IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 20, 2022 Session

STATE OF TENNESSEE EX REL. JOSHUA M. HARMAN QUI TAM v. TRINITY INDUSTRIES, INC., ET AL.

Appeal from the Circuit Court for Davidson County
No. 14C-2652 Hamilton V. Gayden, Jr., Judge

No. M2022-00167-COA-R3-CV

A qui tam relator brought a Tennessee False Claims Act suit on behalf of himself and the State of Tennessee against a manufacturer of guardrail end terminals. The manufacturer moved to dismiss, and the trial court granted the motion on a wide variety of bases. The qui tam relator appeals. We conclude that a number of the rationales relied upon by the trial court were in error; nevertheless, the trial court properly dismissed the action for failure to state a claim upon which relief can be granted under the Tennessee False Claims Act.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

JEFFREY USMAN, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P.J., M.S., and W. NEAL MCBRAYER, J., joined.

Jerry E. Martin and Seth M. Hyatt, Nashville, Tennessee, and Allan B. Diamond and Justin Strother, Houston, Texas, for the appellant, Joshua M. Harman, *qui tam* for the State of Tennessee.

Robert E. Cooper, Jr., and Molly K. Ruberg, Nashville, Tennessee; Allyson N. Ho and Bradley G. Hubbard, Dallas, Texas; John C. Fitzpatrick, Chicago, Illinois; and Robert S. Salcido, Washington, DC, for the appellees, Trinity Industries, Inc., and Trinity Highway Products, LLC.

OPINION

I.

In this qui tam case, the parties present competing views of the significance of

certain design changes made by Trinity Industries, Inc. and Trinity Highway Products, LLC, (Trinity) to the guardrail end terminals that Trinity manufactures. The qui tam relator Joshua Harman asserts that Trinity hid significant and dangerous design alterations to its roadside hardware and that it submitted false certifications assuring the Tennessee Department of Transportation (TDOT) that the altered products were identical to those previously approved for use on the road. Trinity counters that the altered design was compliant with federal crash testing standards and was at all times approved for use by the federal government, and it asserts that it never submitted the certifications relied on by Mr. Harman in his complaint. Instead, Trinity avers that it truthfully certified that the product was compliant with federal regulations.

According to the facts alleged in the dismissed Second Amended Complaint, which is the complaint at issue in this appeal, Trinity is a manufacturer of guardrail end terminals, which are designed to prevent guardrails from "spearing" the vehicles of motorists who have veered off the road. The end terminal, which is affixed to the end of the guardrail, absorbs the impact of any vehicle colliding with the terminus of the rail and uses an extruder throat to deflect the guardrail as a ribbon away from the vehicle. Trinity manufactures the ET-Plus terminal, which was approved for installation on Tennessee roadways by the Tennessee Department of Transportation around 2000.[1] As part of the approval process, Trinity submitted drawings and an exemplar of the terminal itself.

The complaint cites TDOT regulations for the proposition that TDOT required all materials used on road projects to be accepted prior to use. One method of acceptance is placement on a Qualified Products List (QPL).[2] Inclusion on the QPL does not preclude further testing or approval requirements.[3] An application for inclusion on the QPL must include a letter from the Federal Highway Administration (FHWA) stating that the product meets National Cooperative Highway Research Program Report 350 (Report 350) guidelines.[4] According to the complaint, a product on the QPL "is not eligible for inclusion on TDOT projects absent the appropriate certifications from the contractor and manufacturer," and this certification must state that "the material furnished to the project **is of the same formulation and has the same physical characteristics** as the material evaluated for the Qualified Products List." (Emphasis in complaint).[5] The complaint

[1] The complaint alleges both that the ET-Plus received TDOT approval in 1999 and that Trinity submitted the design to TDOT after it received Federal Highway Administration (FHWA) approval in January 2000.

[2] Citing *TDOT Procedures for the Sampling and Testing, and Acceptance of Materials and Products* (SOP 1-1).

[3] Citing *TDOT Qualified Products List and Evaluation Procedures* (March 1, 2005).

[4] Citing *TDOT Qualified Products List and Evaluation Procedures*, List 34 (March 1, 2005).

[5] Citing *TDOT Procedures for the Sampling and Testing, and Acceptance of Materials and Products* (SOP 1-1).

alleges that a contractor must use a T-2 form "which attaches the manufacturer's certification that the product is the same as that on the Qualified Products List."[6]

The ET-Plus was originally crash tested in compliance with National Cooperative Highway Research Program Report 350 guidelines in 1999, and the FHWA approved the design in 2000. The ET-Plus design was submitted to TDOT with drawings showing a five-inch wide "feeder chute," which functions to extrude the guardrail as a ribbon deflected away from the vehicle. A sample of the ET-Plus was submitted for review, and the ET-Plus was placed on the QPL. A 2003 letter from TDOT to Trinity stated that substitution "will be only in accordance as tested and approved by NCHRP 350 testing" and noted the manufacturer was required to supply construction drawings.

In 2005, Trinity made modifications to the ET-Plus, in particular shortening the width of the feeder chute to four inches. The complaint alleges that these changes "transformed the product from an efficacious safety device into a latent and deadly hazard." Mr. Harman asserts in his complaint that the changes were made to save money and that Trinity failed to disclose these changes to federal or state regulatory bodies. According to the complaint, "thousands of the altered and defective ET-Plus systems" were installed in Tennessee between 2005 and 2014. The complaint further alleges that:

> From approximately 2005 through at least 2014, Trinity made and caused contractors to make thousands of false certifications to TDOT. Specifically, from 2005 onward, every time an altered ET-Plus was installed on a Tennessee road, the installing contractors submitted a sworn T-2 Form, which attached Trinity's certification that the altered ET-Plus that was installed was identical to the ET-Plus design that TDOT approved. These certifications, all of which were false, were a precondition of installation and payment.[7]

The complaint alleges that Trinity did not inform federal or state agencies of the "material design changes." Mr. Harman further alleges that 2005 testing of the ET-Plus revealed that the product was dangerous and that Trinity kept the modifications secret for this reason. Mr. Harman asserts that "Trinity never disclosed the new product to TDOT or any other regulatory agency, nor did it disclose the design changes or the crash tests, notwithstanding that Trinity made certifications to TDOT (both directly and through the FHWA) with respect to the ET-Plus on multiple occasions subsequent to fundamentally altering its design." He states that Trinity continued to use the same product name and

[6] Citing *TDOT Procedures for the Sampling and Testing, and Acceptance of Materials and Products* (SOP 1-1).

[7] Similarly, the complaint alleges that "[w]ith each sale and installation of the secretly modified ET-Plus, Trinity falsely certified and caused highway contractors to falsely certify to the State of Tennessee that the altered end terminal system was identical in design to the original approved design."

number with the intent of deceiving regulators.

Mr. Harman avers that in 2012, he "exposed Trinity's wrongdoing" and that Trinity distributed in response a "To Whom It May Concern" letter. According to Mr. Harman, this letter falsely claimed that the ET-Plus was Report-350 compliant, having undergone testing at the Texas Transportation Institute. Mr. Harman also alleges that Trinity falsely represented to the FHWA that it had inadvertently failed to disclose the design change. The letter is appended to the complaint and states that Trinity representatives met with the FHWA regarding the allegations and reviewed the 2005 crash tests. The letter states that the new design was tested in 2005 and had no effect on performance and that the ET-Plus continued to be accepted by the FHWA.

The complaint asserts, however, that Trinity knowingly and fraudulently caused TDOT's contractors to submit false claims by representing and certifying that the ET-Plus was authorized for installation on Tennessee roadways.[8] It asserts that Trinity presented or caused to be presented false invoices because the invoices materially relied on a false record or statement by Trinity.

On March 6, 2012, Mr. Harman filed a federal qui tam action under the False Claims Act (FCA) in the Eastern District of Texas. *See* 31 U.S.C.A. § 3729(a)(1)(B) (imposing liability on any person who "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim").[9] On June 17, 2014, the FHWA issued a signed memorandum regarding the safety of the ET-Plus. In the memorandum, the FHWA confirmed that the altered ET-Plus was crash tested in 2005 to the relevant standards, the results of the test were presented to the FHWA, the device met relevant crash test standards, and the ET-Plus remained eligible for federal aid reimbursement. The memorandum documented that in January 2012 allegations were made to the FHWA and to some states regarding the change to the guide channels, and Trinity confirmed that this design change was "inadvertently omitted" from the FHWA documentation. Nevertheless, according to the FHWA memo, the redesigned ET-Plus with the four-inch guide channels had been tested by the Texas Transportation Institute in compliance with Report 350 in May 2005. The memorandum indicated that this was confirmed to FHWA by Texas Transportation Institute and also confirmed through FHWA's own reexamination of the documentation from the 2005 crash tests. The four-inch ET-Plus was the version of the device approved in September 2005. The FHWA confirmed that there existed an "unbroken chain of eligibility" for federal-aid reimbursement for the ET-Plus at heights

[8] The complaint states: "In sum, the four-inch ET-Plus is not and has never been authorized for installation on Tennessee roadways. By representing and certifying otherwise, Trinity knowingly and fraudulently caused TDOT's contractors to submit false and fraudulent claims for payment to the State of Tennessee. The State unknowingly paid those claims."

[9] We include facts outside the pleadings to provide context for the Davidson County Circuit Court's actions in this case.

from 27 ¾ to 31 inches from 2005 to the date of the 2014 memorandum.

On June 27, 2014, ten days after the FHWA released its June 2014 memorandum and during the pendency of the federal suit, in seeming conflict with FHWA's June memorandum, Mr. Harman filed an action in Tennessee under the Tennessee False Claims Act (TFCA). Mr. Harman alleged therein that Trinity falsely represented that the ET-Plus was compliant with Report 350 and that the ET-Plus had been approved by TDOT. According to Mr. Harman's Second Amended Complaint, Trinity subsequently requested TDOT approval of the "ET-Plus 31," a "version of the terminal that was thirty-one inches tall," on July 22, 2014, and approval was granted August 20, 2014.

In October 2014, the Texas jury returned a verdict in favor of Mr. Harman, and the federal district court awarded Mr. Harman $663,360,750. *United States ex rel. Harman v. Trinity Indus. Inc.*, 872 F.3d 645, 650-52 & n.11 (5th Cir. 2017), *cert. denied* (Jan. 7, 2019). On appeal, the Fifth Circuit reversed. *Id.* at 652. Observing that the paucity of evidence supporting any federal disclosure requirement[10] "puts . . . Harman's falsity theory at risk"[11] and that the ambiguity in Report 350 regarding whether Trinity was required to report the design changes likewise cast doubt on the sufficiency of evidence supporting scienter, the Fifth Circuit ultimately concluded that Mr. Harman's claim failed as a matter of law on the element of materiality. *Id.* at 654-69. Noting that the government continued at all times to pay for the ET-Plus despite knowledge of the changes, and observing that Mr. Harman had not established that the FHWA's June 2014 memorandum was procured by fraud, the court concluded that the alleged misstatements were not material to the government's decision to pay and that Trinity was entitled to judgment as a matter of law. *Id.* at 662-68.

Mr. Harman alleges in his complaint that, shortly after the federal jury verdict in 2014 but years before the Fifth Circuit's reversal thereof, TDOT received the "To Whom It May Concern" letter from Trinity and an October 2014 letter from the FHWA regarding further testing of the ET-Plus. He alleges these communications were received subsequent to the August 2014 approval of the "ET-Plus 31."[12] TDOT then determined that "in light of the requirement for additional testing and Trinity's own decision to discontinue the ET-Plus, the unit should be removed from the Qualified Products List."

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[10] The Fifth Circuit also noted that the FHWA conducted further independent testing of the ET-Plus between December 10, 2014, and January 6, 2015, and that these tests revealed that the units that were crash tested were representative of those installed. *Harman*, 872 F.3d at 651.

[11] Mr. Harman's theory was that Trinity falsely certified that the ET-Plus complied with FHWA testing and thus caused states to present false claims to the FHWA. *Harman*, 872 F.3d at 654.

[12] The complaint states, "Thus, on August 20, 2014, TDOT accepted the ET-Plus 31. However, subsequent thereto, TDOT received Trinity's 'To whom it may concern' letter as well as the FHWA's October 21, 2014 letter outlining the tests that the ET-Plus would need to pass." (Footnotes omitted.)

On June 17, 2015, the State of Tennessee elected not to intervene in Mr. Harman's action under the TFCA, and the proceedings were stayed pending the resolution of the federal qui tam action, which was at the time on appeal to the Fifth Circuit. In June 2019, after the United States Supreme Court denied certiorari, Trinity moved to dismiss the Tennessee action on the grounds that the complaint failed to allege fraud with specificity. Trinity also argued that Mr. Harman's complaint rested on the demonstrably untrue allegation that the ET-Plus was not compliant with Report 350, an issue which Trinity contended collateral estoppel prevented Mr. Harman from challenging. Mr. Harman subsequently amended his complaint, alleging that Trinity falsely certified and caused contractors to falsely certify in the T-2 form that the ET-Plus was identical to the original approved design. Mr. Harman removed from his complaint multiple detailed references to allegedly false statements premised on Trinity's assertions that its product was Report-350 compliant but retained some references thereto. Trinity again moved to dismiss. Mr. Harman opposed dismissal, arguing that Trinity had caused its contractors to misrepresent that the ET-Plus was identical to the product evaluated for TDOT's QPL and that it was Report-350 compliant.

The trial court granted the motion to dismiss the First Amended Complaint.[13] The court later relied, in part, on the reasoning for this dismissal when it addressed the merits of the Second Amended Complaint at issue in this appeal. In its May 2020 ruling, the trial court noted Tennessee's liberal pleading standards and that a motion to dismiss merely tests the legal sufficiency of the claim. Concluding that regulations and other publications referenced by a complaint are subject to judicial notice, the court relied on the FHWA's memoranda. The court also noted that it was persuaded by the reasoning and conclusions of the Fifth Circuit case. The trial court concluded that issues not related to TDOT regulations were substantially the same as in the Fifth Circuit case and stated that "the facts found by the Federal Court of Appeals in its decision are adopted by this court." The trial court concluded that the allegations in the complaint, if proven, would not entitle Mr. Harman to relief, noting that fraud had not been pled with particularity. The court cited the June 2014 FHWA memorandum and a May 2019 FHWA publication for the proposition that the ET-Plus remained compliant with Report 350 throughout the relevant time period. The trial court concluded that the allegation that the T-2 forms, "which

[13] On May 8, 2020, the trial court filed a "Memorandum Opinion and Dismissal Order." This order concluded with the statement that "the Court dismisses Harman's First Amended Complaint without prejudice for failing to adequately allege the three necessary elements of a TFCA claim — falsity, knowledge, and materiality — and for failing to plead facts sufficient to satisfy Rule 9.02's requirement that fraud claims be stated with particularity." According to the Plaintiff's subsequent filing, the court on May 11, 2020, asked the parties to submit a proposed final order. The parties disagreed regarding whether the Plaintiff could file a new complaint without leave of the court, with Trinity relying on Tennessee Rule of Civil Procedure 15.01 regarding amending complaints. The trial court subsequently entered a "Final Order" on May 27, 2020, stating simply that the court "hereby DISMISSES Relator's First Amended Complaint, *without* prejudice, and enters this Final Order." The effect of this second purported order of dismissal is not at issue in this appeal.

attached Trinity's certification that the altered ET-Plus that was installed was identical to the ET-Plus design that TDOT approved" was insufficient to state a claim of express falsity because no facts were pled that Trinity made such a certification and because actual certifications provided by Trinity as attachments to the Motion to Dismiss did not contain false statements. The court also found that there was not any implied false certification because any representations made by Trinity were truthful and because there was no regulatory noncompliance. The circuit court found that Mr. Harman also failed to plead knowledge because Trinity's interpretation of TDOT regulations was reasonable. The circuit court further determined that the TFCA required materiality and that as a matter of law, materiality could not be established when TDOT continued to approve the ET-Plus even after it discovered the change in design. The court also found that the pleadings did not comply with the particularity requirements of Tennessee Rule of Civil Procedure 9.02 that the time and place of the misrepresentation and the manner in which it was fraudulent be averred. In its oral ruling, the court stated it was not applying collateral estoppel from the Fifth Circuit case.

During the hearing on the motion to dismiss the First Amended Complaint, the court clarified that it was dismissing without prejudice, so that "if there's something out there that I've missed, or that comes up in a limitation of time, then I'll hear it." Mr. Harman's counsel attempted to clarify that "the dismissal is without prejudice, which I presume means that if we're able to plead additional facts that the Court mentioned that the Court may have overlooked, that we would have leave to amend; is that fair to say?" The court responded, "Within the limitations periods. . . ."

On May 7, 2021, Mr. Harman filed a pleading styled "Second Amended Complaint." In a footnote, Mr. Harman noted that the circuit court, during the telephonic hearing held the year before, had indicated that it would give Mr. Harman leave to amend his complaint should additional facts supporting relief come to light. Mr. Harman accordingly stated that he was filing "this complaint as an amended complaint in the same proceeding pursuant to the Court's guidance at that hearing." The Second Amended Complaint alleged that Mr. Harman obtained "smoking gun" emails, which demonstrated that Trinity was aware of a safety issue with the ET-Plus and the need for testing. The June 2005 emails, attached to the Second Amended Complaint, are regarding a "4' 0 Offset ET Test" in which the device "marginally passed" the test but left a gouge two inches short of the allowable maximum. One email asks regarding Trinity's liability if the rail spears the vehicle and causes injury and "[t]hen the lawyer finds this crash test and says that it is inherent to the design for this to happen" due to a "faulty design." The emails discuss whether Dick Powers of the FHWA might "have a problem" with the test, and Brian Smith states that if Mr. Powers insisted on including commentary about the intrusion into the passenger compartment, Texas Transportation Institute would withdraw its request.

Mr. Harman's Second Amended Complaint appended approximately two thousand pages of material. Trinity moved to dismiss, appending approximately fifteen hundred

pages of material. The parties submitted briefing on the motion to dismiss. Trinity argued that the emails, which one of Mr. Harman's attorneys had known about since 2018, had no effect on Mr. Harman's claim, averring that they were regarding the testing of a different, "flared" end terminal. It asserted that TDOT granted approval to end terminals that were approved by the FHWA as compliant with Report 350, which the ET-Plus was at all times. Trinity argued that the complaint did not identify the contents of any false certification, citing the actual certifications Trinity had attached to its motion to dismiss, and Trinity argued that because TDOT did not require such certifications, there was no reasonable inference that they were made. It also argued that there was no implied false certification because there was no noncompliance with material regulation and that the complaint did not plead falsity with particularity. Trinity likewise argued that any misrepresentation could not have been made knowingly as required by statute because Trinity had no duty to disclose changes, and it asserted that Mr. Harman failed to plead materiality. In asserting that a certification of Report-350 compliance satisfied TDOT requirements, Trinity relied in part on TDOT's *Procedures and Qualifications for Guardrail Manufacturer and Supplier* (SOP 6-1), which required, as related to end terminals: "[a] certification letter indicating the tangent energy absorbing terminals is on the Departments Qualified Products List (QPL) and/or that it meets NCHRP 350 requirements and this should be stated on the certification."[14] Trinity appended numerous certifications made by Trinity in respect to the ET-Plus, which illustrated that the certifications were limited to a statement that the product was compliant with Report 350.

Mr. Harman, opposing dismissal, likewise cited to SOP 6-1 for the proposition that "[a]ll Guardrail and Guardrail Hardware (posts, blocks, bolts, washer, and other miscellaneous parts) products shall be manufactured in strict accordance with" certain requirements, including the TDOT standard drawings. Mr. Harman objected to the court's consideration of any extrinsic material or the facts recited in the Fifth Circuit decision. Mr. Harman agreed with Trinity that the trial court could properly consider TDOT regulations and rules, but argued that the FHWA materials could not be considered for the truth of any matter asserted therein. He argued in his brief that Trinity made false statements that the ET-Plus was compliant with Report 350, that it was manufactured in accordance with the standard or approved shop drawings, and that it met requirements for Type 38 End

[14] Trinity also cited TDOT Standard Specifications for Road and Bridge Construction 705.02, which notes that "[a]ll guardrail safety End Treatment systems shall require certification from the supplier that the device is an NCHRP 350 approved product, documented in an acceptance letter from FHWA. The acceptance letter stating that the proposed device complies with NCHRP 350, for the appropriate test level, shall be attached to the certification. In addition, detailed shop drawings form the NCHRP 350 approved devices shall be submitted to the Engineer and shall be on-site during the installation." *See also TDOT Procedures for the Sampling and Testing, and Acceptance of Materials and Products* (SOP 1-1) (cited in the complaint for the proposition that material on the QPL "may be accepted by a certification from the manufacturer stating that the material furnished to the project is of the same formulation and has the same physical characteristics as the material evaluated for the Qualified Products List," using a T-2 form).

Terminals.[15] Mr. Harman also argued that the TFCA has no materiality requirement.

The trial court granted Trinity's motion to dismiss the Second Amended Complaint. In its order, the court recited and applied a wide variety of legal standards to the case. Analyzing the emails under the standards relevant to newly discovered evidence, the court found the allegedly newly discovered emails not significant, not relevant, and cumulative, and it determined the evidence would not change the court's prior judgment of dismissal. The court indicated that it was required to inquire into the proffered newly discovered evidence under Rule 59.04 of the Tennessee Rules of Civil Procedure. The court observed that it would apply "defensive collateral estoppel" to those issues which were decided by the Fifth Circuit and which met the elements of defensive estoppel, but the court never specified what these issues were. The court stated it was taking judicial notice of "the Federal and State of Tennessee regulations, rules, memorand[a] and material from government websites," including the June 2014 FHWA memorandum. In its order, the circuit court wrote that "the 2005 e-mails also relate to crash tests for experimental flared testing and not testing for the ET Plus tangent system, to which this court takes judicial knowledge, and which underlines lack of relevancy of the 2005 e-mails." The court stated that it had not converted the motion to dismiss into one for summary judgment. Relying on caselaw regarding the granting of new trials, the court concluded that the newly discovered emails would not change the outcome of the prior adjudication, were cumulative, and were not impeachment evidence because they related to a different end terminal. It further noted that permitting amendment of the first complaint would be futile. The court noted that it "consider[ed]" that the State had declined to join the qui tam suit.

Additionally, the trial court also incorporated its prior order of dismissal, in which it had concluded that Mr. Harman failed to allege falsity, knowledge, and materiality and that he had likewise not pled fraud with the requisite particularity. In its incorporated May 2020 dismissal order, the court had noted Tennessee's liberal pleading standards and that a motion to dismiss merely tests the legal sufficiency of the claim before concluding that Mr. Harman had failed to state a claim upon which relief could be granted.

Mr. Harman appeals, asserting that the trial court applied incorrect legal standards, erroneously considered improper evidence in context of ruling on a motion to dismiss, and erred in concluding that the complaint failed to state a claim upon which relief could be granted. Trinity responds asserting that the trial court did not err, that any error was harmless, and that dismissal was appropriate because Mr. Harman failed to adequately plead falsity, knowledge, and materiality and with sufficient particularity his TFCA claim.

II.

Taking aim at the trial court's ruling, Mr. Harman asserts that the trial court erred

[15] There is no mention in the Second Amended Complaint of Type 38 End Terminals.

in employing the various legal standards it applied when ruling upon Trinity's motion to dismiss. Trinity responds that the trial court properly considered whether the Second Amended Complaint stated a claim for relief, that its discussion of various legal standards was not error, and that any error was harmless. The determination of what legal standard should be applied presents an issue of law that is reviewed de novo. *Fisher v. Hargett*, 604 S.W.3d 381, 395 (Tenn. 2020).

Mr. Harman styled the pleading at issue in the present case as his "Second Amended Complaint," and the trial court cited standards related to Tennessee Rules of Civil Procedure 54.02 and 59.04, as well as caselaw on whether permitting amendment of the First Amended Complaint would be futile, in its order of dismissal. We note that the trial court's use of variegated legal standards can be traced back to Mr. Harman's "Second Amended Complaint," in which he noted that the trial court had ruled that it would give Mr. Harman leave to amend his complaint if additional facts came to light, and that he "therefore files this complaint as an amended complaint in the same proceeding pursuant to the Court's guidance at that hearing."[16] This appears to be a contributing factor to the disorienting churn in the present case in which the trial court found itself immersed.

The parties, in their arguments before the trial court, treated the Second Amended Complaint functionally as simply a new pleading alleging violation of the TFCA rather than a pleading seeking permission to amend the First Amended Complaint. The parties instead contested whether the pleading adequately stated a claim upon which relief could be granted. We agree with Mr. Harman that the trial court's application of various alternative standards was in error and that proper legal standard was whether the complaint failed to state a claim upon which relief could be granted under Tennessee Rule of Civil Procedure 12.06. However, we agree with Trinity that any error is rendered harmless if the trial court's decision to dismiss the complaint was nevertheless supported by Mr. Harman's failure to state a claim upon which relief could be granted under Tennessee Rule of Civil Procedure 12.06, which is the motion that was before the circuit court.

We note that this particular basis for dismissal was adopted through incorporation of the trial court's May 8, 2020 ruling dismissing Mr. Harman's First Amended Complaint. The trial court noted in dismissing the Second Amended Complaint that "the findings in the Court's May 8, 2020 [order], copied here, as if copied verbatim" formed an additional basis for the court's determination. Mr. Harman argues that it was improper for the trial

[16] Mr. Harman's First Amended Complaint was dismissed by the trial court on May 8, 2020. The parties discussed during the hearing preceding dismissal that the dismissal would be without prejudice, with the judge elaborating that "if there's something out there that I've missed, or that comes up in a limitation of time, then I'll hear it." Mr. Harman's out-of-state counsel asked if the court meant that Mr. Harman would have "leave to amend" with the pleading of additional facts, and the court responded, "Within the limitations periods. . . ." Mr. Harman filed the Second Amended Complaint on May 7, 2021.

court to incorporate its prior findings and reasoning from its May 2020 ruling dismissing the First Amended Complaint. Mr. Harman, however, cites no authority that the court was required to copy and paste the text of its prior order when the order was contained in the record and when the court incorporated it as though copied verbatim. *See*, *e.g.*, *Reynolds v. Reynolds*, No. E1999-00380-COA-R3-CV, 2000 WL 66058, at *2 (Tenn. Ct. App. Jan. 27, 2000) (concluding that a final judgment which incorporated a memorandum opinion "as if copied verbatim" satisfied the requirement of written findings). Even if we were to accept Mr. Harman's contention, the operative motion that the trial court acted upon sought dismissal based on the inadequacy of the pleadings, and the parties have contested that ground both before the trial court and this court. Accordingly, even if we were to accept Mr. Harman's argument that the trial court's manner of incorporation of its ruling on the First Amended Complaint into its ruling on the Second Amended Complaint was error, appellate courts, nevertheless, "have the authority to affirm a trial court's decision if it 'reached the right result for the wrong reason.'" *Innerimages, Inc. v. Newman*, 579 S.W.3d 29, 44 (Tenn. Ct. App. 2019) (quoting *Shutt v. Blount*, 194 Tenn. 1, 249 S.W.2d 904, 907 (1952)); *see* Tenn. R. App. P. 36(b). Therefore, it is the question of the adequacy of Mr. Harman's pleadings under Tennessee Rule of Civil Procedure 12.06 to which we next turn.

III.

Beginning with the relevant standard of review, we note that a motion to dismiss for failure to state a claim upon which relief can be granted, brought under Tennessee Rule of Civil Procedure 12.02(6), challenges only the legal sufficiency of the complaint, not the strength of the plaintiff's proof or evidence. *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011). A ruling upon a motion to dismiss for failure to state a claim presents a question of law, and this court's review is de novo with no presumption of correctness. *Reliant Bank v. Bush*, 631 S.W.3d 1, 6-7 (Tenn. Ct. App. 2021). The complaint should only be dismissed "when it appears that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief." *Elvis Presley Enterprises, Inc. v. City of Memphis*, 620 S.W.3d 318, 323 (Tenn. 2021). When engaging in this analysis, Tennessee courts are "required to take the relevant and material factual allegations in the complaint as true." *Lind v. Beaman Dodge, Inc.*, 356 S.W.3d 889, 894 (Tenn. 2011). Furthermore, courts are to liberally construe the complaint in favor of the plaintiff when considering a motion to dismiss for purportedly failing to state a claim. *Leach v. Taylor*, 124 S.W.3d 87, 92 (Tenn. 2004). Additionally, in such circumstances, the plaintiff receives the benefit of reasonable inferences that can be drawn from the pleaded facts. *Webb*, 346 S.W.3d at 426. However, "courts are not required to accept as true assertions that are merely legal arguments or 'legal conclusions' couched as facts." *Id*. at 427. To dismiss based upon failure to state a claim, the motion must be based on the premise that all the material allegations of the complaint, even if true, do not constitute a cause of action. *Lanier v. Rains*, 229 S.W.3d 656, 660 (Tenn. 2007).

This appeal ultimately centers around whether Mr. Harman's claims under the

Tennessee False Claims Act (TFCA) were adequately pled. The TFCA establishes penalties for filing false claims with state, county, or municipal governments and permits a private person to act as a qui tam plaintiff. *Cotham v. Yeager*, 607 S.W.3d 820, 828 (Tenn. Ct. App. 2020). The name "qui tam" comes from the Latin phrase "qui tam pro domino rege quam pro se ipso in hac parte sequitur," and a qui tam plaintiff is one who proceeds in this role (of plaintiff) as much for the lord king as for his own self. *See Knox Cnty. ex rel. Envtl. Termite & Pest Control, Inc. v. Arrow Exterminators, Inc.*, 350 S.W.3d 511, 519 n.10 (Tenn. 2011) (defining the phrase as one "who pursues this action on our Lord the King's behalf as well as his own"). The Tennessee Supreme Court has noted the Tennessee General Assembly included certain jurisdictional bars "intended to encourage private citizens to assist state and local government in ferreting out fraud but, at the same time, to prevent parasitic plaintiffs from piggybacking on public disclosures of fraud to bring qui tam actions." *Id.* at 523. The TFCA imposes liability on one who "[k]nowingly makes, uses, or causes to be made or used a false record or statement to get a false claim paid or approved by the state or by any political subdivision." Tenn. Code Ann. § 4-18-103(a)(2).

Trinity contends that Mr. Harman did not properly plead the elements required for this cause of action, including falsity, knowledge, and materiality, and that Mr. Harman has not pled with sufficient particularity. In a part of the statutory measure relevant to the present case, the TFCA imposes liability on one who "[k]nowingly makes, uses, or causes to be made or used a false record or statement to get a false claim paid or approved by the state or by any political subdivision." *Id*. The statute accordingly expressly requires: (1) making or using a false record or statement or causing another to do so; (2) acting knowingly; and (3) that the false statement be used "to get a false claim paid or approved" by the State or political subdivision.

To resolve the complex question of whether Mr. Harman has adequately pled a TFCA claim, we find it necessary to consider three aspects of the issue. One, we address the application of the particularity pleading requirement under Tenn. R. Civ. P. 9.02 to TFCA claims. For reasons addressed below, we conclude that particularity requirement applies to TFCA claims. Two, the parties contest whether Mr. Harman has adequately asserted any false statements by Trinity to TDOT in his pleadings. We conclude that, while some of the purported false statements advanced by Mr. Harman are not adequately pled, his pleadings are sufficient to set forth with adequate particularity false statements allegedly made by Trinity directly to, or via its contractors to, TDOT. Three, given Mr. Harman's failure to challenge the trial court's ruling that materiality akin to the federal standard is a required element of a TFCA claim, we proceed under the assumption that the trial court correctly interpreted the TFCA as including such a requirement. The parties dispute whether Mr. Harman's complaint satisfies the materiality requirement. For reasons addressed below, we conclude that he has not adequately pled materiality. Accordingly, the trial court properly dismissed Mr. Harman's complaint for failure to state a claim upon which relief can be granted.

A. Particularity

In considering whether a TCFA claim has been adequately pled, we begin with considering the applicability of the requirement of pleading with particularity under Tennessee Rule of Civil Procedure 9.02. While a motion to dismiss is evaluated in light of the liberal pleading standards of Tennessee Rule of Civil Procedure 8.01, requiring only "a short and plain statement of the claim showing that the pleader is entitled to relief" and a demand for judgment, Rule 9.02 requires fraud to be pled with particularity. *See* Tenn. R. Civ. P. 8.01; Tenn. R. Civ. P. 9.02; *Dobbs v. Guenther*, 846 S.W.2d 270, 273 (Tenn. Ct. App. 1992).

Mr. Harman insists that he has satisfied the requirement of Tennessee Rule of Civil Procedure 9.02, which states:

> In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

Tenn. R. Civ. P. 9.02. The Advisory Commission Comment clarifies that Rule 9.02 is not intended to require a "lengthy recital of detail." Tenn. R. Civ. P. 9.02, Advisory Comm'n Cmt.; *see* Tenn. R. Civ. P. 8.01. In pleading a fraud claim, though, "general allegations of fraud and mistake are insufficient." Tenn. R. Civ. P. 9.02, Advisory Comm'n Cmt.

The TFCA is intended to combat fraud against the government. The Tennessee Supreme Court has previously described the TFCA as targeting a "broad[] array of fraudulent activity perpetrated against state and local governments" and noted that "the General Assembly provided a statutory jurisdictional bar that is intended to encourage private citizens to assist state and local government in ferreting out fraud" but prevent them from capitalizing on "public disclosures of fraud to bring qui tam actions." *Knox Cnty. ex rel. Envtl. Termite & Pest Control, Inc.,* 350 S.W.3d at 523. On appeal, Mr. Harman does not dispute that Rule 9.02 applies to the Tennessee False Claims Act, nor should he. *See Harvey v. Ford Motor Credit Co.*, 8 S.W.3d 273, 275-76 (Tenn. Ct. App. 1999) (concluding that the particularity requirement of Rule 9.02 should be applied to a claim under the Tennessee Consumer Protection Act because circumstances constituting fraud must be pled with particularity). Because claims under the TFCA sound in fraud, the pleading standards of Tennessee Rule of Civil Procedure 9.02 apply.

In *Kincaid v. SouthTrust Bank*, the court delineated the requirements of Tennessee Rule of Civil Procedure 9.02: "To pass the particularity test, the actors should be identified and the substance of each allegation should be pled." 221 S.W.3d 32, 41 (Tenn. Ct. App. 2006); *see Strategic Capital Res., Inc. v. Dylan Tire Indus., LLC*, 102 S.W.3d 603, 611 (Tenn. Ct. App. 2002) ("At a minimum the actors should be identified and the substance

of each statement should be pled."). Accordingly, in considering the sufficiency of Mr. Harman's complaint, we examine whether the pleadings alleged a TFCA violation with sufficient particularity in accordance with Rule 9.02.

B. False Statement

Mr. Harman asserts that he adequately pled the elements of a TFCA claim by identifying the actors and the substance of the misrepresentations. As to the requirement of a false statement, Mr. Harman argues that he adequately pled the element of making or using a false record or statement or causing one to be made or used. Mr. Harman's appellate brief asserts the following false statements as seven bases for demonstrating that false statements have been adequately pled in his complaint: [17]

> [1.] Regarding the 2005 Emails, "Trinity's leadership demonstrated an awareness of serious issues both as to the dangerousness and safety of its ET-Plus modifications . . . Trinity fretted about potential bodily harm to persons [and] acknowledged that the modifications were so significant that this new product would need to undergo its own, new approval process." T.R. Vol. 41 at 5357, ¶ 4.
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> [2.] "From approximately 2005 through at least 2014, Trinity made and caused contractors to make thousands of false certifications to TDOT. . . . [E]very time an altered ET-Plus was installed on a Tennessee road, the installing contractors . . . attached Trinity's certification that the altered ET-Plus that was installed was identical to the ET-Plus design that TDOT approved."[18] *Id.* at 5367, ¶ 35.
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> [3.] "Despite an acute awareness of the risks posed by the modifications, Trinity nonetheless discontinued the five-inch ET-Plus model . . . However, Trinity never disclosed the new product to TDOT . . . nor did it disclose the design changes . . . notwithstanding that Trinity made certifications to TDOT (both directly and through the FHWA) with respect to the ET-Plus on multiple occasions subsequent to fundamentally altering its design." *Id.* at 5369.

[17] We have renumbered Mr. Harman's bullet points for ease of reference.

[18] A paragraph in the Second Amended Complaint reads: "From approximately 2005 through at least 2014, Trinity made and caused contractors to make thousands of false certifications to TDOT. Specifically, from 2005 onward, every time an altered ET-Plus was installed on a Tennessee road, the installing contractors submitted a sworn T-2 Form, which attached Trinity's certification that the altered ET-Plus that was installed was identical to the ET-Plus design that TDOT approved. These certifications, all of which were false, were a precondition of installation and payment."

> [4.] "Trinity affirmatively attempted to deceive its regulators and customers by giving the four-inch ET-Plus end terminal the same product number and name as the discontinued five-inch ET-Plus . . . notwithstanding an awareness that Trinity *should* have treated the four-inch ET-Plus as a new product." *Id.* at 5369-5370, ¶ 40.
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> [5.] "Trinity distributed a 'To whom it may concern' letter dated March 14, 2012 . . . falsely claim[ing] that the 'ET-Plus™ was subjected to all FHWA-required NCHRP 350 crash testing . . .' This was true [only] as to the five-inch ET-Plus . . ." *Id.* at 5370, ¶ 41.
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> . . . .
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> [6]. The four-inch ET-Plus contained alterations that required disclosure to the FHWA and separate approval. T.R. Vol. 41 at 5368-73, ¶¶ 38–46. Therefore, each certification of Report 350 compliance submitted to TDOT by contractors, including those attached to Trinity's Motion, was false. Id. Additionally, Trinity's own representation to TDOT that the four-inch ET-Plus was Report 350 compliant was likewise false. *Id.* at 5370-71, ¶ 42.
>
> [7.] On September 3, 2003, Trinity applied to TDOT for the ET-Plus's inclusion on the QPL as a Type 38 End Terminal, which TDOT granted. *Id.* at 5365-66, ¶¶ 28–29. Trinity represented that the ET-Plus satisfied TDOT's requirements for the Type 38 End Terminal. T.R. Vol. 55 at 7330, SAC Exhibit K. However, the Type 38 End Terminal is used in a flared configuration in Tennessee. Thus, Trinity misrepresented that the ET-Plus satisfied TDOT's requirements for the Type 38 End Terminal. T.R. Vol. 41 at 5366, ¶ 31 et. seq.

In response, Trinity argues that Mr. Harman's complaint must fail because he "failed to provide a single example" of the false certifications.[19] We review the pleadings in the context of a motion to dismiss, where the court is tasked with determining the legal sufficiency of the complaint, not the strength of the plaintiff's case. *Lanier*, 229 S.W.3d at 660; *Finchum v. Ace*, *USA*, 156 S.W.3d 536, 537 (Tenn. Ct. App. 2004); *see* Tenn. R. Civ. P. 12.02(6).

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[19] In response to Mr. Harman's contention, Trinity argues that he has failed to identify any requirement providing for the certifications that he contends have been falsely made. Contrary to Trinity's argument, the complaint cites to *TDOT Procedures for the Sampling and Testing, and Acceptance of Materials and Products* SOP 1-1, which states that "[a]ny material that is on the departments Qualified Products List may be accepted by a certification from the manufacturer stating that the material furnished to the project is of the same formulation and has the same physical characteristics as the material evaluated for the Qualified Products List" through a T-2 form.

This court has previously held that in the context of a claim under the TFCA, "false" should be given its natural and ordinary meaning of "untrue," "deceitful," and "not genuine; inauthentic." *Cotham*, 607 S.W.3d at 830 (quoting *Black's Law Dictionary* 635 (8th ed. 2004)). As noted above, Rule 9.02 requires that, for allegations of fraud, "the actors should be identified and the substance of each allegation should be pled." *Kincaid*, 221 S.W.3d at 41. In *PNC Multifamily Capital Institutional Fund XXVI Limited Partnership v. Bluff City Community Development Corp.*, the plaintiff's allegations regarding misrepresentations as to the enforceability of agreements and financial condition of the projects were insufficiently particular because "without information as to what representations were made and by whom," the pleadings failed to satisfy Rule 9.02. 387 S.W.3d 525, 548, 549 (Tenn. Ct. App. 2012); *see W. Exp., Inc. v. Brentwood Servs., Inc.*, No. M2008-02227-COA-R3-CV, 2009 WL 3448747, at *9 (Tenn. Ct. App. Oct. 26, 2009) (allegations of secret meetings concealing a failure to perform and of a disregard of laws and regulations were insufficient); *Hampton v. Tenn. Bd. of Law Examiners*, 770 S.W.2d 755, 764 (Tenn. Ct. App. 1988) (plaintiffs who failed the bar exam did not allege with sufficient particularity the misrepresentations or the persons making misrepresentations which induced them to take the exam); *compare City State Bank v. Dean Witter Reynolds, Inc*., 948 S.W.2d 729, 738 (Tenn. Ct. App. 1996) ("Plaintiffs' complaint specifically identifies the time and place of each alleged false representation, and identifies the manner in which each representation was deemed to have been fraudulent.").

Arguing there is deficiency of particularity in Mr. Harman's pleadings, Trinity cites to *U.S. ex rel. SNAPP, Inc. v. Ford Motor Co.*, for the proposition that the complaint should be dismissed because the relator provided no single example of a specific claim. 532 F.3d 496, 503 (6th Cir. 2008) ("When a *qui tam* relator pleads 'a complex and far-reaching fraudulent scheme' it must 'provide[] examples of specific false claims submitted to the government pursuant to that scheme" in order to comply with Rule 9(b).'" (quoting *U.S. ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 501 F.3d 493, 510 (6th Cir. 2007)). In *SNAPP*, the Sixth Circuit concluded that the relator adequately alleged under the federal FCA that the defendant had made false statements but had not adequately identified a claim for payment because the allegations were that the defendant "entered into a large, undetermined number of contracts with the federal government, and that the government made hundreds of millions of dollars of payments . . . as a result of these contracts." *U.S. ex rel. SNAPP, Inc.*, 532 F.3d at 506. The Sixth Circuit held that allegations of such a "complex and far-reaching scheme" required specific examples of payment. *Id.* at 506; *compare U.S. ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 190 (5th Cir. 2009) ("[A] relator's complaint, if it cannot allege the details of an actually submitted false claim, may nevertheless survive by alleging particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted."); *In re Pharm. Indus. Average Wholesale Price Litig.*, 478 F. Supp. 2d 164, 172 (D. Mass. 2007) ("Given the sheer volume of drug reimbursements involved in this case, Rule 9(b) will be satisfied if the complaint alleges the basic framework, procedures, and the nature

of fraudulent scheme that give rise to California's belief that false claims have been submitted."); *U.S. ex rel. Johnson v. Shell Oil Co.*, 183 F.R.D. 204, 206 (E.D. Tex. 1998) (citing cases for the proposition that "where the fraud allegedly was complex and occurred over a period of time, the requirements of Rule 9(b) are less stringently applied").

While the court in *SNAPP* concluded the failure to identify a claim for payment failed the particularity requirement, it nevertheless emphasized that the primary purpose of Rule 9(b) is to provide the defendant adequate notice of the claim and the ground upon which it rests: "So long as a relator pleads sufficient detail—in terms of time, place and content, the nature of a defendant's fraudulent scheme, and the injury resulting from the fraud—to allow the defendant to prepare a responsive pleading, the requirements of Rule 9(b) will generally be met." *U.S. ex rel. SNAPP, Inc.*, 532 F.3d at 504.

Some of the "false statements" noted in Mr. Harman's brief fail to meet Tennessee's pleading requirements under Rule 9.02. For instance, the first purportedly false statement advanced by Mr. Harman (Basis 1) does not actually allege any false statement made to TDOT; instead, it alleges that Trinity was aware of a design defect. Paragraph 42 of Mr. Harman's complaint, which is addressed in Basis 6 advanced in his brief on appeal, does allege that Trinity represented to TDOT that the "ET-Plus 31," (described in the complaint as a "version of the terminal that was thirty-one inches tall") was "Test Level 3 compl[ia]nt" in seeking approval in July 2014. However, the complaint fails to explain the significance of "Test Level 3" compliance nor does the complaint allege that this version of the terminal, the "ET-Plus 31" was not actually "Test Level 3" compliant. Basis 7 advanced in Mr. Harman's brief purportedly reflects false statements as to "Type 38" end terminals, but his complaint does not reference "Type 38" end terminals.

Nevertheless, contrary to Trinity's contention, we conclude that some of the pleadings do adequately allege falsity with sufficient particularity under Rule 9.02. Mr. Harman alleged that with each installation of the ET-Plus, Trinity caused its contractors to submit to TDOT T-2 forms certifying that the device installed was identical to the originally approved device and also indicating that the design was compliant with Report 350. The latter assertion was also allegedly directly communicated by Trinity to TDOT through its "To Whom It May Concern Letter," which Mr. Harman alleges TDOT received in 2014. Under Tennessee Rule of Civil Procedure 9.02, Trinity's complaint is sufficient to allege the actor and substance of the false statements and to give Trinity adequate notice of the allegations so that it can prepare an answer. *See Dobbs v. Guenther*, 846 S.W.2d 270, 274-75 (Tenn. Ct. App. 1992). Accordingly, taking the allegations of the complaint as true, we conclude that Mr. Harman has adequately pled falsity insofar as it relates to causing its contractors to certify to TDOT that the product was identical to what had previously been approved by TDOT and that the design was Report-350 compliant, as well as making the latter assertion directly to TDOT.[20]

[20] Because the pleadings are adequate, we do not address the implied false certification theory which Trinity

C. Materiality

Before the trial court, the parties contested the issue of whether the Tennessee False Claims Act requires a showing that the false statement is material, with Mr. Harman having taken the position that it does not, while Trinity insisted that it does. The trial court determined that the TFCA included as an element the same materiality requirement and standard as suits under the federal False Claims Act (FCA).

In his principal brief before this court, Mr. Harman argues his pleadings are sufficient to satisfy the element of materiality, but nowhere in his principal brief does he challenge the trial court's conclusion that materiality is a requirement under the TFCA. In his reply brief, Mr. Harman renews his contention advanced before the trial court that materiality is not a requirement under Tennessee law before returning to the position advanced in his principal brief that his pleadings satisfied the materiality standard.

A reply brief does not provide a vehicle to raise issues on appeal that should have been advanced in the party's principal brief, resulting in waiver of such issues. *See*, *e.g.*, *Mini Sys. Inc. v. Alexander*, No. W2019-01871-COA-R3-CV, 2020 WL 6892010, at *2 (Tenn. Ct. App. Nov. 24, 2020); *Regions Financial Corp. v. Marsh USA, Inc.*, 310 S.W.3d 382, 392 (Tenn. Ct. App. 2009); *Owens v. Owens*, 241 S.W.3d 478, 499 (Tenn. Ct. App. 2007) (opinion denying pet. to rehear); *Castle v. State, Dep't of Corr.*, E2005-00874-COA-R3-CV, 2005 WL 2372762, at *4 (Tenn. Ct. App. Sept. 27, 2005). Therefore, we proceed in this case, which lacks a proper appeal of the trial court's determination that materiality is an element of a TFCA claim, under the assumption that materiality, in accordance with the federal FCA standard applied by the trial court, is an element of a TFCA claim.[21] We instead focus our analysis on the related issue that has been properly raised by Mr. Harman — whether Mr. Harman's pleadings satisfy this materiality standard.

To do so though, we begin with a brief exploration of the federal FCA materiality standard that the trial court concluded was part of the TFCA. The United States Supreme Court has clarified the materiality requirement under the FCA, noting that "materiality

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addressed in its briefs. *See Universal Health Servs., Inc. v. U.S. ex rel. Escobar*, 579 U.S. 176, 190 (2016) ("Accordingly, we hold that the implied certification theory can be a basis for liability, at least where two conditions are satisfied: first, the claim does not merely request payment, but also makes specific representations about the goods or services provided; and second, the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths.").

[21] The parties' briefing on appeal does not meaningfully engage with the seemingly important question of whether there is any variance between the express textual provision of the TFCA that the false statement or record is made or used "to get a false claim paid or approved" under Tennessee Code Annotated section 4-18-103(a)(2) and the materiality requirement as understood by the trial court.

'look[s] to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation.'" *Universal Health Servs., Inc. v. Escobar*, 579 U.S. 176, 193 (2016) (quoting 26 Williston on Contracts § 69:12, p. 549 (4th ed. 2003)). Stating that the standard for materiality is "demanding," the United States Supreme Court rejected the contention that a misrepresentation could be deemed material based solely on the government's designation of compliance with a requirement as a condition of payment or the government's option to reject payment based on noncompliance. *Id*. at 194. The United States Supreme Court indicated that "[m]ateriality . . . cannot be found where noncompliance is minor or insubstantial." *Id*.

Turning to the adequacy of Mr. Harman's pleading in connection with this standard, we note that according to Mr. Harman's complaint, in 2005, Trinity altered the product design, but did not reveal the new design to the FHWA or TDOT.[22] Mr. Harman alleges that between 2005 and 2014, each time the altered design was installed on Tennessee roadways, Trinity caused contractors to submit T-2 forms falsely certifying that the devices installed were identical to the original, five-inch design, and that the design was Report-350 compliant. Problematically, however, for Mr. Harman, his complaint also alleges that, in 2012, Mr. Harman "exposed Trinity's wrongdoing." In his brief to the trial court opposing Trinity's motion to dismiss, he conceded that "the noncompliance caused by the reduction to a four-inch channel was revealed to the TDOT in 2012," but he argued that TDOT was ignorant of the 2005 emails and other unspecified "revelations" from the 2014 trial. TDOT continued to use the ET-Plus, and it approved the use of the "ET-Plus 31" in August 2014. There is no indication in the complaint that TDOT took any action to remedy the allegedly defective terminals. Mr. Harman's complaint concedes that despite being alerted to the false assertions discussed above, TDOT continued to purchase Trinity's four-inch design guardrails for another two years.

The United States Supreme Court has indicated that "if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material." *Universal Health Servs., Inc.*, 579 U.S. at 195. Likewise, "if the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, and has signaled no change in position, that is strong evidence that the requirements are not material." *Id*. (footnote omitted). Applied to the motion to dismiss context, the United States Supreme Court has expressly rejected the contention that "materiality is too fact intensive for courts to dismiss False Claims Act cases on a motion to dismiss." *Id*. at 195 n.6.

There are, in fact, numerous decisions that have relied on the government's continued payments despite knowledge of the alleged fraud in granting motions to dismiss

[22] Trinity, relying on FHWA materials, asserts that the new design was properly tested and compliant with Report 350, while Mr. Harman asserts that it was defective and dangerous.

in connection with failure to adequately plead materiality. *See United States ex rel. Foreman v. AECOM*, 19 F.4th 85, 112-14 (2d Cir. 2021), *cert. denied*, 212 L. Ed. 2d 764 (May 2, 2022) ("Despite its knowledge of, and investigation into, [the] violations . . . , the government still extended the . . . Contract. Moreover, the government did not disallow any charged costs; instead, it simply reduced staffing levels. This provides powerful evidence that any misrepresentations . . . were not material to the government's payment decision." (noting plaintiff had not pled facts that would support an alternative explanation of the decision to pay and dismissing certain claims while allowing others to go forward)); *United States ex rel. Petratos v. Genentech Inc.*, 855 F.3d 481, 490 (3d Cir. 2017) (concluding that the relator's concession that the government would have paid the claims with full knowledge of the alleged noncompliance "dooms his case"); *United States ex rel. Porter v. Magnolia Health Plan, Inc.*, 810 Fed. Appx. 237, 242 (5th Cir. 2020) (facts pled were not sufficient to survive a motion to dismiss when Medicaid continued payment and renewed its contract with the defendant several times); *United States ex rel. Gardner v. Vanda Pharm., Inc.*, 2020 WL 2542121, *10-11 (D.D.C. May 19, 2020) (conclusory assertions were not enough when the complaint contained "no well-pleaded factual support for the assertion that government payors would not have covered the prescriptions had they know about the off-label uses")[23]; *United States v. Comstor Corp.*, 308 F. Supp. 3d 56, 86-88 (D.D.C. 2018) (dismissal was appropriate in part because the government had been aware of the relator's allegations for years, but the complaint was "silent as to whether the government took any action whatsoever against the defendants, or took steps to cancel the . . . contracts at issue . . ., or even sent notices regarding . . . non-compliance to the defendants"); *United States ex rel. Jackson v. Ventavia Research Grp., LLC*, No. 1:21-CV-00008, 2023 WL 2744394, at *20 (E.D. Tex. Mar. 31, 2023) (the complaint did not support the conclusion that the government was a victim of fraud because "[t]he Government's unbroken chain of authorization and payments in the face of [the relator's] allegations does not support an inference that the alleged misrepresentations were material"); *Knudsen v. Sprint Commc'ns Co.*, No. C13-04476 CRB, 2016 WL 4548924, at *13-14 (N.D. Cal. Sept. 1, 2016) ("Without further details, such as allegations that the government consistently refuses to pay claims that violate . . . terms or that the government did not know that it was not receiving the required price reductions, Knudsen fails to adequately plead materiality."); *United States ex rel. Poehling v. UnitedHealth Grp., Inc.*, No. CV 16-08697-MWF (SSx), 2018 WL 1363487, at *9–10 (C.D. Cal. Feb. 12, 2018) (dismissing certain claims because the complaint "failed to allege that CMS would have refused to make risk adjustment payments if it had known the Attestations were false").

There are certainly circumstances in which continued payment, however, would not render legally deficient a claim of fraud perpetrated against the government in a qui tam action in which the government continued to pay despite awareness of the alleged fraud. *United States ex rel. Campie v. Gilead Sciences, Inc.*, 862 F.3d 890, 906 (9th Cir. 2017)

[23] The relator was permitted to amend the complaint and successfully alleged materiality in the amended complaint. *United States ex rel. Gardner v. Vanda Pharm., Inc.*, 554 F. Supp. 3d 146, 159 (D.D.C. 2021).

("[T]here are many reasons the FDA may choose not to withdraw a drug approval, unrelated to the concern that the government paid out billions of dollars for nonconforming and adulterated drugs."); *United States ex rel. Bonzani v. United Techs. Corp.*, No. 3:16-CV-1730 (JCH), 2019 WL 5394577, at *7 (D. Conn. Oct. 22, 2019) (materiality was adequately pled when the government continued payment but the complaint plausibly alleged that the contract could not be terminated because defendants were the sole manufacturers of the product and it was necessary to national security); *see United States ex rel. Mei Ling v. City of Los Angeles*, 389 F. Supp. 3d 744, 761 (C.D. Cal. 2019) ("[T]he Government may still maintain an FCA claim if it can muster allegations, taken as true, that explain why continued payments are not probative of immateriality in the circumstances presented by a specific case.").

A critical problem for Mr. Harman with his complaint, however, is that his own pleadings indicate that he exposed Trinity's wrongdoing to TDOT in 2012. TDOT, which was made aware of the variance of Trinity's product from the one they had previously approved and the alleged potential dangerousness thereof, nevertheless continued to acquire the product for two years. Moreover, Mr. Harman has noted that TDOT even expressly approved the use of the "ET-Plus 31" after the filing of Mr. Harman's complaint in the midst of the federal litigation. According to Mr. Harman's complaint, TDOT only stopped purchasing the product after FHWA's review pause on approval and Trinity ceasing sales following the adverse federal jury verdict.[24] This synopsis, which runs contrary to an adequate pleading of materiality, is derived from the facts as pled by Mr. Harman.

As noted above, there can be circumstances where a party could still adequately plead materiality despite the relevant government entity being aware of the alleged falsity and nevertheless continuing to acquire the product without a reduction in price or any other change in the government's course of conduct. Tennessee, however, requires particularity of pleading with regard to TFCA claims, and Mr. Harman has failed to offer an adequate, particularly pled basis for discounting the impact of the continuing purchases by TDOT. To plead materiality where the complaint indicates government awareness of the alleged falsity and continuing unmodified purchasing behavior for two years, we think it incumbent on the relator to plead with particularity an adequate basis for discounting the continuing course of conduct by the government. Mr. Harman has failed to do that in the present case. He has failed to plead with sufficient particularity a basis for discounting the government's continuing acquisition of the product despite awareness of the alleged deficiencies thereof.

The FHWA's June 2014 report is also problematic for Mr. Harman, insofar as his complaint rests upon asserting that the statement to TDOT that Trinity's guardrail end terminals are Report-350 compliant was false. The contention that this assertion is a

[24] As addressed above, the jury verdict was reversed on appeal by the United States Court of Appeals for the Fifth Circuit.

material false statement rests on complex scaffolding. Mr. Harman does not claim that the FHWA indicated that the product was not Report-350 compliant. Rather, he contends that, despite the FHWA's indication to the contrary, Trinity's product is not truly Report-350 compliant. Under Mr. Harman's theory, the product is not truly Report-350 compliant because federal authorities lacked awareness of the modifications made by Trinity and because the modifications made the product less safe, requiring Trinity to submit the modified product for testing. If Trinity had submitted the product for testing, Mr. Harman theorizes, the product would have been found not to be Report-350 compliant.

Problematic for Mr. Harman, the FHWA concluded that the product is Report-350 compliant. Furthermore, it did so after having been apprised of variances from the original design and the purported dangerousness of the product. Despite concerns having been raised regarding the product, the FHWA's June 2014 Memorandum, nevertheless, declares that the FHWA's "September 2, 2005 letter . . . to Trinity is still in effect and ET-Plus w-beam guardrail end terminal became eligible on that date and continues to be eligible for Federal-aid reimbursement." The FHWA specified that "[a]n unbroken chain of eligibility for Federal-aid reimbursement has existed since September 2, 2005 and the ET-Plus continues to be eligible today." The FHWA also added that the four-inch model had actually been tested in 2005 and found to be compliant. An error in Trinity's documentation suggested, inaccurately, it was not the model that had been tested in 2005. In other words, the four-inch model, which Mr. Harman asserts should have been tested, was according to the FHWA memorandum tested in 2005 and approved as Report-350 compliant. Following the federal jury verdict, the FHWA indicated that further independent testing was conducted that again showed the four-inch model to be Report-350 compliant.

In addressing Mr. Harman's litigation against Trinity under the FCA, the Fifth Circuit, noting the FHWA's conclusions, rejected Mr. Harman's arguments as to materiality of his FCA claim with regard to purported lack of Report-350 compliance. *United States ex rel. Harman*, 872 F.3d at 668. The Fifth Circuit observed that "given FHWA's unwavering position that the ET-Plus was and remains eligible for federal reimbursement, Trinity's alleged misstatements were not material to its payment decisions." *Id.* The Fifth Circuit rejected Mr. Harman's arguments regarding materiality as a matter of law. *Id.*

A basis of purported falsity in Trinity's Tennessee action is non-compliance with the Report-350 standard. Despite awareness of Harman's claims regarding the product, the FHWA has concluded that it is Report-350 compliant and noted that Trinity's four-inch model was actually tested in 2005. This drives a stake into the heart of a fraud claim based on failure to submit to testing and not being truly Report-350 compliant as a basis for material falsity.

The trial court considered the FHWA's June 2014 report, which was appended to

Trinity's motion to dismiss, in concluding that Mr. Harman had failed to state a claim upon which relief could be granted.[25] Mr. Harman argues this was error. And therein lies the rub,[26] for he insists that Tennessee courts cannot consider the FHWA's June 2014 report in the context of ruling upon a motion to dismiss. Rather, he contends that the trial court's

[25] As noted above, Mr. Harman and Trinity submitted to the trial court more than three thousand pages of materials in connection with Mr. Harman's complaint and Trinity's motion to dismiss.

[26] "To die, to sleep; / To sleep: perchance to dream: ay, there's the rub." William Shakespeare, *Hamlet* act 3, sc. 1.

> These latter words, then, are the point where the self-induced deconstruction of Hamlet's death wish is complete and where he is forced to "pause" and redirect his thought. If this is so, then one may legitimately ask what significance is attached to the expression "there's the rub," which marks the reversal. English speakers of today are likely to respond to the expression as a whole, since it is familiar, almost proverbial, perhaps a mere verbal gesture recognizing some difficulty, or perhaps an intensified variant of "that is the question" at the beginning of the soliloquy. This is how the in dictionaries of current English usage the pertinent sense of the noun rub (apart from the more usual meaning "the act of rubbing") is explained, mostly with reference to the idiomatic there's the rub itself; for example:
>
> There's / here's the rub used when saying that a particular problem is the reason why a situation is so difficult.
>
> The rub [sing.] (dated or rhet.) a problem or difficulty: . . . there's / there lies the rub.
>
> But then the familiarity of the phrase may well be due to its occurrence in the most famous monologue of the most famous play of the most famous [English] dramatist. Shakespeare may, indeed, have coined it--the OED, at any rate, has no earlier attestations of the phrase. If so, he would have made use of a meaning of rub common in his own time but obsolete today. In early modern English, rub was a bowling term, denoting "an obstacle or impediment by which a bowl is hindered in, or diverted from, its proper course." It also had a more general meaning, no doubt transferred from the bowling context, signifying any kind of "impediment or difficulty" of either a physical or mental nature. . . . In the Shakespeare canon itself, rub in those senses occurs about ten times, though it is not always easy to determine whether, and to what extent, the bowling association is present or whether a more general meaning predominates-- in other words, whether rub is a fresh or faded metaphor. It will be noticed, however, that in Shakespeare a rub is usually something that obstructs a path, in which case the bowling association seems natural--as in Henry V ("We doubt not now / But every rub is smoothed our way") or in King John ("the breath of what I mean to speak / Shall blow each dust, each straw, each little rub"). Or else it may obstruct, in a more abstract sense, the course of fortune. . . . Surely Shakespeare is aware of both meanings--the concrete one applied to bowling and the transferred one, since he plays with them in the garden scene of Richard II; when the lady-in-waiting, attempting to cheer up the melancholy queen, suggests: "Madam, we'll play at bowls," the answer is: "Twill make me think the world is full of rubs / and that my fortune runs against the bias."

Werner Habicht, *Translating Hamlet's Thoughts Process, in Shakespeare without Boundaries: Essays in Honor of Dieter Mehl* 267, 268-69 (Christa Jansohn et al. eds., 2011) (footnotes and citations omitted).

consideration of the FHWA's June 2014 Memorandum requires converting the matter into a summary judgment determination rather than a motion to dismiss for failure to state a claim upon which relief can be granted and that the trial court made no such conversion. Trinity counters that the FHWA's report was properly considered by the trial court in the context of a motion to dismiss. Trinity emphasizes that the FHWA report was not employed by the trial court in support of the truth of the matter asserted therein.

This court has often noted the general rule that a trial court considering extraneous evidentiary materials outside the pleadings that are submitted by the parties in support of or in opposition to a Tennessee Rule of Civil Procedure 12.02(6) motion to dismiss for failure to state a claim necessitates conversion from a motion to dismiss to a summary judgment with appropriate accompanying actions including notice to the parties of the court's action.[27] This court has also often noted, however, that there are exceptions to this general rule.[28] Without need of conversion to summary judgment, courts have appropriately considered "matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned." *Vanwinkle v. Thompson*, No. M2020-01291-COA-R3-CV, 2022 WL 1788274, at *3 (Tenn. Ct. App. June 2, 2022); *Felker v. Felker*, No. W2019-01925-COA-R3-CV, 2021 WL

[27] *See*, *e.g.*, *Karr v. Saint Thomas Midtown Hosp.*, No. M2020-00029-COA-R3-CV, 2021 WL 457981, at *3 (Tenn. Ct. App. Feb. 9, 2021) (citation omitted) ("Generally, the resolution of a 12.02(6) motion to dismiss is determined by an examination of the pleadings alone. When a trial court considers matters outside of the pleadings, a motion to dismiss is converted to a motion for summary judgment."); *Patton v. Est. of Upchurch*, 242 S.W.3d 781, 786 (Tenn. Ct. App. 2007) ("If matters outside the pleadings are presented in conjunction with either a Rule 12.02(6) motion or a Rule 12.03 motion and the trial court does not exclude those matters, the court must treat such motions as motions for summary judgment and dispose of them as provided in Rule 56. Tennessee case law on this issue views the matters outside the pleadings as 'extraneous evidence.'"); *Staats v. McKinnon*, 206 S.W.3d 532, 543 n.14 (Tenn. Ct. App. 2006) (citations omitted) ("If either or both parties submit evidentiary materials outside the pleadings in support of or in opposition to a Tenn. R. Civ. P. 12.02(6) motion and the trial court decides to consider these materials, the trial court must convert the motion to dismiss to a motion for summary judgment, and notify the parties that it has made the conversion."); *see also* Lawrence A. Pivnick, 1 Tenn. Cir. Ct. Prac. § 11:3 (2022) ("Generally, consideration of the motion to dismiss for failure to state a claim is confined to the pleading attacked.").

[28] *See*, *e.g.*, *Karr*, 2021 WL 457981, at *3 (discussing exceptions to the general rule); *Harvey v. Shelby Cnty.*, No. W2018-01747-COA-R3-CV, 2019 WL 3854297, at *4 (Tenn. Ct. App. Aug. 16, 2019) ("We recognize that there are exceptions to the general rule that a court must convert a motion for judgment on the pleadings to a motion for summary judgment if the court considers evidence outside the pleadings."); *Grose v. Kustoff*, No. W2017-01984-COA-R3-CV, 2019 WL 244469, at *3 n.4 (Tenn. Ct. App. Jan. 17, 2019) ("The conversion rule . . . does have some notable exceptions."); *Haynes v. Bass*, No. W2015-01192-COA-R3-CV, 2016 WL 3351365, at *4 (Tenn. Ct. App. June 9, 2016) ("There are exceptions to the general rule . . . that a court must convert a Tenn. R. Civ. P. 12.02(6) motion to a motion for summary judgment if the court considers evidence outside the pleadings."); *see also* Lawrence A. Pivnick, 1 Tenn. Cir. Ct. Prac. § 11:3 n.12 (2022) ("There are exceptions to the general rule that a court must convert a Rule 12.02(6) motion to a motion for summary judgment if the court considers matters outside the pleadings.").

3507745, at *4 (Tenn. Ct. App. Aug. 10, 2021); *W. Exp., Inc. v. Brentwood Servs., Inc.*, No. M2008-02227-COA-R3-CV, 2009 WL 3448747, at *3 (Tenn. Ct. App. Oct. 26, 2009); *Ind. State Dist. Council of Laborers v. Brukardt*, No. M2007-02271-COA-R3-CV, 2009 WL 426237, at *8 (Tenn. Ct. App. Feb. 19, 2009).

For example, in addressing the exceptions to the general rule, this court concluded in *Indiana State District Council of Laborers v. Brukardt* that the trial court had properly considered a proxy statement and certificate of incorporation as public records subject to judicial notice[29] without need to convert the action to a summary judgment but did caution that "[o]bviously the proxy statement is to only be considered for what it says, not for the truth of the information in the statement." 2009 WL 426237, at *9. This court in the same case also concluded that the trial court had erred, however, by considering newspaper articles and press releases without converting the matter to a summary judgment where the materials brought "before the trial court information such as: the shareholders voted 'overwhelmingly' for the merger; the price was competitive in comparison to a recent merger; the sales price was a 39.5% premium over the average market closing over the prior year; and the sales price was extremely attractive." *Id*. In *Western Express, Inc. v. Brentwood Services, Inc.*, this court concluded that a settlement agreement between the Commissioner of the Tennessee Department of Commerce and Insurance acting as a liquidator and an administrator of a trust "was properly considered as it is a public record of which the court could take judicial notice. As part of the record in the liquidation action, which Plaintiff references in his Complaint, the trial court did not err by considering the Settlement Agreement when deciding whether to dismiss Plaintiff's complaint for failure to state a claim upon which relief can be granted." 2009 WL 3448747, at *3.

This court similarly found conversion to summary judgment was unnecessary in *Singer v. Highway 46 Properties, LLC*, finding the trial court acted appropriately in

[29] Judicial notice has been employed in variety of contexts. In *Johnston v. Johnston*, this court took judicial notice of the United States Census Bureau official website to determine the population of a county. No. E2013-00525-COA-R3CV, 2014 WL 890758, at *22 (Tenn. Ct. App. Mar. 6, 2014); *see Hicks v. Seitz*, No. E2014-02225-COA-R3-CV, 2015 WL 5602285, at *5 (Tenn. Ct. App. Sept. 23, 2015) (same). Likewise, this court has taken judicial notice of the position of a public official obtained from an official website. *Flade v. City of Shelbyville*, No. M2022-00553-COA-R3-CV, 2023 WL 2200729, at *1 (Tenn. Ct. App. Feb. 24, 2023) (taking judicial notice of the Shelbyville City Council website listing a defendant's association with the Bedford County Listening Project); *State ex rel. Williams v. Woods*, 530 S.W.3d 129, 138 (Tenn. Ct. App. 2017) (judicial notice that a judicial officer was "listed as a juvenile magistrate on the website maintained by the Tennessee Administrative Office of the Courts"); *In re Catherine J.*, No. W2017-00491-COA-R3-PT, 2018 WL 618703, at *6 (Tenn. Ct. App. Jan. 30, 2018) (same). In *State v. Springer*, we took judicial notice that a facility was run by Corrections Corporation of America. No. W2010-02153-CCA-R3-CD, 2012 WL 603820, at *1 (Tenn. Crim. App. Feb. 16, 2012), *rev'd on other grounds by State v. Springer*, 406 S.W.3d 526 (Tenn. 2013). A Google map was judicially noticed when there was no argument it was unreliable. *Total Garage Store, LLC v. Moody*, No. M201-901342-COA-R3-CV, 2020 WL 6892012, at *10–11 (Tenn. Ct. App. Nov. 24, 2020). Furthermore, the Tennessee Supreme Court has taken judicial notice of the contents of an order obtained through the Davidson County Chancery Information Access website. *Moore v. Lee*, 644 S.W.3d 59, 61 (Tenn. 2022).

considering "the following public records in addition to the complaint: (1) the quitclaim deed in which Summers conveyed the property to Highway 46; and (2) Highway 46's Articles of Organization and annual reports." No. M2013-02682-COA-R3CV, 2014 WL 4725247, at *3 (Tenn. Ct. App. Sept. 23, 2014). In *Belton v. City of Memphis*, this court determined that consideration of a contract that was required by rule to be attached to the complaint, but which had not been, did not convert the action to a summary judgment but that consideration of a letter, which was not included as part of the plaintiff's complaint and was purportedly sent by the private business regarding termination of the disputed contact, did require conversion. No. W2015-01785-COA-R3-CV, 2016 WL 2754407, at *4 (Tenn. Ct. App. May 10, 2016). When a trial court considered affidavits and forensic evidence in a condonation defense in *Swaney v. Swaney*, this court concluded that the action should have been converted from a motion to dismiss to summary judgment. No. W2005-00156-COA-R3CV, 2005 WL 3447694, at *3 (Tenn. Ct. App. Dec. 16, 2005)

Courts, in general, have regarded a wide variety of governmental administrative agency materials as appropriate for consideration without need of converting a motion to dismiss to a summary judgment. *See*, *e.g.*, *Thomas v. Noder-Love*, 621 F. App'x 825, 829 (6th Cir. 2015) ("Documents outside of the pleadings that may typically be incorporated without converting the motion to dismiss into a motion for summary judgment are 'public records, matters of which a court may take judicial notice, and letter decisions of governmental agencies.'"); *Menominee Indian Tribe of Wisconsin v. Thompson*, 161 F.3d 449, 456 (7th Cir. 1998) ("Judicial notice of . . . documents contained in the public record, and reports of administrative bodies is proper."); *Tillman v. Smith & Nephew, Inc.*, No. 12 C 4977, 2012 WL 6681698, at *1 (N.D. Ill. Nov. 1, 2012) ("The court may also take judicial notice of matters of public record. Thus, despite the fact that Tillman never references the [Department of Health and Human Services] letter in his complaint, the court may take judicial notice of the letter because it is a matter of public record."); *Caplinger v. Uranium Disposition Servs., LLC*, No. 2:08-CV-548, 2009 WL 367407, at *2 (S.D. Ohio Feb. 11, 2009) ("Courts may also consider public records, including . . . letter decisions of government agencies and published reports of administrative bodies."); *Smart v. Goord*, 441 F. Supp. 2d 631, 637 (S.D.N.Y. 2006), *on reconsideration in part*, No. 04 CIV. 8850 RWS, 2008 WL 591230 (S.D.N.Y. Mar. 3, 2008) ("When ruling on a motion to dismiss, the Court may take judicial notice of records and reports of administrative bodies. . . ."); *Bova v. U.S. Bank, N.A.*, 446 F.Supp.2d 926, 930 n.2 (S.D. Ill. 2006) ("The Court may of course judicially notice public records and government documents, including those available from reliable sources on the Internet."); *Intermedics v. Ventritex*, 775 F.Supp. 1258, 1261 (N.D.Cal.1991) (when considering a Rule 12(b)(6) motion, a district court may take judicial notice of, among other things, "records and reports of administrative bodies. . . .").

In this case we consider the FHWA's June 2014 memorandum not for the truth of the assertions therein, but instead as indicating the decision reached by the federal regulatory authority and the reasons stated for reaching this decision. In other words, we

consider it "for what it says, not for the truth of the information in the statement." *Indiana State District Council of Laborers v. Brukardt*, 2009 WL 426237, at *9.[30] The FHWA June 2014 Memorandum indicates that the FHWA was aware of concerns regarding the four-inch model and, nevertheless, concluded it was Report-350 Compliant. The FHWA also indicated that the four-inch model actually had been subject to testing in 2005 and met the relevant standards. Perhaps, the FHWA is errant as to both conclusions. We do not embrace the factual correctness of either conclusion as part of our analysis of this motion to dismiss.

The problem for Mr. Harman is that his theory of material falsity is predicated upon the premise that the four-inch model was not really approved by the FHWA. That is, the FHWA approval is essentially not true approval because Trinity concealed a change to the product and the modified product should have been submitted to testing. Having been made aware, however, of concerns regarding the model, the FHWA concluded that the four-inch model continued to enjoy its approval and noted the four-inch model had actually been tested in 2005. Again, perhaps the FHWA is mistaken, but that does not particularly assist Mr. Harman in advancing his TFCA claim. His falsity theory rests upon Trinity causing contractors to make false assertions to TDOT that its product is regarded by the FHWA as Report-350 compliant and Trinity making such assertions directly itself. Mr. Harman's pleading fails to adequately plead material falsity given that, despite awareness of concerns about the product, the FHWA maintained its conclusion that the product is Report-350 compliant and concluded that the product had been tested in 2005.

We address the FHWA June 2014 memorandum in connection with Mr. Harman's failure to adequately plead materiality rather than to adequately plead falsity as part of this court's consideration of the FHWA memorandum for what it says rather than the truth of what it says. Even if FHWA was in error in assessment as to Report-350 compliance or as to which model was actually tested in 2005, these were the FHWA's determinations that were reached after having been informed about concerns regarding the product. Perhaps, Mr. Harman is correct and the four-inch model was not truly Report-350 compliant or the four-inch model was not truly tested in 2005. The material falsity of Trinity's representations to TDOT in the present case turn though not upon the actual correctness of FHWA's conclusions but instead upon FHWA having reached these conclusions. Mr. Harman contends that Trinity falsely claimed to TDOT that the four-inch model was

[30] Courts have often taken the view that "[a] court may take judicial notice of matters of public record without converting a motion to dismiss into a motion for summary judgment[, b]ut a court cannot take judicial notice of disputed facts contained in such public records." *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999 (9th Cir. 2018). "Courts may consider public records for the truth of the statements contained within them only when the 'contents prove facts whose accuracy cannot reasonably be questioned.'" *Elec. Merch. Sys. LLC v. Gaal*, 58 F.4th 877, 883 (6th Cir. 2023); *Welch v. Santos*, No. 2:21-cv-08691-MEMF-KSx, 2022 WL 2125146, at *2 (C.D. Cal. Mar. 22, 2022) ("When taking public records under notice, the Court may only do so 'not for the truth of the facts recited therein, but for the existence of the opinion, which is not subject to reasonable dispute over its authenticity.'").

Report-350 compliant, but regardless of actual compliance, TDOT's requirements provided for "certification from the supplier that the device is an NCHRP 350 approved product, **documented in an acceptance letter from FHWA**." TDOT Standard Specifications for Road and Bridge Construction 705.02 (emphasis added). The FHWA at all times accepted the product as Report-350 compliant. The FHWA's acceptance meets TDOT's requirements for demonstrating Report-350 compliance, obviating any showing of materiality.

A contrary approach would lose the thread of the purpose of the TFCA and upend the decision-making role of the regulatory authority. The First Circuit in *D'Agostino v. ev3, Inc.*, addressing the federal counterpart to the TFCA, stated well the problem with such an approach: "The FCA exists to protect the government from paying fraudulent claims, not to second-guess agencies' judgments about whether to rescind regulatory rulings." 845 F.3d 1, 8 (1st Cir. 2016).

Given Mr. Harman's failure to challenge the trial court's determination that the TFCA includes a materiality component akin to the federal requirement, we have analyzed whether Mr. Harman's complaint adequately plead materiality. We conclude that it is does not. Therefore, the trial court did not err in dismissing his complaint for failure to state a claim upon which relief can be granted.

IV.

For the reasons discussed above, we affirm the judgment of the Circuit Court for Davidson County. Costs of the appeal are taxed to the Appellant, Joshua M. Harman, for which execution may issue if necessary.

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JEFFREY USMAN, JUDGE