THOMAS JOSEPH

P.O. BOX 2111
BRATTLEBORO, VERMONT 05303

February 16, 2015

Attorney Kevin Balkwill
Disciplinary Counsel
Board of Professional Responsibility
10 Cadillac Drive, Suite 220
Brentwood, TN 37027

RE: File No: 37705-5-KB
Respondent: Matthew Michael Curley, #18613

Bass Berry & Sims PLC
150 Third Avenue South
Suite 2800
Nashville, TN 37201

Counsel for Defendant, The Brattleboro Retreat in the matter of
United States ex. rel. Thomas Joseph v. The Brattleboro Retreat
United States District Court, District of Vermont, Case No: 2:13-cv-55wks

Dear Attorney Balkwill:

As you are aware, I represent myself in the above captioned matter. In short order, the Board of Professional Responsibility ("BPR") of The Supreme Court of Tennessee will be able to see for themselves that the complaint now under investigation does have merit and can withstand the smokescreen which Attorney Matthew M. Curley and his fellow Vanderbilt University alumnus Attorney Charles I. Malone of Walker, Tipps & Malone PLC, hope will shield them from further scrutiny.

The BPR surely recognizes that federal Courts do not confer a license to practice law, only the state courts can. Naturally, an attorney can only be admitted to a federal Court provided they are an attorney in good standing in the state court where their license was conferred. Therefore, an attorney is required to conduct themselves by the Rules of Professional Conduct ("RPC") where his/her license is conferred and any additional rules that the federal Court may have. A federal Court does not have the jurisdiction or authority to reframe, redefine or water down an attorney's obligation to the state that licensed him or her.

Not surprisingly then, that the United States Court of Appeals for the Second Circuit in the matter of *United States ex rel. Fair Laboratory Practices Associates v. Quest Diagnostics Inc., 734 F.3d 154 (2d Cir. 2013)* held that the FCA does not preempt state professional ethics rules. The Second Circuit stated that "[n]othing in the [FCA] evinces a clear legislative intent to preempt state statutes and rules that regulate an attorney's disclosure of client confidences," 734 F.3d at 163, and it explained that although the FCA permits relators to bring *qui tam* suits, "it does not authorize [such] person[s] to violate state laws in the process." *Id.* (See Exhibit A)

More importantly, because the Court in *United States ex. rel. Fair Laboratory Practices Associates v. Quest Diagnostics, Inc.*, made clear that not only does the FCA not preempt state ethical rules but if an interpretation of a state ethical rule is "inconsistent with or antithetical to federal interests, a federal court interpreting that rule must do so in a way that balances the varying federal interests at stake." As a *qui tam* relator, I was suing on behalf of the United States of America and our government's interests, therefore, there should be no doubt that the federal interests in the federal Complaint should be primary. (Refer to Grievance Committee for the S.D.N.Y. v. Simels 48 F.3rd 640, 646 (2d Cir. 1995) and *United States ex. rel. Doe v. X. Corp*., 862 F. Supp. 1502, 1507 (E.D.Va. 1994) and also refer to 31 U.S.C. 3730(b).

Therefore, Attorney Malone's assertion and reliance that "Attorney Curley and his co-counsel had no obligation under the RPC – Rule 3.3 or otherwise – to raise legal arguments on behalf of Mr. Joseph to toll the statute of limitations on the basis of the WSLA" in the FCA litigation is not only a false defense without merit, but also evidences disingenuous intent that further contradicts Attorney Curley and Attorney Malone's sworn obligations as required of them by the Rules of Professional Conduct for the State of Tennessee which now has been affirmed by the United States Court of Appeals for the Second Circuit.

More damning for Attorney Curley and his co-counsel Attorney Elizabeth Wohl of Downs Rachlin Martin PLLC will be the detailed and repeated misrepresentations of fact (RPC 3.3(a)(1)) contained in this response that memorializes Attorney Curley and Attorney Wohl's own fraud beyond the fraud that their client, The Brattleboro Retreat, engaged in that spanned no less than a decade and was memorialized in the federal Complaint. The Complaint contained far more particularity as required by Rule 9(b) than Attorney Curley and Attorney Wohl collectively recognized and when coupled with the specificity in the Complaint left little doubt that the attorney's collective misconduct rivaled only that of their own client, The Brattleboro Retreat. Attorney Curley and his defense counsel Attorney Malone seek to take credit for what *would be* appropriate and ethical behavior *had they* conducted themselves in the purported manner they describe as follows:

> *"As the Board is aware,* ***the legal standards applicable to this analysis involved a review of the facts as set forth in Mr. Joseph's own complaint, with the assumption for purposes of the Motion to Dismiss that such facts are true****. As such, Attorney Curley and his co-counsel did not make – and could not have even made – any "false statement of fact" in violation of RPC 3.3(a)(1) on behalf of the Retreat in connection with the Motion to Dismiss." (Emphasis mine).*

This detailed response of those repeated misrepresentations of fact will evidence overwhelmingly, that Attorney Curley and co-counsel Attorney Wohl did not abide by the ***"legal standards applicable to this analysis involved in a review of the facts as set forth in Mr. Joseph's own complaint"*** but rather, manufactured their own facts to mislead the Court in furtherance of their collective effort to circumvent justice, confuse the Court and carve out an escape of liability for their clients years of fraudulent misconduct. Moreover, in his defense of Attorney Curley, Attorney Malone has also exposed himself to improper conduct by knowingly presenting false information that simply cannot withstand the bare and unvarnished facts contained with this submission.

Attorney Matthew M. Curley of Bass, Berry & Sims PLC and Co-counsel Attorney Elizabeth Wohl of Downs Rachlin Martin PLLC

Purposeful Misrepresentations of Fact (FRAUD) in clear violation of their collective and admitted obligations to a review of the facts as set forth in the Complaint, with the assumption for purposes of The Brattleboro Retreat's Motion to Dismiss analysis that such facts are true.

Motion to Dismiss: Preliminary Statement ¶ 3: Attorney Curley and co-counsel Attorney Elizabeth Wohl state: "Mr. Joseph formerly worked at the Retreat as a Self-Pay Collections Representative. In other words, Mr. Joseph focused on collecting amounts owed by individual patients (described by Mr. Joseph as "patient responsibility") and not amounts owed by commercial or government payers." (Emphasis mine)

➔ **BPR**: Complaint ¶ 82: "In early of January of 2011, Relator Thomas Joseph accepted a position at the Retreat as a Self-Pay Collections Representative. The position described to Relator involved calling self-pay payers, *including individuals who have an unpaid obligation to the Retreat pursuant to Medicare, Medicaid, or other government health care benefit program rules regarding beneficiary deductibles and coinsurance payments*, in an attempt to resolve unpaid claims and other claims-related issues. Relator Thomas Joseph's duties as a Self-Pay Collections Representative also include attempting to collect unpaid amounts designated as "patient responsibility," as indicated on commercial insurance remittance information or "EOB"."

➔ **BPR**: In the Motion to Dismiss Preliminary Statement ¶ 3 Attorney Curley and co-counsel purposely water down my responsibilities to falsely advance a narrative that I had no reason to be familiar with federal health benefit programs or claim forms specifically. On Motion to Dismiss page 13 counsel boldly question whether I had ever ***seen*** a claim form. They failed to recognize or advance the facts in the Complaint that detailed my job duties in resolving patient balances regarding all payers involved reviewing claims and EOBs which are essentially an exact replica of what was evidenced on any claim submitted by the Retreat. In totality, they purposely deviated from Complaint ¶ 82, 85 and virtually every other in their wholesale neglect of their professional obligations to consider the facts in the Complaint as true for their analysis contained in the Motion to Dismiss.

➔ **BPR**: Complaint ¶ 85: "In November of 2011, Relator Thomas Joseph was asked by Jennifer Broussard to assist with the Retreat's handling of commercial insurance credits**.** In the course of this work, Relator Thomas Joseph discovered substantial unrefunded commercial insurance credits in many patient account accounts. When Relator Thomas Joseph brought some of these unrefunded commercial insurance credits to Jennifer Broussard's attention, she entered allowance reversals using posting code 21 to eliminate the credits from any accounts for which the Retreat did not have a request for a refund from the commercial insurer on file. This was done in Relator Thomas Joseph's presence." (Emphasis mine).

➔ **BPR**: Attorney Curley and co-counsel Attorney Wohl misleading statements in the Preliminary Statement are brought home here as they suggest I had no experience working with commercial or government payers when in fact, I did (refer to Complaint ¶82 and 85 respectively). They also fail to acknowledge that I witnessed my own Manager make accounting entries that evaporated legitimate credit balances due commercial insurance companies (refer Complaint ¶ 85).

> Motion to Dismiss Page 6: "Mr. Joseph's Complaint is based on his belief that the Retreat fraudulently retained overpayments from government payers and maintained deliberately falsified records concealing the Retreat's obligation to return those overpayments. This belief is based on *alleged observations* by Mr. Joseph during his employment as a Self-Pay Collections Representative at the Retreat, which began in January 2011. (Emphasis mine)

➔ **BPR**: Complaint ¶ 2: Reads as follows: Relator's claims are based on the Retreat's submission of false and fraudulent patient reimbursement claims and billing statements…." (Emphasis mine.)

➔ **BPR**: These were not "beliefs" or "alleged observations" but actual documentation of claims and patient reimbursement documents and billing statements (Complaint ¶ 2) that included Explanation of Benefits (EOBs) with the remittance data (that also provides virtually an exact replica of the Retreat's claim billed to all payers) that were explained in the Complaint in narrative form and given the government at the time of filing. Attorney Curley and Attorney Wohl assert falsely, once again, something far different than what was stated in the Complaint.

➔ **BPR**: Complaint ¶ 13: "Relator states that all allegations in this Complaint are based on evidence obtained directly by Relator independently and though his own labor and efforts. The information and evidence he has obtained or of which **he has personal knowledge**, and on which these allegations of violations of the False Claims Act are based**, consist of documents, computer data, conversations with authorized agents and employees of the Retreat, and his own direct observation of manipulations of computer accounting data or other actions taken by such authorized agents and employees of the Retreat**…." (Emphasis mine).

➔ **BPR**: Attorney Curley and Attorney Wohl falsely suggest a "belief" formed the basis of the Complaint based on "alleged observations" while ignoring the numerous "facts" in the Complaint that memorialized that the "beliefs" and "alleged observations" went far beyond mere suspicion and included huge amounts of documents, computer data (that spanned ten years), my own eye-witness accounts of the evaporation of real money and credits by my former Manager and numerous and exhaustive conversations in the Complaint that continued with Senior Management that spanned nearly two years of my employment. Indeed, the mere use of the word "alleged" evidences that they were not referring to the facts in the Complaint as true for their Motion to Dismiss analysis. The email documentation between myself and Senior Management concerning all issues and memorialized in the Complaint demonstrated overwhelmingly the fraud afoot which Attorney Curley and co-counsel Attorney Wohl surely would have reviewed while consulting with their client and prior to their preparation of their fraud-laden Motion to Dismiss. Moreover, the e-mails and communications to all levels of

Retreat management mentioned in the Complaint and given the government included some of the same electronic or computer data that the Complaint cites comprised the body of "evidence" I had given the government. For the record, the vast computer data doesn't lie so there is no doubt Attorney Curley and Attorney Wohl had affirmative knowledge of their client's fraud well before they prepared their client's Motion to Dismiss.

➔ **BPR**: The Complaint makes clear the numerous challenges I encountered as I repeatedly tried to get the historic psychiatric hospitals senior management team to return patient credits or "self-pay" credits that had been on the books for ten years or the entire period at issue in the Complaint. By not timely refunding patient or "self-pay" credits absent an affirmative request, The Brattleboro Retreat was stealing from their very own patient population - - the most disadvantaged of our society - - those with mental health and substance abuse. Had Attorney Curley and Attorney Wohl assumed the facts in the Complaint to be true for the purposes of their Motion to Dismiss analysis, they could see that their client, the historic psychiatric hospital, The Brattleboro Retreat, stole from everyone including their own patients by not giving them a refund of any amount absent an affirmative request from them to do so. Please refer to Complaint ¶'s 3, 75, 76, 77, 79, 81, 85, 86, 88, 89, 90, 91, 94, and 95.

➔ **BPR**: Complaint ¶ 94 makes clear that when my former colleague Lyndsay Sunderland and I undertook a due diligence mailing, Retreat management continued to resist and only allowed us to approach a limited number of patient and commercial credits on the books. Complaint paragraph 94 also demonstrates, if taken as true for the Motion to Dismiss analysis, the historic hospital never had a due diligence process previously and by not having one was admitting they did nothing to proactively return credits due all payers including federal health benefit programs as they had no need to because they employed their devious scheme of entering a few keystrokes (Code 21 allowance reversals) to wipe any credit due anyone off the books.

All of this information and documentation referred to in the Complaint went far beyond "belief", "alleged observations" or "inferences" that both Attorney Curley and Attorney Wohl suggest was the basis for my allegations. Had Attorney Curley and Attorney Wohl not fraudulently manipulated the facts in Complaint they would not have been able to paint my complaint as my attorneys suggested in our Opposition document as "overly vague" but with the requisite particularity and specificity required under Rule 9(b) that would have allowed me to easily reach discovery.

➔ **BPR**: Complaint ¶ 85 evidences I was a witness to a crime and conveyed the same in my many meetings with senior management. Surely, the eye witness account memorialized in Paragraph 85 goes far beyond "belief" or "inferences" and details the traumatic realization that my own Manager was engaging in criminal behavior. The Complaint ¶ 86 makes clear of the severity of what I witnessed when I emailed the Controller, Lisa Dixon to alert her to these troubling transactions in my presence. Complaint ¶'s 79, 80, 81, 82, 84, 85, 86 and 89 detailed that even after notifying all levels of Retreat management they still had not restored the credits timely and never would have had I not notified them a 2nd time many months later that the commercial payers credits still had not been restored. Complaint ¶ 88 memorialized that Mr. Jeffrey Corrigan,

the Vice President of Human Resources had informed me that had I not reported what I witnessed, I would have been in violation of the Retreat's Compliance Plan (which coincidentally I was the only employee that honored the Compliance Plan as everyone else who knew of the fraud looked the other way). And yet, the best Attorney Curley and Attorney Wohl could do in their fraud-laden Motion to Dismiss was advance that my allegations were based on "beliefs", "alleged observations" and "inferences"? Perhaps Attorney Curley and Attorney Wohl got me confused with one of the patients who might have been experiencing delusional or other schizophrenic attributes and forgot that I was hired by the Retreat in Administration with the requisite knowledge and skill set to know right from wrong.

Defendant's Motion to Dismiss Page 7 2nd ¶ The Complaint includes allegations regarding 32 separate patient accounts, spanning roughly seven years, with respect to which it asserts that the Retreat used Code 21 to eliminate credits owed to federal and state government payers. (*Id.* ¶ ¶ 104-173) The Complaint does not identify any actual bills submitted to government payers by the Retreat or any reimbursement received from those payers. Rather, the entirety of the Complaint is based on *inferences* drawn from the use of accounting entries and codes on particular patient accounts and his review of patient ledgers……." He also asserts without specificity that, since 2003, each and every Form CMS-838 Credit Balance Report submitted to CMS, which enrolled providers must submit to CMS each quarter and which sets forth credit balances, was fraudulent as a result of the use of Code 21 to eliminate refunds due to government payers."

➔ **BPR**: Attorney Curley and co-counsel Attorney Wohl flat out lie repeatedly. See the specific claims submitted to government payers referred to in Complaint ¶'s 103-174. The Complaint paragraphs provide overwhelming detail that directly contradicts the misrepresentations advanced by Attorney Curley and co-counsel Attorney Wohl's manufactured facts in their Motion to Dismiss and in direct opposition to their pronouncements in their formal reply to Attorney Kevin Balkwill of the BPR dated 12/22/14 that their analysis in the Motion to Dismiss would use the facts in the Complaint with the assumption that such facts were true.

➔ **BPR**: Complaint ¶ 104: The amounts indicated here were actual amounts that Medicare had paid and the paragraph was providing a written narrative of a particular client ledger for a patient where using the Retreat's own accounting codes you could understand the service the hospital billed Medicare, the amount Medicare had paid and the amounts the Retreat staff posted to the client ledger and other amounts designated for either a contractual allowance or patient responsibility. In addition, the Retreat's client ledgers provide for the actual internal claim number that corresponded with the Medicare claim number that would have been on the remittance documents provided to the government. Every patient example contained in the Complaint memorialized with incredible detail, particularity and yes, specificity, despite Attorney Curley and Attorney Wohl's assertions to the contrary that "*no actual claims to federal health benefit programs and other payers were identified*." Despite this reality, they collectively pollute the facts by creating their own set of working "facts" to deploy in their legal pleadings and ignore those contained in the Complaint to advance flat out lies in their efforts to portray a completely

different picture than what the facts in the Complaint demonstrate. Attorney Curley and Attorney Wohl were obligated to treat the facts in the Complaint as true for purposes of the Motion to Dismiss analysis but flagrantly ignored their collective obligations in furtherance of their egregious misconduct to carry forward their client's fraud and deception before a federal Court.

➔ **BPR**: Complaint ¶ 105: "Accordingly, the Retreat submitted a claim for payment for DOS 3/21/2006 for Patient 1 at a per diem amount equal to the allowed charges of $1,512.90 less the $952.00 deductible designated by Medicare Part A as patient responsibility, or $560.89.

➔ **BPR**: Complaint ¶ 106: Because Patient 1 was also an indigent Medicaid beneficiary, the Retreat submitted a claim for payment of his patient responsibility in the amount of $952.00 to Medicaid of Vermont. On April 20, 2006, the Retreat **received** $3,891.66 from Medicare Part A for Patient 1's inpatient per diem charges for DOS 3/21/2006. The April 20, 2006 payment *resulted in an overpayment of $3,330.77*, or $3,891.66 less than the $560.89 that Medicare Part A legitimately was required to pay, which, when reduced by the amount of $77.11 which the Retreat would normally write off as a discount to Medicare Part A, equals $3,253.66. The patient ledger reflects that when the Medicare Part A overpayment to the Retreat posted on April 20, 2006 using posting code 10, a simultaneous entry using posting code 21 (signifying an allowance reversal) was posted in the amount of $3,253.66, *eliminating the entire balance of the overpayment from the patient ledger*."

➔ **BPR**: Complaint ¶ 103 which if treated as "true" for the Motion to Dismiss analysis would have left no question for Attorney Curley or Attorney Wohl to discern that the use of Code 21 in this manner and articulated in Complaint ¶105 and 106 was overwhelmingly fraudulent. Instead, they ignored their obligations and set aside the facts in the Complaint in favor of their own manufactured facts to deceive a federal Court and carry forward their client's fraudulent conduct.

➔ **BPR**: The Retreat never returned the $3,253.66 referred in Complaint ¶ 105 because if they had you would have seen on the patient ledger either a posting code of 11 suggesting a recoupment or take back from Medicare A or a posting code of 50 (See Complaint Page 6 IV. Substantive Allegations and Complaint ¶ 103) which would have indicated a check request was made to refund the amounts due. More importantly, the Retreat's payment posted and was reversed on the same day!!!! When the amounts were posted to the client ledger it was after the Medicare A remittance had been received (and already safely in the Retreat's bank account) and the Retreat was simply accounting for their haul compliments of the US Treasury. The only need for the Code 21 Allowance Reversal was because no legitimate balance remained due on the client ledger and the Retreat needed a way to remove the credit in favor of Medicare A off the books (See Complaint ¶'96-99, 102 and 103). There is no doubt in the course of Attorney Curley and co-counsel Attorney Wohl's meetings and discussions with many Retreat staff long before the Motion to Dismiss was drafted that the Retreat's fraud was crystal clear as any inquiry by either attorney of those staff named in the Complaint would have overwhelmingly and affirmatively confirmed without question what the Retreat was doing as it would have been

confirmed by any one of my former colleagues in the Patient Financial Services Department (named in the Complaint), verified by multiple Managers, including the Chief Financial Officer as well as the President and Chief Executive Officer. Therefore, there is no doubt that Attorney Curley and Attorney Wohl had affirmative knowledge of their client's fraudulent conduct long before they made the strategic and purposeful decision to join forces with their client to further advance factually incorrect assertions that directly contradict the "facts" in the Complaint which they were obligated to treat as true for the purposes of their Motion to Dismiss analysis. At a minimum, Attorney Curley and even Attorney Wohl should be compelled to give the BPR sworn testimony under oath with penalties of perjury so that their knowledge can be further understood beyond the legal pleadings which on its face evidence an intent to defraud a federal Court of law in an effort to circumvent justice, obtain safe passage and an escape for their client and avoid them having to be being held accountable under the law.

Additionally, in defense of Attorney Curley, Attorney Malone has also likely violated the Rules of Professional Conduct by advancing falsities and should face appropriate review of his conduct and if necessary, disciplinary measures as well.

> Motion to Dismiss Page 7: (Restating) "Rather, the entirety of the Complaint is based on inferences drawn from the use of accounting entries and codes on particular patient accounts and his review of patient ledgers. He also asserts without specificity that, since 2003, each and every Form CMS-838 Credit Balance Report submitted to CMS, which enrolled providers must submit to CMS each quarter and which sets forth credit balances, was fraudulent as a result of the use of Code 21 to eliminate refunds due to government payers."

➔ **BPR**: Complaint ¶ 2: "Relator's claims are based on the Retreat's submission of false and fraudulent patient reimbursement claims and billing statements…."

➔ **BPR**: Complaint ¶ 13: "Relator states that all allegations in this Complaint are based on evidence obtained directly by Relator independently and though his own labor and efforts. The information and evidence he has obtained or of which he has personal knowledge, and on which these allegations of violations of the False Claims Act are based, consist of documents, computer data, conversations with authorized agents and employees of the Retreat, and his own direct observation of manipulations of computer accounting data or other actions taken by such authorized agents and employees of the Retreat…." (Emphasis mine).

➔ **BPR**: Complaint ¶ 75: Refers to an actual conversation with Senior Vice President and Chief Financial Officer John Blaha. This wasn't based on "inferences" as Attorney Curley and co-counsel falsely state on Motion to Dismiss Page 7 but an actual conversation that occurred.

➔ **BPR**: Complaint ¶ 80: This paragraph refers to actual handwritten notes on a client ledger and was given to the government along with the Explanation of Benefits and client ledgers to support the duplicate payments and reversals. These same documents were shared with Senior Management and surely reviewed by Attorney Curley and Attorney Wohl prior to their Motion to Dismiss analysis. Moreover, the Complaint makes clear that the commercial amounts

removed from the client ledger were only partially restored eight months later and after I had gone back to Senior Management a **second** time (See Complaint ¶ 81) and alerted them that the original $57,355.53 that my former Manager Jennifer Broussard had evaporated eight months earlier (in my own presence) had not been restored. Had I not continued to monitor these accounts the commercial credits never would have been partially restored.

➔ **BPR**: Complaint ¶ 85: "In November of 2011, Relator Thomas Joseph was asked by Jennifer Broussard to assist with the Retreat's handling of commercial insurance credits. In the course of this work, Relator Thomas Joseph discovered substantial unrefunded commercial insurance credits in many patient accounts. When Relator Thomas Joseph brought some of these unrefunded commercial insurance credits to Jennifer Broussard's attention, she entered allowance reversals using posting code 21 to eliminate the credits from any accounts for which the Retreat did not have a request for a refund from the commercial insurer on file. This was done in Relator Thomas Joseph's presence."

➔ **BPR**: Complaint ¶ 86: Had Attorney Curley and co-counsel taken the Complaint facts as being "true" they would have gleaned from this paragraph, "In the days following his initial communication to Ms. Dixon, she informed Relator Thomas Joseph of her intention to speak to Jennifer Broussard regarding the practice of eliminating overpayment credits for which there was no refund request on file using allowance reversals."

➔ **BPR**: This wasn't an "inference", but an actual conversation where Ms. Dixon, the Controller stated she intended to speak to my former Manager not only about the credits she evaporated in my presence but further indicated and concurred this was not appropriate behavior with her statement that she would be speaking with my former Manager about this "practice". Clearly, Attorney Curley and co-counsel purposely did not take this as "fact" and therefore "true" for purposes of the Motion to Dismiss so as to mislead the Court in furtherance of their own fraud.

➔ **BPR**: Complaint ¶ 97: Application of allowance reversals entered under posting code 21 to an overpayment renders the Retreat's quarterly credit balance reports submitted to Medicare and Medicaid on form CMS-838 inaccurate. The Retreat is required, as a condition of payment, to submit accurate form CMS-838 credit balance reports so that the government can be assured of obtaining a refund of amounts it has overpaid for medical services.

➔ **BPR**: Had Attorney Curley and co-counsel taken Complaint ¶ 97 as fact and "true" for the purposes of the their Motion to Dismiss analysis they would have no reason to suggest that I failed to provide specificity as they did on Motion to Dismiss page 7 as to the Retreat's fraudulent submission of CMS-838s.

Motion to Dismiss Page 9: "….The plausibility standard is only satisfied "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged" *Id. (citing Bell Atl. Corp. v Twombly, 550 U.S. 544, 556 (2007)). (Emphasis mine).*

➔ **BPR**: Here Attorney Curley and co-counsel Attorney Elizabeth Wohl have the audacity to cling to case law to further suggest that I needed to plead a reasonable "*inference*" when they were simultaneously using the word "inference" repeatedly to derogatorily dismiss and diminish the factual content in the Complaint which they were obligated to interpret for the Motion to Dismiss as factual. Here, I plead factual content making more than ample "inferences" but supported with real facts that were further buttressed by overwhelming detail and both attorneys maliciously demonstrate their true colors here. The Complaint not only connects the dots of a fraudulent scheme but is conveyed in a way that only requires two active brain cells to discern. Despite this, both Attorney Curley and Attorney Wohl collectively embark on a devious campaign to misuse the facts and involving millions of dollars in taxpayer money while trying to import case law to their advantage while simultaneously using the same language to diminish the particularity of the fraud pleaded in the Complaint and demanded by Rule 9(b). This is not conduct that should be allowed in any Court of law in the United States and I call upon the BPR to hold Attorney Matthew M. Curley accountable for the miscarriage of justice that he conceived, conspired, planned and executed.

Motion to Dismiss Page 11: Regarding Patient Examples 1, 2, 10, 11-14, 17-29, 31 and 32. Please refer to Complaint ¶'s 105-107, 109-110, 153-154, 166, 170 and 172 all demonstrate ample specificity that the Retreat was using Posting Code 21 to conceal duplicate and/or overpayments which more than sufficiently evidence "fraudulent intent" which Attorney Curley and co-counsel Attorney Wohl claim was missing on Motion to Dismiss page 13. Moreover, Attorney Curley and co-counsel purposely ignored their knowledge of the Wartime Suspension of Limitations Act (WSLA) that clearly demonstrated that statute of limitations should be tolled. The original complaint to the BPR acknowledges that Attorney Curley concedes knowledge of the WSLA. Case law from the United States Supreme Court on down has supported that the WSLA is the law of the land and will be until such time that the Supreme Court rules this summer in *Kellogg Brown & Root Services, Inc., et al. v. United States of America ex. rel. Benjamin Carter*. At a minimum, Attorney Curley would have to "qualify" his definition of *honesty* for the purposes of interpreting the black letter law of the WSLA which couldn't be any clearer and will be discussed in more detail below.

➔ **BPR**: Motion to Dismiss Page 11: Attorney Curley and co-counsel overlooked Complaint Paragraph 102-103 which makes clear that the import of Posting Code 10 and 21 (payment with a simultaneous reversal) when used in tandem is overwhelmingly fraudulent(!).

➔ **BPR**: Regarding Patient 1 refer to Complaint ¶'s 106-107 evidence that actual claims were submitted, provide dates, service rendered, amounts billed, amounts received and amounts evaporated with the use of Code 21 allowance reversals which evidence fraudulent intent. Paragraphs 102 and 103 evidences the use of payment/reversals in tandem is knowingly fraudulent but Attorney Curley and Attorney Wohl flat out lie to the Court and deviate from their obligations to take the facts, as alleged, as true for the purposes of their Motion to Dismiss analysis. They also fail to identify their conceded knowledge of the WSLA which has been the law of the land for decades and has been used by the Supreme Court and United States Court of

Appeals for the Second Circuit, other Circuits and other District Courts within the Second Circuit to establish both controlling and persuasive case law directly opposite to what they argued for in a reduction in the statute of limitations from the entire ten year period at issue to six years.

➔ **BPR**: Regarding Patient 2 refer Complaint ¶'s 108-112 which evidence that actual claims were submitted, provide dates, service rendered, amounts billed, amounts received and amounts evaporated with the use of Code 21 allowance reversals which evidence fraudulent intent. Paragraphs 102 and 103 evidences the use of payment/reversals in tandem is knowingly fraudulent but Attorney Curley and Attorney Wohl flat out lie to the Court and deviate from their obligations to take the facts, as alleged, as true for the purposes of the Motion to Dismiss analysis. They also fail to identify their conceded knowledge of the WSLA which has been the law of the land for decades and has been used by the Supreme Court and United States Court of Appeals for the Second Circuit, other Circuits and other District Courts within the Second Circuit to establish both controlling and persuasive case law directly opposite to what they argued for in a reduction in the statute of limitations from the entire ten year period at issue to six years.

➔ **BPR**: Motion to Dismiss: Patient 10 Complaint ¶'s 151-153. Motion to Dismiss incorrectly refers to ¶ 153 though Complaint ¶'s 151-153 are applicable. As before, these paragraphs evidence that actual claims were submitted, provide dates, service rendered, amounts billed, amounts received and amounts evaporated with the use of Code 21 allowance reversals which evidence fraudulent intent. Paragraphs 102 and 103 evidences the use of payment/reversals in tandem is knowingly fraudulent but Attorney Curley and Attorney Wohl flat out lie to the Court and deviate from their obligations to take the facts, as alleged, as true for the purposes of the Motion to Dismiss analysis. They also fail to identify their conceded knowledge of the WSLA which has been the law of the land for decades and has been used by the Supreme Court and United States Court of Appeals for the Second Circuit, other Circuits and other District Courts within the Second Circuit to establish both controlling and persuasive case law directly opposite to what they argued for in a reduction in the statute of limitations from the entire ten year period at issue to six years.

➔ **BPR**: Motion to Dismiss: Patients 11-14 ¶'s 154. These were knowingly fraudulent payments as Complaint Paragraphs 102 and 103 evidences the use of payment/reversals in tandem is knowingly fraudulent but Attorney Curley and Attorney Wohl flat out lie to the Court and deviate from their obligations to take the facts, as alleged, as true for the purposes of the Motion to Dismiss analysis. They also fail to identify their conceded knowledge of the WSLA which has been the law of the land for decades and has been used by the Supreme Court and United States Court of Appeals for the Second Circuit, other Circuits and other District Courts within the Second Circuit to establish both controlling and persuasive case law directly opposite to what they argued for in a reduction in the statute of limitations from the entire ten year period at issue to six years.

➔ **BPR**: Motion to Dismiss: Patients 17-29 ¶ 166. These were knowingly fraudulent payments as Complaint Paragraphs 102 and 103 evidences the use of payment/reversals in tandem is knowingly fraudulent but Attorney Curley and Attorney Wohl flat out lie to the Court and deviate

from their obligations to take the facts, as alleged, as true for the purposes of the Motion to Dismiss analysis. They also fail to identify their conceded knowledge of the WSLA which has been the law of the land for decades and has been used by the Supreme Court and United States Court of Appeals for the Second Circuit, other Circuits and other District Courts within the Second Circuit to establish both controlling and persuasive case law directly opposite to what they argued for in a reduction in the statute of limitations from the entire ten year period at issue to six years.

➔ **BPR**: Motion to Dismiss: Patient 31 ¶'s 170-171 These were knowingly fraudulent payments as Complaint Paragraphs 102 and 103 evidences the use of payment/reversals in tandem is knowingly fraudulent but Attorney Curley and Attorney Wohl flat out lie to the Court and deviate from their obligations to take the facts, as alleged, as true for the purposes of the Motion to Dismiss analysis. They also fail to identify their conceded knowledge of the WSLA which has been the law of the land for decades and has been used by the Supreme Court and United States Court of Appeals for the Second Circuit, other Circuits and other District Courts within the Second Circuit to establish both controlling and persuasive case law directly opposite to what they argued for in a reduction in the statute of limitations from the entire ten year period at issue to six years.

➔ **BPR**: Motion to Dismiss: Patient 32 ¶'s 172-173 Similar as before but noteworthy. These were also knowingly fraudulent payments as Complaint Paragraphs 102 and 103 evidences the use of payment/reversals in tandem is knowingly fraudulent. In this patient example, the reversal occurs two years after the patient was in the hospital(!) Surely, Attorney Curley and Attorney Wohl would be able to discern that something was amiss here had they taken the facts in the Complaint as true for purposes of the Motion to Dismiss. Paragraph 173 makes clear that the reversal occurred on 06/02/2007 so this confirms that the overpayment posted on 07/13/2005 had been showing as an aging credit balance on any credit report run by the Retreat's accounting system AVATAR as the overpayment had been showing due TRICARE, a federal health benefit program from the day it was posted to the client ledger on 07/13/2005 until the day it was removed from the ledger with a reversal on 06/02/07. Most American's would have enjoyed a $7,374.96 interest free loan or line of credit (for almost two years) compliments of the US Treasury but it gets even better for the historic psychiatric hospital, The Brattleboro Retreat, as they completed their haul from the US Treasury by employing their favored Code 21 "allowance reversal" to belatedly remove the credit due TRICARE from the ledger and with that reversal - - - any trace of the credit would have been removed from any aging report that the Retreat's computer system AVATAR would have been able to generate. Instead of honoring their obligations before the Court, Attorney Curley and Attorney Wohl continued their client's deception and fraud, purposely deviated from their obligations to take the facts, as alleged, as true for the purposes of the Motion to Dismiss analysis, while marching forward using their own deception and purposeful lies to seek an escape of justice for their client to avoid having them held accountable under the law for their decade of ghastly transactional behavior.

Motion to Dismiss Page 10: Attorney Curley and Attorney Wohl fail to cite relevant controlling and persuasive case law concerning the Wartime Suspension of Limitations Act (WSLA) which the Complaint to the BPR evidences Attorney Curley had and conceded such knowledge. Also, when you consider *United States ex. rel. Fair Laboratory Practices Associates v. Quest Diagnostics, Inc.*, the United States Court of Appeals for the Second Circuit made clear that not only does the FCA not preempt state ethical rules but if an interpretation of a state ethical rule is "inconsistent with or antithetical to federal interests, a federal court interpreting that rule must do so in a way that balances the varying federal interests at stake." Indeed, any attorney, practicing law in the United States of America, indeed any citizen of the United States should always have the best interests of the United States in mind at all times. Therefore, for Attorney Curley to purposely ignore conceded knowledge of the Wartime Suspension of Limitations Act (WSLA) on its face and to the detriment of the U.S. Treasury suggests that Attorney Curley does not have the best interests of his country in mind when he practices law and may explain why his tenure as an Assistant United States Attorney was so brief and approximately only a year in duration.

➔ **BPR**: Please refer to the discussion and applicability of the Wartime Suspension of Limitations Act (WSLA) to follow.

Motion to Dismiss Page 12: "Both FCA provisions contain certain fundamental pleading requirements: (1) there must have been a "claim" submitted for payment by the defendant within the meaning of FCA; (2) either the claim itself or the record or statement material to the claim must have been false or fraudulent; and (3) the defendant must have known that the claim or statement was false or fraudulent."

➔ **BPR**: Every one of the 32 patient examples represented an actual claim to a federal health benefit program or other payer. As stated earlier and evidenced in the Complaint, all 32 patient examples evidence actual claims submitted for payment, provide dates, service rendered, amounts billed, amounts received and amounts evaporated with the use of Code 21 allowance reversals. Moreover, in each of the Complaint paragraphs regarding each example provided a narrative or statement demonstrating their falsity. The use of Code 21 Allowance Reversal often at the same time a payment was applied to a client ledger evidences that the claim was knowingly fraudulent as the Retreat was removing payments from its books for which it was not owed. See Complaint paragraph 102-103 which memorializes with crystal clarity that the use of these transaction codes in tandem with real claims evidences overwhelming fraudulent activity. Again, had Attorney Curley and co-counsel Attorney Wohl not abandoned their obligation to treat the facts as true for the purposes of their Motion to Dismiss analysis they would not have been able to make false pronouncements that I had failed to plead with requisite *particularity* the "fundamental pleading requirements" required of the FCA.

Motion to Dismiss Page 12 (Bottom) and (Top) Page 13: "The Complaint includes virtually no allegations about the submission of actual claims by the Retreat. It relies largely on references to entries in the Retreat's accounting system and presupposes that claims were submitted for each entry in the system, but fails to identify any actual claim. No bills or claims forms are

attached to the Complaint; no details are provided regarding any supposed claims; no dates are given for claims submitted; and no details are provided about who completed or submitted the claim forms.

➔ **BPR**: Paragraph after paragraph of the Complaint evidences that actual claims were submitted, provide dates, service rendered, amounts billed, amounts received and amounts evaporated with the use of Code 21 allowance reversals. Paragraphs 102 and 103 evidences the use of payment/reversals in tandem is knowingly fraudulent but Attorney Curley and Attorney Wohl flat out lie to the Court and deviate from their obligations to take the facts, as alleged, as true for the purposes of the Motion to Dismiss analysis.

In the spirit of full disclosure, I am registered with the State of Vermont Marijuana Registry (ID No: M308053) for the use of medicinal marijuana and have long thought I had good access to quality herb but it's becoming clearer that Attorney Curley and Attorney Wohl apparently have either better access or better cultivation skills as their pleadings of "fact" appear to be either from another case or universe. In the Motion to Dismiss page 12/13 they must have either over indulged or been on a binge because they claim **"no details are provided regarding any supposed claims; no dates are given for claims submitted; and no details are provided about who completed or submitted the claim forms."** Every one of the 32 patient examples *provided dates, service rendered, service billed, amounts billed, amounts received, and amounts wiped off the books by the fraudulent use of Code 21 "allowance reversals"*. The detail is stunning, provided overwhelming clarity of the fraudulent scheme, memorialized the actual claims that were submitted for payment as well as the fraudulent scheme employed. Again, had Attorney Curley and Attorney Wohl taken the facts in the Complaint as true for the purposes of their Motion to Dismiss analysis they never would have been able to assert such fraudulent facts in their Motion to Dismiss. Moreover, Complaint ¶ 69 speaks directly to who was responsible for claims submissions despite Attorney Curley and Attorney Wohl's efforts to suggest I did not identify who was responsible for claims submission(!)

Motion to Dismiss Pg. 14: "In paragraph 141, it is alleged that "the Retreat submitted claims to VSH, a Medicaid-funded program, purportedly for [a] dual-eligible patient's patient responsibility amount as designated by Medicare Part A, but in the amount of $70,829.81 rather than in the amount of $21,508.00 as the patient responsibility for these DOS was determined to be by CMS." (Id.¶141.) The Complaint does not allege when these claims were submitted, or by whom. In addition, the Complaint acknowledges that Mr. Joseph does not know what the appropriate reimbursement rate for this service was, and therefore, he cannot plead with particularity whether the claim submitted was, in fact, false or fraudulent. Moreover, he has provided no basis for his assertion that the claim submitted was, in fact, false or fraudulent. Moreover, he has provided no basis for his assertion that the claim should be considered false simply because the amount billed to VSH allegedly differed from the guidance given the Payment/Adjustment Report prepared by CMS (sic). Additionally, there are no facts alleged supporting a strong inference that the claims in question were knowingly false when submitted."

➔ **BPR**: This is a beautiful example of how Attorney Curley and Attorney Wohl have cherry picked appropriate paragraphs of the Complaint to assert only part of the story to purposely confuse the Court or anyone trying to discern the facts that THEY present because they have selectively chosen to create the *impression* that the Complaint hasn't already addressed all of their purported deficiencies. Indeed, this patient example **DID NOT** start at Paragraph 141 but actually at Paragraph 131 and continued for eleven paragraphs until Paragraph 142 and overwhelming details a level of specificity that is required under Rule 9(b) but those details were carefully and purposely left out because Attorney Curley and Attorney Wohl wanted the Court to believe that the facts started at Paragraph 141 and were overwhelmingly deficient. Moreover, Complaint paragraph 69 makes clear who handles the majority of billing for the Retreat and indicates that Jennifer Broussard handled the VSH billing. Additionally, the Payment & Adjustment Report is a report run from the Retreat's own AVATAR computer system and NOT CMS as the Motion to Dismiss inaccurately states. Despite all of the facts memorialized in eleven (11) paragraphs in the Complaint that pertained to the same patient, Attorney Curley and Attorney Wohl did their best to purposely deceive everyone, including a federal Court and Judge.

➔ **BPR**: In furtherance of the Motion to Dismiss Page 14 misrepresentations that I failed to state what the correct reimbursement rate was and therefore couldn't have plead with particularity, the BPR should carefully review the eleven paragraphs (Complaint ¶'s 131-142) that overwhelming support that I did plead with the requisite particularity despite Attorney Curley and Attorney Wohl's repeated lies to the contrary. Moreover, the eleven paragraphs made clear that the Retreat was determined to bring in $1,285.72 on a per diem basis regardless of what Medicare A was paying or which Medicare A had directed was patient responsibility or the patient co-insurance or deductible amounts and therefore billable to any secondary payer. The Retreat flagrantly violated Medicare's Secondary Payer guidelines to discard the amounts Medicare A directed that they bill any secondary payer. In this case, they turned to the State of Vermont Medicaid program for Vermont State Hospital patients to pay amounts in excess of what Medicare had directed on their remittance advice as the Retreat was determined to recover $1,285.72/per day at all costs even including flagrantly violating federal law. The Complaint makes clear that the Retreat was manipulating their accounting system AVATAR to fraudulently increase the patient responsibility amounts or Posting Code 61 while they were simultaneously pulling the difference or whatever amount needed to reach $1,285.72/per day regardless of what Medicare had paid as the primary payer and in complete disregard for what Medicare directed should be the combined patient responsibility and billable to any secondary insurer - - in this case they bilked the State of Vermont as secondary payer for amounts beyond what Medicare had directed as patient responsibility from the combined amounts Medicare directed as the patient's deductible or co-insurance amount (Complaint ¶'s 131-138 speak directly to the manipulation as the Retreat was using triple off-setting accounting entries to achieve its goal of bilking the State of Vermont for amounts it was not entitled) and which Medicare never directed was billable to a secondary payer let alone a state Medicaid program.

Motion to Dismiss Page 14 (last paragraph): "Finally, the Complaint asserts that the Retreat's submission of each and every quarterly or annual report to CMS constituted a false or fraudulent

claim, within the meaning of § 3729(a)(1)(A), or was a false record or statement material to a claim, within the meaning of § 3729(a)(1)(B)…. The Complaint, however, fails to attach, or even describe, any specific report or to tie any report to any allegedly false claims."

➔ **BPR**: Please refer to Complaint ¶'s 96 – 99, 101-103, 115, 174-177, 185 where it is overwhelmingly made clear how the use of the Retreat's use of "allowance reversals" would directly "tie" to false claims and render the Retreat's CMS-838 inaccurate and fraudulent. I won't restate every paragraph here but the BPR should read the above mentioned paragraphs of the Complaint carefully as they clearly create a nexus between the Retreat's transactional behavior and their purposeful submission of false claims including fraudulent quarterly credit balance reports or CMS-838s and also a decade of fraudulent hospital cost reports which skewed, in the Retreat's favor, Medicare's reimbursement scheme Diagnosis Related Group ("DRG") and resulted in higher reimbursement amounts than what the Retreat was lawfully entitled from both Medicare and Medicaid or any per diem reimbursement rate affected by hospital cost report data.

➔ **BPR**: Complaint ¶ 99: "As a result of the Retreat's practice of using posting code 21 allowance reversals to offset overpayment credits due government payers, any computer reports for overpayments or credit balances would not reflect the existence of overpayments on accounts manipulated in this manner."

➔ **BPR**: Moreover, Complaint paragraphs 96-99 tie beautifully the fraudulent behavior together as it applies to instance after instance of the Retreat's use of Posting Code 10 (Payment) and Posting Code 21 (Allowance Reversal) as each and every example contained in the 59 page complaint overwhelmingly evidences and ties the transactional behavior directly to the false claims that the Retreat submitted with each CMS-838 filing as well as their Annual Hospital Cost Report. Attorney Curley and his co-counsel flat out lie in their manufactured assertions on page 14 of the Motion to Dismiss and again fail to take the Complaint facts as true for purposes of their analysis.

Motion to Dismiss Page 16 and 17: "In Count Three, the Complaint asserts a claim under §3729(a)(1)(G), the so-called "reverse false claims" provision of the FCA, which "creates FCA liability for false statements designed to conceal, reduce, or avoid an obligation to pay money or property to the Government…….Because the Complaint fails to alleges particularized facts sufficient to state a claim under § 3729(a)(1)(G), this claim must be dismissed." What?

➔ **BPR**: Every Code 21 "allowance reversal" detailed in every one of the 32 patient examples memorialized in the Complaint was purposely employed to **"**conceal, reduce, and avoid" an obligation to pay money or property to the Government or other payer. The only reason why the Code 21 was used, often at the same time a payment was applied, was to conceal and remove an amount due the federal government or any other payer so that it never showed up anywhere – be it on the client ledger, any aging report pulled from the Retreat's accounting system AVATAR and ultimately allowed the Retreat to falsely state that they didn't owe anyone anything as they falsified quarter after quarter, year after year, their CMS-838's and their annual Hospital Cost

Reports. Had Attorney Curley and Attorney Wohl honored their obligations to take the Complaint facts as true, for purposes of their Motion to Dismiss analysis, there would be no doubt that the Retreat was guilty beyond any doubt of reverse false claim liability for as long as the eye can see. The very use of the Code 21 entry and keystroke(s) thousands of times over the ten year period at issue in the Complaint overwhelmingly evidences fraudulent intent, requisite scienter and fraudulent conduct of their client, the historic Brattleboro Retreat. (Refer to Complaint ¶'s 97-99 which, if taken as true, would leave no doubt what Attorney Curley and co-counsel Attorney Wohl's client was doing.) Attorney Curley and Attorney Wohl flat out lied to the Court, overlooked clear facts in the Complaint and manufactured their own false narrative to advance their clients deception, and therefore, were active participants in the Brattleboro Retreat's fraud before a federal Court which allowed their client to escape justice.

In fact, the government was given ten years' worth of computer data/reports showing in tandem the payment/reversals or Posting Code 10 (payments) married up with the Posting Code 21 (reversals) and this same data that spanned a decade was surrendered to Attorney Wohl at Downs Rachlin Martin PLLC, the Brattleboro Retreat's local attorneys at the end of formal litigation. The Brattleboro Retreat along with their attorneys now have possession and access to the reports given the government that provide a road map to their client's devious scheme that spans no less than a decade. The Payment & Adjustment Reports were mentioned throughout the Complaint and were easily accessible by all of the Retreat's counsel by simply running a report in the Retreat's accounting system AVATAR during litigation. Therefore, there is no doubt that Attorney Curley and Attorney Wohl actively participated in their client's fraudulent scheme and carried forward their client's deception and fraud before a federal Court to avoid being held accountable under the law.

Motion to Dismiss Page 18 2nd ¶: "The Complaint, however, *fails to include any allegations explaining how the use of an internal accounting code would constitute a false record or statement material to any particular obligation, or how the use of such codes concealed or avoided any particular obligation to the Retreat presently owed to the government*. Absent such facts, the Complaint falls well short." What?

➔ **BPR**: See also my response to the Motion to Dismiss Pages 16 and 17 prior to this entry. Also, please refer to Complaint ¶'s 79, 96, 97, 98, 99, 102-103 and 115. These paragraphs overwhelmingly evidence and provide the information that Attorney Curley and co-counsel Attorney Wohl falsely state I failed to provide. Again, the import of Attorney Curley and co-counsel's own deviation from their obligations to use the facts in the Complaint as true for the purposes of their analysis as well as their own proactive efforts to actively engage in fraud could not be any clearer. I will highlight a few critical Complaint paragraphs here that directly counter the false assertions they make on Motion to Dismiss page 18:

➔ **BPR**: Complaint ¶ 96: When the Retreat has billed a charge in error, it has accepted an overpayment for that charge *but then conceals the existence of the overpayment by entering an offsetting amount under posting code 21, or an allowance reversal. When an allowance reversal is applied to negate an amount paid in error by a government health care benefit program, the*

Retreat retains overpayments in violation of its obligations to refund such overpayments in a reasonably timely manner.

➔ **BPR**: Complaint ¶ 97: *Application of allowance reversal entered under posting code 21 to an overpayment renders the Retreat's quarterly credit balance reports submitted to Medicare and Medicaid on form CMS-838 inaccurate.* The Retreat is required, as a condition of payment, to submit accurate form CMS-838 credit balance reports so that the government can be assured of obtaining a refund of amounts it has overpaid for medical services.

➔ **BPR**: Complaint ¶ 102: *"Such overpayment credits are routinely concealed by the Retreat by applying a posting code 21 allowance reversal in an amount calculated to offset the credit balance owed to Medicare or Medicaid due to the overpayments. This operation results in the patient ledger erroneously showing a zero balance when in reality, a credit remains due and payable to a government health care benefit program, and thus represents knowingly fraudulent avoidance or concealment of an obligation due and payable to the government."* (NOTE: Code 21 reversals were used to the detriment of every other payer including commercial insurance companies and virtually everyone who either was billed fraudulently and remitted an overpayment or who remitted an overpayment in error. At every opportunity, the Retreat never hesitated to pocket the excess it received from ANY payer as part of its overpayment retention policy that was memorialized in the federal Complaint). No wonder they never had a need for a due diligence policy or process!!!

➔ **BPR**: Complaint ¶ 103: *"This operation is knowingly fraudulent because an entry posted using code 21 is only legitimately associated with an entry of an allowance or discount credit using code 20 which the code 21 posting reverses, whereas with entries posted using code 10, which is used for payments received by the Retreat and would be associated with a code 11 or code 50 if the Retreat had granted an overpayment credit or refunded an overpayment, respectively."*

➔ **BPR**: Complaint ¶ 115: Speaks to the use of Unapplied Cash where any overpayments that remained here would render the next quarterly credit balance report or CMS-838 inaccurate, false and fraudulent.

➔ **NOTE to BPR:** The Motion to Dismiss Page 18, Footnote 12 states: "To the contrary, the Complaint acknowledges occasions when an allegedly inaccurate accounting code was used, but the overpayment in question was repaid in full. (See, e.g., Compl. ¶¶93, 162). Response: My attorneys addressed this on page 13 of our Opposition to the Defendant the Brattleboro Retreat's Motion to Dismiss where my attorneys demonstrate that the Complaint "was intended to show that there were times when the Retreat actually billed properly and no fraud was committed. In doing so, the Complaint shows that the Retreat's actions were knowing and intentional."

Motion to Dismiss Page 19: "As the Complaint makes clear, Mr. Joseph has no knowledge of what payments were *actually* received, which of those payments, if any, constituted actual overpayments, or which of those overpayments, if any, were *actually* retained." Stunningly false!

➔ **BPR**: Apparently, Attorney Curley and Attorney Wohl are referring to another Complaint altogether as paragraph after paragraph of the Complaint at issue makes clear the amounts that the Retreat received in payment and identified the amounts of overpayment that were subjected to an allowance reversal and wiped permanently off the Retreat books. See Complaint ¶'s 52, 70, 71, 79, 89-90, 94, 96-99, 101-103, 106, 108-177 for affirmative facts to support that I did know the amounts of overpayments and when they were created. Refer to all 32 patient examples in the Complaint where the code 21 or allowance reversals were used that overwhelmingly evidence to the contrary that Attorney Curley and co-counsel's assertions on Page 19 are nothing more than manufactured garbage that further highlights their ethical misconduct by not taking the facts as alleged for the purposes of their analysis as true. Indeed, there should be little doubt that the Brattleboro Retreat's own attorneys engaged in fraud to carry forward their client's fraud before a federal Court to escape justice.

Motion to Dismiss Page 23: "The Complaint's allegations about Patient 15 also suffer from puzzling inconsistencies. The Complaint describes an episode in which the Massachusetts Behavioral Health Partnership allegedly overpaid by $105,000 *and was later repaid in full*. The thrust of the Complaint's allegations is that the Retreat should be liable for failing to repay this money sooner. Although it makes no allegations about when the Retreat actually had knowledge of the overpayment, the Complaint asserts that it "could not have been any later than June 20, 2008. Yet, the preceding paragraph, the Complaint alleges that the overpayment of $103,125 was posted on October 6, 2009. How the Retreat could have been aware of an overpayment 16 months before receiving it, the Complaint does not say. Nor does it make any allegation to support the conclusion that the period between the Retreat's receipt of the payment and its reimbursement of the payer was marked by improper retention. To the contrary, the Complaint alleges that the accounting ledger reflects numerous instances in which the Retreat tendered a refund to the payer. Accordingly, the Complaint fails to allege improper retention of any overpayment, or facts supporting a strong inference of scienter.

➔ **BPR**: This narrative by Attorney Curley and co-counsel is representative of why we should not have attorneys of Attorney Curley and Attorney Wohl's caliber engaging in prejudicial conduct that derails the administration of justice (which is consistent with the American Bar Association Model Rules of Conduct). The facts of this patient example are so clear I will share a story. At my relator interview which lasted more than 5 hours and was attended by Assistant United States Attorney Nikolas "Kolo" Kerest, an agent from the United States Department of Health and Human Services as well as Special Agent Jennie Emmons of the Federal Bureau of Investigation, the agent from HHS who had been relatively quiet throughout the entire proceeding came alive as we began to discuss this patient example. The agent from HHS leaned forward towards me across a very large conference room table in the U.S. Attorney's Office in Burlington, Vermont to ask affirmatively, "How did you find this?" I replied, "I ran a reversal report and zeroed in on it

because of the dollar amount involved." Indeed, while Attorney Curley and co-counsel do their best to assert that this patient example is "puzzling" it is not puzzling at all. A careful review of the Complaint will evidence that there were three payments two of which represented overpayments. The May 19, 2008 payment (Complaint ¶ 160) of $1,875.00 was an overpayment and was showing as a credit on the Retreat books but wasn't reversed until the second larger overpayment came in on October 6, 2009 when the Retreat received and posted $103,125.00. Paragraph ¶ 162 makes clear that the $103,125.00 overpayment was reversed on the very same day it was received and was removed off the books along with the first overpayment of $1,875.00. Therefore, on October 6, 2009, the payment was posted in the amount of $103,125.00 but the reversal entered the same day was for exactly $105,000.00 which included the first overpayment of $1,875.00 paid to the Retreat on May 19, 2008 and the second overpayment of $103,125.00 received on October 6, 2009. The Retreat knew this was an overpayment the very day it received the payment as it purposely entered a reversal transaction simultaneous to the payment application to ensure that this HUGE overpayment was nowhere to be found. More stunning, is that in Complaint ¶'s 163 and 164 memorializes that the Retreat's Cash Poster had to purposely enter 55 dual reversal transactions in tandem (Posting Code 11 and 21) to conceal and remove this huge overpayment off the books. Moreover, the Retreat took no remedial action on its own initiative to return this money to the Commonwealth of Massachusetts Medicaid program that manages behavioral health until the payer discovered their own error and recouped it eight full months later. Thankfully, the Massachusetts Behavioral Health Plan (MBHP) discovered their own error and recouped it by deducting it from a then current payment with the transactions that occurred on June 25, 2010. The Brattleboro Retreat enjoyed an interest free loan compliments of the Commonwealth of Massachusetts Medicaid program and would never have returned the money had MPHP not discovered their own error. There is nothing "puzzling" about an attempted theft of $105,000.00 nor is it worthy of our justice system to have Attorney Curley and co-counsel Attorney Wohl falsely suggest otherwise. Attorney Curley and co-counsel state "The Complaint describes an episode in which the Massachusetts Behavioral Health Partnership "allegedly" overpaid by $105,000 *and was later repaid in full*." To suggest that the Retreat repaid anyone is misleading and false. Moreover, the use of the word "alleged" in the Motion to Dismiss evidences the attorneys were not considering the facts as true for their Motion to Dismiss analysis. The MBHP recouped their own overpayment without the help or any remedial action by the Brattleboro Retreat as MBHP simply deducted this large overpayment from an even larger payment MPHP was making to the Retreat on June 25, 2010.

My attorneys in our Opposition to The Brattleboro Retreat's Motion to Dismiss stated it beautifully when they said: *The facts, however - specific, explicit and damning - tell a very different story.*

Therefore, there should be no doubt that Attorney Curley with the assistance of co-counsel Attorney Elizabeth Wohl of Downs Rachlin Martin PLLC has affirmatively violated the Tenn. Sup. Ct. R. 8. RPC 3.3(a)(1), RPC 3.3(a)(2), and RPC 3.3(a)(3). Additionally, further violations of the RPC likely have occurred and I will refer to them individually as appropriate.

Not only has Attorney Curley with the help of co-counsel blatantly violated multiple aspects of the RPC but are now seeking an escape to avoid being held to account as the Rules of Professional Conduct are clear and unambiguous. Simply put, Attorney Curley has been caught red-handed engaging in ethical misconduct and is now desperate to find a loophole or an escape that will shield him from further "reputational risk" - - - the same strategy he employed in his defense of the historic psychiatric hospital, The Brattleboro Retreat.

Attorney Curley's defense counsel states that, "Mr. Joseph's complaint should be summarily dismissed, as the reputation and record of an outstanding and honorable lawyer in this State should not be sullied by baseless and false allegations by an individual who is simply unhappy with a ruling of law issued by a Unites States District Court" but they categorically fail to provide the BPR with **any** detail or representative information that their collective self-serving rhetoric is anything more than grand pronouncements intended to project an image of comported professional behavior which will surely lose steam when exposed to the bare and undeniable facts which neither can escape in this formal reply.

As a result of Attorney Curley and his co-counsel's wholesale abandonment of their obligations to consider the "facts" in the Complaint as true for the purposes of the Motion to Dismiss, evidences that Attorney Curley and co-counsel Attorney Wohl had personal confirmation of their clients fraud but made a decision long before they prepared the Motion to Dismiss to conspire with their client to escape justice.

My attorney's made clear in our Opposition to The Brattleboro Retreat's Motion to Dismiss that "It is also within Defendant's capacity to identify the fraud from the facts alleged." (Opposition to MTD Pg. 9). The core of the Retreat's transactional behavior involved a simple computer entry in the Retreat's accounting system AVATAR which utilized posting code 21 that removes any lingering credit due any payer on a patient account that had previously showed a credit due. Posting code 21 was used by the Retreat as a housekeeping mechanism to tidy up client ledgers so that the client ledgers reflected a zero balance even when money was due. By removing the majority of credits in this method, the Retreat ensured that the credits due all payers never appeared on any aging credit report generated from the accounting system AVATAR. Therefore, by manipulating their own accounting system they were able to avoid having to repay these amounts to the federal government and accurately carried forward their doctored credit balances to their CMS-838s. Unfortunately, the CMS-838s would not have necessarily evidenced the fraud because the Retreat had removed virtually all credits due from the same accounting system they were obligated to rely upon to report any outstanding credits due federal health benefit programs and all other payers. This same scheme was used to bilk not only the state and federal governments, private/commercial insurance companies and others of millions of dollars. (Refer to Complaint ¶'s 79, 85, 89, 91, 97-99, 102-103).

Likewise, if Attorney Curley and co-counsel handled the facts in the Complaint as true, they also would be able to discern the fraud afoot as my attorneys made clear in our Opposition to the Brattleboro Retreat's Motion to Dismiss. Moreover, Attorney Curley and co-counsel surely consulted with their client extensively prior to and during the preparation of the Motion to

Dismiss and the Reply Brief that the attorneys filed on the hospitals behalf. Anyone of my former colleagues in the Patient Financial Services Department named in the Complaint all the way up to the Retreat's Senior Management would have surely been able to and likely did confirm to Attorney Curley and co-counsel that the usage of Code 21 or "allowance reversals" was employed to reconcile the client ledger and ensure the client ledgers reflected a zero balance. Simply put, the use of "allowance reversals" or Posting Code 21 was used to evaporate and conceal any trace of overpayments on the Retreat's client ledgers while never returning one dime to anyone. Attorney Curley and co-counsel surely were able to discern this from their extensive consultations with the Retreat's staff in preparation of the legal documents at issue. Therefore, there is little doubt that Attorney Curley and co-counsel knew or confirmed with their client the import of their transactional behavior and wholesale fraud that spanned no less than a decade.

Given the high probability that Attorney Curley and co-counsel had verified the allegations of fraud to be true they likely further violated other rules including Tenn. Sup. Ct. R. 8. RPC 1.16(b)(2), RPC 1.16(b)(3), RPC 3.3(c), RPC 3.3(e), RPC 3.3(f). Additionally, RPC 3.3 Comment 2 makes clear that Attorney Curley and his co-counsel had every reason to present their client's case with "persuasive force" but that force is qualified by the requirement that it be done in a way to "refrain from assisting to perpetuate a fraud upon the tribunal." Collectively, the record will reflect with this detailed submission that Attorney Curley and his co-counsel's purposeful deviation from their obligations to consider the facts in the Complaint as true for purposes of their clients Motion to Dismiss overwhelmingly evidences that they have collectively assisted their client perpetuate a fraud in a federal Court of law.

Discussion of the Wartime Suspension of Limitations Act (WSLA)
Applicability to United States ex. rel. Joseph v. The Brattleboro Retreat
Citing Relevant Controlling and Persuasive Case Law

The Wartime Suspension of Limitations Act (WSLA) was enacted around World War II and has been the law of the land for many decades. There is no question that the black letter law reads with overwhelming clarity that it applies to all frauds against the United States government during wartime. The United States has been virtually at war since the terrorist attacks of September 11, 2001 and with various amendments the WSLA remains the law of the land – certainly for the period at issue in the Complaint in *United States ex. rel. Joseph v. The Brattleboro Retreat.* Attorney Curley and his defense counsel state:

> *"Had Mr. Joseph and his counsel made the strategic decision to raise the WSLA as a grounds to avoid dismissal of Mr. Joseph's claims* ***despite no controlling law*** *for such an argument,* ***Attorney Curley and co-counsel would have vehemently opposed the argument based*** **on a good-faith application of persuasive case law** *to the contrary." (Emphasis mine)*

Had Attorney Curley and co-counsel "vehemently" opposed this argument they would have had to rely on their already evidenced selective memory to cherry-pick controlling and persuasive case law to support their beliefs while overlooking plain case law to the contrary that affirmatively supports the applicability of the WSLA to *United States ex. rel. Joseph v. The Brattleboro Retreat*. Surely, Attorney Curley and co-counsel would have to acknowledge relevant Supreme Court cases that upheld the WSLA in similar matters involving fraud against the United States. In *Bridges v. United States, 346 U.S. 209 (1953)*, the United States Supreme Court made clear that the WSLA applied only to fraud "of a pecuniary nature or at least of a nature concerning property." Justice Harold Burton went on to emphasize that Congress limited the suspension statute to "offenses in which defrauding or attempting to defraud the United States *is an essential ingredient of the offense charged*. Clearly, the embezzlement of the US Treasury evidences fraud of a pecuniary nature and therefore would have been controlling case law to support the WSLA applicability to *United States ex. rel. Joseph v. The Brattleboro Retreat*. (See Exhibit B)

In *United States v. Grainger 346 U.S. 235 (1953*), the United States Supreme Court position and finding is particularly relevant and thus controlling as the High Court made very clear that for the purposes of the False Claims Act and the defendant's attempts to obtain payment from the Commodity Credit Corporation in amounts based upon knowingly false certifications that the Wartime Suspension of Limitations Act (WSLA) in fact tolled the statute of limitations. The core of Grainger speaks with remarkable similarity to the issues presented in *United States ex. rel. Joseph v. The Brattleboro Retreat* as it relates to the applicability of the WSLA to litigation involving the False Claims Act and allegations that the defendant The Brattleboro Retreat presented false certifications to obtain payment that is wasn't lawfully entitled. Attorney Curley and Attorney Malone can quibble about whether there is any discrepancy as it relates to civil or criminal matters, but the issue at hand is much simpler and speaks with overwhelming clarity. The WSLA does toll the statute of limitations in False Claims Act litigation as upheld by the United States Supreme Court as the black letter law of the WSLA intended it to do so. Attorney Curley, Wohl and Malone are welcome to debate the issue as to whether it was intended to apply to civil or criminal litigation but it's merely a sideshow for the purposes of the matter before the BPR. (See Exhibit C).

Additionally, in 1944 the Wartime Suspension of Limitations Act was edited to remove the phrase "now indictable" and in 1944 in *Dugan & McNamara 127 F. Supp. at 802-04*, the US Court of Claims held that this edit signified that the Act applies not only to criminal charges of fraud against the United States, but also to civil lawsuits involving fraud against the United States. This decision brought *qui tam* actions under the False Claims Act within the ambit of the tolling statute.

Please note, that Attorney Curley and Attorney Malone directly contradict existing case law as they falsely suggest that the Second Circuit hasn't considered the applicability of the WSLA:

> *"While federal courts in other circuits have reached differing conclusions regarding whether the WSLA, a provision in the federal criminal code, can be utilized by a qui tam relator to toll the limitations period for a civil complaint filed under the False Claims Act."*

In *United States v. Obermeier 186 F.2d. 243 (2d Cir. 1951),* the government contended, however, that, in any event the War Time Suspension of Limitations Act preserved its right to prosecute this action. That Act, so far as pertinent, is substantially the same as the Acts interpreted by the Supreme Court in *United States v. Noveck*, 271 U.S. 201, 46 S.Ct. 476, 70 L.Ed. 904, *United States v. McElvain*, 272 U.S. 633, 47 S.Ct. 219, 71 L.Ed. 451, and *United States v. Scharton*, 285 U.S. 518, 52 S.Ct. 416, 76 L.Ed. 917. (See Exhibit D).

Therefore, it should be no surprise that the United States Court of Appeals for the Second Circuit held in *Obermeier* that "As so interpreted, it suspends a statute of limitations only when fraud or attempted fraud against the United States (or one of its agencies) "is an ingredient under the statute defining the offense," and does not, absent such a statutory definition, apply to perjury or false swearing, even when the United States is directly interested." *Id.*

Additionally, Attorney Curley and his defense counsel Attorney Malone trip themselves up when they state "Had Mr. Joseph and his counsel made the strategic decision to raise the WSLA as a grounds to avoid dismissal of Mr. Joseph's claims despite no controlling case law for such an argument, Attorney Curley and co-counsel would have vehemently opposed the argument based on good-faith application of persuasive case law to the contrary." Therefore, the assertion by Attorney Malone that "There is no adverse *controlling case law* from either the Second Circuit Court of Appeals or the United States District Court for the District of Vermont that the WSLA tolls the statute of limitations for Mr. Joseph's Qui Tam Action" is disingenuous as Attorney Curley and defense counsel are cherry-picking and seeking to have their cake and eat it too. Attorney Curley and co-counsel admit from their perspective that they would have had to rely upon persuasive case law despite their simultaneous position and assertion that the lack of controlling case law (even though controlling case law does exist) somehow shields them from disciplinary consequences by the BPR as a result of their ethical misconduct and fraud before a federal Court.

Attorney Curley concedes in his very own 2013 Healthcare Fraud and Abuse Review another very important case right here in the Second Circuit in the matter of *United States v. Wells Fargo Bank, N.A. in United States District Court for the Southern District of New York* which affirmed the Wartime Suspension of Limitations Act (WSLA) by stating that:

> "in applying the WSLA, "it makes no difference that the fraud in this case was….unrelated to the Iraqi or Afghani conflicts" as "[t]he WSLA serves not only to allow the government to combat fraud related to wartime procurement programs, but also to give the government sufficient time to investigate to investigate and prosecute ***pecuniary frauds*** of any kind committed while the nation is distracted by the demands of war." The district court also rejected the defendant's argument that the amendments to the WSLA were not retroactive, holding that any FCA "claims that were live as of October 24, 2008, when the WSLA was amended to apply to congressional authorizations for the use of military force, are timely." (Emphasis mine).

*~~Excerpts from **Bass, Berry & Sims PLC 2013 Healthcare Fraud and Review** available on http://www.bassberry.com*

Further, in the Courts opinion in *United States v. Wells Fargo Bank, N.A. in United States District Court for the Southern District of New York* (also within the Second Circuit) the court states:

> *"To the extent relevant here, the WSLA suspends the statute of limitations for offenses involving fraud against the United States when the country is at war or Congress has enacted a specific authorization for the use of the Armed Forces. See 18 U.S.C. § 3287. The Government argues that even if some of its FCA claims arose prior to June 25, 2002, they are nevertheless timely because the WSLA tolled the statute of limitations for claims that were live as of October 14, 2008, the date upon which the WSLA was amended to make clear that the Act applied to congressional authorizations for the use of force. (See Gov't Mem. 46-48). The Court agrees. Because, as explained above, there is no reason at this stage to believe that the Attorney General knew or should have known of the facts at issue here until 2011, pursuant to Section 3731(b)(2), any claims that arose within ten years of October 14, 2008 - - that is, all of the Government's claims - - presumably live as of the date and thus tolled by the WSLA." (Emphasis mine.)* (See also Exhibit E).

As Attorney Curley and defense counsel now admit they would have relied upon *persuasive case law* despite their apparent belief that established controlling case law doesn't exist or provide for controlling authority, it is important to refer to our Second Circuit neighbor - the United States District Court, District of Massachusetts in the First Circuit as it relates to persuasive authority found in *United States v. Prosperi, et al* (U.S.D.C. Dist. MA. August 29, 2008) where the defendants were charged with 85 counts of fraud of a pecuniary nature related to Boston's Big Dig Highway Project. Judge Richard Stearns held that the "Suspension Act [tolled] the limitations period for defendants' alleged offense from September 18, 2001, to May 1, 2006 and cited the black letter law of the WSLA that evidences that any fraud related to any federal agency is tolled during wartime. (See Exhibit F).

In addition, in the case of *United States ex rel. Carter v. Halliburton Co., No. 12-1011 (4th Cir. 2013)* before the United States Court of Appeals for the Fourth Circuit, the Court found "As an initial matter, we find it unnecessary to decide which version of the WSLA applies because we find that the Act does not require a formal declaration of war. Therefore, under either version of the Act, the United States was at war when the acts at issue occurred." (See Exhibit G).

The Court of Appeals went further to state "we believe that requiring a declared war would be an unduly formalistic approach that ignores the realities of today, where the United States engages in massive military campaigns resulting in enormous expense and widespread bloodshed without declaring a formal war." Clearly, this has persuasive value as Mr. Curley and co-counsel Attorney Wohl admitted in Attorney Curley's formal reply that they would have had to rely on

persuasive as opposed to controlling case law to defend any assertion by my attorneys that the WSLA was applicable to *United States ex. rel. Joseph v. The Brattleboro Retreat*.

Most importantly, the United States Court of Appeals for the Fourth Circuit states beautifully "[W]hen a statute speaks with clarity to an issue[,] judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." *Ramey v. Dir., Office of Workers' Comp. Program*, 326 F.3rd 474, 476 (4th Cir. 2003) (second alteration in original) (quoting *Estate of Cowert v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992)) (internal quotation marks omitted). In interpreting a statute we "must presume that a legislature says in a statute what is means and means in a statute what is says there." *Barhart v. Sigmon Coal Co., Inc. 534 U.S. 438, 461-62 (2002)*.

The BPR should also take note that the United States Court of Appeals for the Fourth Circuit also cites *Dugan & McNamara*, *127 F. Supp. At 802-804* that I had earlier cited. Specifically, in this instance the Court stated:

> "In *Dugan & McNamara*, 127 F. Supp. At 802-804, the court examined both the legislative history of the Act and the meaning of "offense." The court reasoned that the term "offense" in the 1942 version referred only to criminal penalties. *Id.* However, when amended in 1944, the phrase "now indictable" was deleted. The WSLA was then applicable to all actions involving fraud against the United States. *Id.* at 802 ("The 1942 statute with the phrase 'now indictable' spoke clearly of only criminal offenses. The 1944 enactment deleted that phrase……This deletion leads us to the conclusion that the Suspension Act then became applicable to all actions involving fraud against the United States….."). Further, all but one court, *United States v. Weaver*, 107 F. Supp. 963, 966 (N.D. Ala. 1952), *rev'd on other grounds*, 207 F.2d 796 (5th Cir 1953), to have considered the issue of whether the WSLA applies to civil claims have found that it applies. *See, e.g. United States v. Witherspoon*, 211 F.2d 858 (6th Cir. 1954); *United States ex. rel. McCans v. Armour & Co*., 146 F. Supp. 546 (D.D.C. 1956); *United States v. BNP Paribas*, No. H-11-3718, 2012 WL 3234233 (S.D. Tex. Aug. 6, 2012)." (Emphasis mine.)

The matter currently before the United States Supreme Court involving *Kellogg Brown & Root Services, Inc., et al. v. United States of America ex. rel. Benjamin Carter* is equally instructive even though the United States Supreme Court has yet to issue its decision in this important case. All the BPR has to do is look to the Brief for the United States as amicus curiae submitted by the Solicitor General Donald B. Verrilli, Jr. and Counsel of Record for the United States of America. The government's position cites and takes similar positions as articulated in this formal reply. The government states that the Fourth Circuit ruled correctly in *United States ex rel. Carter v. Halliburton Co., No. 12-1011 (4th Cir. 2013)* stating:

> "The court of appeals correctly held that the WSLA applies in FCA suits brought by *qui tam* relators. By its terms, the WSLA's applicability turns on the nature of the "offense" alleged, not on the identity of the plaintiff. (pg. 14)…. The government goes further to state "Nothing in the WSLA's text, however, provides a basis for

> distinguishing between civil FCA suits brought by the United States and those brought by private relators." (pg. 15) (Emphasis mine.)

Finally, the brief for the United States as amicus curiae submitted by the Solicitor General Donald B. Verrilli, Jr. and Counsel of Record for the United States of America noted on page 15 at 2(a) the following:

> "Every court of appeals to consider the question has held that the WSLA applies in civil fraud cases. See Pet. App. 13a-14a; *United States v. Hougham*, 270 F.2d 290, 292, & n.3 (9th Cir. 1959), rev'd on other grounds, 364 U.S. 310 (1960*); United States v. Witherspoon*, 211 F.2d 858, 860-863 (6th Cir. 1954). During the 1950s, numerous district courts addressed that issue, and they overwhelmingly reached the same conclusion. (See *United States v. Temple*, 147 F. Supp. 118, 120-121 (N.D. Ill. 1956), rev'd on other grounds, 299 F.2d 30 (7th Cir. 1962); *United States ex. rel. McCans v. Armour & Co.*, 146 F. Supp. 546, 550-551 (D.D.C. 1956); *United States v. Salvatore*, 140 F. Supp. 470, 473 (E.D. Pa. 1956); *United States v. Kolsky*, 137 F. Supp. 359, 361 (E.D. Pa. 1955); *United States v. Covollo*, 136 F. Supp. 107, 109 (E.D. Pa. 1955); *United States v. Murphy-Cook & Co*., 123 F. Supp. 806, 806 (E.D. Pa. 1955); United States v. Strange Bros. Hide Co., 123 F. Supp. 177, 181-184 (N.D. Iowa 1954))."

The BRP should ask Attorney Curley if he concurs with the black letter law of the WSLA as written below and which remains in force today. The WSLA has been affirmed by numerous controlling and persuasive Courts all the way from the United States Supreme Court on down to the United States Court of Appeals for the Second Circuit, other Circuits and other District Courts within the Second Circuit. In the event Attorney Curley has any answer other than the affirmative applicability of the WSLA to all frauds involving <u>any</u> federal agency would evidence in my view, that Attorney Curley simply should no longer be practicing law.

The mere fact that Attorney Curley and his co-counsel Attorney Elizabeth Wohl aided by defense counsel Attorney Malone need to figuratively run for cover and seek to shield themselves with the use or reference to controlling case law (which they admit they wouldn't have used) or persuasive case law evidences on its face that Attorney Curley and co-counsel Attorney Elizabeth Wohl are incapable of admitting that the black letter law of the WSLA couldn't be any clearer and remains the law of the land in the United States of America and applicable to *United States ex. rel. Joseph v. The Brattleboro Retreat.*

U.S.C. § 3287. Wartime suspension of limitations

> When the United States is at war or Congress has enacted a specific authorization for the use of the Armed Forces, as described in section 5(b) of the War Powers Resolution (50 U.S.C. 1544(b)), *the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not,* or (2) committed in connection with the acquisition, care, handling, custody, control or disposition

> of any real or personal property of the United States, or (3) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation, or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the war or directly connected with or related to the authorized use of the Armed Forces, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until 5 years after the termination of hostilities as proclaimed by a Presidential proclamation, with notice to Congress, or by a concurrent resolution of Congress.
>
> Definitions of terms in section 103 1 of title 41 shall apply to similar terms used in this section. For purposes of applying such definitions in this section, the term ''war'' includes a specific authorization for the use of the Armed Forces, as described in section 5(b) of the War Powers Resolution (50 U.S.C. 1544(b)). (June 25, 1948, ch. 645, 62 Stat. 828; Pub. L. 110–329, div. C, title VIII, §8117, Sept. 30, 2008, 122 Stat. 3647; Pub. L. 110–417, [div. A], title VIII, §855, Oct. 14, 2008, 122 Stat. 4545; Pub. L. 111–84, div. A, title X, §1073(c)(7), Oct. 28, 2009, 123 Stat. 2475.)

Attorney Curley and co-counsel sought in their pleadings to complicate the Retreat's transactional behavior when it only required two active brain cells to understand what Attorney Curley's client was doing. Therefore, it follows with a certainty that Attorney Curley knew of his clients fraud and FCA liability long before he decided to "roll the dice" with his Motion to Dismiss. By rolling the dice, Attorney Curley and co-counsel abandoned their professional obligations and employed the equivalent of a "cluster bomb" - - whose sole purpose was to scatter the facts, as alleged, so that they could manipulate them while providing ample cover for their repeated misrepresentations of fact and fraud to conceal their ethical misconduct and behavior in violation of RPC 3.3(a)(1). The "cluster bomb" rendered any submission of an Amended Complaint exceedingly difficult and virtually impossible and was the sole contributor to the miscarriage of justice that has now occurred.

Attorney Curley and his counsel seek to gain further traction by suggesting the United States District Court, District of Vermont and presumably Judge William Sessions III had an opportunity to review my complaint to the BPR before dismissing the case with prejudice. To the contrary, my submission of the BPR complaint to US District Court in Brattleboro, Vermont was only intended to be treated as correspondence and to be sent via Internal Mail within the District Court internal mail system as I knew that I could not file anything on my own behalf or appear *pro se*. Indeed, when the correspondence was received in US District Court in Burlington, Vermont, the Clerk mistook it as a "filing" and returned it to my local counsel, Attorney Rich Cassidy of Hoff Curtis, P.C. Therefore, it is virtually a certainty that the Judge never saw the correspondence. (See Exhibit I).

Moreover, Attorney Curley tries to imply that I had an extended time to file an Amended Complaint though the Motion for an Enlargement available on PACER will reveal that it was to pursue information received from the State of Vermont Attorney General's Office and to submit a Freedom of Information Act Request (FOIA) to obtain CMS-838's. As stated previously, given

Attorney Curley and co-counsel's deployment of a "cluster bomb" in their Motion to Dismiss rendered an Amended Complaint virtually impossible.

For the above reasons, I respectfully ask that the Board of Professional Responsibility continue with this process and pursue all disciplinary measures including disbarment to ensure that Attorney Curley doesn't have the opportunity again to fraudulently participate in another miscarriage of justice at the expense of our country and the American people. The BPR by its own unique statutory role has within its grasp the ability to render a much needed form of justice by holding Attorney Matthew M. Curley accountable for his actions and ensuring he never has the opportunity to pollute our judicial system again with his fraudulent conduct as overwhelmingly demonstrated above.

Respectfully,

Thomas Joseph

cc: Ms. Catherine O'Hagan Wolf
Clerk of the Court
United States Court of Appeals for the Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square
New York, New York 10007