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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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UNITED STATES OF AMERICA AND THE  
STATE OF NEVADA ex rel. MARY KAYE  
WELCH,

Plaintiff,

v.

MY LEFT FOOT CHILDREN'S THERAPY,  
LLC, JON GOTTLIEB, AND ANN MARIE  
GOTTLIEB,

Defendants.

Case No. 2:14-cv-01786-MMD-GWF

ORDER

(Def's Motion to Dismiss – ECF No. 68)

**I. SUMMARY**

This case involves allegations of Medicaid and Tricare fraud brought against a Las Vegas children's rehabilitative functional therapy company and the company's owners. Before the Court is Defendant My Left Foot ("MLF"), Jon Gottlieb and Ann Marie Gottlieb's (collectively, "the Gottliebs") Motion to Dismiss the First Amended Complaint ("Motion"). (ECF No. 68.) The Court has reviewed Plaintiff's response (ECF No. 69) and Defendants' reply (ECF No. 71), as well as the federal government's Statement of Interest (ECF No. 80) and Defendants' reply (ECF No. 81). Defendants also filed a Notice of Supplemental Authority (ECF No. 86) without leave of court as is required by Local Rule LR 7-2(g). The Court will strike the notice. The Court's analysis is based solely on the briefs mentioned above. Plaintiff's motion and amended motion to strike the supplement (ECF Nos. 87, 88) are denied as moot.

1 For the reasons stated below, Defendants' Motion is granted in part and denied in  
2 part.

3 **II. BACKGROUND**

4 Plaintiff-relator Mary Kaye Welch ("Welch" or "Plaintiff") brings suit under both the  
5 federal and Nevada False Claims Act on behalf of the Government.<sup>1</sup> Both the federal and  
6 the Nevada False Claims Act make liable anyone who: knowingly presents, or causes to  
7 be presented, a false or fraudulent claim for payment or approval; or, knowingly makes,  
8 uses, or causes to be made or used, a false record or statement to get a claim paid or  
9 approved by the Government. 31 U.S.C. § 3729(a)(1)(A) & (B); NRS § 357.040(1)(a) &  
10 (b). Welch filed her initial Complaint under seal pursuant to the federal False Claims Act  
11 ("FCA"), 31 U.S.C. § 3279 *et seq.*, and the Nevada False Claims Act ("Nevada FCA"),  
12 NRS § 357.010 *et seq.*, on October 28, 2014. (ECF No. 1.) The Court unsealed the  
13 Complaint on June 1, 2015 (ECF No. 10). Welch filed the First Amended Complaint  
14 ("FAC") on September 28, 2015 (ECF No. 15). In the FAC, Welch added allegations  
15 concerning Defendants' alleged policy of "upcoding" therapy services to obtain higher  
16 rates of reimbursement under the Medicaid and Tricare programs. The facts below are  
17 taken from the FAC.

18 MLF provides physical, occupational, speech, and aquatic therapy as well as  
19 adaptive swimming lessons and group classes for children with special needs. It is owned  
20 by Ann Marie Gottlieb and her husband, Jonathan Gottlieb. Ann Marie is a qualified  
21 occupational therapist. Jonathan has no qualifications in occupational, speech, or physical  
22 therapy. MLF has four Las Vegas locations, roughly 55 to 100 employees, and as of 2012  
23 was treating approximately 1,200 children per week. MLF now treats closer to 1,800  
24 children per week. Of the roughly 55 to 100 employees at MLF, approximately 31 work  
25 exclusively on administrative matters.

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27 \_\_\_\_\_  
28 <sup>1</sup>"Government" refers collectively to the federal government and the State of Nevada.

1 MLF bills roughly 70 percent of its services to Medicaid. The Medicaid program  
2 provides health care benefits to low-income children and is funded jointly by the federal  
3 and state governments. MLF also bills roughly 20 to 25 percent of its services to Tricare.  
4 Tricare is a federally-funded program that provides health care benefits to service  
5 members and their families. Under both Nevada and federal law, services reimbursed  
6 under Medicaid and Tricare must be medically necessary.<sup>2</sup>

7 Welch claims that certain of Defendants' policies have resulted in the submission  
8 and approval of false claims by the Medicaid and Tricare programs. Before MLF provides  
9 services, Defendants pre-fill medical authorization forms for those doctors who make  
10 therapy referrals. As a result, children receive all forms of therapy, including medically  
11 unnecessary occupational and physical therapy for children who come to MLF for speech  
12 therapy services. Once a child begins therapy at MLF, the Gottliebs have a policy of  
13 treating every child that comes through the door, regardless of medical necessity or proper  
14 medical authorization. Moreover, they do not permit therapists to discharge patients. In  
15 order to continue services for certain patients, Defendants require therapists to change  
16 patients' progress reports to note that therapy should be continued, that there is parental  
17 involvement and that therapists require at least two sessions per week, even if none of  
18 these statements is actually true. Therapists are also required to recommend the highest  
19 number of weekly therapy sessions without regard to a patient's specific medical needs.  
20 In addition, MLF's policies that every child should be treated and that all children make  
21 some progress result in patients who are too low-functioning, too high-functioning, and  
22 who speak Spanish receiving medically unnecessary therapy services. The FAC also

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23 <sup>2</sup>The Nevada Medicaid plan allows for reimbursement of outpatient services so long  
24 as those services are medically necessary. Medicaid Services Manual § 1700. To be  
25 considered medically necessary, therapy services must "be considered under accepted  
26 standards of medical practice to be specific and effective treatment" and the "amount,  
27 frequency, and duration for restorative therapy services must be appropriate and  
28 reasonable based on best practice standards for the illness or injury being treated." *Id.* at  
§ 1703.2A(5)(b), (e). Under the Tricare program, a service is "medically or psychologically  
necessary" if the "frequency, extent, and types of medical services . . . represent  
appropriate medical care and [ ] are generally accepted by qualified professionals to be  
reasonable and adequate for the diagnosis and treatment of illness, injury, pregnancy, and  
mental disorders." 32 CFR § 199.2.

1 contains allegations that the Tricare program was billed for therapy sessions which did  
2 not, in fact, occur. (ECF No. 15 at 20-21.)

3 An additional theory of liability emerges from Welch's allegations concerning  
4 upcoding. She claims that Defendants require all therapists who work for MLF to bill  
5 services<sup>3</sup> under the same code—CPT code 97530—regardless of whether the therapist  
6 believes a different code more accurately describes the services rendered. Reprimand  
7 and/or termination supposedly results when therapists do not comply with this  
8 requirement. The purpose of using the one CPT code is to obtain the highest rate of  
9 reimbursement while also eliminating particular administrative costs.

10 The FAC asserts the following claims against each of the three Defendants  
11 individually:<sup>4</sup> (1) knowingly presenting or causing to be presented a false or fraudulent  
12 claim for payment or approval under the FCA, 31 U.S.C. § 3729(a)(1)(A); (2) knowingly  
13 making, using, or causing to be made or used, a false record or statement material to a  
14 false or fraudulent claim under the FCA, 31 U.S.C. § 3729(a)(1)(B); (3) knowingly  
15 presenting or causing to be presented a false claim for payment or approval under the  
16 Nevada FCA, NRS § 357.040(a); and (4) knowingly making, using, or causing to be made  
17 or used, a false record or statement material to a false or fraudulent claim under the  
18 Nevada FCA, NRS § 357.010(b). (*See id.* at 29-70.)

### 19 **III. DISCUSSION**

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

21 Complaints brought pursuant to the FCA must fulfill the heightened pleading  
22 requirements of Rule 9(b). *Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001).  
23 A motion to dismiss “grounded in fraud under Rule 9(b) for failure to plead with particularity  
24 is the functional equivalent of a motion to dismiss under Rule 12(b)(6) for failure to state a  
25 claim.” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1107 (9th Cir. 2003) (internal

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26 <sup>3</sup>It is unclear if the therapists actually submit the claims to Medicaid and Tricare or  
27 if they provide specific information to the administrative/insurance department who then  
submit the reimbursement requests.

28 <sup>4</sup>Thus, there are a total of twelve counts in the FAC.

1 quotation marks omitted). “Because a dismissal of a complaint or claim grounded in fraud  
2 for failure to comply with Rule 9(b) has the same consequence as a dismissal under Rule  
3 12(b)(6), dismissals under the two rules are treated in the same manner.” *Id.*

4 Under Rule 12(b)(6), a complaint may be dismissed for “failure to state a claim upon  
5 which relief can be granted.” Fed. R. Civ. P. 12(b)(6). A properly pleaded complaint must  
6 provide “a short and plain statement of the claim showing that the pleader is entitled to  
7 relief.” Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).  
8 The Rule 8 notice pleading standard requires Plaintiff to “give the defendant fair notice of  
9 what the . . . claim is and the grounds upon which it rests.” *Id.* (internal quotation marks  
10 and citation omitted). While Rule 8 does not require detailed factual allegations, it  
11 demands more than “labels and conclusions” or a “formulaic recitation of the elements of  
12 a cause of action.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S.  
13 at 555). “Factual allegations must be enough to rise above the speculative level.”  
14 *Twombly*, 550 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain  
15 sufficient factual matter to “state a claim to relief that is plausible on its face.” *Iqbal*, 556  
16 U.S. at 678 (internal quotation marks omitted).

17 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to  
18 apply when considering motions to dismiss. First, a district court must accept as true all  
19 well-pleaded factual allegations in the complaint; however, legal conclusions are not  
20 entitled to the assumption of truth. *Id.* at 678. Mere recitals of the elements of a cause of  
21 action, supported only by conclusory statements, do not suffice. *Id.* Second, a district court  
22 must consider whether the factual allegations in the complaint allege a plausible claim for  
23 relief. *Id.* at 679. A claim is facially plausible when the plaintiff’s complaint alleges facts  
24 that allow a court to draw a reasonable inference that the defendant is liable for the alleged  
25 misconduct. *Id.* at 678. Where the complaint does not permit the court to infer more than  
26 the mere possibility of misconduct, the complaint has “alleged—but it has not show[n]—  
27 that the pleader is entitled to relief.” *Id.* at 679 (internal quotation marks omitted). When  
28 the claims in a complaint have not crossed the line from conceivable to plausible, the

1 complaint must be dismissed. *Twombly*, 550 U.S. at 570. A complaint must contain either  
2 direct or inferential allegations concerning “all the material elements necessary to sustain  
3 recovery under *some* viable legal theory.” *Id.* at 562 (quoting *Car Carriers, Inc. v. Ford*  
4 *Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1989)).

## 5 **B. Analysis**

6 Defendants move to dismiss the FAC on five grounds. First, Defendants argue that  
7 the FAC fails to meet Rule 9(b)’s heightened pleading standard. (ECF No. 68 at 4.)  
8 Second, they argue that Welch alleges nothing more than a difference of opinion as to the  
9 medical necessity of the therapy provided. (*Id.* at 12.) Third, they argue that Welch’s claims  
10 of upcoding are barred by the FCA and Nevada FCA’s public disclosure bar. (*Id.* at 16.)  
11 Fourth, they contend that Welch’s allegations of improper practices promoted through  
12 MLF’s policies are insufficient to establish liability under either the FCA or Nevada FCA.  
13 (*Id.* at 21.) Defendants also make a fifth argument relating to patient H.W., for whom MLF  
14 allegedly billed thirteen therapy services that were not actually provided. (*Id.* at 22.)

15 The Court agrees with Defendants that Welch’s claims premised on upcoding are  
16 barred by both the FCA and Nevada FCA public disclosure bar. The Court, however, finds  
17 that the claims concerning billing for medically unnecessary services and the claims  
18 concerning patient H.W. satisfy Rule 9(b).<sup>5</sup>

### 19 **1. Rule 9(B)**

20 Defendants contend that Counts I, II, III, VII, VIII and X should be dismissed  
21 pursuant to Rule 9(b) because Welch “does not identify a single false claim that resulted  
22 in a violation of the FCA, let alone state with any specificity who submitted the false claim,  
23 how the claim was false, or when the false claim was submitted.” (ECF No. 68 at 4.) They  
24 also request that Counts IV (page 40), V, VI, IV (page 61),<sup>6</sup> XI and XII be dismissed for

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25 <sup>5</sup>The FAC presents several theories of FCA liability. The Court focuses only on  
26 those allegations and accompanying theories that state plausible claims under both the  
FCA and Nevada FCA.

27 <sup>6</sup>The Counts in the FAC are misnumbered such that there are two counts  
28 designated as “Count IV” and there is no “Count IX.” The Court distinguishes between  
each Count IV by referring to the page number on which the allegations begin.

1 failure to allege any false records or statements under 31 U.S.C. § 3729(a)(1)(B). (*Id.* at  
2 11.)

3 To comply with Rule 9(b), allegations of fraud must be “specific enough to give  
4 defendants notice of the particular misconduct which is alleged to constitute the fraud  
5 charged so that they can defend against the charge and not just deny that they have done  
6 anything wrong.” *Neubronner v. Milken*, 6 F.3d 666, 671 (9th Cir. 1993) (internal quotation  
7 marks and citation omitted). However, the rule does not require that the complaint provide  
8 all facts supporting each and every instance of fraud over a multi-year period. *United*  
9 *States ex rel Lee v. SmithKline Beecham Inc.*, 245 F.3d 1048, 1051 (9th Cir. 2001) (citing  
10 *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997)). In order to satisfy the requirements  
11 of Rule 9(b) in an FCA action, a relator must either allege with detail that a false claim was  
12 actually submitted to the government or at a minimum allege “particular details of a  
13 scheme to submit false claims paired with reliable indicia that lead to a strong inference  
14 that claims were actually submitted.” *Ebeid ex rel. United States v. Lungwitz*, 606 F.3d  
15 993, 998-99 (9th Cir. 2010). The complaint in an FCA action “must state enough fact[s] to  
16 raise a reasonable expectation that discovery will reveal evidence of [the misconduct  
17 alleged].” *United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047,  
18 1055 (9th Cir. 2011) (citing *Twombly*, 550 U.S. at 556) (internal quotation marks).

19 The FAC outlines the process by which an organization like MLF submits claims for  
20 reimbursement to the Medicaid program for therapy services performed by its employees.  
21 First, a physician refers a child to the organization for particular types of therapy, which  
22 the physician has identified to be medically necessary. (See ECF No. 15 at ¶¶ 53, 66.)  
23 The child then sees a qualified therapist in order to receive the prescribed services. (See  
24 *id.* at ¶ 66.) Before the therapist provides an initial or a continuing therapy session to the  
25 child, the entity that submits claims for the therapist’s services to the Medicaid program  
26 for reimbursement—here, the FAC states that the entity at MLF is its “insurance  
27 department” (see *id.* ¶ 95)—must request authorization from the Medicaid program to  
28 perform those services (see *id.* at ¶ 69). Authorization requires submission of a specific

1 form through an online system called HP Enterprise Services. (*See id.* at ¶¶ 70-72.) In  
2 support of the authorization request, the organization submits therapists' progress reports  
3 and notes.<sup>7</sup> (*See id.* at ¶ 73.) Once Medicaid reviews the form and supporting  
4 documentation, it approves a certain number of sessions of particular types of therapy  
5 services for the patient. (*See id.* at ¶ 74.) Once the session has occurred, the entity then  
6 submits a claim for reimbursement for the services to the program, and the services  
7 identified in the claim must match the services requested and approved in the prior  
8 authorization (*See id.* at ¶ 75.) MLF's insurance department is responsible for the  
9 submission of claims. (*See id.* at ¶ 95.) Plaintiff contends that this department pre-checks  
10 all boxes on the Medical Necessity Form that referring physicians sign. (*See id.* at ¶¶ 92-  
11 95.) The FAC states that "Tricare is run substantially similar to Medicaid." (*Id.* at ¶ 68.) The  
12 Court therefore infers that the process for submitting claims to Tricare is roughly analogous  
13 to the process by which claims are submitted to Tricare.

14 A claim submitted to a federal health care program is false where a party falsely  
15 certifies compliance with a statute or regulation as a condition to Government payment.  
16 *United States ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1171 (9th Cir. 2006);  
17 *see also United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266 (9th Cir. 1996) ("It is  
18 the false certification of compliance which creates liability when certification is a  
19 prerequisite to obtaining a government benefit."). To successfully plead a violation under  
20 the FCA,<sup>8</sup> the plaintiff must allege that defendant (1) made a false statement or engaged  
21 in a fraudulent course of conduct, (2) made with scienter (3) that was material to and (4)  
22 caused the Government to pay out money. *Hendow*, 461 F.3d at 1174.

23 The FAC provides sufficient facts to allege the element of falsity. Medical necessity  
24 is an express requirement for reimbursement under the Medicaid and Tricare programs.

25 \_\_\_\_\_  
26 <sup>7</sup>Ostensibly, this occurs only in the context of continuing therapy services and not  
when an initial therapy service is provided to a patient by an MLF therapist.

27 <sup>8</sup>The Court focuses on the federal FCA and relevant case law, but the wording of  
28 the federal and Nevada statutes is the same. Therefore, the analysis applies to the Nevada  
FCA claims in the FAC as well.



1 Under the Nevada Medicaid program, “Medicaid reimbursement for outpatient [physical,  
2 occupational, and speech therapy] is based on the provision of medically necessary  
3 therapy services. (ECF No. 80 at 2 (quoting Medicaid Services Manual § 1700) (internal  
4 quotation marks omitted).)<sup>9</sup> Welch alleges that MLF and the Gottliebs required staff to  
5 provide treatment to patients, even if the reviewing therapist deemed the frequency or  
6 continuation of a particular type of treatment to be medically unnecessary. (*See, e.g.*, ECF  
7 No. 15 at ¶¶ 159-164.) For instance, in the FAC, Welch alleges that, “Jonathan and Anne  
8 Marie direct all of MLF’s insurance department staff to ask therapists to change their  
9 evaluation reports if the recommended therapy frequency is listed for less than two or  
10 three sessions per week.” (*Id.* at ¶ 95.) This allegation is supported by an excerpt from an  
11 email sent by Jonathan to MLF therapists directing them to put down the highest number  
12 of recommended weekly visits for patients. (*Id.* at ¶ 101.) From these allegations, the Court  
13 can reasonably infer that the Gottliebs required therapists to provide information in their  
14 progress notes that ensured a higher number of sessions would be authorized by Medicaid  
15 or Tricare regardless of the medical needs of the child. Directing or requiring a reviewing  
16 therapist, who after evaluation of a patient has determined a set number of sessions per  
17 week is medically necessary, to then change her recommendation necessarily requires  
18 the therapist to falsify documents, specifically the progress notes and written justifications  
19 for the recommendation. This documentation is then submitted by MLF’s insurance  
20 department in support of claims for reimbursement. Plaintiff’s allegations permit the Court  
21 to reasonably infer the possibility of misconduct—that is, false statements or fraudulent  
22 conduct—which satisfies the first element of FCA liability.

23 Neither Defendants nor Plaintiff address whether the FAC sufficiently identifies  
24 facts to support the element of scienter. Under both the FCA and Nevada FCA, scienter  
25 is established by proving that Defendants had actual knowledge of the falsity of the  
26 statements submitted to the Government, acted in deliberate ignorance of the truth or

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27 <sup>9</sup>*See supra* note 2 (regarding medical necessity requirement under the Tricare  
28 program).

1 falsity of those statements, or acted in reckless disregard of the truth or falsity of those  
2 statements. See 31 U.S.C. § 3729(b)(1)(a)(i) - (iii); see also NRS § 357.040(2)(a) - (c). By  
3 establishing a policy that all children make some progress, no matter how minimal, and by  
4 reprimanding therapists who determine that continuing therapy is medically  
5 unnecessary—for instance, in the example of a therapist recommending discharge of a  
6 patient based on the patient’s lack of progress (see ECF No. 15 at ¶¶ 168-171)—  
7 Defendants clearly demonstrate disregard for whether the statement—i.e., making  
8 progress on patient’s goals and recommending that the patient continue to receive therapy  
9 (see *id.* at ¶ 171)—is true or false. Similarly, by requiring a certain frequency of weekly  
10 visits to be recommended, even where therapists determine only one session per week is  
11 medically necessary, Defendants act with deliberate indifference as to the truth or falsity  
12 of statements made in support of claims submitted for reimbursement.

13 The FAC also provides sufficient facts to allege the element of materiality.  
14 Defendants assert that “[Welch] fails to identify a single false record or statement that is  
15 material to a false claim.” (ECF No. 68 at 4.) Welch responds that “the complaint alleges  
16 that MLF directs its therapists to falsify progress reports . . . [which] are submitted to  
17 Medicaid to secure re-authorization of funding and are a precondition to funding.” (ECF  
18 No. 69 at 19 (internal quotation marks omitted).) From this and the allegations discussed  
19 above, the Court is able to draw a reasonable inference that therapists’ progress notes,  
20 which include recommendations and statements made in support of those  
21 recommendations, were material to the Government’s decision to pay because the  
22 Medicaid and Tricare programs do not reimburse for medically unnecessary services.

23 Defendants contend that the FAC does not explain how MLF caused the  
24 presentation of a false claim, which is necessary to satisfy the causation element. (ECF  
25 No. 68 at 10.) Plaintiff responds that the FAC “described numerous communications from  
26 the Gottliebs which established that they, individually, caused to be submitted false claims  
27 for payment.” (ECF No. 69 at 20.) The Court agrees with Plaintiff. The Court can  
28 reasonably infer that the alleged requirement that therapists continue to provide therapy

1 or provide therapy at particular frequencies without regard to medical necessity as  
2 determined by the individual therapist, or else be reprimanded or potentially fired, was the  
3 cause of allegedly falsified statements in progress notes that were then used to obtain  
4 reimbursement under the Medicaid and Tricare programs.

5 Defendants also contend that the FAC “does not allege that any of the children  
6 identified in the FAC were Medicaid or TRICARE beneficiaries or that MLF submitted  
7 claims to the government for their care.” (ECF No. 68 at 12.) However, the FAC, where  
8 possible, identifies if the patient is a recipient of Government benefits—e.g., H.W. received  
9 benefits under Tricare (ECF No. 15 at ¶ 186)—and also identifies what percentage of MLF  
10 patients and claims were reimbursed under the Medicaid and Tricare programs (*id.* at ¶¶  
11 36, 64, 67). The FAC’s examples of certain patients’ experiences at MLF appear to be just  
12 that—examples of medically unnecessary services being rendered as a result of MLF’s  
13 policies and directives. The Court is able to draw a reasonable inference from these  
14 examples that the policies and directives impacted all MLF patients, regardless of  
15 insurance status.

## 16 **2. Medical Necessity**

17 Defendants contend that the FAC “alleges nothing more than a difference of opinion  
18 as to the medical necessity of the therapy provided,” which is “insufficient to ground a suit  
19 under the FCA.” (ECF No. 68 at 12.) Defendants argue that because a physician  
20 authorized the initial referral for therapy services and the FAC fails to identify any specific  
21 documentation that an MLF therapist falsified (which was then submitted to the  
22 Government), Welch is alleging a mere difference of opinion as to what other therapists at  
23 MLF deemed to be medically necessary. (*Id.* at 14.)

24 The FAC does not allege that all claims for reimbursement of therapy services ever  
25 provided to Medicaid or Tricare patients were medically unnecessary; rather, the FAC  
26 points to those MLF’s policies that directed qualified therapists to recommend a frequency  
27 or continuation of services without regard to whether or not the qualified therapist, after  
28 evaluation, found the services to be medically necessary. (See ECF No. 15 at ¶¶ 12, 78,

1 101, 103, 107, 133, 143, 157, 162-164, 170, 183.) “Although physicians refer patients for  
2 therapy,<sup>10</sup> the Relator’s complaint alleges that it was *Defendants*—and not independent  
3 physicians—who determined the specific amount and duration of therapy to be provided  
4 and billed.” (ECF No. 80 at 2.) Regardless of whether in particular instances MLF’s policies  
5 and directives matched a qualified therapist’s recommendation regarding a particular  
6 patient, the policies themselves directed all therapists to recommend services at higher  
7 levels or to continue services. The Court is able to reasonably infer from the FAC that  
8 therapists’ recommendations to the Medicaid and Tricare programs, and facts used to  
9 justify the medical necessity of those services, were the false statements made in support  
10 of claims for reimbursement. Moreover, the FAC alleges that Defendants’ policies were  
11 the cause of these statements. Thus, the false certification occurred not when a physician  
12 referred a child for therapy but rather when MLF submitted claims through the online  
13 submission system (HP Enterprise Services).<sup>11</sup>

14 Moreover, the Court is able to reasonably infer that because of MLF’s policies and  
15 directives, some if not all therapists at one point falsified their progress notes by  
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17  
18 <sup>10</sup>Nowhere in the FAC does it state that physicians’ referrals, even if false, caused  
19 the submission of false claims. (See ECF No. 15 at ¶¶ 54-63.) Rather, the crux of the  
20 FAC’s legal theory is that once patients arrive at MLF, the frequency and continuation of  
21 therapy services are directed by management, not based on a therapist’s determination  
22 of medical necessity. Thus, the Gottliebs stated directives necessarily require therapists  
23 to falsify statements in their progress reports regarding the medical necessity of services.  
24 (See *id.* at ¶ 242 (“MLF management inserts its own opinion regarding the care of patients  
and overrides the opinion of the therapists which are based on patients’ needs and deficits,  
in order to maximize its reimbursement”). While the FAC identifies instances where  
“ineligible” patients were referred by a physician to MLF, it appears the determination of  
ineligibility occurred after therapists evaluated and/or worked with the patient and deemed  
it medically appropriate to discharge the patient but was told not to discharge the patient  
and to, instead, falsify their progress notes.

25 <sup>11</sup>Defendants appear to misunderstand the false certification theory of liability in the  
26 context of therapy services. (See ECF No. 81 at 2 (“Relator does not sufficiently allege  
27 that any physician falsely recommended medically unnecessary therapy or allege the  
28 particulars of a scheme by MLF that resulted in doctors false certifying that therapy was  
medically necessary.”).) The false claims alleged in the FAC stem not from the initial  
physician referral but from MLF’s ongoing services to patients. The FAC argues that MLF’s  
policies regarding the frequency and continuation of these services resulted in the  
rendering of medically unnecessary services.

1 recommending a frequency or continuation of therapy services they did not believe, after  
2 evaluating the patient, to be medically necessary.

### 3                   **3.           Allegations of Upcoding**

4           The public disclosure bar under both the federal and Nevada FCA “sets up a two-  
5 tiered inquiry,” requiring a court to first determine whether the elements of public disclosure  
6 have been met and, if so, whether the relator is the original source of the information. See  
7 *A-1 Ambulance Service, Inc. v. California*, 202 F.3d 1238, 1243 (9th Cir. 2000). To satisfy  
8 the first tier of the analysis, a court must establish that the relator’s allegations are (1)  
9 substantially based on the (2) same allegations or transactions that (3) have been  
10 disclosed publicly in a criminal, civil, or administrative hearing to which the government is  
11 a party. See NRS § 357.100(1); 31 U.S.C. § 3730(e)(4)(A)(i). Once these elements are  
12 satisfied, the court must determine whether the relator is an “original source” under the  
13 statute. See NRS § 357.100(2); 31 U.S.C. § 3730(e)(4)(A) & (B).

#### 14                   a.           *First Tier - Public Disclosure Elements*

15           In their Motion, Defendants point to a public May 21, 2015, Nevada State Board of  
16 Physical Therapy Examiners’ meeting in Las Vegas as the “administrative hearing to which  
17 the government was a party” and at which point public disclosure occurred. (ECF No. 68  
18 at 17.) Because the Court takes judicial notice of the minutes of this meeting,<sup>12</sup> which are  
19 publicly available at the Board’s website,<sup>13</sup> the Court views all facts as alleged and draws  
20 all inferences in the light most favorable to Plaintiff. See *Kaiser Cement Corp. v. Fishbach*  
21 *& Moore, Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986). At the Board’s meeting, Jonathan  
22 Gottlieb and his attorney followed up on a May 7, 2015, letter that MLF had received from  
23 the Board. The letter was created in response to an inquiry the Board had received from  
24 an MLF employee, who asked whether it was appropriate (or legal) to bill only one code

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25                   <sup>12</sup>Defendants cite to these minutes in footnote 4 of their Motion. (See ECF No. 68  
26 at 17.)

27                   <sup>13</sup> See *Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001) (a court  
28 may take judicial notice of a document if it is a matter of public record or its contents are  
alleged in and central to a compliant without converting a motion to dismiss into a motion  
for summary judgment).

1 for all physical therapy treatments for all patients. In the Board's response letter,  
2 addressed to MLF, the Board indicated that only licensed therapists could determine the  
3 appropriate code for services rendered. (Meeting Minutes, Nevada Board of Physical  
4 Therapy Examiners, (May 21, 2015).)<sup>14</sup> At the meeting, the letter sent to MLF was read  
5 into the record and was attached to the meeting minutes. *Id.*

6 Because an administrative hearing need not include fraud investigations or  
7 evidentiary presentations but at a minimum must be open to public attendance, permit  
8 public comment, and make its minutes public, the Board's meeting constitutes an  
9 administrative hearing under the FCA's public disclosure bar.<sup>15</sup> See *A-1 Ambulance Serv.,*  
10 *Inc.*, 202 F.3d at 1244.

11 The Court must next determine if the disclosures at the meeting consisted of  
12 "allegations or transactions" that could give rise to an FCA claim. In order to meet this  
13 second requirement, there does not need to be an explicit allegation of fraud; rather, the  
14 public disclosure bar is met so long as the "critical elements of the fraudulent transaction"  
15 are disclosed in the public domain. *Hagood v. Sonoma County Water Agency*, 81 F.3d  
16 1465, 1473 (9th Cir. 1996) (quoting *United States ex rel. Springfield Terminal Ry. V. Quinn*,  
17 14 F.3d 645, 654 (D.C. Cir. 1994)). In their Motion, Defendants state that the "public  
18 disclosure" at issue concerned a proposed plan (ECF No. 68 at 18); however, the minutes  
19 indicate otherwise. At the meeting, it was publicly disclosed that prior to MLF's receipt of  
20 the Board's letter, MLF required staff to agree, in writing, to bill under the one CPT code  
21 (97530). (Meeting Minutes, Nevada Board of Physical Therapy Examiners, (May 21,  
22 2015).) In response, Jonathan indicated that after receiving the Board's letter, MLF  
23 abolished this requirement. At the meeting, Jonathan also stated that, based on the

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25 <sup>14</sup>Accessed at [http://ptboard.nv.gov/uploadedFiles/ptboardnvgov/content/About/Meetings/2015/2015-05-21\\_Minutes\\_ptboard.pdf](http://ptboard.nv.gov/uploadedFiles/ptboardnvgov/content/About/Meetings/2015/2015-05-21_Minutes_ptboard.pdf).

26 <sup>15</sup>At one point in the meeting, the Board addressed whether MLF's use of CPT code  
27 97530 for all functional one-on-one therapy sessions was appropriate. (See ECF No. 68  
28 at 18.) But the meeting included other agenda items, such as determining whether certain  
licensees should be released from probation and whether certain applicants should be  
allowed to retake licensing exams or be granted licenses to practice in the state.

1 Board's assessment, MLF would have to limit what services it provides going forward. *Id.*  
2 Thus, before the Board's meeting, and possibly before MLF's receipt of the Board's letter,  
3 it appears that MLF provided a variety of services but billed them under just CPT code  
4 97530.

5 Finally, the Court finds that the FAC's allegations concerning upcoding under CPT  
6 code 97530 are substantially based upon the statements made both at the meeting and  
7 in the Board's letter to MLF. "For a relator's allegations to be 'based upon' a prior public  
8 disclosure, 'the publicly disclosed facts need not be identical with, but only substantially  
9 similar to, the relator's allegations.'" *United States ex rel. Mateski v. Ratheon Co.*, 816  
10 F.3d 565, 573 (9th Cir. 2016) (quoting *United States ex rel. Meyer v. Horizon Health, Corp.*,  
11 565 F.3d 1195, 1199 (9th Cir. 2009), *overruled on other grounds by United States ex rel.*  
12 *Hartpence v. Kinetic Concepts*, 792 F.3d 1121, 1128 n.6 (9th Cir. 2015)). At the meeting,  
13 Jonathan admitted that a variety of therapy services were provided at MLF yet in  
14 communications with the Board he stated that the use of one CPT code was required (at  
15 least prior to MLF's receipt of the May 7, 2015, letter). This is consistent with the  
16 allegations in the FAC. Moreover, because Plaintiff does not dispute that she attended the  
17 meeting or that she obtained a copy of the May 7, 2015, letter from the meeting, which  
18 she cites to in the FAC (*e.g.*, ECF No. 15 at ¶ 210), the Court finds that the allegations in  
19 the FAC are substantially based on the allegations and information regarding MLF's  
20 transactions regarding CPT code 97530 that were disclosed at the May 21, 2015, meeting.

21 *b. Second Tier - Original Source*

22 An "original source" is an individual who has direct and independent knowledge of  
23 the information on which allegations of fraud are based, who has provided the information  
24 voluntarily to the government before bringing suit and where suit is based on that  
25 information. See § NRS 357.100(2)(a) – (c); 31 U.S.C. § 3730(e)(4)(B). Neither party  
26 addresses whether despite public disclosure having occurred at the Board's meeting,  
27 Welch was, in fact, the original source of that information or the allegations in the FAC.

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1 Because public disclosure occurred on May 21, 2015, but Welch did not amend the  
2 original complaint to include allegations of upcoding until September 28, 2015, and does  
3 not allege that she was the employee who wrote the initial letter to the Board of Physical  
4 Therapy Examiners, the Court is unable to find that Welch was an original source of this  
5 information.

6 Therefore, claims based on Plaintiff's legal theory of upcoding are barred.

#### 7 **4. Allegations of Improper Practices**

8 Defendants argue that Plaintiff cannot establish the prima facie elements of an FCA  
9 violation by citing to MLF's internal "policies," even if these policies amounted to  
10 questionable business practices. (ECF No. 68 at 21.) Defendants contend that any "false  
11 statements made in internal emails [] such as the statement that all children can make  
12 progress" were not material to the Government's decision to pay MLF. (*Id.*) The Court  
13 disagrees with Defendants' characterization of the primary legal theory advanced in the  
14 FAC.

15 As noted previously, the false statements used to obtain prior authorization and  
16 subsequent reimbursement concerned therapists' recommendations that the frequency or  
17 continuation of services were medically necessary as well as statements made to justify  
18 those recommendations, such as statements regarding a patient's progress. The FAC  
19 alleges that Defendant's policies and directives *caused* the making of the false statements  
20 and recommendations, and that these recommendations and statements were material to  
21 the Government's decision to pay (as neither Medicaid nor Tricare reimburse for medically  
22 unnecessary services). Moreover, because Defendants allegedly reprimand therapists  
23 when they refuse to provide a medically unnecessary recommendation (see ECF No. 15  
24 at ¶¶ 96-99, 169-170, 183), the FAC adequately alleges that Defendants' policies were  
25 the cause of the false statements upon which claims for reimbursement were sought and  
26 obtained.

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**5. Patient H.W.**

Defendants argue that the additional theory of liability alleged in the FAC regarding Patient H.W. fails to meet the requirements of Rule 9(b). (ECF No. 68 at 22.) The Court disagrees.

Defendant contends that the FAC fails to allege the “who” and “where” concerning the alleged fraud surrounding H.W.’s treatment. (*Id.*) The FAC alleges that H.W., a Tricare beneficiary, was receiving physical therapy until approximately May 2015, at which point H.W. terminated his treatment at MLF. (ECF No. 15 at ¶¶ 185-188.) Nonetheless, Defendants billed thirteen more therapy sessions for H.W. that never actually occurred. (*Id.* at ¶ 188.) These allegations permit the Court to draw the reasonable inference that MLF falsely billed Tricare for therapy sessions that were not provided to H.W., thereby stating a claim for relief plausible on its face under Rule 12(b)(6) and Rule 9(b).

**IV. CONCLUSION**

The Court notes that the parties made several arguments and cited to several cases not discussed above. The Court has reviewed these arguments and cases and determines that they do not warrant discussion as they do not affect the outcome of Defendant’s Motion.

It is hereby ordered that Defendant’s Motion to Dismiss (ECF No. 68) is granted in part and denied in part. Plaintiff will be precluded from asserting any claims based upon allegations of upcoding.

The Clerk is instructed to strike Defendants’ Notice of Supplemental Authority (ECF No. 86) from the record. Plaintiff’s motions to strike (ECF No. 87, 88) are denied as moot.

DATED THIS 9<sup>th</sup> day of May 2017.

  
MIRANDA M. DU  
UNITED STATES DISTRICT JUDGE