OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: May 1, 2017)

STATE OF RHODE ISLAND ex rel. MICHAEL D. HARMEYER,	:	
Plaintiff,	:	
v.	:	**C.A. No. PC-2015-4895**
SHAW'S SUPERMARKETS, INC.,	:	
Defendant.	:	

STATE OF RHODE ISLAND ex rel. MICHAEL D. HARMEYER,	:	
Plaintiff,	:	
v.	:	**C.A. No. PC-2015-4896**
DAVE'S FRUITLAND OF WARWICK, INC., et al.,	:	
Defendants.	:	

DECISION

SILVERSTEIN, J. Before the Court for decision are two motions born of the same issue: whether Relator Michael D. Harmeyer (Harmeyer) has alleged with sufficient particularity that Defendant Shaw's Supermarkets, Inc. and Defendants Dave's Fruitland of Warwick, Inc., et al.,[1] violated the State False Claims Act (the False Claims Act), G.L. 1956 § 9-1.1-1, et seq. More

[1] The list of Dave's Defendants is: Dave's Fruitland of Warwick, Inc.; Dave's Fruitland Incorporated; Dave's Marketplace of Quonset, Inc.; Dave's Marketplace of Airport Road, Warwick, Inc.; Dave's Marketplace of Wickford, Inc.; Dave's Marketplace of Cumberland, Inc.; Dave's Marketplace East Greenwich Square, Inc.; Dave's Marketplace of Smithfield, Inc.; and Dave's Marketplace of Coventry, Inc. (collectively, the Dave's Defendants).

specifically, Defendant Shaw's Supermarkets, Inc., (the Shaw's Defendant) moves to dismiss Harmeyer's Amended qui tam Complaint pursuant to Super. R. Civ. P. 12(b)(6) and the Dave's Defendants move for judgment on the pleadings pursuant to Super. R. Civ. P. 12(c).

Although the above-captioned cases have not been formally consolidated, in this Decision, the Court will address the Shaw's Defendant and the Dave's Defendants' (collectively, Defendants) motions together.[2] In his qui tam[3] Complaints,[4] Harmeyer sets forth nearly identical

[2] The issue raised in the two motions before the Court—the Shaw's Defendant's motion to dismiss pending in State ex rel. Michael D. Harmeyer v. Shaw's Supermarkets, Inc., No. PC-2015-4895 and the Dave's Defendants' motion for judgment on the pleadings pending in State ex rel. Michael D. Harmeyer v. Dave's Fruitland of Warwick, Inc., et al., No. PC-2015-4896—is the same: whether Relator Harmeyer's qui tam Complaints allege False Claims Act violations with sufficient particularity. Although the cases have not been consolidated, the allegations contained in the respective Complaints are nearly identical and therefore, for purposes of judicial economy, warrant this Court's treatment of both herein. Counsels' arguments on both motions are also nearly the same. However, each case comes before the Court on a separate procedural track. Because they have already answered Relator Harmeyer's Complaint, the Dave's Defendants have moved for judgment on the pleadings pursuant to Super. R. Civ. P. 12(c) whereas, because it has not answered Relator Harmeyer's Complaint, the Shaw's Defendant has moved to dismiss for failure to state a claim pursuant to Super. R. Civ. P. 12(b)(6). Still, as explained infra, the Court applies the same standard of review to each motion. In addition, Super. R. Civ. P. 12(h) preserved the Dave's Defendants' right to assert the "defense of failure to state a claim upon which relief can be granted . . . by motion for judgment on the pleadings." See also 5C Wright & Miller, Federal Practice and Procedure, Civil 3d § 1367 at 218-221 (2004).

[3] By way of background, under Rhode Island's False Claims Act, a private person—referred to here as a relator—may bring a civil action for an alleged violation of the False Claims Act in the name of the State of Rhode Island. G.L. 1956 § 9-1.1-4(b)(1). When a person files a False Claims Act complaint with the Rhode Island Attorney General, the Attorney General, after sixty days of investigating the complaint, may choose whether to proceed in prosecuting the complaint. Sec. 9-1.1-4(b)(2). If the Attorney General opts not to prosecute the claim, then the complainant or relator—in this case, Michael D. Harmeyer—may proceed with the action on the State's behalf. Sec. 9-1.1-4(c)(3). This is known as a qui tam action, which—derived from a Latin phrase meaning "who as well for the king as for himself sues in this matter"—is defined as "[a]n action brought under a statute that allows a private person to sue for a penalty, part of which the government or some specified institution will receive." Black's Law Dictionary 1444 (10th ed. 2014). It is the nature of Harmeyer's qui tam action—brought for himself as well as for the State of Rhode Island—that gives rise to his status as the Relator.

factual allegations in support of the same claim—that Defendants violated the False Claims Act. According to Harmeyer, Defendants knowingly misclassified certain grocery items, such as prepared food, resulting in their failure to collect sales taxes on those items, which, in turn, resulted in their failure to remit the statutorily-required sales taxes to the State of Rhode Island. In addition to denying Harmeyer's allegations, the Dave's Defendants move for judgment on the pleadings on the ground that Harmeyer has failed to state his claim with sufficient particularity as Super. R. Civ. P. 9(b) requires. The Shaw's Defendant argues the same; however, due to the procedural state of its case, the Shaw's Defendant moves to dismiss for failure to state a claim upon which relief can be granted. Harmeyer opposes both motions, arguing that his Complaints contain sufficient allegations of Defendants' False Claims Act violations. The Court exercises jurisdiction pursuant to G.L. 1956 § 8-2-14.

I

Facts and Travel

The allegations in Harmeyer's Complaints are fairly straightforward. Commonly known as Dave's Marketplace and Shaw's Supermarket, Defendants are grocery stores located throughout the State of Rhode Island. As corporations engaged in retail sales in Rhode Island, Defendants have certain statutory duties to collect our State's seven percent sales tax on an array of items sold in their stores. Generally, items classified as "food and food ingredients" are exempted from Rhode Island's seven percent sales tax, see G.L. 1956 § 44-18-30(9), while other items, such as candy, soft drinks, dietary supplements, and prepared food are taxed at the seven percent rate. See § 44-18-7.1(l). At the end of each month, pursuant to our General Laws,

---

[4] In the interest of providing clarity, Harmeyer's Amended qui tam Complaint against the Shaw's Defendant will be cited to herein as "Shaw's Compl." Similarly, Harmeyer's qui tam Complaint against the Dave's Defendants will be cited to herein as "Dave's Compl."

retailers and grocery stores like Defendants are required to file a monthly tax form detailing the net sales tax due. See § 44-19-10(a). After submitting their reports, retailers such as Defendants are then required to remit the sales taxes that they owe to the State. Similarly, at the end of each year, retailers like Defendants must also send to the State of Rhode Island a form outlining, among other things, the amount of gross sales, the deductions taken for "food and food ingredients," the amount of net taxable sales, and the amount of sales tax due. Dave's Compl. at ¶ 41; Shaw's Compl. at ¶ 61. Essentially, this process can be distilled down to collecting and remitting to the State of Rhode Island the sales taxes assessed on items not classified as "food and food ingredients."

Harmeyer, an Indiana-based attorney well versed in the tax laws of Rhode Island, alleges that Defendants have failed to collect and remit taxes under that statutory framework. According to Harmeyer, Defendants have improperly classified candy, soft drinks, dietary supplements, and prepared food as "food and food ingredients," thereby exempting those items from the seven percent sales taxes and, in turn, depriving the State of money. Harmeyer bases his claim on three days of shopping at each of the nine Dave's Marketplaces included in this lawsuit and on two days of shopping at two of Shaw's Supermarkets' locations. To provide a flavor of Harmeyer's purchases from Dave's Marketplaces: on October 3, 2015, Harmeyer purchased SpongeBob SquarePants Fruit Flavored Snacks, Dave's BBQ Rack of Ribs Slow Roasted with Sweet Baby Ray's, Skinny Pop Naturally Sweet Popcorn, Emerald Raspberry Glazed Almonds, Traditional Medicinals Organic Throat Coat, Kellogg's Rice Krispies Treats, Ocean Spray Craisins Dried Cranberries coated in Greek Yogurt, Brookside Dark Chocolate Bars, a bottle of POM Antioxidant SuperTea Pomegranate Honey Green Tea, Rice Krispies Treats Blasted with M&M's Minis, Hershey's Special Dark Chocolate Chips, IGA Mini-marshmallows, and Scooby-

Doo! Fruit Flavored Snacks at seven of the nine Dave's Marketplaces listed as Defendants in this lawsuit. Dave's Compl. at ¶¶ 50(a)-(d), (i)-(j), (m)-(t). Moreover, on October 4, 2015 and January 22, 2015, Harmeyer went to the remaining Dave's Marketplaces named above and made similar purchases of goods that he claims were supposed to be assessed a sales tax and be classified as candy, soft drinks, dietary supplements, and prepared food. Id. at ¶¶ 50(e)-(h), (k)-(l). On two of those days—January 22, 2015 and October 3, 2015—Harmeyer also purchased similar products at Shaw's Supermarkets. Shaw's Compl. at ¶¶ 78(a)-(ggg).

After making those assorted purchases, Harmeyer inspected his sales receipts and learned that the items he bought had not been assessed the requisite seven percent sales tax. Based on the information he gleaned from those receipts, Harmeyer alleges that Defendants failed to properly collect and remit sales tax to the State of Rhode Island on candy, soft drinks, dietary supplements, and prepared food for a period of time extending back to 2009—conduct he claims amounts to a violation of the False Claims Act. In conformity with the procedures outlined in the False Claims Act, Harmeyer first submitted his qui tam Complaints in camera to the Rhode Island Attorney General. See §§ 9-1.1-4(b). After affording the Attorney General the statutorily required sixty days to review the Complaints—during which the Complaints remained under seal—the Attorney General declined to take over Harmeyer's actions, allowing Harmeyer to proceed on his own. See §§ 9-1.1-4(b)(2), -(b)(4)(ii). Consistent with that process, Harmeyer's Complaints were unsealed and filed in Superior Court in November of 2015.

With respect to the case against the Dave's Defendants, after some procedural back and forth, in August of 2016, the Dave's Defendants answered Harmeyer's Complaint. In February of 2017, they moved for judgment on the pleadings pursuant to Super. R. Civ. P. 12(c). Both parties submitted memoranda in support of their respective positions: the Dave's Defendants in

favor; Harmeyer opposed. On March 16, 2017, the Court heard argument on that matter, after which the Court accepted supplemental memoranda from the parties.

The case against the Shaw's Defendant has followed a different procedural route. Harmeyer's initial qui tam Complaint against Shaw's Supermarkets, Inc. was conditionally dismissed in November of 2016 for its failure to include sufficiently definitive allegations of fraud under Super. R. Civ. P. 9(b). The Court granted the Shaw's Defendant's first motion to dismiss with the caveat that Harmeyer had thirty days to amend his Complaint, which Harmeyer did in a timely fashion. Shortly thereafter, the Shaw's Defendant again moved to dismiss pursuant to Super. R. Civ. P. 12(b)(6), arguing that Harmeyer's Amended Complaint did not cure the initial deficiency regarding particularized allegations of fraud as required by Super. R. Civ. P. 9(b).[5] The Court heard argument on that matter on February 3, 2017. On March 23, 2017, shortly after the Court heard argument on the Dave's Defendants' motion for judgment on the pleadings, counsel for the Shaw's Defendant submitted a supplemental memorandum incorporating by reference the Dave's Defendants' arguments in their supplemental memorandum.

As detailed below, Defendants argue that they are entitled to dismissal and judgment on the pleadings, respectively, because Harmeyer has failed to plead the alleged False Claims Act violations with sufficient particularity.

[5] In the interest of brevity, throughout the text of this Decision, the Court will forego the full citation to our Rules of Civil Procedure. Where possible, the Court will simply refer to the rules by their number, shedding the usual prefix of "Super. R. Civ. P." Any references to distinct rules from other jurisdictions will be noted accordingly.

II

Standard of Review

As our Supreme Court has explained—and of particular importance to the motions presently before the Court—"'[a] Rule 12(c) motion is tantamount to a Rule 12(b)(6) motion, and the same test is applicable to both . . . .'" Heritage Healthcare Servs., Inc. v. Beacon Mut. Ins. Co., 109 A.3d 373, 377 (R.I. 2015) (quoting Collins v. Fairways Condos. Assoc., 592 A.2d 147, 148 (R.I. 1991)). It is a familiar principle that, under Rhode Island law, "'the sole function of a motion to dismiss is to test the sufficiency of the complaint[.]'" Audette v. Poulin, 127 A.3d 908, 911 (R.I. 2015) (quoting Ho-Rath v. R.I. Hosp., 115 A.3d 938, 942 (R.I. 2015)). In testing the complaint's sufficiency, the Court's "review is confined to the four corners of that pleading," id. (citation omitted), and the Court "'assumes the allegations contained in the complaint to be true and views the facts in the light most favorable to the plaintiff[].'" R.I. Emp't Sec. All., Local 401 v. State, Dep't of Emp't & Training, 788 A.2d 465, 467 (R.I. 2002) (hereinafter R.I. Emp't) (per curiam) (quoting St. James Condo. Ass'n v. Lokey, 676 A.2d 1343, 1346 (R.I. 1996)).

The purpose of a Rule 12(c) motion for judgment on the pleadings is to provide the Court "'with the means of disposing of a case early in the litigation process when the material facts are not in dispute after the pleadings have been closed and only questions of law remain to be decided.'" Heritage Healthcare Servs., Inc., 109 A.3d at 377 (quoting Haley v. Town of Lincoln, 611 A.2d 845, 847 (R.I. 1992)). In accordance with this jurisdiction's liberal approach to pleading rules and our Supreme Court's instruction that "[t]he standard to be applied to a Rule 12(c) motion is 'restrictive,'" id. (quoting Haley, 611 A.2d at 847), when reviewing a Rule 12(c) motion, a court must "view the alleged facts presented in the pleadings in the manner most

favorable to the nonmoving party" and draw all proper inferences in his favor. Haley, 611 A.2d at 847. Indeed, the Court approaches Rule 12(c) motions with some caution as "cases in our system are not to be disposed of summarily on arcane or technical grounds." Id. at 848. If a court grants a judgment on the pleadings, "it is because it is apparent beyond a reasonable doubt that a trial would be of no use in determining the merits of the plaintiff's claim for relief." Id. Likewise, a Rule 12(b)(6) motion to dismiss will not be granted "'unless it appears to a certainty that [the nonmoving party] will not be entitled to relief under any set of facts which might be proved in support of [his] claim.'" R.I. Emp't, 788 A.2d at 467 (internal alterations omitted) (quoting St. James Condo Ass'n, 676 A.2d at 1346). Therefore, the Court should only grant a Rule 12(c) motion for judgment on the pleadings—and, by extension, a Rule 12(b)(6) motion to dismiss—when the moving party has "'demonstrate[d] to a certainty that the [nonmoving party] will not be entitled to relief under any set of facts that might be proved at trial.'" Heritage Healthcare Servs., Inc., 109 A.3d at 377 (quoting Haley, 611 A.2d at 847).

III

Applicable Law

Defendants respectively move to dismiss and for judgment on the pleadings on the basis that Harmeyer has failed to plead his False Claims Act claim with sufficient particularity. In support of that contention, Defendants rely on the heightened pleading standard required for allegations of fraud, as illustrated by Rule 9(b) of our Rules of Civil Procedure. Conversely, Harmeyer maintains that his qui tam Complaints satisfy Rule 9(b)'s pleading standard because they contain allegations that provide Defendants with fair and adequate notice of the False Claims Act claim asserted against them. The Court will delve—in much greater detail—into the parties' contentions with respect to the issue of whether Harmeyer's Complaints satisfy Rule

9(b)'s heightened pleading requirement for purposes of the Shaw's Defendant's Rule 12(b)(6) motion to dismiss and the Dave's Defendants' Rule 12(c) motion for judgment on the pleadings. However, resolution of the motions before the Court first requires a brief discussion of the False Claims Act itself followed by an analysis of the interplay between Rule 9(b) and the False Claims Act. To date, the Court is unaware of any Rhode Island court—neither Supreme nor Superior—that has addressed the State False Claims Act.

A

The False Claims Act

As briefly outlined above, the False Claims Act allows a private person to enforce its terms on behalf of the State of Rhode Island. Sec. 9-1.1-4(b)(1). That private person, referred to as the relator, files his or her complaint under seal with the Rhode Island Attorney General, giving the State sixty days to decide whether to intervene. Sec. 9-1.1-4(b)(2). If, after those sixty days, the Attorney General opts not to proceed with the relator's complaint, the seal is lifted and the relator may serve the complaint on the defendants. Sec. 9-1.1-4(c)(3). Enacted in 2007, Rhode Island's version of the False Claims Act largely mirrors its federal counterpart, though the federal False Claims Act's roots date back to 1863. See Universal Health Servs., Inc. v. U.S., 136 S. Ct. 1989, 1996 (2016). The federal False Claims Act "'was originally aimed principally at stopping the massive frauds perpetrated by large contractors during the Civil War.'" Id. (quoting U.S. v. Bornstein, 423 U.S. 303, 309 (1976)); see also U.S. ex rel. Totten v. Bombardier Corp., 380 F.3d 488, 502 (D.C. Cir. 2004) (Garland, J., dissenting) ("The False Claims Act, 'adopted in 1863 and signed into law by President Abraham Lincoln in order to combat rampant fraud in Civil War defense contracts,' . . . is the 'Government's primary litigative tool for combating fraud[.]'") (quoting S. Rep. No. 99-345, at 8 (1986)). Presumably, our General

Assembly enacted Rhode Island's False Claims Act with the same principal purpose in mind: combatting fraud against the State.

Section 9-1.1-3(a)—the section of Rhode Island's False Claims Act which spells out precisely the type of fraudulent conduct that falls within its ambit—is nearly identical to its federal equivalent, 31 U.S.C. § 3729(a)(1), save for some slight deviations in formatting and monetary limitations. Rhode Island's False Claims Act imposes liability on "[a]ny person who:

> "(1) Knowingly presents, or causes to be presented a false or fraudulent claim for payment or approval;
> "(2) Knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;
> "(3) Conspires to commit a violation of subdivisions 9-1.1-3(1), (2), (3), (4), (5), (6) or (7);
> "(4) Has possession, custody, or control of property or money used, or to be used, by the state and knowingly delivers, or causes to be delivered, less property than all of that money or property;
> "(5) Is authorized to make or deliver a document certifying receipt of property used, or to be used, by the state and, intending to defraud the state, makes or delivers the receipt without completely knowing that the information on the receipt is true;
> "(6) Knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the state, or a member of the guard, who lawfully may not sell or pledge the property; or
> "(7) Knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the state, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the state; is liable to the state for a civil penalty of not less than five thousand five hundred dollars ($5,500) and not more than eleven thousand dollars ($11,000), plus three (3) times the amount of damages which the state sustains because of the act of that person. A person violating this subsection (a) shall also be liable to the state for the costs of a civil action brought to recover any such penalty or damages." Sec. 9-1.1-3(a).

Because Congress and the General Assembly's versions of the act are so similar, and without any Rhode Island precedent on point, the Court will look to the federal courts for guidance on interpreting the False Claims Act's terms.

"Not all fraudulent conduct gives rise to liability under the F[alse] C[laims] A[ct]. '[T]he statute attaches liability, not to the underlying fraudulent activity or to the government's wrongful payment, but to the 'claim for payment.'" U.S. ex rel. Karvelas v. Melrose-Wakefield Hosp., 360 F.3d 220, 225 (1st Cir. 2004) (quoting U.S. v. Rivera, 55 F.3d 703, 709 (1st Cir. 1995)), abrogated on other grounds by Allison Engine Co. v. U.S. ex rel. Sanders, 553 U.S. 662 (2008). This principle stems from the harm that the False Claims Act intends to deter: "damage to the public fisc." U.S. ex rel. Clausen v. Lab. Corp. of Am., Inc., 290 F.3d 1301, 1311 (11th Cir. 2002), cert. denied, 537 U.S. 1105 (2003). As the First Circuit—in quoting the Eleventh Circuit—has succinctly phrased it, "[e]vidence of an actual false claim is 'the sine qua non of a False Claims Act violation.'" U.S. ex rel. Booker v. Pfizer, Inc., 847 F.3d 52, 57 (1st Cir. 2017) (quoting Karvelas, 360 F.3d at 225 (quoting Clausen, 290 F.3d at 1311)). Thus, generally, "even when a relator can prove that a defendant engaged in fraudulent conduct affecting the government, F[alse] C[laims] A[ct] liability attaches only if that conduct resulted in the filing of a false claim for payment from the government." Id. (citation omitted) (internal quotation marks omitted). In other words, it is the false claim, not the fraudulent conduct, that implicates the False Claims Act. See id.

Of the seven distinct types of fraudulent conduct that constitute claims arising under the False Claims Act, the most straightforward, and perhaps most typically alleged, is a "presentment claim." Pencheng Si v. Laogai Research Found., 71 F. Supp. 3d 73, 87 (D.D.C. 2014); see also § 9-1.1-3. A presentment claim, which derives its name from the plain language

of 31 U.S.C. 3729(a)(1)(A)—text that is identical to § 9-1.1-3(a)(1)—"has three elements: '(1) the defendant submitted a claim [for payment] to the government, (2) the claim was false, and (3) the defendant knew the claim was false.'" Pencheng Si, 71 F. Supp. 3d at 87 (quoting U.S. ex rel. Folliard v. CDW Tech. Servs., Inc. 722 F. Supp. 2d 20, 26 (D.D.C. 2010)); see also Karvelas, 360 F.3d at 225. A less common and slightly more nuanced violation of the False Claims Act arises under 31 U.S.C. § 3729(a)(1)(G), which is identical in text to § 9-1.1-3(a)(7). Rather than impose liability for the knowing presentment of a false claim for the payment of money to the government, 31 U.S.C. § 3729(a)(1)(G)—and in turn § 9-1.1-3(a)(7)—impose liability for "fraudulent conduct that 'results in no payment to the government when a payment is obligated.'" Pencheng Si, 71 F. Supp. 3d at 88 (quoting Hoyte v. Am. Nat'l Red Cross, 518 F.3d 61, 63 n.1 (D.C. Cir. 2008)); see, e.g., Booker, 847 F.3d at 55-56. As one court has explained, "a typical reverse false claim action involves a defendant knowingly making a false statement in order to avoid having to pay the government when payment is otherwise due." Pencheng Si, 71 F. Supp. 3d at 88.

Here, Harmeyer has alleged reverse false claims under § 9-1.1-3(a)(7). See Dave's Compl. at ¶ 63; Shaw's Compl. at ¶ 95. By way of analogy, Harmeyer does not allege that, for example, Defendants charged him $1.07 for a prepared food item—of which $1 would represent the cost of the item and seven cents would represent the amount of sales tax—and thereafter kept the seven cents assessed in sales tax. Rather, Harmeyer alleges that Defendants altogether failed to assess any sales tax on that $1 prepared food item. Applying the analogy to the averments in the Complaints, Defendants have allegedly misclassified a prepared food item as "food and food ingredients" to avoid collecting the sales tax on the item, resulting in a seven cent deficiency in payment to the State of Rhode Island, but without Defendants keeping seven cents as profit.

Extending the analogy to its useful end, Defendants' alleged conduct in the latter scenario, though not as malicious in nature as the conduct analogized to in the former situation, may still constitute a False Claims Act violation. See § 9-1.1-3(a)(7). Allegedly, for each item Harmeyer purchased—candy, soft drinks, dietary supplements, and prepared food—Defendants misclassified the item as "food and food ingredients" decreasing Defendants' statutory obligations to collect and remit sales taxes to the State of Rhode Island.

So long as Harmeyer has alleged that Defendants "[k]nowingly ma[de], use[d], or cause[d] to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the state, or knowingly conceal[ed] or knowingly and improperly avoid[ed] or decrease[d] an obligation to pay or transmit money or property to the state" then he has asserted a viable False Claims Act claim. Sec. 9-1.1-3(a)(7). Importantly, courts, including the First Circuit, have unanimously held that Rule 9(b)'s particularity requirement applies to claims under the False Claims Act. Booker, 847 F.3d at 57-58; Karvelas, 360 F.3d at 228 (stating that, as recently as 2004, "every circuit court that has addressed t[he] issue [of whether Rule 9(b) applies to the False Claims Act] has concluded that the heightened pleading requirements of Rule 9(b) apply to claims brought under the F[alse] C[laims] A[ct]") (collecting cases). This is because a claim brought pursuant to the False Claims Act sounds, quite clearly, in fraud. Booker, 847 F.3d at 57. Neither Harmeyer nor Defendants dispute this rule; thus, this Court applies that consensus approach here. Therefore, the question for this Court is whether Harmeyer has alleged his claim with sufficient particularity as required under Rule 9(b) of our Rules of Civil Procedure.

B

Rule 9(b) Legal Standard

Generally, a complaint only needs to contain: "(1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the pleader seeks." Super. R. Civ. P. 8(a). Rule 8(a), which governs the general rules of pleading, requires what is known as "notice pleading." The idea behind notice pleading is to ensure "that the complaint give[s] the opposing party fair and adequate notice of the type of claim being asserted." Haley, 611 A.2d at 848. It is with that principle in mind that our Supreme Court has remarked on a number of occasions that Rule 8 should be interpreted liberally. E.g., id. However, when a party pleads special matters—such as fraud—our liberal pleading rules take a backseat to a heightened pleading requirement: under Rule 9(b), "[i]n all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity." Here, Harmeyer's claim under the False Claims Act is no different; his qui tam Complaints must set forth allegations of Defendants' alleged fraud with particularity. Booker, 847 F.3d at 57-58; Karvelas, 360 F.3d at 228 (collecting cases).

Though the Rhode Island Supreme Court has not yet extensively analyzed Rule 9(b)'s particularity requirement, it is well settled that this Court may seek guidance from federal courts where, as here, "'the federal rule and our state rule of procedure are substantially similar.'" Henderson v. Newport Cty. Reg'l YMCA, 966 A.2d 1242, 1246 (R.I. 2009) (quoting Crowe Countryside Realty Assocs., Co., LLC v. Novare Eng'rs, Inc., 891 A.2d 838, 840 (R.I. 2006)); compare Fed. R. Civ. P. 9(b) ("In alleging fraud . . . a party must state with particularity the circumstances constituting fraud.") with Super. R. Civ. P. 9(b) ("In all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity."). In quoting Professor

Kent's oft-cited treatise Rhode Island Civil Practice, our Supreme Court has parenthetically stated that "[w]hat constitutes sufficient particularity necessarily depends upon the nature of the case and should always be determined in the light of the purpose of the rule [which is] to give fair notice to the adverse party and to enable him to prepare his responsive pleading." Women's Dev. Corp. v. City of Cent. Falls, 764 A.2d 151, 161 (R.I. 2001). Thus, whereas Rule 8(a) ensures that defendants have fair and adequate notice of the claim alleged, Rule 9(b) is more exacting—it demands that a complaint contain "fair and specific notice of the alleged fraud." Id. (emphasis added). Furthermore, Rule 9(b)'s heightened pleading requirement serves the additional purpose of safeguarding defendants from frivolous claims that might damage their reputations. Haft v. Eastland Fin. Corp., 755 F. Supp. 1123, 1127 (D.R.I. 1991) (quoting New England Data Servs., Inc. v. Becher, 829 F.2d 286, 289 (1st Cir. 1987)).

A court must also be mindful of the balance that the particularity requirement attempts to strike: "Although it is of the utmost importance to keep the courtroom doors open to those who have been wronged, the particularity requirement creates a very delicate balance between the rights of such individuals and the rights of those who are accused." Id. at 1130. Nevertheless, as this Court has previously stated, "[b]ased on the purposes of Rule 9(b), when a fraud count is conclusory and lacking in specifics, it is too vague to meet the Rule 9(b) standard." Przygoda v. Clifford J. Deck, CPA, Inc., No. PB-2009-1336, 2010 WL 1956239, at *5 (R.I. Super. May 12, 2010) (Silverstein, J.) (citing Powers v. Boston Cooper Corp., 926 F.2d 109, 111 (1st Cir. 1991). Therefore, it has generally been held that to satisfy Rule 9(b)'s particularity requirement, "[a] plaintiff must plead 'the who, what, when, where, and how: the first paragraph of any newspaper story.'" Haft, 755 F. Supp. at 1128 (quoting DiLeo v. Ernst & Young, 901 F.2d 624, 627 (7th Cir. 1990)). As for Harmeyer's False Claims Act claim, the same rule applies: "Because [a]

claim[] of fraud [is] involved, even at the pleading stage [the] relator[] [is] required under Fed. R. Civ. P. 9(b) [and in turn under Rule 9(b) of the Superior Court Rules of Civil Procedure] 'to set forth with particularity [at least] the who, what, when, where, and how of' an actual false claim alleged to have been filed because of the defendant[s]' actions." Booker, 847 F.3d at 57-58 (quoting Lawton ex rel. U.S. v. Takeda Pharm. Co., 842 F.3d 125, 130 (1st Cir. 2016)).

IV

Discussion

Turning now to the parties' arguments, Defendants assert that Harmeyer's Complaints fail to pass muster under Rule 9(b)'s particularity requirement. The Dave's Defendants argue that Harmeyer has not identified: "(1) the individual(s) who allegedly submitted false reports to the State; (2) the individual(s) who allegedly remitted less than the total amount due; (3) the dates when the alleged underreporting and/or underpayments occurred; (4) the specific content of each (or any) allegedly fraudulent form submitted to the State, . . . ; and (5) the specific amount(s) allegedly due and the amount(s) actually paid." Dave's Defs.' Mot. for J. on the Pleadings and Mem. of Law in Supp. at 2 (hereinafter Dave's Mem.). The Shaw's Defendant argues essentially the same. See Shaw's Def.'s Mem. of Law in Supp. of Def.'s Mot. to Dismiss Relator's First Am. qui tam Compl. at 4-5 (hereinafter Shaw's Mem.). According to Defendants, Harmeyer's apparent failure to specify that information—that which gets to the core "who, what, when, where, and how" question presented by Rule 9(b)—renders his Complaints fatally insufficient under Rule 9(b)'s particularity requirement. Defendants support that argument with a list that they maintain illustrates Harmeyer's Complaints' insufficiency. See Dave's Mem. at 5-6; Shaw's Mem. at 4-5.

In response, Harmeyer provides his own list to account for the "who, what, when, and how" details required under Rule 9(b). See Relator's Obj. to Defs.' Mot. for J. on the Pleadings at 7-8; Shaw's Compl. at ¶¶ 3-9. In his opposition memorandum to the Dave's Defendants, Harmeyer summarizes his list as follows: (a) the "who" are "Dave's supermarkets, as retailers of food products at their nine commonly controlled locations in Rhode Island"; the "what" is "Dave's fail[ure] to collect and remit to Rhode Island the appropriate 7% sales tax on numerous items of 'candy,' 'soft drinks,' 'prepared food,' and 'dietary supplements,' as required by the Rhode Island sales tax code"; the "when" is "[f]rom at least 2009 to the present"; the "where" is each of Defendants' nine locations as well as their corporate headquarters; and, finally, the "how" is represented by Defendants' allegedly false classification of items "as non-taxable," and failure to collect and remit a 7% sales tax to Rhode Island, resulting in Defendants allegedly filing "false monthly and annual tax returns, as well as false business license renewals, that concealed the amount of sales tax that Dave's actually owed to Rhode Island." Relator's Obj. to Defs.' Mot. for J. on the Pleadings at 7-8; see also Shaw's Compl. at ¶¶ 3-9. Harmeyer bases those allegations—which Defendants aver are insufficiently vague—on three days shopping at the Dave's Defendants' nine locations and on two days of shopping at the Shaw's Defendant's two locations in 2015, as well as on the sales receipts generated from his assorted purchases, which purportedly did not show any sales tax assessment on the candy, soft drinks, dietary supplements, and prepared food that he bought.

Defendants do not appear to contest the "where"—as it is evident from the Complaints that Harmeyer made his purchases at various Dave's Marketplaces and Shaw's Supermarkets throughout the State. However, Defendants, in their illustrative lists, point to Harmeyer's failure to identify: the "who" as in which individuals made false statements or which individuals signed

false forms; the "what" as in the specific—not merely generic—forms Defendants allegedly submitted to the State; the "when" as far too vague because Harmeyer "appears to contend that every form and payment" submitted to the State was false, dating back to 2009 based on two or three days of shopping in 2015; and, finally, the "how" as deficient because Harmeyer's Complaint lacks details showing the manner in which unidentified individuals in Defendants' employ carried out the allegedly fraudulent scheme. See Dave's Mem. at 5-6. Moreover, the Shaw's Defendant contests whether Harmeyer has sufficiently alleged that it acted "knowingly" as defined by the State False Claims Act. See Shaw's Mem. at 6-7. Both the Dave's Defendants and the Shaw's Defendant argue the same point; however, they emphasize their arguments in a slightly different manner. The Shaw's Defendant hones in on Harmeyer's allegations regarding knowledge; the Dave's Defendants center their focus on Harmeyer's allegations regarding the allegedly false claim.

The parties' arguments on the issue of whether Harmeyer's qui tam Complaints are sufficient under Rule 9(b) boils down to two questions: (1) whether Harmeyer's Complaints contain sufficient allegations that Defendants acted "knowingly" under the False Claims Act, as defined by § 9-1.1-3(b)(1); and (2) if they do, whether Harmeyer's Complaints sufficiently allege that Defendants committed reverse false claims pursuant to Rule 9(b). With respect to the second question, there is a split amongst the federal courts of appeal as to whether a relator must plead the "who, what, when, where, and how" of both the fraudulent conduct and the false claim or whether a relator need only plead the "who, what, when, where, and how" of the fraudulent conduct and, then based on the reliability of the relator's allegations, make inferences in the relator's favor as to the false claim itself.

1

Whether Harmeyer Has Sufficiently Alleged that Defendants Acted "Knowingly"

Section 9-1.1-3(a)(7) of the False Claims Act imposes civil liability on any person who "[k]nowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the state, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the state[.]" The False Claims Act defines "[k]nowing" and "knowingly" to mean "that a person with respect to information: (i) [h]as actual knowledge of the information; (ii) [a]cts in deliberate ignorance of the truth or falsity of the information; (iii) [a]cts in reckless disregard of the truth or falsity of the information[.]" Sec. 9-1.1-3(b)(1)(i)-(iii). There is no requirement "of specific intent to defraud." Sec. 9-1.1-3(b)(1)(iv). However, as our federal district court has indicated, to sufficiently support a False Claims Act violation, the False Claims Act's scienter requirement must be pled with more than the language of negligence. City of Providence v. Buck Consultants, LLC, No. 13-131 S, 2013 WL 4047133, at *4 (D.R.I. Aug. 9, 2013) (dismissing a claim brought pursuant to Rhode Island's False Claims Act because the plaintiff's complaint used the language of negligence— "knew or should have known"—not "knowledge" and stating that "the language of negligence . . . is insufficient to support a False Claims Act claim"). Rhode Island's False Claims Act definition of "knowing" and "knowingly" tracks verbatim with the definition provided in the federal False Claims Act. Compare § 9-1.1-3(b)(1) with 31 U.S.C. § 3729(b)(1). As such, federal case law again provides a guiding hand.

In 2009, Congress amended the reverse-false-claim provision of the federal False Claims Act. See U.S. ex rel. Harper v. Muskingum Watershed Conservancy Dist., 842 F.3d 430, 436 (6th Cir. 2016). The Sixth Circuit recently explained that the current language—imposing civil

liability on "anyone who 'knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government[,]'"[6] id.—means that "unless the circumstances of a case show that a defendant knows of, or 'acts in deliberate ignorance' or 'reckless disregard' of, the fact that he is involved in conduct that violates a legal obligation to the United States, the defendant cannot be held liable under the F[alse] C[laims] A[ct]." Id. at 437 (quoting 31 U.S.C. § 3729(b)). In interpreting the scienter or knowledge element, the Sixth Circuit also explained that while the False Claims Act "is aimed at stopping fraud against the United States," it "does not create 'a vehicle to police technical compliance with' federal obligations." Id. at 437 (quoting U.S. ex rel. Williams v. Renal Care Grp., Inc., 696 F.3d 518, 531 (6th Cir. 2012)). Such a reading of the False Claims Act is consistent with that of our federal district court: allegations sounding merely in negligence or mistake are insufficient to plead a violation of the False Claims Act. See id.; Buck Consultants, LLC, 2013 WL 4047133, at *4 (interpreting the scienter element of Rhode Island's False Claims Act). This Court adopts that reasoning here.

This Court's application of the Sixth Circuit's reasoning to Rhode Island's False Claims Act's definition of "knowing" or "knowingly" is buttressed by the fact that in 2013 our General Assembly amended the State False Claims Act's reverse-false-claim provision in a manner that tracks the language Congress used in amending the federal False Claims Act. Compare 2013 R.I. P.L. 1367, 1620 and 2007 R.I. P.L. 429, 441, with P.L. No. 111-21, 123 Stat. 1617 (2009) and P.L. No. 99-562, 100 Stat. 3153 (1986); see also Harper, 842 F.3d at 436. Thus, at the pleading stage, to establish a "knowing" violation of Rhode Island's False Claims Act, Harmeyer's "complaint[s] must allege facts that create the inference that [Defendants] knew"

[6] Prior to 2009, "the reverse-false-claim provision of the [federal] F[alse] C[laims] A[ct] imposed civil liability on those who 'knowingly mak[e], us[e], or caus[e] to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government.'" Harper, 842 F.3d at 436 (quoting 31 U.S.C. § 3729(a)(7) (2006)).

that they had an obligation to properly classify items as either "food and food ingredients" or as candy, soft drinks, dietary supplements, or prepared food and collect and remit sales taxes on those items, or that Defendants "'act[ed] in deliberate ignorance' or in 'reckless disregard' of this fact." See Harper, 842 F.3d at 437.

Here, the Court concludes that Harmeyer has sufficiently alleged that Defendants acted "knowingly" as defined by § 9-1.1-3(b). In his qui tam Complaints, Harmeyer includes a detailed explanation of the Rhode Island sales tax framework and how Defendants, as retailers, fall under that framework. Harmeyer alleges that Defendants knew of their statutory obligations to collect a seven percent sales tax on various items—including candy, soft drinks, dietary supplements, and prepared food. He has set forth the basic allegations needed for the Court to infer that Defendants acted "knowingly": Defendants allegedly knew of their sales tax obligations under Rhode Island law, and they allegedly knew that their misclassification of certain items ran afoul of those obligations. Accordingly, for purposes of a reverse false claim, Harmeyer's allegations sufficiently show that Defendants acted "knowingly."[7]

However, the Court pauses to note that Harmeyer's allegations with respect to Defendants' knowledge are rather conclusory and based on a somewhat speculative assumption. As Defendants reason, Harmeyer does not point to specific individuals in Defendants' employ who knowingly violated the False Claims Act. All Harmeyer identifies is the general manner in which Defendants, through their unnamed employees, engaged in fraudulent conduct that he

[7] Moreover, with respect to Harmeyer's allegations against the Shaw's Defendant in particular, Harmeyer's Amended qui tam Complaint contains an allegation that Shaw's Supermarkets, Inc. has "received actual notice of its failure to comply with Rhode Island sales tax law" in a previously conducted audit. Shaw's Compl. at ¶ 72; see also id. at ¶ 88. While not dispositive of the issue of knowledge—an issue that Shaw's Supermarkets, Inc. vigorously contests—the Court's conclusion that Harmeyer has sufficiently alleged that the Shaw's Defendant acted "knowingly" is bolstered by that allegation.

assumes resulted in false filings and knowing avoidance of Rhode Island's sales tax obligations. As our Supreme Court has noted, this Court can, where appropriate, discount conclusory legal allegations. See Doe ex rel. His Parents & Nat. Guardians v. E. Greenwich Sch. Dep't, 899 A.2d 1258, 1262 n.2 (R.I. 2006) (hereinafter Doe) ("Allegations that are more in the nature of legal conclusions rather than factual assertions are not necessarily assumed to be true."). Indeed, recent federal court decisions interpreting the interplay of the False Claims Act and the federal pleading rules have done so with a more skeptical eye, given the United States Supreme Court's holdings in Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) and Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). See, e.g., Harper, 842 F.3d at 437-38 (dismissing the relators' complaint because it lacked factual allegations showing more than a mere possibility that the defendant knowingly violated the federal False Claims Act) (citing Iqbal, 556 U.S. at 679).

In Rhode Island, though, we subscribe to a more liberal standard of review with respect to motions to dismiss and, by extension, motions for judgment on the pleadings. See Chhun v. Mortg. Elec. Registration Sys., Inc., 84 A.3d 419, 422 (R.I. 2014); Haley, 611 A.2d at 847. While a federal court reviewing the pleadings here would look for allegations that carry Defendants' "knowledge" from the merely possible to the plausible, e.g., Harper, 842 F.3d at 437-38, this Court reviews Harmeyer's Complaints with a more liberal eye. See Chhun, 84 A.3d at 422 n.5; Haley, 611 A.2d at 847. On the specific issue of knowledge—a general pleading matter, see Super. R. Civ. P. 9(b), 8(a)—all that Harmeyer need plead are allegations sufficient for the Court to infer that there is some set of facts that might be proved at trial which entitle him to relief. See Haley, 611 A.2d at 847. The Court concludes that he has met that low burden.

In light of our Supreme Court's liberal approach to pleading general matters such as knowledge, this Court must make inferences even where federal courts, applying their own rules

of civil procedure, would not. Compare Haley, 611 A.2d at 847, with Harper, 842 F.3d at 437-38. Moreover, by its own terms, Rule 9(b)'s "who, what, where, when, and how" particularity requirement does not extend to averments of knowledge, further compelling the Court's conclusion that Harmeyer's allegations of knowledge are sufficient. See Super. R. Civ. P. 9(b). Therefore, in light of Rule 9(b)'s plain language and our Supreme Court's instruction to make all proper inferences in Harmeyer's favor, Haley, 611 A.2d at 848, this Court is compelled to find that Harmeyer has sufficiently alleged that Defendants acted "knowingly" for purposes of §§ 9-1.1-3(a)(7) and 9-1.1-3(b)(1).

2

Whether Harmeyer Has Sufficiently Alleged that Defendants Violated the False Claims Act

Next, having found that Harmeyer has sufficiently alleged that Defendants acted "knowingly," the Court considers whether Harmeyer has sufficiently stated his False Claims Act claim with particularity pursuant to Rule 9(b). Without precedent on Rhode Island's False Claims Act, this Court again turns to federal case law for guidance. As indicated above, there is a circuit split on the application of Rule 9(b)'s particularity requirement to the federal False Claims Act. At the crux of the circuit split is whether Rule 9(b)'s "who, what, where, when, and how" requirement applies to the allegations of fraudulent conduct and a false claim or whether it applies to allegations of fraudulent conduct alone. See generally U.S. v. N.Y. Soc'y for the Relief of the Ruptured & Crippled, Maintaining the Hosp. for Special Surgery, No. 07 CIV. 292 PKC, 2014 WL 3905742, at *11-15 (S.D.N.Y. Aug. 7, 2014) (hereinafter N.Y. Soc'y) (surveying and summarizing "the various approaches of the United States courts of appeals" with respect to Rule 9(b) and a False Claims Act claim). On this point, Harmeyer and Defendants are also split,

each urging this Court to adopt an approach they assert is consistent with the underlying purposes of Rule 9(b) of our Rules of Civil Procedure.

Generally, the federal courts of appeal have taken one of two approaches in analyzing the interaction of Rule 9(b) with the federal False Claims Act. One approach—stemming from the Fifth Circuit's opinion in U.S. ex rel. Grubbs v. Kanneganti, 565 F.3d 180 (5th Cir. 2009)—affords a relator greater leeway when alleging a False Claims Act claim. Under the Grubbs approach, "a relator's complaint, if it cannot allege the details of an actually submitted false claim, may nevertheless survive by alleging particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted." Id. at 190. In other words, the Grubbs approach "do[es] not require a complaint to plead the contents or details of allegedly false claims." N.Y. Soc'y, 2014 WL 3905742, at * 12. That reasoning has been adopted, in some form, by Third, Seventh, Ninth, and Tenth Circuits. Id. (collecting cases).

The Fifth Circuit reasoned that Rule 9(b) applies differently to "a claim under the [federal] False Claims Act and a claim under common law or securities fraud," and that, due to the circumstances of a False Claims Act case, Rule 9(b)'s particularity requirement is more flexible for a False Claims Act plaintiff than for a traditional, common law fraud plaintiff. Grubbs, 565 F.3d at 189. The Fifth Circuit based its reasoning, in part, on the idea that "[t]o require [] details [of time, place, contents, and identity] is one small step shy of requiring production of actual documentation with the complaint, a level of proof not demanded to win at trial and significantly more than any federal pleading rule contemplates." Id. at 190. Thus, to put it into the terms of our particularity requirement, see Haft, 755 F. Supp. at 1128, a court applying the standard articulated in Grubbs need only find that the relator's complaint alleges the

"who, what, when, where, and how" of the fraudulent conduct. See id.; see also Grubbs, 565 F.3d at 190 ("[T]he 'time, place, contents, and identity' standard is not a straightjacket for Rule 9(b)."). Pursuant to Grubbs, the particularity requirement is relaxed for allegations of the false claim itself—indicia of reliability, rather than specifics, are sufficient at the pleading stage for a court to reasonably infer the making of a false claim. See Grubbs, 565 F.3d at 188-89.

On the other hand, the second approach—stemming from the Eleventh Circuit's opinion in Clausen v. Lab. Corp. of America, Inc., 290 F.3d 1301 (11th Cir. 2002)—applies a more stringent standard to a relator's complaint. Under the Clausen approach, "Rule 9(b)'s directive that 'the circumstances constituting fraud or mistake shall be stated with particularity' does not permit a False Claims Act plaintiff merely to describe a private scheme in detail but then to allege simply and without any stated reason for his belief that claims requesting illegal payments must have been submitted, were likely submitted or should have been submitted to the Government." Id. at 1311. Unlike the court in Grubbs, the Clausen court made no distinction between the applicability of Rule 9(b)'s particularity requirement to claims under the False Claims Act or claims of common law fraud.

The Eleventh Circuit reasoned that because the false claim is the "sine qua non" of a False Claims Act violation, then it follows that Rule 9(b)'s particularity requirement must apply to both the false claim and the fraudulent conduct. Id. As the court explained, "[w]hen Rule 9(b) applies to a complaint, a plaintiff is not expected to actually prove his allegations . . . [b]ut we cannot be left wondering whether a plaintiff has offered mere conjecture or a specifically pleaded allegation on an essential element of the lawsuit." Id. at 1313. Furthermore, the Fourth Circuit—in rejecting Grubbs's "more relaxed construction of Rule 9(b)" and adopting the Clausen approach—has stated that "when a defendant's actions, as alleged and as reasonably

inferred from the allegations, could have led, but need not necessarily have led, to the submission of false claims, a relator must allege with particularity that specific false claims actually were presented to the government for payment." U.S. ex rel. Nathan v. Takeda Pharm. N. Am., Inc., 707 F.3d 451, 457, 458 (4th Cir. 2013). Thus, to put Clausen's more exacting approach into the language of our Rule 9(b) case law, see Haft, 755 F. Supp. at 1128, a court reviewing a reverse false claim through the lens of Rule 9(b) needs to find sufficient allegations showing the "who, what, when, where, and how" of both the fraudulent conduct and the false claim. See Clausen, 290 F.3d at 1311-13.[8]

Thus, this Court is presented with two divergent approaches—one more lenient and inference-friendly, see Grubbs, 565 F.3d at 190, and one more demanding and inference-averse, see Clausen, 290 F.3d at 1311-13. As the reader may have predicted, Harmeyer, as the relator, urges the Court to apply Grubbs's more relaxed standard to his Complaints while Defendants prefer Clausen's more exacting approach. In the past, when confronted with Rule 9(b)'s particularity requirement, our Supreme Court has specifically relied upon First Circuit case law for guidance. See, e.g., Cruz v. Mortg. Elec. Registration Sys., Inc., 108 A.3d 992, 998 n.6 (R.I. 2015) (citing with approval several First Circuit opinions with respect to Rule 9(b)). The Court sees no reason to depart from that practice here. E.g., The R.I. Indus.-Recreational Bldg. Auth. v. Capco Steel, LLC, No. PC-2014-6055, 2015 WL 4523458, *8 (R.I. Super. July 22, 2015) (Silverstein, J.). Accordingly, the Court will apply the First Circuit's approach to Fed. R. Civ. P.

[8] The Court pauses, briefly, to note that although the courts cited above reviewed Rule 9(b) in the context of a presentment claim, their reasoning applies to a reverse false claim as well. The only difference is that rather than present a false claim for payment, "a typical reverse false claim action involves a defendant knowingly making a false statement in order to avoid having to pay the government when payment is otherwise due." Pencheng Si, 71 F. Supp. 3d at 88. The essence of the False Claims Act claim and thus the applicability of Rule 9(b) remains the same: fraud. See id.

9(b) and the federal False Claims Act and to Rule 9(b) of our Rules of Civil Procedure and Rhode Island's False Claims Act.

In Karvelas, the First Circuit adopted an approach similar to that which the Eleventh Circuit adopted in Clausen: "As applied to the F[alse] C[laims] A[ct], Rule 9(b)'s requirement that averments of fraud be stated with particularity—specifying the 'time, place, and content' of the alleged false or fraudulent representations, means that a relator must provide details that identify particular false claims for payment that were submitted to the government." Karvelas, 360 F.3d at 232. Quoting Clausen, the First Circuit agreed that the essential element or "sine qua non" of a False Claims Act claim is the false claim itself. Id. at 225. Therefore, like the Eleventh Circuit in Clausen, the First Circuit applies Rule 9(b)'s particularity requirement to both the fraudulent conduct and the false claim. See id. at 232; see also Booker, 847 F.3d at 57-58 ("Because [a] claim[] of fraud [is] involved, even at the pleading stage [the] relator[] [is] required under Fed. R. Civ. P. 9(b) 'to set forth with particularity [at least] the who, what, when, where, and how of' an actual false claim alleged to have been filed because of the defendant[s]' actions.") (quoting Lawton, 842 F.3d at 130).

Moreover, as the First Circuit has explained, "[u]nderlying schemes and other wrongful activities that result in the submission of fraudulent claims are included in the 'circumstances constituting fraud or mistake' that must be pled with particularity pursuant to Rule 9(b)." Karvelas, 360 F.3d at 232. "[S]uch pleadings invariably are inadequate unless they are linked to allegations, stated with particularity, of the actual false claims submitted to the government that constitute the essential element of a[] F[alse] C[laims] A[ct] qui tam action." Id. The First Circuit also provided a non-exhaustive checklist of details and information "that may help a relator to state his or her claims with particularity[,]" including:

> "details concerning the dates of the claims, the content of the forms or bills submitted, their identification numbers, the amount of money charged to the government, the particular goods or services for which the government was billed, the individuals involved in the billing, and the length of time between the alleged fraudulent practices and the submission of claims based on those practices . . . ." Id. at 233.

"[L]ike the Eleventh Circuit, [the First Circuit] believe[s] that 'some of this information for at least some of the claims must be pleaded in order to satisfy Rule 9(b).'" Id. (quoting Clausen, 290 F.3d at 1312 n.21).

Applying the First Circuit's formulation of Rule 9(b)'s particularity requirement to Harmeyer's False Claims Act claim, for Harmeyer's Complaints to withstand scrutiny under Rule 9(b), they must contain allegations showing "the who, what, when, where, and how" of the fraudulent conduct Defendants have engaged in as well as allegations showing "the who, what, when, where, and how" of Defendants' reverse false claims. See Booker, 847 F.3d at 57-58; Karvelas, 360 F.3d at 232; see also Haft, 755 F. Supp. at 1128. Even assuming, without deciding, that Harmeyer's qui tam Complaints are sufficient with respect to the former (i.e., allegations of Defendants' purportedly fraudulent conduct), the Court finds that the Complaints are deficient as to the latter, the "who, what, when, where, and how" of the false claim. Put another way, the Complaints are deficient with respect to the "sine qua non" of the False Claims Act claim—the false claim itself. See Booker, 847 F.3d at 57; Karvelas, 360 F.3d at 225. Therefore, the Court must dismiss Harmeyer's Complaints for failure to sufficiently allege Defendants' reverse false claims with particularity pursuant to Rule 9(b) of our Rules of Civil Procedure.

In his qui tam Complaints, Harmeyer alleges that Defendants knowingly misclassified certain food items to avoid collecting and remitting sales tax on those items. He bases that

allegation on three days of shopping at nine Dave's Marketplaces and two days of shopping at two Shaw's Supermarkets in 2015. Based on his review of the standard-issue sales receipts that Harmeyer received from the cashier, Harmeyer then concludes that Defendants have engaged in a fraudulent scheme to "[k]nowingly make[], use[] or cause[] to be made or used, a false record or statement material to [their] obligation to pay or transmit [sales taxes] to the state, or knowingly conceal[] or knowingly and improperly avoid[] or decrease[]" their obligation to collect and remit sales taxes to the State. See § 9-1.1-3(a)(7). Harmeyer's leap—from noticing his receipts' lack of a sales tax on the assorted items he purchased to contending that Defendants violated the False Claims Act—illustrates the deficiency of his Complaints. Under Rule 9(b)'s demanding particularity requirement, this Court cannot make that leap for Harmeyer; it is an inference too broad, based on allegations too generalized in nature, for this Court to find that Harmeyer has stated his claim with sufficient particularity.

Harmeyer asks this Court to infer—from his reading of sales receipts—that Defendants' knowing improper classification of candy, soft drinks, dietary supplements, and prepared food resulted in the knowing submission of falsified monthly and annual tax forms to the State of Rhode Island. However, his Complaints lack the factual allegations on which this Court could rely to make such an inference. Other than a passing reference to the Dave's Defendants' owner and President, see Dave's Compl. at ¶ 23, Harmeyer fails to point to the "who"—i.e., individuals who orchestrated or participated in the allegedly fraudulent scheme to deprive the State of Rhode Island of sales taxes. Harmeyer alleges even less with respect to individuals in the Shaw's Defendant's employ. He also fails to sufficiently establish the "what" and the "how." As analogized supra, Harmeyer does not allege a scenario involving Defendants who have skimmed seven cents from the sales of taxable items that cost $1; rather, allegedly, Defendants have failed

to collect and thereafter remit seven cents on the dollar for items not classified as "food and food ingredients." Relying on standard-issue sales receipts, Harmeyer contends that it is fair to assume that, in the aggregate, Defendants' employees—none of whom is identified in the Complaints—would then submit monthly and annual tax forms that were falsified—although none is specifically identified—because they failed to include the statutorily obligated sales tax amounts. On those allegations and assumptions, this Court does not find that Harmeyer's Complaints sufficiently state "how" Defendants carried out the "what," an allegedly fraudulent scheme for which they would stand to gain little to no financial benefit.

Furthermore, as for the "when," Harmeyer bases his allegations of fraud on a few days of shopping in Defendants' stores in 2015. According to Harmeyer, he assumes, then, that at the end of every month of 2015, and at year end 2015, Defendants submitted falsified tax forms to the State. Such a practice would also purportedly avoid untold amounts of sales taxes due the State. However, Harmeyer, other than referencing the generic tax forms provided by the State for monthly and annual reporting, does not specifically allege the dates—or even a short timeframe—during which the false claims occurred.

Moreover, "[u]pon information and belief," Harmeyer then attempts to shoehorn in False Claims Act violations against the Dave's Defendants dating back to 2009. See Dave's Compl. at ¶ 62. This, too, is an inferential leap too broad for the Court in light of Rule 9(b)'s particularity requirement. See, e.g., U.S. ex rel. Polansky v. Pfizer, Inc., No. 04-CV-0704 (ERK), 2009 WL 1456582, at *5 (E.D.N.Y. May 22, 2009) ("a relator cannot circumscribe the Rule 9(b) pleading requirements by alleging a fraudulent scheme in detail and concluding, that as a result of the fraudulent scheme, false claims must have been submitted") (citing U.S. ex rel. Rost v. Pfizer, Inc., 507 F.3d 720, 731 (1st Cir. 2007) and Clausen, 290 F.3d at 1311) (other citations omitted).

Similarly, in his Complaint against the Shaw's Defendant, Harmeyer attempts to stretch Shaw's Supermarkets, Inc.'s alleged violations back to 2009—albeit he does so with slightly more than allegations based merely "upon information and belief." See Shaw's Compl. at ¶¶ 88-91. Even assuming that Harmeyer's allegations of the "when" were pled with sufficient particularity, e.g., id. at ¶ 5, the Court concludes that Harmeyer's allegations regarding the Shaw's Defendant's alleged False Claims Act violation fail in all other respects—i.e., the "who," the "what," and the "how" of the false claim. See Booker, 847 F.3d at 57-58.

Had Harmeyer's Complaints been governed by Rule 8(a) of our Rules of Civil Procedure, perhaps some of the inferences and assumptions on which his claim is based would be drawn in his favor. See Haley, 611 A.2d at 847 (stating that "[a]ll proper inferences to be derived from the pleadings are to be drawn in favor of the nonmovant") (emphasis added). However, under Rule 9(b), such inferences and assumptions are impermissible. Rule 9(b) demands more; it demands, at the least, that a relator plead the "who, what, when, where, and how" of both the fraudulent conduct and the false claim. See Booker, 847 F.3d at 57-58; see also Haft, 755 F. Supp. at 1128. This Court finds that Harmeyer's Complaints fail to meet that demand.

As the Eleventh Circuit has also observed, this Court is "not unsympathetic to the situation in which [Harmeyer] finds himself. Most relators in qui tam actions are insiders. As a corporate outsider, he may have had to work hard to learn the details of the alleged schemes entered into by [Defendants.]" Clausen, 290 F.3d at 1314. However, "while an insider might have an easier time obtaining information . . . and meeting the pleading requirements under the False Claims Act, neither" the Superior Court Rules of Civil Procedure "nor the [False Claims] Act offer any special leniency under these particular circumstances to justify [Harmeyer] failing to allege with the required specificity the circumstances of the fraudulent conduct he asserts in

his action." See id. This Court concurs with the view that "[i]f Rule 9(b) is to carry any water, it must mean that an essential allegation and circumstance of fraudulent conduct cannot be alleged in such conclusory fashion." Id. at 1313. Rule 9(b)'s particularity requirement is therefore unrelenting, even in the face of a claim brought by a corporate outsider. See Karvelas, 360 F.3d at 229 (declining to relax Rule 9(b)'s pleading requirements under the federal False Claims Act).

The Court is also mindful of Harmeyer's argument that his Complaints have offered Defendants fair notice of the claims asserted against them. It is true that the Dave's Defendants have answered Harmeyer's Complaint. However, as our Supreme Court has stated, a higher standard applies to Rule 9(b): rather than merely providing fair and adequate notice, Rhode Island law requires a complaint alleging fraud to provide "fair and specific notice." Women's Dev. Corp., 764 A.2d at 161. This standard ensures not only that a defendant can prepare an adequate answer, but also to safeguard defendants from claims that might damage their reputations. See Haft, 755 F. Supp. at 1127. Harmeyer's Complaints fail to fulfill those purposes. Furthermore, like the First Circuit in Karvelas, this Court will not allow Harmeyer to cure his qui tam Complaints' deficiencies with discovery. See Karvelas, 360 F.3d at 231 (stating that "[o]ther courts have repeatedly refused to allow qui tam relators to rely on later discovery to comply with Rule 9(b)'s pleading requirements") (quoting Clausen, 290 F.3d at 1313 n.24) ("noting that allowing a plaintiff 'to learn the complaint's bare essentials through discovery . . . may needlessly harm a defendant['s] goodwill and reputation by bringing a suit that is, at best, missing some of its core underpinnings, and, at worst, [contains] baseless allegations used to extract settlements'").

Fraudulent conduct may affect the government in myriad ways, but not all of it implicates the False Claims Act. See Karvelas, 360 F.3d at 225. In order for a complaint to satisfy Rule

9(b)'s particularity requirement in the context of Rhode Island's False Claims Act, it must contain allegations of the particulars of the fraudulent conduct and the particulars of the false claim. See Booker, 847 F.3d at 57-58; Karvelas, 360 F.3d at 225. In this case, Harmeyer's qui tam Complaints fail to do so. Harmeyer's Complaints fail to allege with sufficient particularity the "sine qua non" of a False Claims Act claim—the false claim itself. See Booker, 847 F.3d at 57-58; Karvelas, 360 F.3d at 225.

V

Conclusion

After reviewing "the alleged facts presented in the pleadings in the manner most favorable to the nonmoving party" and drawing all proper inferences in Harmeyer's favor, Haley, 611 A.2d at 847, the Court concludes that neither Harmeyer's Amended qui tam Complaint against the Shaw's Defendant nor Harmeyer's qui tam Complaint against the Dave's Defendants sufficiently states a False Claims Act claim with particularity pursuant to Rule 9(b) of our Rules of Civil Procedure. See Booker, 847 F.3d at 57-58; Karvelas, 360 F.3d at 232; see also Heritage Healthcare Servs., Inc., 109 A.3d at 377; R.I. Emp't, 788 A.2d at 467. Accordingly, the Court grants the Dave's Defendants' motion for judgment on the pleadings and the Shaw's Defendant's motion to dismiss. Prevailing counsel shall present appropriate orders consistent herewith which shall be settled after due notice to counsel of record.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASES:	**State of Rhode Island ex rel. Michael D. Harmeyer v. Shaw's Supermarkets, Inc.** **State of Rhode Island ex rel. Michael D. Harmeyer v. Dave's Fruitland of Warwick, Inc., et al.**
CASE NOS:	**PC-2015-4895 and PC-2015-4896**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**May 1, 2017**
JUSTICE/MAGISTRATE:	**Silverstein, J.**
ATTORNEYS:	
For Plaintiffs:	**Louise A. Herman, Esq.; James B. Helmer, Jr., Esq.; Robert M. Rice, Esq.; James A. Tate, Esq.**
For Defendant:	**Jeffrey S. Brenner, Esq. (Shaw's Supermarkets, Inc.)** **Robert C. Corrente, Esq. (Dave's Fruitland of Warwick, Inc., et al.)** **Christopher N. Dawson, Esq. (Dave's Fruitland of Warwick, Inc., et al.)**