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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA ex rel.
STEVEN MATESKI,

Plaintiff,

and

STEVEN MATESKI,

Plaintiff-Relator-Appellant,

v.

RAYTHEON COMPANY,

Defendant-Appellee.

No. 17-56320

D.C. No.

2:06-cv-03614-ODW-KS

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Otis D. Wright II, District Judge, Presiding

Argued and Submitted December 5, 2018
Seattle, Washington

Before: GRABER, McKEOWN, and CHRISTEN, Circuit Judges.

Relator Steven Mateski worked for Defendant Raytheon Company from
2002 to 2006. Thereafter, he filed this action under the False Claims Act ("FCA"),

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

alleging that Raytheon received payments from the United States through a scheme of falsely claiming compliance with applicable contracts related to a sensor for a satellite system and covering up Raytheon's non-compliance. The United States investigated Relator's claims for several years but decided not to intervene. After a remand from this court, United States ex rel. Mateski v. Raytheon Co., 816 F.3d 565 (9th Cir. 2016), which rejected the ground on which the district court had dismissed the 134-page fourth amended complaint, the district court again dismissed that complaint, without prejudice, but on different grounds: failure to allege falsity and lack of a coherent and concise pleading. Relator filed a nine-page fifth amended complaint, which the district court dismissed with prejudice for failure to plead falsity and failure to plead materiality. Relator timely appeals. Reviewing de novo, Lloyd v. CVB Fin. Corp., 811 F.3d 1200, 1205 (9th Cir. 2016), we affirm.

Under Federal Rule of Civil Procedure 8(a), the factual allegations in a complaint, accepted as true, must state a claim for relief that is plausible on its face. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). In addition, for allegations of fraud, including FCA claims, Federal Rule of Civil Procedure 9(b) requires that the allegations be pleaded with particularity. Ebeid ex rel. United States v. Lungwitz, 616 F.3d 993, 996 (9th Cir. 2010). "Averments of fraud must be accompanied by

the who, what, when, where, and how of the misconduct charged." Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003) (internal quotation marks omitted). Among the elements that a relator must show to establish an FCA claim are (1) a false statement or fraudulent course of conduct (2) that is material to the government's decision to pay. United States ex rel. Rose v. Stephens Inst., No. 17-15111, 2018 WL 6165627, at *4 (9th Cir. Nov. 26, 2018).

Under that standard, the fifth amended complaint fails to satisfy the particularity requirement with respect, at least, to the "what," "when," and "how" of the allegedly false claims. As one example, in paragraph 9(a) Relator alleges that Raytheon "failed to perform complete tests and retests of component parts and of assembled hardware in violation of" two contractual requirements. Which tests? Which component parts? Were no tests done, or were they done incompletely? The allegations cover the period 2002 to 2010; without knowing which tests and approximately when they were performed, Raytheon does not have enough information to defend against the claims.

Similarly, with respect to materiality, the fifth amended complaint is wanting under the "demanding" standard established by the Supreme Court. Universal Health Servs., Inc. v. United States ex rel. Escobar, 136 S. Ct. 1989,

2002–03 (2016). Without more particularity regarding the false claims, we cannot assess whether noncompliance was material or minor.

Accordingly, we hold that the fifth amended complaint does not meet the demands of Rule 9(b). Relator has not sought, either in the district court or here, leave to file a sixth amended complaint. In view of our disposition of the case, we need not address Relator’s request for reassignment to a different judge.

AFFIRMED.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
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Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
Form 10. Bill of Costs**

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form10instructions.pdf>

9th Cir. Case Number(s)

Case Name

The Clerk is requested to award costs to (*party name(s)*):

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