-81:14, 87:10-88:1, 124:6-124:22.)
- The McDermott Report was never submitted by McDermott to Tenet. (SOF ¶ 27.) It was not in a state where Don Goldman, the engagement partner, would have been comfortable sending it out and it would have needed substantial modifications before he would have been able to reach definitive conclusions as to the legality of the LCS contracts. (SOF ¶ 28.)
- Myla Reizen believes she brought the draft Report with her to Tenet when she was later employed by Tenet. She did not show the Report to anyone at Tenet and has no recollection of advising anyone at Tenet that the LCS contracts were illegal. (SOF ¶ 43.)
- Sulzbach has no recollection of ever seeing the Report until sometime after the Government gave notice in late 2006 of its intent to file the current lawsuit. (SOF ¶ 44.)

Goldman never reached a conclusion that the LCS contracts violated the Stark Law and thus does not believe he would have advised Sulzbach that the contracts were illegal. (SOF ¶ 29.) Moreover, although there were discussions between Goldman and numerous Tenet employees, including Sulzbach, about issues of concern regarding the LCS contracts, none of the

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<sup>9</sup> Holding that it could not consider the statements made in the prior case, the Court denied the motion to dismiss without prejudice to Sulzbach's right to present the evidence in a motion such as the one she brings now.

many people involved in such discussions recalls Goldman ever advising that the contracts were illegal. (SOF ¶ 32.) Thus, not only does the Government lack evidence that Sulzbach was advised that the LCS contracts were illegal, all evidence is to the contrary.

### **III. SUMMARY JUDGMENT STANDARD OF REVIEW**

Under Federal Rule of Civil Procedure 56, a court should grant summary judgment when "there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law." The purpose of summary judgment is to eliminate from trial those matters which are not in genuine dispute or that are factually or legally unsupported. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). If the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, there is "no genuine issue for trial" and the court must grant the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

While the moving party must make a prima facie showing that summary judgment is appropriate, this requirement is fulfilled by pointing out an absence of evidence supporting the non-movant's claims. *Celotex*, 477 U.S. at 323. The burden then shifts to the non-moving party to present actual evidence showing the presence of a genuine issue of material fact for a fact-finder to resolve. *Id.*; *Matsushita*, 475 U.S. at 588. The mere existence of some alleged factual dispute is insufficient to defeat a motion for summary judgment; the non-moving party must present evidence sufficient for a jury to return a verdict in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986).

### **IV. STATUTE OF LIMITATIONS ARGUMENT**

#### **A. Legal Standard**

The Government's three causes of action are brought under the False Claims Act, which contains its own statute of limitations. Under this provision, a civil action under the FCA must be brought within six years of the date of the violation, or within "3 years after the date when the facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act . . . ." 31 U.S.C. § 3731(b).

According to the Complaint, the last of Sulzbach's alleged affirmative misconduct occurred in June 1998, and the last of the alleged false claims for which the Government seeks to

hold Sulzbach responsible was submitted in August 1999.<sup>10</sup> Using either date, this case was clearly brought beyond the six-year limitations bar. Therefore, the Government relies on the statutory tolling provision of 31 U.S.C. § 3731(b)(2), and thus was required to file this case within three years of when it first learned the facts material to its causes of action. As this case is effectively deemed filed in December 2006 (per subsequent tolling agreements), the question is whether the Government was aware of the facts material to its causes of action prior to December 14, 2003. (Agreement Between the United States and Christi Sulzbach to Toll the Statute of Limitations (December 14, 2006), App., Ex. 44.)

While tolling provisions reflect Congressional intent that the Government should not be precluded from bringing claims if it is not aware of the underlying fraud, *see* H.R. Rep. No. 600, 99th Cong., 2d Sess. 25 (1986), "the rationale behind tolling requires that the statute of limitations start to run when the plaintiff acquires knowledge of the wrongful activity." *United States ex rel. Hyatt v. Northrup Corp.*, 91 F.3d 1211, 1217 (9th Cir. 1996). In *United States v. Kass*, the Eleventh Circuit interpreted an almost identical tolling provision and held,

Congress could not . . . be completely forgiving of government delay and still be true to its motives in enacting a statute of limitations. Therefore, *it is not necessary that relevant officials have all details of a claim* before the statutory period begins to run; *once the facts making up the "very essence of the right of action" are reasonably knowable, the [statutory] bar is dropped.* Cong. News at 2508.

740 F.2d 1493, 1497 (11th Cir. 1984) (emphasis added). In *United States ex rel. Wilkins v. North American Constr. Corp.*, the court applied these principles from *Kass* in evaluating the FCA tolling provision and held that discovering additional facts does not justify delay once the essential facts are known:

*Those additional facts strengthen and add specificity to the government's knowledge of the fraudulent statement . . . .* However, the law does not require that the government have information that is so complete or so inculpatory before the responsive official can be charged with knowledge of the facts material to a fraud cause of action, so as to trigger limitations. *See, e.g., United States v. Kass*, 740 F.2d 1493 (11th Cir. 1984).

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<sup>10</sup> The Government's claims against Sulzbach are based on her "submission of false certifications, her failure to stop Tenet from violating the Stark Statute, and her failure to report Tenet's violations to the Government . . . ." (Complaint at ¶ 102.) According to the Complaint, Sulzbach's false certifications occurred in June 1997 and June 1998, and she failed to prevent Tenet from continuing to submit illegal claims to Medicare until August 1999. (*Id.* at ¶ 89, 92.)

2001 U.S. Dist. LEXIS 20538, at \*30 (S.D. Tex. Sept. 26, 2001) (emphasis added).

**B. The United States Did Not Discover Its Causes of Action in 2006; Years Prior to Receiving the McDermott Report, the United States Formed the Belief and Alleged that Sulzbach had Knowingly Made False Certifications**

Typically when limitations is raised as a defense, the question is whether the plaintiff should have realized earlier that it had grounds to accuse the defendant of the wrongdoing later asserted. No such hindsight analysis is needed here, because we know exactly what the Government thought about Sulzbach's conduct well before December 2003. While we strongly disagree that this case has any factual merit, to the extent the Government believes otherwise, the facts "making up the very essence of [its] right of action" were plainly known when it accused Sulzbach of misconduct during the *Barbera* lawsuit.

This case and the *Barbera* case are foundationally identical. The fundamental allegation in both cases is that the LCS employment contracts violated the Stark Law, thus making it illegal for North Ridge to charge the United States for services rendered to patients referred by those physicians. In *Barbera*, the Government alleged that North Ridge and Tenet had submitted false claims for payment of services rendered to patients referred to North Ridge by certain of the LCS physicians. Now, many years later, the *very same* Department of Justice lawyers seek to hold Sulzbach liable for the *very same claims*. The causes of action in this case are virtually cut and pasted from the *Barbera* case. (*Compare* ¶¶ 104-112 of the *Sulzbach* Complaint, with ¶¶ 134-142 of the United States' *Barbera* Intervention Complaint, App., Ex. 35.)

The Government has known since *Barbera* filed his *qui tam* complaint in May 1997 that there were potential Stark Law issues at North Ridge, and thus cannot dispute that it knew about those issues when Sulzbach submitted her annual compliance report certifications in June 1997 and June 1998. (SOF ¶ 25.) And the Government has also known since, at the latest, May 2000, that Sulzbach knew about the LCS Stark Law issues when she made her certifications. For it was in May 2000 that the Government took the deposition of Tony Bennett, who testified that Sulzbach both received his February 1997 memo and then met with him a few weeks later to discuss his concerns. (SOF ¶ 46.)

Did the Government somehow fail to connect the dots (under its erroneous theory that Tenet was required to disclose the LCS issues) during the *Barbera* case? Hardly. As shown above, during the *Barbera* case the Government pointedly and repeatedly alleged that Sulzbach was "directly and personally involved in [the] unlawful conduct," (United States' *Barbera*

Compel Reply at 5) that she "recognized that [Bennett's] concerns were valid" but thereafter "allowed the company to continue billing the Government unlawfully without making any disclosure to the Government" (*Id.* at 5-6), and that she thereafter submitted false sworn certifications of Tenet's compliance to the Government (United States' *Barbera* Pre-Trial Brief at 35).

Indeed, in an effort to convince Judge Jordan that it could prove that Tenet and North Ridge had acted "knowingly" that the United States pointed straight at Sulzbach:

Later documents indicate that the defendants had *actual knowledge* that their relationships with the Doctors violated the Stark Law. . . . The evidence will show that shortly after sending [his] memo to Mr. Heinemann, CFO Bennett was requested to and did *discuss his concerns with Christi Sulzbach*, Tenet's then Associate General Counsel and Corporate Integrity Program Director. Nevertheless, *even after the meeting Tenet continued to bill Medicare for millions of dollars in violation of the Stark Law.*

(United States' *Barbera* Pre-Trial Brief at 26 (emphasis added).) The Government also pointed to Sulzbach's allegedly false compliance report certifications and said, "Tenet is legally bound by" her actions. (*Id.* at 35.)

Yet, incredibly, the same lawyers who made these contentions in *Barbera* now argue that until they obtained the McDermott Report in 2006, "the United States lacked evidence that Sulzbach *personally* had *knowingly* caused false claims to be submitted to the United States." (United States Opp'n to Mot. to Dismiss at 1 (emphasis in original).)

If, in 2003, the Government considered Sulzbach's alleged acts sufficient to prove that Tenet "knowingly" submitted false claims, then how can the Government now claim that, prior to 2006, it lacked sufficient evidence to allege that Sulzbach acted "knowingly" when she signed the certifications the Government claims are false? The Government obviously believed and represented otherwise in the prior case. Indeed, the Government should be judicially estopped<sup>11</sup> from "changing positions according to the exigencies of the moment" and thereby "making a

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<sup>11</sup> The Eleventh Circuit applies two factors in applying the doctrine of judicial estoppel: "First, it must be shown that the allegedly inconsistent positions were made under oath in a prior proceeding. Second, such inconsistencies must be shown to have been calculated to make a mockery of the judicial system." *Burnes*, 291 F.3d at 1285-86 ("these two enumerated factors are not inflexible or exhaustive; rather, courts must always give due consideration to all of the circumstances of a particular case when considering the applicability of this doctrine"). Clearly, the circumstances of this case warrant imposition of the doctrine, as the Government is deliberately contradicting a position it repeatedly asserted in *Barbera* in order to avoid the limitations bar in this case.

mockery of justice." *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1285 (11th Cir. 2002) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750 (U.S. 2001)).

Finally, and most telling, is the recent deposition testimony of Lew Morris, the OIG Chief Counsel. When asked whether his view that Sulzbach had lied to the Government would be changed if the Court found (as we will show in the following section) that she had not been advised by outside counsel that the contracts were illegal, he testified in pertinent part: "And I believe that she had *ample evidence* that false claims were continuing to be submitted to our program based on information she was provided by employees independent of the law firm's report, assuming for the moment she didn't know about it." (Morris Dep. 41:20-42:3 (emphasis added).) Mr. Morris' candor exposes the fiction that has been visited upon this Court. Long prior to 2006, the Government concluded that it had "ample evidence" that Sulzbach knew her certifications were false, and it so alleged repeatedly.

**C. The Evidence is Uncontroverted that the Assertion that McDermott Advised Sulzbach that the LCS Contracts Were Illegal is Erroneous**

The Government contends that prior to the July 2006 production of privileged documents, it "lacked evidence that defendant Sulzbach had *personally* and *knowingly* made false statements or *knowingly* caused false claims to be submitted to the United States."<sup>12</sup> (United States' Opp'n to Mot. to Dismiss at 1.) According to the Government, when it finally received the documents in 2006, it learned "for the first time" that Sulzbach "personally knew [her certifications of compliance] were false, because she had been advised that the physician contracts at issue in this case were illegal, and because she subsequently directed that the contracts be revised." (*Id.* at 2.)

As we have already detailed, this "first time" notion, at least in terms of what the Government believed, is belied by the Government's own statements in *Barbera*. But putting that aside, the evidence is uncontroverted that Sulzbach was *never advised that the contracts*

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<sup>12</sup> The privileged documents to which the Government refers are the two draft McDermott Reports and a July 31 memo from Sulzbach to Heinemann directing him to implement some unspecified McDermott "corrective actions" with respect to unspecified Florida physician practices. That memo does not reference any advice from McDermott that any of the contracts were illegal and Heinemann testified that the memo was written to give him political cover with Tenet hospital operations people in his effort to get the contracts restructured. (Heinemann Dep. 101:13-104:10.)

were illegal. Not only does the Government lack such evidence, but, in fact, the evidence is all to the contrary.

According to Don Goldman, the responsible McDermott partner, the so-called McDermott Report was never finalized and never submitted to Tenet. (SOF ¶ 28-29.) More fundamentally, Goldman testified that sufficient work had not been performed for him to have reached a conclusion as to the legality of the LCS contracts.<sup>13</sup> (Goldman Dep. 149:19-154:23.)

The only known substantive conversation between Sulzbach and Goldman about McDermott's analysis was a June 12, 1997 conference call. (SOF ¶ 31.) The other participants to that call, Sulzbach, Heinemann, and Barry Schochet, have no recollection of Goldman ever advising that the contracts were illegal. (SOF ¶ 32.) Indeed, all testified that such advice, if given, would have been helpful to Tenet's efforts to restructure the contracts or simply terminate them altogether. (SOF ¶ 33.)<sup>14</sup>

In sum, for at least six years prior to its receipt of the McDermott Report from Tenet, the Government was aware that when she signed her 1997 and 1998 certifications, Sulzbach was aware of the LCS issues and aware that they had not been disclosed. What the Government now contends was the critical missing link in its case prior to 2006—evidence that McDermott advised her that the contracts were in fact illegal—never happened.

## V. FALSE CLAIMS ACT ARGUMENT

Separate and apart from the fact that this case is time-barred, summary judgment is also called for on the merits because the Government lacks the facts necessary to prove that Sulzbach is liable under the False Claims Act. There is simply no evidence that Sulzbach made any false

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<sup>13</sup> Goldman testified that while Reizen did a good job of raising issues for review in her draft, he believed she often applied incorrect analysis under Stark. For example, Goldman noted that Reizen's analysis overlooked whether the physicians were compensated at fair market value at the time the contracts were formed, but changed economic circumstances led to the later heavy losses. (Goldman Dep. 75-76.) He also took issue with the draft's analysis regarding whether the contracts took into account the value of referral revenues because Reizen failed to highlight an alternative, exonerating interpretation of the regulatory language (which the Final Regulations ultimately adopted (42 C.F.R. § 411.354(d)(2)), and which McDermott later advocated in the *Barbera* case (Transcript of Oral Argument, heard January 13, 2003 in *U.S. ex. rel. Barbera v. Tenet Healthcare Corp.*, Case No. 97-6590, at 49-60, App., Ex. 45)). (*Id.* at 71-72.)

<sup>14</sup> Nor do any of the numerous participants to an in-person meeting concerning the LCS contract issues with Goldman held in Dallas on June 24, 1997 recall Goldman stating then or at any other time that the contracts were illegal. (SOF ¶ 32.)

statements, let alone that she *knowingly* submitted false claims, caused others to present false claims, or made false statements for the purpose of getting false claims paid.

**A. Sulzbach's Certifications of Compliance Cannot Serve as the Grounds for False Claims Act Liability**

The Government contends that in both 1997 and 1998, Sulzbach made false certifications in Tenet's annual compliance reports when she represented, "to the best of [her] information and belief" that Tenet was in "material compliance with its obligations" under the CIA and certain applicable law. However, as a matter of law, such certifications cannot serve as the basis for liability under the False Claims Act.

Courts only impose liability for making false certifications in narrow circumstances where the defendant made a false certification that was an express condition of payment: "[v]iolations of laws, rules, or regulations alone do not create a cause of action under the FCA. It is the false certification of compliance which creates liability *when certification is a prerequisite to obtaining a government benefit.*" *United States ex rel. Siewick v. Jamieson Sci. & Eng'g Inc.*, 214 F.3d 1372, 1376 (D.C. Cir. 2000) (emphasis added). *See also United States ex rel. Conner v. Salina Reg'l Health Ctr., Inc.*, 543 F.3d 1211, 1217-21 (10th Cir. 2008) (holding that a defendant's certifications in annual Medicare cost reports, even if false, could not give rise to FCA liability because those certifications only contained "general sweeping language and do[] not contain language stating that payment is conditioned on perfect compliance with any particular law or regulation").

If general certifications of compliance in annual cost reports—which are directly related to receiving Medicare payments—could not trigger liability in *Conner*, then it is unsurprising that liability cannot be premised on even more generic certifications of compliance in annual compliance reports. On facts almost identical to this case, one court held that false certifications of compliance in annual compliance reports under a corporate integrity agreement are too far removed from the submission of Medicare claims to result in FCA liability:

[T]he Annual reports . . . [are] *separate and distinct from the form related to payment*, the CMS-1500 form. . . . Therefore, *because the CIAs and the Annual Reports are not connected to any claim for payment*, Plaintiffs' allegation that Defendant violated these agreements cannot form the basis of a cause of action under the False Claims Act.

*United States ex rel. Urbanek v. Laboratory Corp. of Am. Holdings, Inc.*, 2003 U.S. Dist. LEXIS 27469, at \*9-12 (E.D. Penn. Aug. 14, 2003) (emphasis added).

Sulzbach's certifications of compliance were clearly not conditions of the Government's payment of any Medicare claims, much less the claims at issue. Thus, even if the Government could prove that Sulzbach's certifications were knowingly false (which it cannot, as detailed below), it still could not prove a recognized theory of liability under the False Claims Act.

**B. The United States Has No Evidence to Support its Claim that Sulzbach Knowingly Violated the False Claims Act**

Even if Sulzbach's certifications could give rise to False Claims Act liability, this case would still fail as a matter of law because the Government cannot prove that the certifications were false, let alone that Sulzbach knew they were false.<sup>15</sup>

The contention that Sulzbach made a false certification of Tenet's compliance with the CIA rests upon a bald presumption that Tenet was obligated under the CIA to disclose the LCS Stark Law issues when they surfaced in the spring of 1997 and that Sulzbach knew it. There is no evidence that Sulzbach caved into corporate pressure to keep the issues secret, that she rejected someone's counsel that disclosure was necessary, or anything else showing that she knew the issues needed to be disclosed but directed that they be withheld. Rather, the Government simply assumes that the LCS issues were so obviously material that Sulzbach had to have known that they must be disclosed. This contention of course ignores both the lack of a formal definition or other guidance as to the meaning of "material" as used in the CIA, and the informal advice received by Sulzbach from OIG, through Steve Davis, on the standard to be applied.

As detailed above, the "material" qualifier for civil disclosures was a negotiated term, not defined in the CIA or the subject of any other official guidance at the time. (SOF ¶ 6, 8.) Documents retrieved from the OIG website indicate that even after Sulzbach made her allegedly false certifications, parties to CIAs were still complaining that the materiality disclosure standard was still "evolving," "subjective," and that there was "no concurrence" with the Government on how to more clearly define and apply the standard. ("Building a Partnership for Effective Compliance" Report (April 2, 1999), at SUL 204.)

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<sup>15</sup> Separate and apart from the "information and belief" language in the certifications, the False Claims Act itself requires proof that the defendant violated the law "knowingly," which is defined under the statute as acting with actual knowledge, deliberate ignorance, or reckless disregard. 31 U.S.C. § 3729(b).

In the face of this uncertainty, Sulzbach sought guidance on how to interpret the CIA by meeting with the OIG official responsible for monitoring Tenet's compliance, Steve Davis. (SOF ¶ 10-11.) Both Sulzbach and Holliday recall that at this meeting Davis agreed it would be appropriate for Tenet to apply the same standard with respect to materiality as the company used with respect to SEC disclosures (SOF ¶ 12), which essentially asks whether a reasonable investor would have considered the issue material to his investing decision. *See TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

Sulzbach explained that the SEC standard made sense because it provided a familiar, objective way to evaluate issues, "[I]t had to do with trying to apply a standard that the company was familiar with; that we had applied, as a publicly traded company, with respect to our disclosure documents. . . . We needed . . . something a little more objective by which to try and implement this Corporate Integrity Agreement. The standard that we . . . all agreed on was a standard that the company was familiar with applying." (Sulzbach Dep. 174:20-175:6.)

Sulzbach further testified that in applying her understanding of the SEC-based standard, she looked beyond the numerical rule of thumb to evaluate the totality of the circumstances: "it's still not wholly objective, and it's not necessarily clearcut because it is an analysis, whether for SEC purposes or these purposes, of the set of facts that present themselves." (Sulzbach Dep. 175:10-175:14.) She further explained:

[I]n terms of dollars, the SEC guidance that we looked to was roughly a 5 percent, I think, of net income type of standard. It's something that could potentially materially adversely impact financial statements. But it wasn't just a dollar figure. It was also whether or not it was something that, as I've stated previously, an investor would want to know before investing in Tenet.

(*Id.* at 183:14-184:22.) Sulzbach's understanding of materiality was *entirely consistent* with SEC guidance, which also calls for a numeric threshold analysis, followed by a broader look at the totality of the circumstances from the perspective of a hypothetical investor. (SEC Staff Accounting Bulletin No. 99 (August 12, 1999), at 2-4, App., Ex. 8.)

When the LCS issues later arose, Sulzbach applied the materiality standard as she understood it based upon her discussion with Davis in determining whether the issues needed to be disclosed under the CIA. Sulzbach concluded that the LCS issues did not rise to the level of materiality that would necessitate disclosure of civil law issues under paragraph 11 of the CIA. As explained by Sulzbach under oath:

[T]he issues that were presented there were issues related to a discrete group of doctors at . . . primarily one hospital in the Tenet system, which consisted of over a hundred – maybe upwards of 130 hospitals, that didn't, in my analysis, equate to the type of disclosure that a reasonable investor would want to know about Tenet before investing. And it didn't appear to represent a set of circumstances that could result in a material adverse impact on the company's financial statements. That was my understanding of the materiality standard, and the issues that were presented by that group of doctors just did not reach that threshold.

(*Id.* at 173:12-174:2.)

Steve Davis' non-specific belief that at the time he met with Sulzbach, "I didn't know how to define material," is hardly helpful to the Government. (Davis Dep. 67:12-68:7.) If accepted, it would simply mean that the Government expects this Court to find that Sulzbach made a knowing false statement based on her interpretation of a materiality standard that was "still being developed" (*Id.* 61:17-62:4), and that could not be defined by the person who was responsible for providing definitional guidance to Tenet.

As the Supreme Court and other courts have held, a defendant who acts based on a reasonable interpretation of unclear statutory, regulatory, or contractual obligations cannot be deemed to have knowingly violated such obligations as a matter of law. In *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47 (2007), the Supreme Court recently evaluated the Fair Credit Reporting Act's nearly identical *scienter* provision and held that where "the statutory text and relevant court and agency guidance allow for more than one reasonable interpretation, it would defy history and current thinking to treat a defendant who merely adopts one such interpretation as a knowing or reckless violator." *Id.* at 70 n. 20. Noting that the FTC and courts had not offered guidance "that might have warned [defendant] away from the view it took," the Court explained that "[g]iven this dearth of guidance and the less-than-pellucid statutory text, [defendant's] reading was not objectively unreasonable, and so falls well short of raising the 'unjustifiably high risk' of violating the statute necessary for reckless liability."<sup>16</sup> *Id.* at 70.

Subsequent federal courts, including the D.C. Circuit, have applied the *Safeco* principle to cases involving the False Claims Act and held that parties cannot knowingly submit false claims when they act based on a reasonable interpretation of their legal obligations. *See, e.g.*

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<sup>16</sup> Despite the parties' dispute as to the defendant's obligations under the correct interpretation of the FCRA, the Court held that there was no need to remand for factual development given that there was no dispute as to whether the defendant's reading of the statute was unreasonable. *Id.* at 71.

*United States ex rel. K & R Ltd. P'ship v. Mass. Hous. Fin. Agency*, 530 F.3d 980, 983 (D.C. Cir. 2008) (finding that the plaintiff failed to prove the defendant's interpretation of ambiguous mortgage note terms was objectively unreasonable and the defendant therefore could not have knowingly submitted false claims); *United States ex rel. Pritsker v. Sodexho, Inc.*, 2009 U.S. Dist. LEXIS 51469, at \*53-54 (E.D. Penn. Mar. 6, 2009) ("[t]he lack of clarity regarding the proper interpretation of the regulations indicates that no basis exists for imposing FCA liability on Defendants, who merely adopted a reasonable interpretation of the regulatory requirements that favored their interests"). Numerous FCA cases preceding *Safeco* applied the same principle and held that because the FCA requires "the knowing presentation of what is known to be false," a legal dispute under a statute or contract cannot give rise to knowing misconduct.<sup>17</sup>

There is no contemporaneous guidance from HHS contradicting Sulzbach's understanding of materiality and Tenet's reporting obligations.<sup>18</sup> What can the Government point to "that might have warned [Sulzbach] away from the view [she] took"? *Safeco*, 551 U.S. at 70. In the face of ambiguous contract provisions, a dearth of agency guidance on the issue, and the "I didn't know how to define material" recollection of the person charged with providing guidance to Tenet, how can the Government possibly now contend that Sulzbach's interpretation was objectively unreasonable—especially when the first official guidance from HHS explicitly referenced the very position Sulzbach relied on? It cannot and the Government's case thus necessarily fails on the merits for failure to prove knowing misconduct.

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<sup>17</sup> *Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1478-79 (9th Cir. 1996) ("to take advantage of a disputed legal question, as may have happened here, is to be neither deliberately ignorant nor recklessly disregardful"); accord *United States ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 377 (4th Cir. 2008) ("the question of whether [defendant] performed . . . under the contract represents, at the very least, 'a disputed legal question' . . . . This is precisely the sort of claim that courts have determined not to be a false statement under the FCA."); *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1018 (7th Cir. 1999) ("imprecise statements or differences in interpretation growing out of a disputed legal question are similarly not false under the FCA"); *United States v. Southland Mgmt. Corp.*, 326 F.3d 669, 682 (5th Cir. 2003) (E. Jones concurring) ("where disputed legal issues arise from vague provisions or regulations, a contractor's decision to take advantage of a position can not result in his filing a 'knowingly' false claim").

<sup>18</sup> In fact, when guidance was finally published in 2002 in the OIG website FAQs, when discussing how parties to CIAs should evaluate materiality, OIG referred readers to the SEC Staff Accounting Bulletin that discussed the SEC standard. (SOF ¶ 8; OIG Frequently Asked Questions (July 19, 2002), at SUL 000218 (citing SEC Staff Accounting Bulletin No. 99 (August 12, 1999))).

**C. The United States Lacks Evidence Necessary to Prove the Elements of the FCA Causes of Action Plead**

**1. There is No Evidence That Sulzbach Caused the Presentment of False Claims under § 3729(a)(1)**

When evaluating whether a defendant caused others to present false claims under (a)(1), the courts apply a strict proximate causation test to "determine whether there is a sufficient nexus between the conduct of the party and the ultimate presentation of the false claim to support liability under the FCA." *United States ex rel. Sikkenga v. Regence Bluecross Blueshield*, 472 F.3d 702, 714 (10th Cir. 2006); *see also United States ex rel. Bane v. Breathe Easy Pulmonary Services, Inc.*, 597 F. Supp. 2d 1280, 1291 (M.D. Fla. 2009) (holding that "the element of causation under the FCA requires more than a broad 'but for' test"). This test acts to "winnow[] out those claims with only attenuated links between the defendants' specific actions and the presentation of the false claim." *Sikkenga*, 472 F.3d at 714. Because there must be evidence that the defendant's "specific conduct *causes* the presentment of a false claim," "mere passive acquiescence" or "merely failing to prevent the fraudulent acts of others" is not grounds for liability. *Id.* at 714-15 (emphasis in original).

In *Breathe Easy*, the Middle District of Florida held that there was insufficient evidence of a "strong and direct causal link between the defendant's actions and the submission of the false claim" when the defendant was allegedly aware of the fraudulent conduct but had "no *control* over . . . claims procedures, gave no *suggestion* or *instruction* to [the entity that presented the claims] regarding its Medicare submissions, and in no way *participated* in . . . the submission of bills to Medicare." *Breathe Easy*, 597 F. Supp. 2d at 1292 (emphasis added).<sup>19</sup>

The claims that the Government alleges were falsely submitted to Medicare for payment were presented by employees of North Ridge, one of Tenet's approximately 130 operating hospitals in 1997. Sulzbach had no involvement in the submission of Medicare claims by the

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<sup>19</sup> *See also United States ex rel. Piacentile v. Wolk*, 1995 U.S. Dist. LEXIS 580, at \*10-11 (E.D. Pa. Jan. 13, 1995) (section (a)(1) "requires both knowledge of a claim's falsity and some action by the defendant which causes the claim to be presented to the government. . . . Mere inaction is not enough"); *United States v. President & Fellows of Harvard College*, 323 F. Supp. 2d 151, 188 (D. Mass. 2004) (holding that FCA liability is only appropriate when individuals were "engaged in the claims process" and denying liability as to officer who "did not take any actions to have claims submitted to the government"); *United States v. Safe Env't Corp.*, 2002 WL 976033, at \*3 (N.D. Ill. May 10, 2002) (dismissing case against corporate officer who "may have played some role in the underlying fraud" because there was no evidence he had "participated in any way in the presentation of a false claim").

hospitals generally, let alone the specific claims at issue in this case. (SOF ¶ 48.) Nor is there any evidence that Sulzbach's alleged misconduct, even if true, *caused* North Ridge to present false claims, or that Sulzbach "controlled," "instructed," "participated" with, or otherwise influenced those who were responsible for submitting the claims.<sup>20</sup>

**2. There is No Evidence That Sulzbach Made False Statements for the Purpose of Getting False Claims Paid Under § 3729(a)(2)**

Under § 3729(a)(2) the Government must prove that Sulzbach knowingly made false statements *for the purpose of getting false claims paid by the Government*.<sup>21</sup> In *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123 (U.S. 2008), the Supreme Court clarified that the "to get" language of (a)(2) requires evidence of a defendant's purpose:

we hold that it is insufficient for a plaintiff asserting a § 3729(a)(2) claim to show merely that "[t]he false statement's use . . . result[ed] in obtaining or getting payment or approval of the claim," . . . or that "government money was used to pay the false or fraudulent claim[.]" Instead, a plaintiff asserting a § 3729(a)(2) claim must prove that the defendant *intended that the false record or statement be material to the Government's decision to pay* or approve the false claim.

128 S. Ct. at 2126 (internal citations omitted) (emphasis added). Thus, the FCA only imposes liability for false statements that are specifically targeted at securing payment from the Government: "[i]f a . . . defendant makes a false statement . . . and *does not intend the Government to rely on that false statement as a condition of payment*, the statement is not made with the purpose of inducing payment of a false claim." *Id.* at 2130 (emphasis added).<sup>22</sup>

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<sup>20</sup> Furthermore, as noted above, false certifications of compliance in annual compliance reports are too far removed from the submission of Medicare claims to trigger FCA liability for causing others to present false claims. See *Urbanek*, 2003 U.S. Dist. LEXIS 27469, at \*9-12.

<sup>21</sup> The vast majority of the claims for which the Government seeks recovery were submitted *before* the first of the two purportedly false certifications was made. Thus, there can be no conceivable (a)(1) or (a)(2) liability for these claims.

<sup>22</sup> Following *Allison Engine's* narrow construction of (a)(2), subsequent courts have dismissed actions against defendants who did not specifically intend the Government to rely on their allegedly false statements as a condition of payment. See, e.g., *Breathe Easy*, 597 F. Supp. 2d at 1292 (noting that there was no evidence the Government had "relied on the [defendant's allegedly falsified] order form as a condition of payment, or that the defendant was more than passively aware of the submission of false claims"); *United States ex rel. Thomas v. Bailey*, 2008 U.S. Dist. LEXIS 91221 (E.D. Ark. 2008) (dismissing case against defendant who had allegedly created a sham consulting agreement with a physician who was violating the Anti-Kickback Statute because there was no proof the sham agreement was made for the purpose of getting claims paid); *United States ex rel. Sterling v. Health Ins. Plan of Greater New York, Inc.*, 2008 WL 4449448 (S.D.N.Y. 2008) (rejecting claims against a defendant who had allegedly falsified data to an accreditation agency to remain eligible to receive

[Footnote continued on next page]

Even assuming that the Government could show that Sulzbach's annual compliance report certifications were false statements and that they were knowingly false, the Government does not have a shred of evidence that she made the certifications *for the purpose of getting North Ridge claims paid*, false or otherwise. There are no documents or testimony that indicate Sulzbach was in any way aware of or concerned about referral revenues from the LCS physicians. There is no evidence that the Government relied on her certifications as a "condition of payment." To the contrary, there is substantial evidence that Sulzbach was involved in Tenet's efforts to terminate or restructure the agreements the Government claims gave rise to false claims, even at the risk of *alienating* the very doctors whose referral revenues give rise to the damages claimed by the Government. (Heinemann Dep. 101:15-104:10; Memorandum from Jeff Heinemann to Christi Sulzbach (August 28, 1997), at 2, 4, App., Ex. 46; Email from Jeff Heinemann to Don Steigman (November 5, 1997, 4:01 p.m.), App., Ex. 47.)

**3. There is No Evidence That Sulzbach Made False Statements to Avoid an Obligation to the United States Under § 3729(a)(7)**

Under § 3729(a)(7), which prohibits what are commonly referred to as "reverse false claims," the Government must prove that Sulzbach knowingly made false statements or records for the purpose of concealing an obligation to the United States. As was true with respect to section (a)(2), there is absolutely no evidence of any sort in this case that Sulzbach made her certifications *for the purpose of concealing* a financial obligation to the United States.

Furthermore, courts have consistently held that mere contingent obligations arising out of statutory or regulatory violations do not constitute "obligations" sufficient to trigger (a)(7) liability. *See, e.g., Am. Textile Mfrs. Inst. Inc. v. The Limited, Inc.*, 190 F.3d 729, 741 (6th Cir. 1999) (while (a)(7) encompasses firm obligations "arising from acknowledgments of indebtedness, final judgments, and breaches of government contracts," the provision "certainly does *not* include those contingent obligations that arise only because the government has

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government contracts because the plaintiff "must show that [the defendant] made the false statements with the intent that the Government would rely on the statement as a condition of payment").

prohibited an act, or [obligations that arise only] after the exercise of government discretion.") (emphasis added).<sup>23</sup>

In addition, even if Tenet had disclosed Bennett's LCS contract concerns, it would have been entirely discretionary for the United States to seek reimbursement.<sup>24</sup> *See, e.g. United States ex rel. Conner v. Salina Regional Health Center, Inc.*, 543 F.3d 1211, 1221 (10th Cir. 2008) (noting that there are "no regulations or case law indicating that the government normally seeks retroactive recovery of Medicare payments for services actually performed on the basis that the noncompliance rendered them fraudulent").

Clearly, Tenet (much less Sulzbach) owed no "fixed obligation" when Sulzbach made her certification. Determining whether any of the LCS contracts violated the Stark Law required resolution of issues of statutory construction, in addition to intensive factual analysis of issues such as a determination of the fair market value of each physician's compensation and the commercial reasonableness of the employment of the physicians by North Ridge. Those factual and legal issues, which have resulted in two hotly-contested lawsuits, have necessitated the employment of experts by both sides, whose opinions differ in dramatic ways. The Government itself has had a difficult time concluding which contracts it believes are illegal—doctors whose contracts were part of the damages claim in the *Barbera* case are not at issue in this case. And even the Government's damages witness admits that some of the damages claimed are based on estimates. (Hilton Dep. 15:20-16:7, September 10, 2009, App., Ex. 48.) In the face of so much uncertainty, disagreement, and discretion, there plainly was no "fixed obligation" sufficient to impose liability under (a)(7).

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<sup>23</sup> *See also United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1267 (9th Cir. 1996); *accord United States v. Q Int'l Courier, Inc.*, 131 F.3d 770, 773 (8th Cir. 1997) ("[h]ad Congress wished [(a)(7)] to cover attempts to avoid *potential* fines or sanctions it would have used language appropriate to that end") (emphasis in original). At heart, to constitute an obligation under (a)(7), the debt "must be for a *fixed sum* that is *immediately due*." *Q Int'l Courier*, 131 F.3d at 774 (emphasis added).

<sup>24</sup> Numerous courts have held that the prosecutorial discretion inherent in the Government's punishment of regulatory violations renders any repayment obligations too contingent to trigger (a)(7) liability. *See, e.g., United States ex rel. Conner v. Salina Regional Health Center, Inc.*, 459 F. Supp. 2d 1081, 1091 (D. Kan. 2006) ("Moreover, any potential liability for future fines or sanctions at some indefinite point in the future for some unknown amount is not an 'obligation to pay' under 31 U.S.C. § 3729(a)(7). [D]efendant's 'potential liability' is unknown and indefinite and is not an 'obligation to pay' under § 3729(a)(7)."), *aff'd in relevant part, United States ex rel. Conner v. Salina Reg'l Health Ctr., Inc.*, 543 F.3d 1211 (10th Cir. 2008); *United States ex rel. Marcy v. Rowan Cos., Inc.*, 520 F.3d 384, 391 (5th Cir. 2008) ("even when a statute requires immediate action from a violator, the government must still choose whether to impose a penalty"); *United States ex rel. Romanosky v. Aggarwal*, 2005 U.S. Dist. LEXIS 46098, at \*22-27 (M.D. Fla. Feb. 20, 2005).

**VI.  
CONCLUSION**

Based on all of the foregoing, summary judgment in favor of the Defendant should be granted.

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 30, 2009, I electronically filed the foregoing document with the Clerk of Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List via transmission of Notices of Electronic Filing generated by CM/ECF.

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