In the
United States Court of Appeals
for the Second Circuit

August Term 2025
Argued: June 9, 2026
Decided: August 28, 2026

No. 25-2950

UNITED STATES OF AMERICA EX REL PATSY GALLIAN, INDIVIDUALLY,
Plaintiff-Appellant,

THE STATE OF ALABAMA, CALIFORNIA, CONNECTICUT, COLORADO, DELAWARE, FLORIDA, GEORGIA, HAWAII, ILLINOIS, INDIANA, IOWA, LOUISIANA, KANSAS, MARYLAND, MINNESOTA, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, OKLAHOMA, RHODE ISLAND, TENNESSEE, TEXAS, VERMONT, WASHINGTON, EX REL PATSY GALLIAN, COMMONWEALTH OF KENTUCKY, MASSACHUSETTS, PENNSYLVANIA, VIRGINIA EX REL PATSY GALLIAN, DISTRICT OF COLUMBIA, EX REL PATSY GALLIAN,
Plaintiffs,

v.

AMERISOURCEBERGEN CORPORATION, AMERISOURCEBERGEN SPECIALTY GROUP, US BIOSERVICES CORPORATION, DBA ENTITIES, JANE DOE AND JOHN DOE,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of New York
No. 16-cv-2458, Eric N. Vitaliano,
District Judge.

Before: LYNCH, NARDINI, and PÉREZ, *Circuit Judges*.

Gallian asserts claims under the False Claims Act, 31 U.S.C. §§ 3729–3732, against AmerisourceBergen Corporation, AmerisourceBergen Specialty Group, and US Bioservices Corporation. Broadly speaking, Gallian alleges that Appellees overcharged various government healthcare programs, hid those overpayments in their internal systems, and eventually converted the overpayments to revenues.

First, we hold that Gallian has failed to satisfy the pleading requirements of Fed. R. Civ. P. 9(b) with respect to her "direct" claims under 31 U.S.C. § 3729(a)(1)(A)–(B). Gallian failed to identify specific misrepresentations to the government, nor did she adequately allege that the information she needs to make such specific allegations is peculiarly in the hands of Appellees. Second, we hold that Gallian has sufficiently alleged a "reverse" FCA claim under 31 U.S.C. § 3729(a)(1)(G). The operative complaint details overpayments made by the government and transferred to US Bio revenues, despite US Bio's obligation to notify the government of such overpayments. Finally, we conclude that the District Court did not abuse its discretion in denying leave to amend with regard to Gallian's claims under 31 U.S.C. § 3729(a)(1)(A)–(B).

Therefore, we **AFFIRM** the judgment of the District Court to the extent it dismissed Gallian's claims pursuant to 31 U.S.C. § 3729(a)(1)(A)–(B), **VACATE** the judgment to the extent it dismissed Gallian's claim under 31 U.S.C. § 3729(a)(1)(G), and **REMAND** for further proceedings consistent with this opinion.

CATHERINE C. JOBE, Boyd & Associates, Dallas, TX, *for Plaintiff-Appellant.*

JAMES D. NELSON (Eric W. Sitarchuk, *on the brief*), Morgan, Lewis & Bockius LLP, Philadelphia, PA, Washington, DC, *for Defendants-Appellees*.

MYRNA PÉREZ, *Circuit Judge*:

Broadly speaking, Plaintiff-Appellant Patsy Gallian alleges that Defendants-Appellees AmerisourceBergen Corporation, AmerisourceBergen Specialty Group, and US Bioservices Corporation (collectively "US Bio")[1] overcharged various government healthcare programs, hid those overpayments in internal systems, and eventually converted the overpayments to revenues. Gallian brought claims under the False Claims Act, 31 U.S.C. §§ 3729–3732 ("FCA"), against US Bio.

By way of summary and as relevant here, FCA claims fall into two categories. "Direct" FCA claims under 31 U.S.C. § 3729(a)(1)(A)–(B) target fraudulent misrepresentations made to the government. "Reverse" FCA claims under 31 U.S.C. § 3729(a)(1)(G) instead cover allegations that a defendant owes the government money.

---

[1] Gallian's factual allegations focus on US Bioservices Corporation's conduct; the other Defendants-Appellees are merely alleged to have provided "instructions" to US Bioservices Corporation and knowingly "acquiesce[d]" to the purported scheme. *See* App'x at 25. Such broad and conclusory allegations of the other parties' involvement, alone, would be insufficient to state a claim under any pleading standard. But Gallian plausibly alleges that Defendants-Appellees are alter egos of one another, *see* App'x at 69, and where such a relationship is alleged (*i.e.*, a relationship that attributes the acts of one defendant to the others), even Rule 9(b) does not require plaintiffs to allege a "specific connection between [the fraud] . . . and particular defendants." *See Luce v. Edelstein*, 802 F.2d 49, 55 (2d Cir. 1986). Therefore, our decision to vacate the dismissal of the reverse FCA claim applies to all Defendants-Appellees. *See, e.g.*, *United States v. Dynamic Visions Inc.*, 971 F.3d 330, 339 (D.C. Cir. 2020) (applying alter ego theory to sustain FCA liability); *United States v. LabQ Clinical Diagnostics, LLC*, Nos. 22-cv-10313, 22-cv-751, 2026 WL 787460, at *21 (S.D.N.Y. Mar. 20, 2026) (permitting FCA claims premised on alter ego theory to survive the pleadings stage); *United States ex rel. Rubar v. Hayner Hoyt Corp.*, 306 F. Supp. 3d 478, 484–85 (N.D.N.Y. 2018) (same). Because the claims against each of the Defendants-Appellees rise and fall as one, we use "US Bio" to refer to all Defendants-Appellees throughout this opinion.

First, we hold that Gallian has failed to satisfy the pleading requirements of Fed. R. Civ. P. 9(b) with respect to her direct FCA claims. Gallian did not identify specific misrepresentations to the government, nor did she allege that the information she needed to make such specific allegations was peculiarly in the hands of US Bio.

Second, we hold that Gallian has stated a reverse FCA claim. The operative complaint details overpayments made by the government and transferred to US Bio revenues, despite US Bio's obligation to notify the government of such overpayments.

Finally, we conclude that the District Court did not abuse its discretion in denying leave to amend with regard to Gallian's claims under 31 U.S.C. § 3729(a)(1)(A)–(B). We therefore **AFFIRM** the judgment of the District Court to the extent it dismissed Gallian's direct FCA claims pursuant to 31 U.S.C. § 3729(a)(1)(A)–(B), **VACATE** the judgment to the extent it dismissed Gallian's reverse FCA claim under 31 U.S.C. § 3729(a)(1)(G), and **REMAND** for further proceedings consistent with this opinion.

BACKGROUND

I. Allegations

US Bio is a nationwide full-service pharmacy.[2] Gallian began working at US Bio as a Reimbursement Manager and was later promoted to Senior Reimbursement Manager. Her duties included "pharmacy benefit management billing (PBM), commercial billing, collections, posting payments to patient accounts, and customer service." *See* App'x at 47.

While performing this role, Gallian "discovered that Defendants knowingly and intentionally presented false or fraudulent claims and concealed overpayments from . . . various Government Agencies, programs and Part D Medicare plans" in connection with various government health programs. *Id.* (emphasis omitted). Specifically, US Bio engaged in what can be described as a three-step scheme.

A. Step One – Obtaining Overpayments

First, US Bio used several methodologies to make the government pay more than what it owed in connection with various health programs.

---

[2] The facts are drawn from the operative complaint and are accepted as true for purposes of our review. *See Schiebel v. Schoharie Cent. Sch. Dist.*, 120 F.4th 1082, 1092 (2d Cir. 2024).

To start, US Bio took advantage of discrepancies between the functioning of its own and the government's billing management systems, which led to overpayments. For example, when US Bio would bill for "30.0" days of a particular service or prescription, the government's system "reflected 300 because their systems did not recognize decimal points." *See id.* at 49. US Bio "knew [about the decimal problem] . . . by virtue of the consistently gross overpayments." *See id.* Gallian also informed her supervisor of the decimal problem, but the issue "was never corrected during [her] employment." *See id.* at 50.

Additionally, "[US Bio] routinely billed for medications for patients who either no longer used the medication or had died." *Id.* Gallian alerted an internal auditor to this practice, but she "was never advised whether [the auditor] ever investigated or resolved the issue." *See id.* Stefani Forsyth, Vice President of Finance at US Bio, approved the practice. *See id.*

After US Bio shifted to new billing software in 2013, US Bio was improperly coded as a "long-term care pharmacy" rather than as a "retail pharmacy." *See id.* at 64 (emphasis omitted). This miscoding led to reimbursements at "materially higher rates." *See id.* (emphasis omitted). Gallian informed the Director of Regulatory Affairs and the compliance department about the issue, but to her knowledge, "the Government was never notified, nor refunded the money arising from the . . . inflated U.S. Bio billings as a long-term pharmacy." *See id.* at 65.

US Bio also overcharged the government for certain drugs: specifically, a drug called Carticel. *See id.* at 44. When Gallian "discovered the Carticel overcharges, she alerted her supervisor," but the overcharges continued. *See id.* at 45.

Finally, US Bio took advantage of the "eligibility check" process, pursuant to which the pharmacy would place an order for a drug solely to check its price. *See id.* at 67. If a patient chose not to purchase a drug after the eligibility check, US Bio nevertheless sometimes treated the orders created as live orders and billed the government accordingly. *See id.* Gallian reported the eligibility check issue, but it was never resolved. *See id.* at 68.

B. Step Two – Hiding and Retaining Overpayments

Second, US Bio retained the funds it received via overpayments as revenue rather than reimbursing the government. Specifically, US Bio internally marked funds owed to the government as "payer processing error[s]" to avoid detection by internal and external auditors. *See id.* at 52. After 18 months, if the government did not come calling, the mislabeled overpayments were transferred to US Bio's own revenues at the request of upper management in a process called a "pickup." *See id.* at 56.

This process was not accidental. Gallian raised the issue, but she was informed that the "practice had been cleared by . . . management." *See id.* Indeed, the Director of Reimbursement would send out emails requesting "pickups" whenever US Bio needed more cash. *See id.*

Gallian reported the pickup practice to the internal auditor, the Senior Vice President of Corporate Security and Regulatory, and a representative from Corporate Compliance and Regulatory. After her report, an internal audit of thirty files showed that nine government overpayments had been moved into US Bio's revenues. Despite the internal audit confirming Gallian's report, no changes were made, as she "continued to observe the . . . credits/overpayments violations." *See id.* at 60.

C. Step Three – Covering Up the Scheme

Third, US Bio falsely certified its compliance with various requirements to participate in government health programs. Despite overcharging the government and keeping overpayments for itself, US Bio certified that it was following all applicable statutes and regulations. This practice "fraudulently induced the United States . . . to contract with and make payments to [US Bio]." *See id.* at 70.

II. Procedural History

Gallian filed her original complaint detailing this scheme in May 2016 and amended it in November 2019.

US Bio then filed a pre-motion conference letter describing the arguments it planned to raise in a forthcoming motion to dismiss. In response, Gallian asserted counterarguments and offered to "add . . . allegations" but only "[t]o the extent, if any, the Court should require." *See United States ex rel. Gallian v. AmerisourceBergen Corp. et al.*, No. 16-cv-2458 (E.D.N.Y.), Dkt. No. 55 at 2. Weeks later, Gallian filed a separate motion for leave to amend, but solely to excise the claims brought on behalf of Kentucky. The District Court granted leave to file a second amended complaint, and like the first amended complaint, it raised claims under the FCA pertaining to US Bio's alleged scheme to overcharge the government and retain overpayments as profit.

After an additional round of pre-motion conference letters, the District Court granted US Bio's motion to dismiss in its entirety and dismissed all of Gallian's federal claims with prejudice. *See United States ex rel. Gallian v.*

AmerisourceBergen Corp., No. 16-cv-2458, 2022 WL 20611664, at *8 (E.D.N.Y. Dec. 22, 2022). Gallian sought reconsideration, which the District Court denied. *See United States ex rel. Gallian v. AmerisourceBergen Corp.*, No. 16-cv-2458, 2025 WL 3455578 (E.D.N.Y. Oct. 17, 2025). This timely appeal followed. *See* Fed. R. App. P. 4(a)(4).

DISCUSSION

Our review is de novo, and we take plaintiffs' well-pleaded factual allegations to be true. *See United States ex rel. Foreman v. AECOM*, 19 F.4th 85, 104 (2d Cir. 2021) (quoting *Mirkin v. XOOM Energy, LLC*, 931 F.3d 173, 176 (2d Cir. 2019)); *see also United States ex rel. Chorches for Bankr. Est. of Fabula v. American Med. Response, Inc.*, 865 F.3d 71, 78 (2d Cir. 2017).

Gallian's claims are brought under the FCA. Generally, "[t]he FCA 'imposes significant penalties on those who defraud the Government.'" *See Miller v. United States ex rel. Miller*, 110 F.4th 533, 541 (2d Cir. 2024) (quoting *Universal Health Servs., Inc. v. United States,* 579 U.S. 176, 180 (2016)). "Both the government and private parties may enforce the FCA. Private parties, called relators, do so by filing civil *qui tam* actions 'in the name of the Government.'" *Id.* (quoting *Chorches*, 865 F.3d at 81).

Part of the FCA, specifically 31 U.S.C. § 3729(a)(1)(A), establishes liability for any person who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval." Relatedly, 31 U.S.C. § 3729(a)(1)(B) imposes liability on any person who "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim." We refer to these provisions, often considered together due to their overlapping elements, as establishing "direct" FCA claims. *Cf. United States ex rel. Chiles v. Cooke Inc.*, ---- F.4th ----, 2026 WL 2249270, at *2 (2d Cir. Aug. 5, 2026) (explaining that "[t]o establish a claim under either subsection, a relator must show" the same elements); *United States v. Strock*, 982 F.3d 51, 58–59 (2d Cir. 2020) (discussing the provisions together).

In addition to imposing liability on those that directly make fraudulent claims for payment to the government, the FCA also establishes liability for

> (1) "knowingly mak[ing], us[ing], or caus[ing] to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government," (2) "knowingly conceal[ing] . . . an obligation to pay or transmit money or property to the Government," and (3) "knowingly and improperly avoid[ing] or decreas[ing] an obligation to pay or transmit money or property to the Government."

See Miller, 110 F.4th at 542 (quoting 31 U.S.C. § 3729(a)(1)(G)). In simpler terms, this provision, known as the "reverse false claim provision, . . . 'covers claims of money *owed* to the government, rather than payments *made* by the government.'" *See id.* (quoting *Foreman*, 19 F.4th at 119).

I. <u>Direct FCA Claims Under 31 U.S.C. § 3729(a)(1)(A)–(B)</u>

First, we affirm the District Court's dismissal of Gallian's direct FCA claims brought under 31 U.S.C. § 3729(a)(1)(A)–(B).

A. Applying Rule 9(b) to Direct FCA Claims

Direct FCA claims sound in fraud and trigger the heightened pleading standard of Rule 9(b). *See United States ex rel. Ladas v. Exelis, Inc.*, 824 F.3d 16, 26 (2d Cir. 2016). Generally, Rule 9(b) requires that a plaintiff "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Id.* at 25 (quoting *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994)). But Rule 9(b)'s precise requirements in a given case will vary.

In some direct FCA cases, for example, Rule 9(b) demands only that a plaintiff "who *can*" allege the "specific identified false invoices submitted to the government" do so. *See Chorches*, 865 F.3d at 86. In keeping with the "case-by-case approach" taken by our sister circuits, *see id.* at 89–90 (discussing cases in other circuits and concluding that reports of a circuit split are "greatly exaggerated" and that the cases reflect a "nuanced" and "case-by-case" approach), application of Rule 9(b) in this Circuit is subject to important caveats.

First, as hinted at above, we have expressly "decline[d] to require" the showing of specific misrepresentations in every case. *See id.* at 86. Instead, our holding in *Chorches* allows claims to move forward absent specific documentation so long as the plaintiff "make[s] plausible allegations creating a strong inference that specific false claims were submitted to the government and that the information that would permit further identification of those claims is peculiarly within the opposing party's knowledge." *See id.*

Second, even where a plaintiff has not met the twin requirements set forth in *Chorches* for triggering a softer standard, Rule 9(b) cannot be understood as requiring that a complaint specifically identify *every* alleged instance of fraudulent conduct where a broad scheme is alleged. In such cases, we have thus far refrained from deciding whether a "representative sample" is sufficient, or whether a plaintiff must allege "every instance of fraudulent conduct" with the requisite specificity. *See United States ex rel. Camburn v. Novartis Pharms. Corp.*, 124 F.4th 129, 136 n.2 (2d Cir. 2024). Today, we join several of our sister circuits in expressly holding that for FCA claims involving fraudulent misstatements, "where a relator pleads a complex and far-reaching fraudulent scheme with particularity, and provides *examples* of specific false claims submitted to the government pursuant to that scheme, a relator may proceed to discovery on the entire fraudulent scheme." *See United States ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 501 F.3d 493, 510 (6th Cir. 2007) (emphasis added); *United States ex rel. Joshi v. St. Luke's Hosp., Inc.*, 441 F.3d 552, 557 (8th Cir. 2006) (noting that "neither this court nor Rule 9(b) requires [the plaintiff] to allege specific details of *every* alleged fraudulent claim" but instead the rule simply requires "*some* representative examples"); *United States ex rel. Clausen v. Lab'y Corp. of America, Inc.*, 290 F.3d 1301, 1308, 1312 n.21 (11th Cir. 2002) (clarifying that its holding does not "ask[] for the impossible" and that Rule 9(b) merely requires some details for "some of the claims"). Such examples provide the "fair notice" that is the central concern of Rule 9(b). *See Strock*, 982 F.3d at 66 n.7 (quoting *Chorches*, 865 F.3d at 86).

B. Gallian's Direct FCA Allegations Do Not Suffice Under Rule 9(b)

Despite detailing the overarching mechanics of US Bio's scheme, Gallian does not argue that she has identified a specific example of a false invoice submitted *to the government* in support of any of her direct FCA theories. *See*

Appellant Br. at 21 (claiming only that Gallian has identified "claims for payment . . . *entered in [US Bio's] electronic systems of record*" (emphasis added)); *see Gallian*, 2022 WL 20611664, at *5 (noting Gallian's concession that she "does not possess physical examples of [d]efendants' false claims to the United States"). Instead, she relies on this Court's holding in *Chorches* permitting certain FCA claims to proceed absent alleged examples of misrepresentations to the government. *See* Appellant Br. at 28. But Gallian does not satisfy the *Chorches* requirements.

Gallian's allegations do not support the conclusion that "the information that would permit further identification of [specific false] claims is peculiarly within [US Bio's] knowledge." *See Chorches*, 865 F.3d at 86. Indeed, Gallian does not affirmatively allege that she lacked access to the purportedly fraudulent bills and invoices submitted to the government. Instead, the operative complaint undermines any inference that might be drawn in Gallian's favor. The allegations make clear that Gallian was the Senior Reimbursement Manager, and that her duties included billing, collections, posting payments to patient accounts, and customer service. Presumably, someone responsible for billing would have access to the purportedly fraudulent bills submitted to the government. It would be an unreasonable (and unsupported) stretch, then, to read the complaint and infer that Gallian lacked access to the specific bills and invoices.

Comparison with *Chorches* buttresses this conclusion. In contrast to Gallian, the plaintiff in *Chorches* alleged facts that demonstrated it was "virtually impossible for most employees to have access to all of the information necessary to certify on personal knowledge both that a particular invoice was submitted for payment and that the facts stated to justify the invoice were false," including the fact that all relevant personnel were prohibited from entering administrative buildings and were barred from participating in billing procedures. *See id.* at 82. Gallian's allegations pale in comparison.

Gallian explains that her position with US Bio does not "necessarily prove[]" that she had the chance to "access, download, and print or e-mail invoices in preparation for [this] lawsuit, before the company terminated her employment." Appellant Br. at 31. But her argument overreads *Chorches*. It is her burden to plead "specific factual allegations" that show "through no fault or lack of diligence on [her] part, [she] lacked the ability to identify specific documents containing false claims . . . submitted to the government." *See Chorches*, 865 F.3d at 83. Thus, it is not enough to assert that Gallian merely lacked the opportunity to collect the relevant documents due to timing constraints; *Chorches* applies where the submitted claims are "uniquely" or "peculiarly" within a defendant's control. *Id.* at 83, 86. Regardless, Gallian's inclusion of other internal US Bio documents in the complaint undercuts the notion that the complaint's shortcomings were caused by a lack of opportunity.

Because Gallian failed to allege facts suggesting the relevant information is peculiarly in US Bio's possession, we need not assess whether she alleges "specific facts supporting a strong inference of fraud." *See id.* at 82 (quoting *Wexner v. First Manhattan Co.*, 902 F.2d 169, 172 (2d Cir. 1990)). Gallian's allegations do not satisfy the *Chorches* requirements, and thus, she has failed to meet the Rule 9(b) pleading standard with regard to her claims under 31 U.S.C. § 3729(a)(1)(A)–(B). *See Miller*, 110 F.4th at 549 n.9 (dismissing claims because "[d]espite her first-hand knowledge of the alleged fraud, [plaintiff] fails to identify any specific fraudulent reports").

II. Reverse FCA Claim

We vacate the judgment of the District Court to the extent it dismissed Gallian's reverse FCA claim under 31 U.S.C. § 3729(a)(1)(G).

A. Threshold Questions

Because this appeal raises several questions regarding the scope and requirements of the reverse FCA claim provision, we start by clarifying the state of our precedent on three threshold matters.

1. Affirmative Misrepresentation Not Required

First, we reiterate that "[n]ot all three theories" of liability under the reverse false claim provision detailed above "require an affirmative misrepresentation." *See Miller*, 110 F.4th at 542; *see also United States ex rel. Customs Fraud Investigations, LLC. v. Victaulic Co.*, 839 F.3d 242, 255 (3d Cir. 2016) (concluding that after a 2009 amendment to the statute, "[a] false statement is no longer a required element" of a reverse false claim). Instead, a plaintiff may state a reverse FCA claim absent an affirmative misrepresentation if she alleges that the defendant knowingly concealed, or "knowingly and improperly avoid[ed] or decrease[d] an obligation to pay . . . the Government." *See Miller*, 110 F.4th at 542 (quoting 31 U.S.C. § 3729(a)(1)(G)).

Thus, Gallian's failure to allege specific examples of fraudulent submissions to the government is not dispositive of her reverse FCA claim.

2. Rule 9(b) Standard May Not Apply to All Reverse FCA Claims

Second, in contrast to direct FCA claims, it is unclear whether the heightened Rule 9(b) pleading standard applies to *all* reverse FCA claims.

True, we have noted that "claims under the FCA—including reverse false claims—are subject to the heightened pleading standard found in Federal Rule of Civil Procedure 9(b)." *See Miller*, 110 F.4th at 543; *see also Foreman*, 19 F.4th at 119 ("Rule 9(b)'s heightened pleading standard applies to reverse false claims."); *United States ex rel. Henig v. Amazon.com, Inc.*, 177 F.4th 156, 164 (2d Cir. 2026) (applying Rule 9(b) to a reverse FCA claim involving affirmative misrepresentations).[3] However, we have simultaneously recognized that "[a]s a theoretical matter," a claim based on a defendant's alleged avoiding or decreasing of an obligation to pay the government, conduct expressly covered by the reverse FCA provision, "could be read to not require fraud, because it may be possible to

[3] Other circuits have also applied Rule 9(b) to certain reverse FCA claims. *Olson v. Fairview Health Servs. of Minn.*, 831 F.3d 1063, 1074 (8th Cir. 2016); *United States ex rel. Customs Fraud Investigations, LLC v. Victaulic Co.*, 839 F.3d 242, 258 (3d Cir. 2016); *United States ex rel. Kini v. Tata Consultancy Servs., Ltd.*, 146 F.4th 1184, 1192 (D.C. Cir. 2025); *United States ex rel. Sibley v. Univ. of Chi. Med. Ctr.*, 44 F.4th 646, 655 (7th Cir. 2022).

'improperly' avoid or decrease an obligation to pay without engaging in fraud." *See Miller*, 110 F.4th at 548 n.8.[4]

If Gallian's case were to rest on a reverse FCA theory that did not involve making an affirmative misrepresentation or fraudulently concealing an obligation to pay the government, "Rule 9(b)'s particularity requirement *arguably* would not apply." *See id.* (emphasis added).[5]

As discussed below, however, we need not resolve the issue today. For now, we assume without deciding that the Rule 9(b) pleading standard applies to *all* reverse FCA claims, including those based on "avoiding" or "decreasing" theories.

---

[4] *Miller* only raises a question regarding the third theory of reverse FCA claims relating to avoiding or decreasing an obligation. *See Miller*, 110 F.4th at 542 n.8. The first two theories premised on misrepresentations in records and concealment will certainly trigger the Rule 9(b) pleading standard. *See Neder v. United States*, 527 U.S. 1, 22 (1999) (recognizing that "the well-settled meaning of 'fraud' required a *misrepresentation or concealment* of *material* fact" (emphasis added)); *Armstrong v. McAlpin*, 699 F.2d 79, 88 (2d Cir. 1983) (applying Rule 9(b) to a claim of fraudulent concealment).

[5] In what we believe is the sole circuit-level decision expressly analyzing the possibility that Rule 9(b) does not apply to all reverse FCA claims, the Eighth Circuit held in a split decision that the reverse FCA provision broadly "encompasses fraudulent conduct to which Rule 9(b)'s pleading requirements apply." *See Olson*, 831 F.3d at 1074; *but see id.* at 1077 (Riley, J., dissenting in part) (arguing "the majority's position" that Rule 9(b) necessarily applies to reverse FCA claims "is doubtful at best"). However, that case dealt with the "concealment" reverse FCA theory, and the Eighth Circuit did not explicitly discuss the possibility that "avoiding" or "decreasing" an obligation to pay the government does not constitute fraud.

3. Our Bar on "Mirrored" Reverse FCA Claims

Third, we have recognized that "a reverse false claim cannot turn on the same conduct underlying a traditional false claim." *See Foreman*, 19 F.4th at 119. Reverse FCA claims that "mirror" direct claims are barred, we have explained, because a contrary reading of the statute "would mean that 'any time a defendant violated sub-sections (a)(1)(A) or (B) and received payment, the defendant would also necessarily violate sub-section (G) if it failed to repay to the Government the fraudulently-obtained payments.'" *See id.* at 120 (quoting *United States v. Mount Sinai Hosp.*, 256 F. Supp. 3d 443, 458 (S.D.N.Y. 2017)).[6]

Applying this Circuit's bar on mirrored claims, the conduct underlying the reverse FCA claim in this case is sufficiently distinct from the conduct underlying Gallian's direct FCA claims. Gallian's reverse FCA claim is premised not solely on the receipt of payments from the government resulting from fraudulent submissions, *see Foreman*, 19 F.4th at 120, but also on additional allegations that US Bio hid government overpayments in its internal systems and eventually

[6] The Fourth Circuit has expressly questioned our this-or-that reading of the statute. *See United States ex rel. Kyer v. Thomas Health Sys., Inc.*, 178 F.4th 119, 137 n.23 (4th Cir. 2026) (doubting our bar on mirrored claims in *Foreman*). That court has suggested that "[t]here may be daylight between these [direct and reverse] offenses, because a direct false claim does not require that the defendant actually receive funds from the submission of a false claim." *Id.*; *see also United States ex rel. Prather v. Brookdale Senior Living Cmtys., Inc.*, 838 F.3d 750, 774–75 (6th Cir. 2016) (taking no issue with the fact that plaintiff's reverse FCA claim relied on the receipt of overpayments caused by direct FCA violations).

transferred those payments to revenues. Thus, Gallian's reverse FCA claim does not hinge on "the same conduct underlying [her] traditional false claim." *Id.* at 119.

B. Gallian States a Reverse FCA Claim

Having addressed these threshold questions, Gallian must still allege that US Bio had an obligation to repay the government overpayments that it received, and that US Bio knowingly concealed, or knowingly and improperly avoided or decreased, that obligation. *See* 31 U.S.C. § 3729(a)(1)(G). She has met these requirements, even assuming Rule 9(b) applies.

1. <u>Obligation</u>

Gallian has adequately alleged a specific "obligation" owed to the government. *See Miller*, 110 F.4th at 542 ("Under any theory of a reverse false claim . . . the relator must allege an 'obligation' to pay money or property to the government.").

The statute defines "obligation" as "an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment." *See* 31 U.S.C. § 3729(b)(3).

A duty is "established" when "it triggers an immediate and self-executing duty to pay." *See Miller*, 110 F.4th at 545. "In contrast, a duty to pay is not established—and there is no cognizable 'obligation' under the reverse false claim provision—when the imposition of penalties depends on government discretion." *Id.*

The operative complaint points to a statutory basis for US Bio's obligation to the government: 42 U.S.C. § 1320a-7k(d). *See* App'x at 37. That provision, enacted with the Affordable Care Act, imposes obligations on certain "person[s]" that receive overpayments from Medicare or Medicaid. 42 U.S.C. § 1320a-7k(d). "If a person has received an overpayment, the person shall . . . report and return the overpayment." *Id.* § 1320a-7k(d)(1). Leaving no doubt that the established obligation was sufficiently "immediate" and "self-executing," *see Miller*, 110 F.4th at 545, Congress specified that "[a]ny overpayment retained by a person . . . is an obligation . . . for purposes of [the FCA]." *See* 42 U.S.C. § 1320a-7k(d)(3). The provision creates a deadline of sixty days after "the overpayment was identified." *Id.* § 1320a-7k(d)(2)(A). Thus, to rely on the obligations created by § 1320a-7k(d), Gallian must allege that US Bio is 1) a "person," 2) who "identified," 3) an "overpayment."

US Bio is a "person" under § 1320a-7k(d). "Person" is defined as, inter alia, "a provider of services, [or] supplier." *Id.* § 1320a-7k(d)(4)(C). US Bio is a Medicare provider, and thus, is a "person" covered by the provision. *See* App'x at 34. US Bio contests this point, citing 79 Fed. Reg. 29844, 29918–19 (May 23, 2014) for the proposition that the obligation applies only to Medicare Advantage organizations and "Part D sponsor[s]." *See* Appellee Br. at 55 n.9. But the regulation cited by US Bio does not purport to catalog all of the "persons" included within the provision's scope, nor could it overcome the plain text of the statute. *See* 79 Fed. Reg. at 29918 ("The definition of person . . . *includes* a Medicare Advantage organization . . . and a Part D sponsor . . . . [but] does not include a beneficiary." (emphasis added)).

US Bio also "identified" at least some of the alleged overpayments. Gallian asserts that an internal auditor "confirmed . . . Relator's allegations involving overpayment credits from Government Payors being moved into revenue from the PPE account and otherwise." *See* App'x at 57 (showing internal document plainly stating that "Government Payer balances [were] incorrectly taken into revenue" between 2008 and 2013). Moreover, to the extent the word "identified" requires greater specificity, the internal auditor is alleged to have noted specific representative amounts inappropriately converted to revenues based on a small sample size. *See id.*

Finally, US Bio does not dispute that it received "overpayments" as that term is defined in § 1320a-7k(d). "Overpayment" is defined as "any funds that a person receives or retains under subchapter XVIII [Medicare] or XIX [Medicaid] to which the person, after applicable reconciliation, is not entitled under such subchapter." *Id.* § 1320a-7k(d)(4)(B). Regardless, US Bio received the relevant funds. *See* App'x at 42 (alleging that US Bio received payments from "[a]pproximately seven thousand . . . Medicare Part D and other Government-related payors").

Therefore, taking the allegations as true, US Bio had an obligation under § 1320a-7k(d) to return the alleged overpayments.

2. <u>Concealing, Avoiding, or Decreasing an Obligation</u>

Per the complaint, US Bio also knowingly concealed or knowingly and improperly avoided or decreased its obligation to pay the government.

As discussed, concealing, avoiding, or decreasing an obligation to pay the government does not necessarily involve making an affirmative statement to the government. In the absence of an affirmative misstatement, our precedents applying Rule 9(b) do not provide specific focal points of inquiry.

The fundamental inquiry, though, is whether the plaintiff has "state[d] with particularity the circumstances constituting fraud." *See* Fed. R. Civ. P. 9(b). We find it helpful to consider a number of touchpoints identified by district courts in this Circuit to guide our assessment of Gallian's allegations.

> [W]here the fraud claim "is premised on concealment so that the plaintiff cannot specify the time and place because no affirmative act occurred, the complaint must still allege: (1) what the omissions were; (2) the person responsible for the failure to disclose; (3) the context of the omissions and the manner in which they misled the plaintiff; and (4) what the defendant obtained through the fraud."

See Oden v. Bos. Sci. Corp., 330 F. Supp. 3d 877, 899 (E.D.N.Y. 2018) (quoting *Woods v. Maytag Co.*, 807 F. Supp. 2d 112, 119 (E.D.N.Y. 2011)); *see also Soroof Trading Dev. Co. v. GE Fuel Cell Sys., LLC*, 842 F. Supp. 2d 502, 513 (S.D.N.Y. 2012) (quoting *Manhattan Motorcars, Inc. v. Automobili Lamborghini, S.p.A.*, 244 F.R.D. 204, 213 (S.D.N.Y. 2007)).[7]

First, the operative complaint points to specific representative overpayments that US Bio knowingly did not report to the government. For

---

[7] Other circuits' applications of Rule 9(b) to reverse FCA claims proceed along similar lines. *See Sibley*, 44 F.4th at 655 (focusing on the "who, what, when, where, and how"); *Olson*, 831 F.3d at 1074; *United States ex rel. Heath v. AT&T, Inc.*, 791 F.3d 112, 124 (D.C. Cir. 2015).

example, between 2011 and 2012, US Bio recorded that several payments by TriCare, the Department of Labor, and Veterans Affairs resulted in "overpayments" or involved an "incorrect contract rate." *See* App'x at 54–55. With respect to the Department of Labor overpayment, Gallian includes an "Adjustment Form" listing the relevant invoice number, which she says was used to transfer that overpayment to US Bio's revenues. *See id.* at 55. Similarly, Gallian excerpts a portion of an internal audit that recognizes that "Healthnet," which is alleged to be a government payor, made an overpayment of $64,984.80 that was "recognized" as an overpayment, transferred "to Payer Processing Error," and received no follow-up. *See id.* at 58. Thus, in addition to alleging an overarching scheme, the operative complaint identifies specific examples of overpayments that were knowingly retained.

Second, though US Bio as a whole was implicated in the scheme to convert government overpayments to revenues, the operative complaint points to specific individuals who failed to disclose the overpayments to the government. Gallian's supervisor, Koreen Muthiah, informed her that Rodney Wright, Muthiah's former boss, "taught her how to use overpayments as revenue, and that it was okay under the law and regulations." *See id.* at 48, 56. Additionally, US Bio's Vice President of Finance Stefani Forsyth was made aware of the fact that US Bio's internal billing system was being misused to bill the government for patients who had died or stopped using the relevant drugs. *See id.* at 50. "Rather than credit or inform the Government of cancelled order overpayments," Forsyth approved of a process to conceal those payments. *See id.* Indeed, another employee informed Forsyth that "numerous payors had been contacting her wanting refunds," but Forsyth "instructed . . . [that employee] not to make a refund." *Id.* at 56–57. Also, Gallian and another employee informed the Senior Vice President of Corporate Security and Regulatory, Chris Zimmerman, and a representative from Corporate Compliance and Regulatory, Paul Ross, of the alleged overpayments and transfers. That led to the internal audit that allegedly confirmed Gallian's reports. Still, Gallian "continued to observe the continuing credits/overpayments violations; nothing changed." *See id.* at 60. These allegations suggest that specific individuals were aware of US Bio's practice of transferring government overpayments to revenues and failed to inform the government.

Third, Gallian details the context of the retained overpayments and the manner in which US Bio misled the government. Overpayments were purposefully re-labeled as "payer processing error[s]" in US Bio's internal system to avoid detection by "external auditors." *See id.* at 58. More specifically, the "[r]e-coding" to payment process error "ensured that the credits owed to the Government and/or commercial payors would not appear when the spreadsheets were reviewed or when reports were generated by internal and external auditors." *See id.* at 51.

Fourth, Gallian plainly alleges that US Bio stood to benefit from the alleged scheme. Government overpayments were transferred to US Bio's "revenue." *See, e.g.*, *id.* at 49. Put bluntly, US Bio "stole money belonging to Government payors." *See id.* at 27. "When [US Bio] needed more cash," management would send out an e-mail requesting a "pickup." *See id.* at 56. Gallian even includes a purported example of this practice: the operative complaint details a February 26, 2015 email from US Bio's Director of Reimbursement stating that Forsyth was "looking for $500,000 in pick[]ups," that she "d[idn't] care where [the pickup was] from," and that "if [the team] ha[d] to reach into [US Bio's billing software], [it could]." *See id.*

In light of these detailed allegations, even assuming the Rule 9(b) standard applies to Gallian's reverse FCA claim, she meets it.[8]

III. <u>Leave to Amend</u>

Finally, with regard to the appropriately dismissed direct FCA claims, the District Court did not abuse its discretion in denying leave to amend. US Bio advised Gallian of the potential deficiencies in her operative complaint via a pre-motion conference letter. Gallian had the opportunity to amend her complaint in response, and indeed did amend, yet failed to address the shortcomings identified by US Bio. Nor has she identified allegations that would either remedy her failure to identify specific misrepresentations to the government or suffice to trigger the

[8] It is unclear whether Gallian's reverse FCA claim carries a materiality requirement. *See Univ. Health Servs., Inc. v. United States ex. rel. Escobar*, 579 U.S. 176, 181 (2016) (clarifying the materiality requirement for direct FCA claims); *United States ex rel. Foreman v. AECOM*, 19 F.4th 85, 104–05 (2d Cir. 2021) (interpreting *Escobar* "to impose a materiality requirement on all claims brought *under § 3279(a)(1)(A)*" (emphasis added)); *but see United States ex rel. Ormsby v. Sutter Health*, 444 F. Supp. 3d 1010, 1055–56 (N.D. Cal. 2020) (limiting the materiality requirement to the first reverse FCA claim theory involving false statements or records); *United States ex rel. Frey v. Health Mgmt. Sys., Inc.*, No. 19-cv-920-B, 2021 WL 4502275, at *7 (N.D. Tex. Oct. 1, 2021) (same). Nor is it clear precisely what such a requirement might entail, given the statute's and the Supreme Court's explications of the requirement for direct FCA claims are ill-suited to claims based solely on the retention of overpayments *that have already been made*. *See* 31 U.S.C. § 3729(b)(4) (defining material as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property"); *Escobar*, 579 U.S. at 192 (explaining "a misrepresentation . . . must be material to the Government's payment decision"). Assuming such a requirement exists, though, we think that "under any understanding of the concept," Gallian's allegations are sufficient. *See Escobar*, 579 U.S. at 193. Gallian alleges that US Bio likely kept "many millions of dollars of monetary credits" through its transferring of government overpayments to revenues, *see* App'x at 60, which she supports with specific examples of such transfers, *see id.* at 55, 57. These sums can hardly be described as "minor or insubstantial." *See Escobar*, 579 U.S. at 194; *see also Foreman*, 19 F.4th at 116 (listing substantiality as a relevant factor).

softer standard under *Chorches*. We therefore conclude that "the [D]istrict [C]ourt acted wholly within its discretion in denying leave to amend." *See Solomon v. Flipps Media, Inc.*, 136 F.4th 41, 55 (2d Cir. 2025) (affirming denial of leave to amend where plaintiff was sent "a premotion letter advising her of the deficiencies in the Complaint" and had not identified any proposed amendments).

CONCLUSION

We agree that the heightened Rule 9(b) standard undermines Gallian's direct FCA claims, and thus, **AFFIRM** the judgment of the District Court to the extent it dismissed those claims. We also conclude that the District Court did not abuse its discretion in denying leave to amend with regard to those claims. However, even assuming that a heightened pleading standard also applies to the reverse FCA claim, we conclude that the District Court erred in dismissing it. We therefore **VACATE** the District Court's dismissal of the reverse FCA claim and **REMAND** for further proceedings consistent with this opinion.