UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 00-3128-CV-S-4-ECF
	)	
NHC HEALTHCARE CORP. *et al*.	)	
	)	
Defendants.	)	

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Respectfully submitted,

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By /s/

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Plaintiff, the United States of America, pursuant to Local Rule 56.1, opposes defendants' motion for summary judgment, and respectfully requests that the Court deny it in its entirety.

I. Introduction.

Plaintiff has direct evidence of services not rendered to residents 1 and 2, even though the law allows it to prove its case with circumstantial evidence, or even to recover penalties without showing any actual damage whatsoever. Causation and the precise amount of damages present disputed fact issues, insufficient to support a grant of summary judgment. In its 8-30-00 Order denying NHC's motion to dismiss, the Court recognized that plaintiff was alleging a gross violation of the core duties imposed by NHC's contracts, and the repeated and knowing failure to provide care. As detailed below, ample material facts exist to support this theory and warrant a jury trial.

II. Plaintiff's Additional Material And Disputed Facts.

Before directly disputing defendants' material facts in Section III of this brief, plaintiff offers these material facts in opposition to defendants' motion.

A. "Direct Evidence" of Services Not Rendered to Resident 1.

1. In September 1998, the Missouri Division of Aging ("DA") interviewed Resident #1 during its survey of the NHC Joplin facility. During his interview, Resident 1 was lucid, intelligent, and kind hearted. See Ex. 1, the affidavit of Barbara Holden, former DA surveyor who interviewed Resident 1.

2. Resident 1 complained about needing help to use the bathroom, and not getting that help from NHC-Joplin staff. Resident 1's sheets were stained and filthy with feces during his 9-17-98 interview. He was upset that he smelled "bad." See Ex. 1

3. Resident 1 said he only got a bath every five days or so, even though he was supposed to get one every one to three days. See Ex. 1.

4. Resident 1 said his pressure sore was very small when he first arrived at NHC-Joplin, but that it got bigger quickly at NHC-Joplin, causing him pain and worry. See Ex. 1.

5. During the interview, Resident 1 had a vacuum apparatus affixed to the pressure sore on his tailbone. The DA surveyor--in 1998 a registered nurse with 22 years of nursing experience--observed that Resident 1's vacuum apparatus was not correctly in place over the wound, making healing of the wound more difficult. See Ex. 1.

6. Resident 1 also complained about not receiving assistance from staff to help him with eating, saying he could not reach his food when hungry. See Ex. 1.

7. Resident 1 complained about not receiving help from NHC Joplin staff to re-position himself in his bed or chair, or to move himself out of bed. See Ex. 1.

8. Another surveyor, Sherry Boyd, testified that she felt Resident 1 died as a result of neglect by NHC-Joplin, and suffered from neglect because of the extent of his pressure sore. Boyd Depo., pp. 101, 107.

9. Karen Smith, Resident 1's daughter, visited him on a regular, almost daily, basis, staying usually for about an hour. Smith Depo., p. 53

10. Resident 1's daughter never saw any NHC Joplin nursing staff provide any direct care to Resident 1 during any of her visits. Smith Depo., p. 53.

11. Resident 1's daughter never saw any NHC Joplin nursing staff take Resident 1's vital signs during any of her visits. Smith Depo., p. 54; Fact 59 ahead.

12. When asked if she felt that the facility had enough people to care for her family, Resident 1's daughter said "no." Smith Depo., p. 55.

13. Resident 1's daughter said two things bothered Resident 1: "... he would put the bell on when he had to use the bathroom and they were very slow in coming to answer. The other thing was people in the halls crying out for help all hours of the day and night. That bothered him." Smith Depo., pp. 38-39.

14. Resident 1's daughter was asked:

> "If you were going to summarize your observations of the care given to your father at NHC and single out the things that were not up to par, what would those be?"
>
> She responded: "Understaffed, not paying attention to patients the way they should, not responding to them in a timely fashion, trying to make me think that I was overreacting, that things weren't as bad as I thought they were, simple things like not picking up dirty trays from his room. I would go in the evening and after he would eat or not eat, his tray would be sitting there. And I would stop by the next day after I got off work in the morning or at noon time and the tray from the night before is still sitting there. Not answering his calls, in particular when he needed to go to the bathroom. Knowing that he had an open wound and that he would be soiled and just

waiting for them to come with his light on. My husband witnessed that a number of times too." Smith Depo., pp. 48-49.

15. Dr. Trentham, a hospital physician, treated Resident 1. Dr. Trentham noted that Resident 1's pressure sore did not improve during his stay at NHC-Joplin, but did improve with therapy at the hospital. Dr. Trentham Depo., pp. 92-94.

16. Dr. Merkelz, the Government's medical expert, made similar observations about Resident 1's sores healing at the hospital while worsening at NHC-Joplin. See Attachment 3 to Defendants' Motion for Summary Judgment, Dr. Merkelz Depo., pp. 92:7-21, 94.

17. From time to time, Dr. Trentham treated other NHC-Joplin residents who had pressure sores. When asked to compare the size of Resident 1's pressure sores to the other NHC Joplin residents he has treated, Dr. Trentham said "I don't think I've had a patient who's had a pressure sore as large as this." Dr. Trentham Depo., pp. 94-95.

18. When Resident 1 was admitted to a Joplin area hospital, a hospital nurse noted a suspicion of abuse and neglect regarding his condition, referring to photographs of his pressure sores. *See* Exhibit 20.

B. "Direct Evidence" of Services Not Rendered to Resident 2.

19. Surveyor Deborah Hancik interviewed Resident 2 at NHC-Joplin in September 1998. Resident 2 said her food choices were not being honored by the facility. Staff would continually bring her eggs and oatmeal which Resident 2 did not like. That

pattern of bringing a resident unattractive food choices is consistent with the resident losing weight. Hancik Depo., pp. 58-59.

20. Resident 2 was not being kept clean at NHC-Joplin, had a dirty catheter, and complained of itching and being dirty. Hancik Depo., p. 59.

21. Surveyor Hancik noted that Resident 2 smelled "real foul" at the time of the interview in September 1998. Hancik Depo., p. 59.

22. Surveyor Hancik's notes of her interview with Resident 2 contains the following entries:

> "Food is cold, served late, choices are not honored ..."
>
> Too much noise makes her nervous--no attempt to schedule time periods to listen to spiritual programs
>
> Sometimes nursing are rough could not be specific or identify anyone. Said about one month ago she thinks one or more nurses put her call light out of reach because she called too much. Hasn't happened again. She said she did not report this. Said she didn't know who to report problems to.
>
> Did not know what a care plan meeting was. Very concerned about her itching, wants to know what is causing it, is it contagious, depressed, has no activities, worries about facility being short of staff, hesitates to ask staff for anything.
>
> Worried about eye drops--doesn't know if being given as ordered. Again, the itching has not been addressed to meet her expectations." See Ex. 2 hereto.

23. Resident 2's family member took care of Resident 2 at home in the first part of 1998. During that time period, Resident 2 did not lose any significant amounts of weight or develop any pressure sores bigger than a skin rash. Hobson Depo, pp. 75-76.

24. Resident 2 and her clothes were not always clean at NHC-Joplin, and the longer she was there the worse it got. Hobson Depo., pp. 78, 82.

25. Ruby Hobson saw Resident 2's food trays sitting with cold food, left uneaten. Hobson Depo., p. 79.

26. Ruby Hobson felt like the facility did not have enough help given its number of patients. Hobson Depo., p. 83.

27. In his sworn report, Dr. Merkelz opined that the conditions of residents 1 and 2 were consistent with the absence of care by NHC, specifically the failure to regularly provide cleaning, nutrition, hydration, wound care, and positioning. See Tab 2.

C. General Evidence of Services Not Rendered.

1. NHC's Knowledge That Services Were Not Being Rendered.

28. In November 1996, Dr. Mehaffy, the facility's medical director, wrote a letter to NHC's regional Vice President Mel Rector suggesting an increase in the amount of wages paid to certified nursing aides, adding that "we are very concerned about this." Dr. Mehaffy Depo., pp. 49-52, Ex. 105.

29. Dr. Mehaffy received a response from Rector noting that NHC Joplin was "still budgeted to lose money considering the higher fixed cost after the purchase by NHC" and adding "we just completed our budget process last week and the center has already projected an 11% increase over last year's budget." Dr. Mehaffy Depo., pp. 49-52, Ex. 106.

30. Dr. Mehaffy was disappointed with Rector's response because he would liked to have seen the nursing assistants get more money. Dr. Mehaffy Depo., p. 52.

31. Rebecca Simmons, Administrator of NHC Joplin from approximately January through September of 1998, was asked if the quality of care declined while she was administrator. She answered "I would say quality declined ... I felt like it was primarily due to a lack of staff. ....We had fewer staff to take care of the patients, therefore, the activities of daily living, [g]rooming. These things weren't accomplished as well as they had been when there were more staff." Simmons Depo., pp. 23-24.

32. In Spring 1998, Simmons sent NHC Regional Vice President Mel Rector two documents about NHC Joplin wage issues. Simmons Depo, pp. 68, 64-67.

33. In April 1998, Simmons sent to Rector was a wage survey showing NHC-Joplin paid the lowest wages in Joplin. Simmons Depo., pp. 26-27, 67; Ex. 45. NHC uses wage surveys like exhibit 45 to make budget decisions. Lindemann Depo., pp. 21-22.

34. Simmons also held a May 1998 meeting with twenty six NHC-Joplin nurses in attendance to discuss ways to "improve" the "staffing situation" at the facility, and sent a summary to Vice President Rector. The summary states in part that "everything we have an issue with here is due to the lack of help" and later suggested:

> "increase the wage of the CNA. We have got to be competitive with the other centers in this area. The biggest reason our aides leave is the wage. We can't pay them less than McDonald's and expect them to stay. This is

our biggest issue, and until it is resolved, nothing else will help." Simmons Depo., pp. 64-69; Ex. 104.

35. Simmons testified that NHC corporate employees questioned her regarding the facility's labor costs being above the facility's budget. Simmons Depo., pp. 60-62.

36. In July 1998, Simmons sent NHC a Center Budget Compliance Report in which she wrote that she would "continue to work on reducing labor by working on new staffing patterns." Simmons Depo., pp. 55-56; Exhibit 45.

37. Simmons was told by NHC's Regional Vice President Mel Rector that maintaining the facility's census level and refusing to admit new patients was not an option for fixing staffing problems, even though Simmons was concerned about having enough staff to care for the patients. Simmons Depo, pp. 73-74, 79.

2. NHC Employee Resignation Letters.

38. On 9-1-98, Ruth Prater, at that time a registered nurse who had worked for NHC-Joplin for eleven years, submitted a resignation note to Administrator Simmons, which read in part: I am no longer able to do my job effectively due to low staffing of nurses and aides. **The residents cannot get their needs met properly.** My license is in jeopardy. My conscience and physical capabilities will no longer allow me to continue." Prater Depo., pp. 26-28; Ex. 152. (emphasis added).

39. Prater testified that a number of NHC Joplin employees submitted resignation letters with her on the same date. Prater discussed the problems at NHC

Joplin with the other people resigning on that date, and reviewed their resignation letters at her deposition. Prater Depo., pp. 28-29; Ex. 150-151; see also Ex. 48-49.

40. Former NHC employee Amy Kralik's resignation letter reads in part: **"I care for each and everyone of these residents as though they were my grandparents and cannot stand to see them not get the care they need, want + deserve."** Ex. 151 (emphasis added).

41. Former NHC employee Wes Green's resignation letter reads in part: "But now with the continuous low staffing, on almost all shifts, I feel that we are going to have an emergency that we cannot handle which is unfair to our residents and family. I do feel like my license for CNA + EMT are on the line every time I clock in. I understand about budgets and money but when you put money in front of PT care you and everyone working here are at fault if we let it continue." Ex. 150.

42. The issues raised in these employees' resignation letters were consistent with complaints family members heard repeatedly from NHC staff. Baine Depo, pp. 66-68; Smith Depo., p 55.

3. NHC-Joplin's Medical Director Describes The Facility As Understaffed and Downstaffed.

43. Later, in June 1998, certified nursing aides and nursing aides at NHC Joplin told Dr. Mehaffy that they felt overworked. After reviewing exhibit 136, notes from the "Certified Nursing Aide Retention and Satisfaction Survey Committee," Dr. Mehaffy testified that "Well, they were concerned, you know, that they couldn't -- that this would

you know, lead to being overworked because they didn't -- couldn't get the job done." Dr. Mehaffy Depo., pp. 53-54.

44. The Committee notes, Exhibit 136, read in part: "the number one issue was dissatisfaction with the amount of pay. Many of the assistants were dissatisfied because they work very hard. Occasionally they have to do the work of two people, when one person calls in sick or quits." Dr. Mehaffy Depo., pp. 52-54; Ex. 136.

45. Later, in December 1998, Dr. Mehaffy wrote Rector a letter in which he described the NHC Joplin facility as being "understaffed" and "downstaffed." Dr. Mehaffy Depo., pp. 85-87; Ex. 108.

46. In his deposition, Dr. Mehaffy testified that he would be concerned about a staffing ratio of one worker to twenty residents on the A Hallway of the NHC Joplin facility because "that's too many people for one person to take care of" and it would be hard for the workers to get their work done in the course of a normal shift. Dr. Mehaffy Depo., pp. 47-48.

47. Family member Jim Baine visited his father in the NHC Joplin facility every day, coming at different times, throughout the Summer and Fall of 1998. Baine Depo., pp. 8-12. When visiting his father, he would generally see only one NHC staff person working with twenty or more residents on all of A Hallway. Baine Depo., pp. 56-57.

4. NHC-Joplin Facility Death Rate.

48. DA surveyor Boyd testified that a facility's rate of death is significant because it can indicate the neglect of residents. Boyd Depo., p. 99.

49. In 1997, NHC Joplin had one of the highest facility death rates in Missouri, with 62 deaths for a 120 bed facility. See Ex. 111 hereto, statistics from the Dep't of Health; Mehaffy Depo., p. 32.

50. In 1998, NHC-Joplin declined to provide information regarding NHC Joplin's facility's death rate to the Dep't of Health. See Ex 112, 1998 statistics.

51. After the Court overruled NHC's objections, NHC answered an interrogatory disclosing that its records showed 69 deaths in 1998 at the NHC Joplin facility. See Ex. 112A. If that number is accurate, it would be higher than the total number of deaths from any facility in 1997. Cf. Ex. 112A and Ex.111.

52. Dr. Mehaffy was asked if he thought the rate of death among residents is important from the resident's perspective. NHC's counsel objected, claiming the question called for speculation. Dr. Mehaffy testified that "the statistics don't really mean anything so I don't feel its important for the residents to know it." Dr. Mehaffy Depo., p. 35.

5. Eyewitness Testimony of Horrific Conditions At NHC-Joplin.

53. When visiting NHC Joplin, Resident 1's daughter observed people crying out in the halls from June 1998 on, sitting in wheelchairs or regular chairs, on both sides of the hall, asking for help. Smith would ask the nurse's station to help the residents, but

the nurse would say "just ignore them. Those people are crazy." Smith would then visit her father, and an hour later the people would still be in the hall. Smith Depo., p. 39.

54. DA Surveyor Larry McGee received a hotline complaint regarding NHC Joplin, and visited the facility to investigate it on 9-14-98. He testified that when he arrived, it was not long until he was surrounded by family members who wanted to talk to him about the concerns they had with the care of their family members. The family members demanded a meeting at a local restaurant to address their concerns. Numerous family members complained about residents not being assisted to eat, not being kept clean and dry, and the overall smell of the facility. McGee Depo., pp. 16-17, 23-24.

55. In September 1998 at NHC-Joplin, DA Surveyor Ann Luce testified that:

> "I observed people wet. I observed people in beds with no sheets, no bed clothing whatsoever. I observed trays on the bed table by the door, of residents who were in bed, could not reach them, and in fact, I distinctly remember two residents asking for something to eat off their trays ... It's not normal that I would see a resident in a bed, naked, with no bed clothes, urine all over the floor, trays on the beside table that the residents could not reach, asking to be fed. This is not a normal thing I see when I go into nursing homes." Luce Depo., p. 39-40.

56. During the September 1998 survey of NHC-Joplin, surveyor Holden noted many problems at the facility, including residents' call lights not being answered, residents repeatedly asking for help with toileting without staff responding, uneaten food trays sitting outside the doors of residents, and a putrid and strong smell throughout the facility. The conditions at NHC Joplin in September 1998 were as bad as she had ever seen as a surveyor in Southwest Missouri. See Ex. 1.

57. Former NHC licensed practical nurse Carol Haagensen worked at a number of skilled nursing facilities in the Joplin area, including but not limited to NHC-Joplin. In her 25 years of nursing, Haagensen testified that she "never witnessed the staffing so heinously and callously short staffed for even one shift, let alone weeks and months on end" that she witnessed at NHC-Joplin. Haagensen Depo., p. 83.

6. Medical Record Irregularities.

58. NHC's records show Resident 1 receiving pressure sore treatment at NHC during the morning and evening shift on 7-19-98, even though he had been admitted to the hospital on 7-18-98. *See* Tab 1 to defendants' motion, First Amended Complaint, Exhibit 12 hereto.

59. NHC's 8-30-98 nursing note lists Resident 2's appetite as "good" while NHC's meal worksheet shows Resident 2 consumed 25% of her breakfast and lunch and none of her dinner on 8-30-98. *See* Tab 2, Exhibit 39 hereto.

60. Former NHC-Joplin Administrator Simmons reviewed Ex. 138 at her deposition. The memorandum is from Simmons to NHC-Joplin staff, and is dated 7-2-98. In part, it reads: "in review of charts we have found that v/s are not being completed &/or documented every shift ...This has been a problem for sometime and it needs to be corrected immediately ... If not completed disciplinary action will be taken." See Simmons Depo., pp. 48-49; Ex. 138.

7. Manipulation of NHC-Joplin Staffing Levels.

61. Barbara Primm, a registered nurse and nursing home administrator, is the Government's staffing expert. Primm was retained to evaluate NHC's payroll and staffing records. See Tab 4 to defendants' motion for summary judgment for Primm's sworn report. NHC's own payroll records show that NHC Joplin was staffed to provide between 2.43 and 2.71 hours of care per patient day in August and September 1998. See tab 4 to defendants' motion for summary judgment, pp 1-2.

62. Former Administrator Rebecca Simmons testified that the NHC Joplin was budgeted to have a "target" of approximately 3.25 hours worth of care per patient day. Simmons Depo, p. 43.

63. NHC Joplin Administrator Murphy testified that the facility had between medium and high acuity for September 1998, with less acuity in October, November, and December 1998. Murphy Depo., p. 54.

64. NHC Joplin Administrator Murphy testified that the facility had a resident census of over 100 in August and August 1998, a census of around 100 residents in September 1998, a census in the low 90s for October 1998, a census in the 80s for November 1998, and in the 80s and 70s for December 1998. Murphy Depo., pp. 51-52.

65. NHC Joplin Administrator Murphy testified that generally a declining resident census in a facility would lessen the need for staff. Murphy Depo., p 53; see also Mehaffy Depo., p. 86.

66. Plaintiff's staffing expert notes that NHC-Joplin dramatically increased its staffing levels almost immediately after state surveyors showed up to survey the facility in September 1998, rising from 2.43 hours per patient day in early September to high around 3.63 hours per patient day in October and November. See tab 4 to defendants' motion for summary judgment, Primm Report, pp. 1-2.

67. Murphy regularly received administrator audit reports (the documents containing the data found in the chart below) at NHC, and testified that such reports were created near the time periods they discuss, and that she used these documents to perform some of her job functions, finding the information in the reports to be generally reliable. Murphy Depo., pp. 34-36.

68. A chart prepared using data from NHC's administrator audit reports shows a significant increase in nursing hours in September 1998 as soon as the survey started, with hours increasing significantly right around the time the surveyors showed up to start the survey. See Ex. 118, referenced in Primm's sworn report, tab 4 to defendants' motion.

69. Looking at the same pattern from a different perspective, NHC's monthly cost of nursing services per patient day goes from $34.94 in August 1998 and $33.46 per patient day in September 1998 (the month the survey started) to $52.55 per patient day in October and $65.40 per patient day in November. See Ex. 118A, NHC's sworn interrogatory answer, answered after the Court's 3-6-00 discovery tele-conference.

70. Former NHC Joplin Administrator Murphy reviewed NHC Joplin payroll documents at her deposition. NHC-Joplin's own records show that December 1998's cost per patient day at NHC Joplin was $62.71. A year later, in December 1999, the facility's cost per patient day was $55.82, even though staffing costs generally increase rather than decrease over time. Murphy Depo., pp. 84-87.

71. Surveyor Dan West testified that he has been involved with over approximately 100 Division of Aging surveys. West testified that corporate owners increased staffing during Division of Aging surveys. West Depo., pp. 33-34.

72. West testified that surveyors can only issue citations for something he could prove as a surveyor, and it would be difficult to cite a facility for problems occurring two or six weeks before the surveyor arrives. For example, additional staff during a survey could reduce a facility's smell. West Depo., p. 34.

73. In March 2000, the Missouri State Auditor audited the Division of Aging, and noted citizen complaints that "facilities often make temporary or cosmetic changes in their staffing levels, physical environment, and quality of care in an effort to mask underlying systemic problems ... Division of Aging personnel acknowledged that it is not unusual for staffing levels to increase once an inspection begins and that this practice results in a skewed picture of actual facility staffing." See Ex. 225; Tab 4 to defendants' motion, where expert Primm references this report in her sworn opinions at p. 4.

III. Plaintiff's Response to NHC's Disputed Material Facts.

A. Defendants' Facility.

1-5. **Admitted.**

B. The Physical Conditions Of And Treatment Given To Residents #1 and #2.

6. Plaintiff bases its entire action on Defendants' submission of Medicare and Medicaid claims totaling approximately $40,487 for the treatment of two residents (designated Resident #1 and Resident #2) of the Facility in the Summer and Fall of 1998. First Amended Complaint. **Denied in part.** Plaintiff admits that it alleges defendants submitted false Medicare and Medicaid claims for Residents 1 and 2, but denies that this is the sole basis of the "entire action." See First Amended Complaint.

7. **Admitted.**

8. Prior to his admission, Resident #1 suffered from chronic lower back pain, congestive heart failure, chronic obstructive pulmonary disease, osteoarthritis, osteoporosis, and renal insufficiency. Deposition of Kurt P. Merkelz (Tab 3 of the Exhibit Package), page 66, lines 3-6 ("Merkelz 66:3-6"). **Denied in part.** Dr. Merkelz testified that resident 1's previous history was: "As best as I can recall, congestive heart failure, chronic obstructive pulmonary disease, osteoarthritis, osteoporosis, had some chronic low back pain, renal insufficiency, that's the best I can--"

9. In addition, prior to the transfer to the Facility, Freeman Hospital noted that Resident #1 had two pressure sores, including a stage II pressure sore on his coccyx.

Exhibit 4 to First Amended Complaint. **Denied in part.** Plaintiff admits that Exhibit 4 notes two pressure sores, but also notes that a NHC-Joplin 6/5/98 intake form has no mention of the pressure ulcers that were documented during the Freeman admission, and further states that Resident 1 is at "low risk" for pressure sores given that he had no impairment to his sensory perception, his skin was rarely moist, his nutrition was adequate in that he ate over half of his meals. See Ex. 222 hereto.

10. While at the Facility, Resident #1 suffered dehydration and digitoxicity due in part to his treatment for his heart condition. Merkelz, *infra.* **Denied in part.** Plaintiff admits that Dr. Merkelz testified that Resident 1 suffered from dehydration and digitoxicity, denies that his heart condition caused these conditions. Dr. Merkelz opined that NHC caused these conditions through its failure to provide Resident 1 with care, including nutrition and hydration. See Tab 2; Dr. Merkelz' sworn report.

11. Resident #1 was taking Digoxin and Cordarone to assist his heart condition. Merkelz 72:24-73:14. **Denied in part.** Plaintiff admits that Dr. Merkelz testified that Resident 1 was taking Digoxin, probably for his congestive heart failure, but denies that the transcript reference shows Dr. Merkelz agreeing that Resident 1 took Cordarone.

12. These drugs increased the risk of Resident #1 developing high levels of digitalis toxicity as a result of his age and renal insufficiencies. Merkelz 73:15-74:20. **Denied in part.** The transcript reference does not track this fact. Dr. Merkelz did say

that "elderly individuals tend to be more sensitive to the drug of digitalis", and that digitalis and cordarone generally need to be used with caution.

13. During Resident #1's stay at the Facility, the Facility staff noticed Resident #1 was experiencing nausea and vomiting (symptoms consistent with digitalis toxicity) and notified Resident #1 's physician. Merkelz 88:11-23; Deposition of Paul Trentham, M.D. (Tab 6 to defendants' motion) at 29:22-35:13. **Denied in part.** Drs. Merkelz and Trentham agreed that Resident 1 suffered from nausea and vomiting, but neither addressed the consistency of those symptoms with digitoxicity in the cited portions of their depositions.

14. Vomiting causes dehydration and will not be eliminated until the digitalis level is reduced through the elimination or reduction of Digoxin doses. Merkelz 80:14-21. **Denied in part.** Dr. Merkelz's testimony here only involves causation as a general proposition without specific application to resident 1.

15. The physician prescribed and the staff administered antiemetics in an effort to control the side effects. *Id.* **Denied.** Depo. transcript cite does not support fact.

16. These drugs, however, would not reduce the vomiting and resulting dehydration absent a reduction in the digitalis level. Merkelz 81:1-12; Trentham 40:18-42:4. **Denied.** Depo. transcript cites do not support fact. Dr. Merkelz is not addressing Resident 1's condition at the cited portion, and Dr. Trentham testified that many factors could have caused Resident 1's nausea beyond digitalis.

17. The Facility staff followed the proper standard of care regarding Resident #1's hydration. Merkelz 87:24-88:17. **Denied.** Dr. Merkelz testified that Resident 1 received hydration from time to time, but did not specify who provided it, either NHC-Joplin or other providers. Dr. Merkelz opined that NHC failed to provide Resident 1 with care, including hydration. See Tab 2 to defendants' motion, Dr. Merkelz' sworn report.

18. Resident #1 experienced severe lower back pain prior to his admission, and the back pain, osteoarthritis, nausea and vomiting, and other conditions limited his mobility at the Facility. Merkelz 82:14-83:16; 84:16-23; 85:11-23; Trentham 77:12-20. **Denied in part.** See fact 9 above.

19. The Facility staff gave Resident #1 Tylox, a strong pain medication, in increasing dosages in an effort to ease his back pain. *Id.* **Denied in part.** Plaintiff admits that Resident 1 received Tylox from NHC-Joplin from time to time, but denies that the medication was strong enough or that appropriate care was provided to Resident 1. See Tab 2 to defendants' motion for summary judgment, the sworn Dr. Merkelz report, and ¶ 26 and Exhibits 6-8 of the First Amended Complaint (medical records noting pain medication not "holding" Resident 1).

20. Resident #1 lost weight while at the Facility between late June and early September. Merkelz 89:18-90:5. **Admitted.** Dr. Merkelz believes NHC-Joplin violated the standard of care by failing to ensure Resident 1 maintained his weight. 89:11-90:5

21. During much of that time, Resident #1 was digitalis toxic and vomiting, factors which made it difficult to maintain Resident #1's weight. Merkelz 90:6-23. **Denied in part.** Dr. Merkelz testified that a patient that is throwing up is hard to nourish, but also testified that NHC Joplin could have taken steps to address that, such as enforcing the need for nutrition, helping to ensure that the care was provided, that the nutrition was provided. Merkelz 90:9-23. See Tab 2 to defendants' motion for summary judgment, the sworn Dr. Merkelz report, where he opines that NHC failed to provide Resident 1 with care, including nutrition.

22. The facility nursing staff properly notified Resident #1's physicians regarding Resident #1's nutritional and other conditions. Merkelz 90:24-91:13. **Denied in part.** In the cited portion of the transcript, Dr. Merkelz only testified that the treating doctors were notified, not that all proper notifications were made.

23. The Facility staff treated Resident #1's pressure sores, albeit with limited success. Merkelz 92:2-12. **Denied.** Cited transcript does not support fact. Dr. Merkelz testified that assessments were made in the records, but NHC's records show Resident 1 receiving pressure sore treatment at NHC during the morning and evening shift on 7-19-98, even though he had been admitted to the hospital on 7-18-98. *See* Exhibit 12 to the First Amended Complaint. See Tab 2 to defendants' motion for summary judgment, the sworn Dr. Merkelz report, which contains a detailed description of how NHC-Joplin failed to treat Resident 1's pressure sores.

24. The treatment included use of a vacuum ("vac") device. Merkelz 94:16-95:5. **Denied in part.** Plaintiff agrees that Resident 1 was fitted with a vacuum device, but denies that it was effective treatment that promoted the maintenance and enhancement of his life. See Tab 2 to defendants' motion for summary judgment, the sworn Dr. Merkelz report, which contains a detailed description of how NHC-Joplin failed to treat Resident 1's pressure sores and plaintiff's disputed material facts 1-17 above.

25. The difficulty in treating the wound was due primarily to the lack of mobility and the fact that Resident #1 was a large man who was difficult to position. Merkelz 95:6-9; Trentham 101:1-14. **Denied in part.** Dr. Merkelz did testify that Resident 1's mobility was a detriment to the wound, but also found the photographs of the wound "striking" in that "while he's at the facility, the wounds get bigger. He goes to the hospital, they start to heal." 92:7-21. See Tab 2 to defendants' motion for summary judgment, the sworn Dr. Merkelz report, which contains a detailed description of how NHC-Joplin failed to treat Resident 1's pressure sores

26. Dr. Merkelz could not identify any specific lack of care with respect to Resident #1's pressure sores. Merkelz 92:16-21. **Denied.** Dr. Merkelz testified that NHC Joplin failed to provide "basic assessment, evaluation, ... repositioning, cleansing of the wound." See also plaintiff's disputed facts 1-17.

27. **Admitted.**

28. On October 8, following a hospital stay, Resident #1 transferred to a different nursing home on but continued to experience enlargement of the pressure sore and developed new pressure sores on his heels. Trentham 82:23-84:20. **Denied in part.** Dr. Trentham noted that the family was concerned about Resident 1's skin care and that he was not getting turned enough. 82:8-25.

29. Resident #1 returned to the hospital ten days later, dying on October 19 of pneumonia due to aspiration. **Denied in part**: Resident 1 is deceased, but there is no cite to the record to verify.

30. Defendants admitted Resident #2 to the Facility on June 23, 1998 following a stay at St. John's Regional Medical Center, where she was discharged with four pressure sores (ear, shoulder, mid spine, and coccyx). **Denied**: no cite to the record to verify; see ¶ 28 and exhibits therein for a discussion of Resident 2's conditions.

31. Resident #2 had entered St. John's because of a gastrointestinal hemorrhage and, as a result, was anemic, a condition that adversely affected her ability to heal. Merkelz 99:2-100:2. **Denied in part.** Dr. Merkelz only testified that being anemic affects healing.

32. At the time of her admission to the Facility, Resident #2 was blind, bedridden, and suffered from cardiac disease and gastric reflux. Merkelz 100:6-24; Deposition of Michael Douglas Landreneau, M.D. (Tab 7 of Exhibit Package), 21:13-22:16. **Denied in part.** Dr. Merkelz testified that she was "pretty much" bedridden.

33. Resident #2 was a poor candidate for rehabilitation. Merkelz 100:25-101:11; Landreneau 15:18-25. **Denied in part.** Dr. Landreneau described her conditions, but did not testify regarding her prospects for rehabilitation. Regardless of her potential for rehabilitation, Dr. Merkelz opined that NHC-Joplin failed to provide Resident 2 with adequate nutrition and wound care. See Tab 2 to defendant's motion.

34. During her stay at the Facility, Resident #2 experienced weight loss, possibly due to her co-morbid conditions and the fact that she had a long history of not eating. Merkelz 104:3-18; Landreneau 22:18-23:24; 34:1-18. **Denied in part.** Plaintiff admits Resident 2 lost weight at NHC-Joplin, but Dr. Merkelz believes NHC-Joplin caused the weight loss by failing to provide nutrition and hydration. See Tab 2 to defendants' motion, Dr. Merkelz's report. Dr. Landreneau did testify that Resident 2 had some problems eating at home during an unspecified time period, but only treated Resident 2 for two surgical procedures in June and August at the hospital, and never treated Resident 2 at the NHC Joplin facility. Landreneau, 48:12-16; 50:16-51:18.; 52:13-15. NHC's own records show Resident 2 losing 9 pounds in 14 days, and allegedly gaining 14 pounds in 8 days. Ex. 224.

35. Resident #2 was at great risk for pressure sores. Merkelz 106:21-107:5; Landreneau 21:7-12; 36:25-43:13. **Denied**. An NHC medical record dated 7/6/98 rated Resident 2 at moderate risk for pressure ulcers. See Ex. 223 hereto.

36. Nevertheless, the Facility staff successfully treated many of Resident #2's pressure sores that she had when she entered the Facility. Merkelz 98:6-1 1; 107:21-23. **Denied in part.** Dr. Merkelz testified that ulcers healed while Resident 2 was at NHC Joplin but that she also had further breakdown of other areas. See Tab 2 to defendants' motion for summary judgment, the sworn Dr. Merkelz report, which contains a detailed description of how NHC-Joplin failed to treat Resident 2's pressure sores.

37. Resident #2 developed pressure sores at the Facility due to her deteriorating physical conditions, including her gastric reflux, a condition that required positioning Resident #2 in a way that elevated her head but increased pressure on her lower back and buttocks. Merkelz 108:6-109:7; Landreneau 36:25-43:13. **Denied in part.** See Tab 2 to defendants' motion for summary judgment, the sworn Dr. Merkelz report, which contains a detailed description of how NHC-Joplin failed to treat Resident 2's pressure sores; plaintiff's disputed facts 18-27.

38. The Facility staff continually monitored and treated Resident #2's pressure sores. Merkelz 107:21-23. **Denied.** The transcript citation does not support this fact. See Tab 2 to defendants' motion for summary judgment, the sworn Dr. Merkelz report, which contains a detailed description of how NHC-Joplin failed to treat Resident 2's pressure sores; plaintiff's disputed facts 18-27.

39. Dr. Merkelz could not identify any specific lack of care with respect to Resident #2's pressure sores. Merkelz 105:4-7. **Denied.** Dr. Merkelz testified that "as

far as do I have specific opinion of instances where something may have been done or not done, again, no. It's a global picture of her whole care, the same with her nutrition." See Tab 2 to defendants' motion, the sworn Dr. Merkelz report, which contains a detailed description of how NHC-Joplin failed to treat Resident 2's pressure sores.

40. Resident #2 died at the Facility on November 6, 1998. **Denied in part:** Plaintiff admits Resident 2 is deceased, but there is no cite to the record to verify.

C. Defendants' Medicare And Medicaid Reimbursement Claims.

41. **Admitted.** See Plaintiff's Motion for Partial Summary Judgment for specific dates, type of service, and amounts.

42. In the case of Resident #1, claims were submitted to Medicare for services rendered in June, August, and September of 1998, and to Medicaid for the months of June, July, and September of 1998. *Id.* **Denied in part.** Plaintiff contends that services were not in fact rendered to Resident 1. See the disputed facts ahead and Plaintiff's Motion for Partial Summary Judgment for specific claim information.

43. Medicare or Medicaid made payments on Defendants' claims for Resident #1 on 7/27/98, 8/7/98, 9/18/98, 10/9/98, 10/23/98, and 12/11/98. **Denied in part**. Plaintiff admits NHC was paid by Medicare and Medicaid, but the citations to the record do not contain the exact dates of payment listed in this paragraph. See Plaintiff's Motion for Partial Summary Judgment for specific claim information.

44. In the case of Resident #2, claims were submitted to Medicare for services rendered in June, July, August, September, and October 1998, and to Medicaid for the months of July, September, and October of 1998. *Id.* **Denied in part.** Plaintiff contends that the services were not rendered to Resident 2, as detailed in the disputed facts ahead. Plaintiff also paid NHC for Medicaid for services allegedly rendered in August 1998. See Plaintiff's Motion for Partial Summary Judgment for specific claim information.

45. Medicare or Medicaid made payments on Defendants' claims for Resident #2 on 7/27/98, 8/19/98, 9/18/98, 10/23/98, 11/25/98, 12/11/98, and 12/24/98. *Id.* **Denied in part**. Plaintiff admits NHC was paid by Medicare and Medicaid, but the amended complaint does not allege the exact dates of payment as listed in this paragraph.

D. Plaintiff's Experts.

46. **Admitted.** (Plaintiff denies that the opinions are inadmissible).

47. Dr. Merkelz opined:

> In sum, it is my opinion that the condition of [Resident 1] and [Resident 2] is consistent with the absence of care by NHC, specifically the failure to [regularly] provide daily cleaning, nutrition, hydration, wound care and positioning. NHC did not promote the maintenance or enhancement of the quality of life of these residents.

Merkelz Report at 4. **Denied in part.** See bracketed additions above.

48. In her Report, Ms. Primm stated "[T]he facility was not adequately staffed to meet the needs of the residents." Primm Report at 5. **Denied in part.** The whole sentence reads: After review of all the listed documents and analysis of the data available

I believe based on my experience, education and knowledge of the applicable standards and regulations that ..."

49. Although Ms. Primm went on to state that "the required services were not rendered or were deficient, inadequate, or substandard, and did not promote the maintenance or enhancement of the quality of life for the described residents', (Primm Report at 6), Ms. Primm disavowed any opinion as to the residents and could not specifically identify any care that was not given to the two residents. Primm 127:20-129:7. **Denied in part.** The full sentence of the report begins with "I do believe the sum of all evidence supports the allegation that ..." Primm testified that for both residents one and two that "I think based on the physician's report and the items listed in the complaint, that the documentation does indicate some gaps in care" and "there was a problem with resumption of digitalis, there was a statement that the decubitus was not improving back and forth to the hospital," as evidenced by the medical record exhibits to the complaint. 127:16-128:7; 129:7.

E. Other Evidence Submitted By Plaintiff

50. In paragraphs 31 through 37 of its First Amended Complaint, Plaintiff alleged that Defendants knew that the Medicare and Medicaid claims for Residents #1 and #2 were false or fraudulent because Defendants had received or were aware of two letters from the Missouri Division of Aging ("MDA") concerning complaints that had been investigated, a citation by the MDA for a regulatory violation in December, 1997, a

wage survey conducted by Defendants in April, 1998, a staff satisfaction survey conducted in June, 1998, a budget report prepared by the Facility Administrator in August, 1998, and resignation letters from two Facility staff members. First Amended Complaint 31-37. **Denied in part.** Plaintiff alleged that "through many sources of information, including but not limited to survey activities, Defendants had knowledge within the meaning of 31 U.S.C. § 3729(b)(1)-(3) that the Medicare and Medicaid claims they submitted regarding Residents 1 and 2 were false or fraudulent." The exhibits to the complaint referenced in this paragraph are not the exclusive sources of knowledge. See plaintiff's disputed facts as listed above.

IV. Argument.

A. Plaintiff Has Direct Evidence of Services Not Provided, and, In Any Event Can Prove the Amount of Damages with Only Circumstantial Evidence.

NHC's primary argument for summary judgment is that plaintiff lacks "direct evidence" of services not rendered, and cannot prove "even a single incident" of billing for care that was not delivered.

Taking the argument at face value, as demonstrated by plaintiff's facts above, there is abundant, specific, and material evidence of services not rendered. See Plaintiff's facts, 1-27. For example, surveyor Holden provided an eyewitness account of Resident 1 lying on filthy sheets, covered with feces and drainage from his wound. Surveyor Hancik observed Resident 2 in an unclean condition with a "foul smell." The residents' family

members testified in a similar manner, repeatedly observing uneaten food trays and a consistent lack of attention from the staff. Resident 1's pressure sore was the biggest his treating doctor had ever seen, and Resident 2 lost nine pounds in fourteen days at NHC-Joplin. One does not need a medical degree to infer from these facts that NHC was neither providing Residents 1 and 2 with the services referenced in its Medicaid and Medicare claims nor promoting the maintenance and enhancement of their lives.

The Court previously held that "knowingly submitting claims against the United States for Medicare and Medicaid services not actually performed clearly violates the FCA." United States v. NHC Healthcare Corp., 115 F.Supp.2d 1149, 1155-56 (W.D.Mo. 2000) (noting Government argues that it paid the defendant for complete care of elderly patients). If the United States pays for nursing services, it can and should expect that its Medicaid and Medicare beneficiaries actually receive them. "The statement that certain services were rendered is clearly an essential part of a claim submitted to the government ... and such a statement would obviously tend to induce government action ..." United States v. Adler, 623 F.2d 1287, 1289 (8th Cir. 1980) (submitting health care claims for services not rendered a material misstatement).

On this record, there are sufficient material disputed facts to support plaintiff's theory of FCA liability, and require a jury trial. Dr. Merkelz, plaintiff's medical expert, does not opine that NHC provided the wrong treatments, but flatly states that the condition of the residents 1-2 is consistent with the **absence** of care by NHC, including

the failure to provide nutrition, hydration, wound care, and positioning. It's wishful thinking to label this record as nothing more than a subjective disagreement over "the effectiveness of the medical services provided by defendants." Even if "direct evidence" was an element of the Government's FCA case, plaintiff meets that burden.

Moreover, under close inspection, NHC's "direct evidence" argument seems to really be about causation. NHC contends that it provided all, or at least most of the services, it billed for, and any problems with the medical residents are best explained by the residents' allegedly frail medical conditions. By contrast, as demonstrated above, plaintiff has plenty of material facts suggesting that the condition of the residents was caused by NHC's failure to provide services and gross violation of its contracts with the Medicare and Medicaid programs. Causation is a quintessential fact issue that is best resolved by a jury. Kenna v. So-Fro Fabrics, Inc., 18 F.3d 623, 629-30 (8th Cir. 1994) (reversing grant of summary judgment for store owner that claimed medication error caused plaintiff's injury; causation is a fact issue).

Indeed, NHC's "direct and specific evidence of damages" argument lacks legal support. No case holds that plaintiff has a special or higher burden of direct evidence when proving the amount of damages under the FCA, which in this case is roughly the number of days where the residents did not receive the package of services required by the programs. Congress made no such requirement when enacting the FCA. In fact, plaintiff can recover statutory fines without a showing of any damage whatsoever.

"Damages awarded under the False Claims Act typically are liberally calculated to ensure that they afford the government complete indemnity for the injuries done to it." United States ex rel. Marcus v. Hess, 317 U.S. 537, 549 (1943). As stated by Congress, the "United States is entitled to recover civil penalties solely upon proof that false claims were made, without proof of any damages." S. Rep. No. 345, 99th Cong., 2d Sess. 8 (1986), reprinted in U.S.C.C.A.N. 5266, 5273. At least in the Eighth Circuit, "civil penalties are recoverable under the FCA even ... where the United States has failed to show actual damages." United States v. Advance Tool Co., 902 F. Supp. 1011, 1016 (W.D.Mo. 1995) (awarding $365,000 worth of penalties where no actual damages were shown), aff'd without opinion, 86 F.3d 1159 (8th Cir. 1996). Damages need not be proven at all, much less proven on a minute by minute, service by service, basis.

Generally, in cases where damages are difficult to prove, proof of the fact of damage is much more important than proof of the amount of damage. Nat'l Farmers Organization, Inc. v. Assoc. Milk Producers, 850 F.2d 1286, 1292 (8th Cir. 1988); TCI Cablevision, Inc. v. Central Tele-Communications, Inc., 800 F.2d 711, 730 (8th Cir.1986). This principle of law is an "ancient one," and "is not restricted to proof of damage in antitrust suits." Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 265 (1946). "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." Bigelow, 327 U.S. at 265. As the facts above show, the fact of damage is obvious. Expecting workers

to remember or experts to identify which precise services were provided or not provided to certain residents for each day during months of twelve hour shifts is unrealistic.

The Court has already noted that it may be "difficult" for plaintiff to show that defendants did not provide the minimum level of care, "but difficulty in proving a cause of action should not bar the cause from even being litigated." NHC Healthcare, 115 F.Supp.2d at 1154 citing United States ex rel Aranda v. Community Psychiatric Center, 945 F.Supp. 1485 (W.D. Okla. 1996) ("a problem of measurement should not pose a bar to pursuing a FCA claim"). That approach was sound, and remains so. Plaintiff has sufficient evidence of damages and causation to proceed to trial.

NHC's argument turns traditional case law on its head. Fraud cases are often proven with circumstantial evidence, since "direct evidence of fraud is rarely available." In re Sholdan, 217 F.3d 1006, 1009-10 (8th Cir. 2000); Scallen v. C.I.R., 877 F.2d 1364, 1370 (8th Cir. 1989) (abundant evidence of circumstantial evidence supports judgment); see also United States v. Auruori, 212 F.3d 105, 115 (2d Cir. 2000) (affirming criminal fraud conviction where only circumstantial and no direct evidence supported scheme to defraud). NHC seeks a higher standard of proof than Congress or the courts have used, and takes an approach that conflicts with existing caselaw.

B. NHC-Joplin's Manipulation of Staffing Creates Material Fact Issues Regarding NHC's Intent and Knowledge.

NHC argues that the Government's case only shows that its facility was "understaffed in an era of nursing shortages." Although plaintiff can understand why

NHC would make this assertion, it's hardly the only inference, or even a likely or plausible inference, from the facts described above. Like storm clouds gathering on the horizon, staffing problems started to surface at NHC-Joplin as early as November 1996, when the facility's medical director unsuccessfully requested a wage increase to slow staff turnover. An April 1998 wage survey and May 1998 nurses' meeting notes sent the same message to NHC, referencing continuing wage and turnover issues with widespread staff dissatisfaction. NHC repeatedly pressured the facility's administrator to stay on budget and reduce the cost of nursing hours, and refused her request to freeze or reduce the facility's census and limit new admissions. A July 1998 NHC Joplin budget report references the administrator's efforts to respond to budgetary pressures and reduce labor expenses, and staffing costs did indeed fall from July through August into September of 1998. Apart from anything either sides' experts may say, family member Baine routinely witnessed a staffing ratio of one worker to plus twenty residents ratio on the A Hallway throughout the Summer and Fall 1998, even though the facility's Medical Director testified that a 1:20 ratio was disturbing in that it is too many residents for one worker. Numerous facility staff resigned during this time period, repeatedly telling NHC they could not meet their residents' needs. Despite these problems, as demonstrated by NHC's own payroll records, the staffing did not increase, but instead declined. These facts suggest at least deliberate ignorance or reckless disregard. United States v. Krizek, 111 F.3d 934, 941-42 (D.C. Cir. 1997) (where claims for psychiatric services submitted with little or no factual

basis or effort to determine validity, reckless disregard shown); United States ex rel v. Compton v.Midwest Specialties, 142 F.3d at 304; United States v. Entin, 750 F.Supp. 512, 518 (S.D. Fla. 1990) (quoting legislative history of FCA).

What changed the staffing picture? In mid-September, Division of Aging surveyors, in response to over twenty hot line complaints, discovered the awful conditions at the facility. Threatened with exclusion from the programs and negative publicity, NHC-Joplin dramatically increased its staffing levels. Surveyors can only cite the facility for problems they can document, and the flood of new staffing limited NHC's exposure to penalties and exclusion from the programs. Although it was impossible to quickly cure Resident 1's giant pressure sore or change Resident 2's weight loss, the abrupt staffing change, whether measured in hours or cost per patient day, shows an intent to misrepresent the actual day to day staffing conditions of the facility. Plaintiff will claim at trial that NHC lied about a critical fact, the facility's ability to provide and deliver care, by creating artificial staffing levels in response to the survey. This pattern is potent and material proof of NHC's intent.

Moreover, the staffing manipulation shows NHC's knowledge. If staffing levels were appropriate before the survey, if the facility was just understaffed in an era of understaffing, then there would be no need to dramatically increase staffing as soon as the survey started. As the complaints and resignation letters rolled in, NHC knew it lacked the staff to provide the services and comply with its contracts throughout the Summer and Fall

of 1998, but waited until it got caught to do anything about it. This staffing pattern creates material fact issues regarding NHC's knowledge of the veracity of the claims it was submitting. Why fix what isn't broken?

In the aftermath of the 9-98 survey, the acuity of the residents improved while the facility's census dropped. Logically, fewer residents who are less sick should generally translate into less staff on the floor, but the staffing pattern goes in the opposite direction, dramatically improving in October and November to the highest ratios at the facility for all of 1998. Even a year later, in December 1999, NHC Joplin was spending less on nursing services than it did in December 1998.

Plaintiff's evidence creates numerous issues of material fact. Construing the factual record set forth at pp. 1-17 of this brief, as well as the disputed facts at pp. 17-29, and all the inferences therefrom in the light most favorable to plaintiff, summary judgment is not proper here. Barker v. Ceridian Corp., 122 F.3d 628, 632 (8th Cir. 1997).

C. Issues Already Resolved By The Court's 8-30-00 Order, But Raised Again By NHC.

1. Certification.

Much of defendants' summary judgment brief was lifted wholesale from its earlier motion to dismiss, which the Court denied in its 8-30-01 Order. NHC Healthcare, 115 F.Supp.2d at 1149. Defendants again raise the issue of certification, arguing its Medicare and Medicaid claims were submitted with no certifications whatsoever. As demonstrated by exhibits 3 and 4 to plaintiff's motion for partial summary judgment, all of NHC's

Medicare and Medicaid claims were submitted under various certifications, including representations that the claims were "correct and complete" or "correct, just, unpaid and actually due according to law and program policy." A claim for services not rendered, as indicated by the facts above, cannot be properly certified as correct, complete, just, or due according to law and program policy. Even at the motion to dismiss stage, looking at just the complaint, the Court noted that implied certification cases like Straus did not apply to the facts of this case. 115 F.Supp.2d at 1155. Now, with a full evidentiary record before it, that conclusion is even more true. With or without the certifications, the facts establish that NHC repeatedly violated the core conditions of its contracts and failed to clean, position, hydrate, and feed residents. Implied certification arguments do not fit this case.

2. Materiality.

Materiality does not appear to be an element of plaintiff's FCA claim, and research disclosed no Eighth Circuit case directly addressing the issue. Advance Tool, a W.D.Mo. case affirmed without opinion by the Eighth Circuit, defines the elements of an FCA case without mentioning materiality. 902 F. Supp. at 1016, aff'd, 86 F.3d 1159. Cases from other courts are split on the issue. Cf. United States ex rel. Roby v. Boeing Co., 184 F.R.D. 107, 112 (S.D. Ohio 1998) (materiality not an element of FCA case) with United States ex rel. Berge v. Board of Trustees, 104 F.3d 1453, 1460 (4th Cir. 1997) (materiality an element of FCA case but is a mixed question of fact and law for the Court to decide).

Assuming, *arguendo*, that materiality is an element here, plaintiff has submitted affidavits from Medicare and Medicaid employees stating that submitting claims for services not rendered is capable of influencing the agency to act, and the agency has acted in such cases by recouping payments or referring the provider for prosecution. See Ex. 3-4 to plaintiff's motion for partial summary judgment. Moreover, the Medicare program was influenced and did act in this case after learning of the conditions of the facility during the survey in 9-98. NHC's own expert Rutledge recommended to the federal government that the Medicare program impose monetary penalties and terminate defendants' provider contract, and even referred the matter for investigation (and eventual prosecution) to the Medicaid Fraud Control Unit. See Ex. 3 to Plaintiff's Motion to Exclude Rutledge.

As previously discussed in plaintiff's opposition to defendants' motion to dismiss, the fact that defendants were paid neither shows a lack of materiality nor Government knowledge. "Government programs are administered by people and people occasionally make mistakes. Those mistakes do not change the law." United States v. White, 27 F.3d 1531, 1536 (11th Cir. 1994) (claims for chiropractic services false even though paid); Shaw v. AAA Engineering, 213 F.3d 519, 534 (10th Cir. 2000) (Gov. knowledge not defense to FCA case). If materiality is an issue, plaintiff meets its burden of proof.

3. Administrative Remedies Are Not Exclusive.

Always partial to the motion for reconsideration, NHC claims again that "public policy" should provide it with immunity from the False Claims Act, and that regulatory consequences provide sufficient--if not exclusive--remedies for "regulatory" violations. These arguments have been addressed by the Court twice already, in its 8-30-00 Order and in its Order striking defendants' affirmative defense of estoppel. (Dockets #37, 50); United States v. NHC Healthcare, 2000 WL 33146581 (12/29/00).

Responding briefly, as demonstrated above, the facts of this case do not present a subjective dispute over the appropriateness of certain treatments, or obscure regulatory claims that defendants denied residents their "rights to a dignified existence," but an objective dispute over whether the residents received basic services like cleaning and feeding. Questions regarding whether a facility can bill for resident services after it is cited for burned out light bulbs or whether a FCA case can proceed after a survey finds only "isolated deficiencies" are simply not presented by this case. Plaintiff has never argued that a surveyor's citation automatically establishes FCA liability. As demonstrated above in plaintiff's facts, the surveyors are only witnesses in this case, testifying about what they saw, heard, and smelled at the facility.

Granted, Congress created administrative consequences for facilities that fail to comply with quality of care regulations, including civil monetary penalties, plans of correction, limitations on new admissions, etc. 42 U.S.C. § 1395i-3(h)(2)(B)(i)–(iii).

However, Congress explicitly declined to make those administrative consequences an exclusive remedy at § 1395i-3(h)(5):

> The remedies provided under this subsection **are in addition** to those otherwise available under state or **federal law** and **shall not be construed as limiting such other remedies ....** (emphasis added)

Administrative remedies are neither "prerequisites nor substitutes" to a FCA case. Aranda, 945 F. Supp. at 1488 (noting Medicaid regulatory scheme not intended displace other remedies, including the FCA). Congress knows how to make Medicare's regulatory scheme an exclusive remedy, but chose not to do so here. Shalala v. Illinois Council on Long Term Care, Inc., 120 S. Ct. 1084, 1097 (2000) (42 U.S.C. § 405(g) is the exclusive remedy for challenging HHS' regulations).

Should the Court decide that policy implications are relevant, plaintiff suggests the following issues for consideration: nursing homes are not inhabited by college students and Olympic athletes. Generally, one has to have a daily need for skilled nursing services to become eligible for Medicare reimbursement of a nursing home stay. 42 C.F.R § 409.31. As such, residents of nursing homes always have complex medical conditions, just like residents 1 and 2. Plaintiff's approach is not purely outcome determinative. "Unlike performing medical tests, when caring for the infirmed it is not the end product result that is crucial, it is the dignity and quality of life provided through the care process." NHC Healthcare, 115 F.Supp. at 1155.

Moreover, nursing homes are a highly regulated industry, as are many healthcare providers, and often attract varying levels of regulatory scrutiny. NHC's arguments for summary judgment would prevent the Government from bringing just about any FCA case for services not rendered against a nursing home, since all nursing homes have residents with complex conditions plus regular survey activity. As the Nation's population grows older, and Medicare and Medicaid reimbursement becomes a greater share of the federal and state budgets, immunizing corporations that seek such reimbursement is bad public policy. Cases like this one protect not just the Treasury but also the elderly.

Indeed, NHC's business as a chain of nursing homes relies on a steady stream of Government revenue to fill its corporate coffers. Taxpayer dollars can only be obtained by NHC through provider contracts which mandate compliance with the requirements of the Medicare and Medicaid programs. "A party seeking public funds must bear a great measure of responsibility in advising the Government of the true and accurate factual basis for the claim" and "eligibility for the payment must be established by the recipient." United States v. Cooperative Grain Supply Co., 476 F.2d 47, 55 (8th Cir. 1973). Broadly speaking, "men must turn square corners when they deal with the government." Midwest Specialties, 142 F.3d at 301 *citing* Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947) (substantial compliance with federal benefits program does not entitle

applicant to funds); Rock Island, A. & L. R . Co. v. United States, 254 U.S. 141, 143 (1920) (failure to comply with "purely formal conditions" fatal to claim).

If NHC finds quality of care requirements to be too burdensome, it can adopt a new business plan, and service only private pay patients. Nursing homes "have freedom to decide whether to remain in business and thus subject themselves voluntarily to the limits imposed by [the State] on the return they obtain from investment of their assets in nursing home operation." Minn. Assoc. of Health Care Facilities v. Minn. Dep't of Public Welfare, 742 F.2d 442, 445 (8th Cir.), cert. denied, 469 U.S. 1215 (1985). However, as long as NHC does business with the United States, it cannot grossly violate its contractual duties by submitting false claims for services not rendered.

V. Relief Requested.

The United States respectfully requests that the Court deny defendants' motion for summary judgment, plus such other and further relief as the Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading electronically served on this 15th day of June, 2001, addressed to:

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