No. 15-7

IN THE

Supreme Court of the United States

UNIVERSAL HEALTH SERVICES, INC.,

Petitioner,

v.

UNITED STATES AND COMMONWEALTH OF MASSACHUSETTS EX REL. JULIO ESCOBAR AND CARMEN CORREA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF MARK MCGRATH AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Mark McGrath is a relator in an action filed in the District of Arizona, *United States of America, ex rel. Mark McGrath v. Microsemi Corp.* (No. CV-13-00864-PHX-DJH), in which his complaint was dismissed in part because of an erroneous interpretation of the requirements of Fed. R. Civ. P. 9(b). The action is now on appeal to the Ninth Circuit Court of Appeals. Mr. McGrath believes that the First Circuit properly applied Rule 9(b) to the facts of this case and further believes that the argument made by CTIA – The Wireless Association, as *amicus curiae* in support of the petitioner ("Association") is incorrect with regard to how Rule 9(b) should be applied in the *qui tam* context.

McGrath was a technical Planning Manager with a subsidiary of defense contractor Microsemi Corp. and became aware that Microsemi and its subsidiaries were routinely violating national security regulations that are designed to restrict access to classified and confidential information about the specifications of the highly technical products sold to the Department of Defense ("DOD"). McGrath's complaint set forth the details of Microsemi's violations and identified the specific statutes and regulations that required Microsemi's compliance as a condition of the DOD's purchases, but his complaint was nonetheless dismissed under Rule 9(b).

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1. Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represent that no counsel for any party authored this brief in whole or in part and that none of the parties or their counsel, nor any other person or entity other than *amicus* or his counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amicus* represent that all parties have consented to the filing of this brief.

McGrath does not believe that the Court should address the scope of Rule 9(b) as it relates to False Claims Act litigation. The issue is beyond the questions presented, and none of the parties addressed it. In light of the Association's submission, however, McGrath submits this *amicus* brief because the reasoning urged by the Association and applied by the district court in *Microsemi* is unfounded and will severely restrict the ability of relators to bring meritorious *qui tam* actions. Indeed, if adopted, the Association's overly narrow view of Rule 9(b) would amount to *de facto* immunity from most FCA claims.

SUMMARY OF ARGUMENT

The Association contends that the lower courts "abdicate their responsibility to apply Rule 9(b) as a check on FCA relators who cannot allege false claims with sufficient detail" and that such conduct will "open the door wide to abuse of litigation." (Assoc. Br. at 3). The Association suggests that a complaint should be dismissed unless the relator can "provide at least one example of a 'representative false claim.'" (Assoc. Br. at 13).

By this, the Association apparently means that the relator must reference a specific invoice or demand for payment from the government in order to meet the requirements of Rule 9(b). Such a requirement would improperly impede numerous meritorious cases. A relator may not have access to specific invoices or claims made to the governmental entity, but the relator may have in-depth knowledge of the actual fraudulent scheme itself. An explanation of the "who, what, when, where and how" of the fraudulent scheme should be sufficient to give a defendant the notice necessary to defend the claim

and to weed out meritless actions. Providing copies or specifically referencing invoices or requests for payment that are made fraudulent as the result of the underlying fraudulent scheme should be unnecessary to meet the relator's pleading obligations.

ARGUMENT

I. Pleading the Who, What, Where, When and How of the Fraudulent Scheme Should Be Sufficient for Rule 9(b).

In the case before the Court, petitioner had full and adequate notice of the nature of the false claim. Petitioner had violated several provisions of Massachusetts law that require adequate licensure and supervision of mental health personnel. Numerous employees of petitioner falsely identified themselves as licensed social workers or licensed mental health counselors when they were not. Petitioner used unlicensed mental health counselors who were not adequately supervised in accordance with Massachusetts regulations. The First Circuit concluded that the respondents had satisfied Rule 9(b) because they specifically alleged that there were 22 unlicensed employees who had obtained National Provider Identification numbers, that 23 unlicensed therapists practiced without supervision, and that one of petitioner's principals admitted that the facility where relator's daughter was treated suffered from a fundamental lack of oversight.

The district court erroneously dismissed the complaint because respondents provided "no claim numbers, no dates, and no amounts charged to the government." 2014 WL 1271757, at *12. But, of course, none of those facts are the *sine qua non* of the violation, nor could respondents, the parents of a former patient, have had access to the specific claim numbers, the dates submitted or the amounts charged to the government. Yet, respondents clearly set forth the material elements of the underlying fraudulent scheme with the specificity required by 9(b).

The Association also singles out the alleged improper application of Rule 9(b) in the court's decision in *U.S. ex rel. Heath v. AT&T, Inc.*, 791 F.3d 112 (D.C. Cir. 2015), *petition for cert pending*, No. 15-363. The Association claims that the pleading in *Heath* was inadequate because the relator did not reference any specific request for payment that was made by AT&T. But the elements of the fraudulent scheme were clearly set forth: AT&T allegedly overbilled schools by at least $2.8 million because it did not offer the schools the "lowest corresponding price" otherwise offered by the company. Thus, the relator alleged that AT&T submitted false claims to the Universal Service Fund "by depriving schools and libraries in the E-Rate program of the lowest corresponding price for services" and that, AT&T "knew that compliance with the lowest-corresponding-price requirement was an express material condition for reimbursement from the Universal Service Fund." 791 F.3d, at 117-118. AT&T was fully apprised of the nature of the fraudulent claim and there was sufficient assurance of the merits of the claim without the need for relator to have access to, and to reference, specific requests for payment made by AT&T.

None of the other cases cited by the Association (Assoc. Br. at 12-13) as examples of "lax" application of Rule 9(b) improperly apply the rule. For example, in *Ebeid v. Lungwitz*, 616 F.3d 993 (9th Cir. 2010), the Ninth Circuit held that a relator adequately sets forth a false claim where he alleges that (1) the defendant explicitly undertook to comply with a law, rule and regulation that was implicated in the submission of a claim; (2) the claims were submitted; and (3) the defendant submitted the claims even though it knew it was not in compliance with the law or regulation. The Ninth Circuit properly rejected the argument that the relator had to identify "representative examples of false claims to support every allegation." *Id.* at 999. The court noted that submission of such representative examples would clearly be *one means* of meeting the requirements of Rule 9(b), but that a relator meets his or her obligations under Rule 9(b) if he or she alleges "particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted." *Id.* at 998-99 (quoting *U.S. ex rel. Grubbs v. Ravikumar Kanneganti*, 465 F.3d 180-190 (5th Cir. 2009)). The Ninth Circuit upheld the dismissal of the relator's claim in *Ebeid* because the relator did not allege with specificity the actual conduct of the defendant that violated specific Medicare regulations. Though Ebeid argued that the defendant had falsely implied compliance with the Stark Act, which prohibits referring Medicare patients to entities in which the physician has a prohibited financial interest, Ebeid failed to allege with specificity the alleged prohibited financial interest. Thus, it was a deficiency in the allegations concerning the fraudulent scheme itself that ran afoul of Rule 9(b), not the failure to delineate the who, what, when, where, and how of the specific requests for payment.

Similarly, in *Grubbs*, the Fifth Circuit explained that the contents of the particular request for payment are often not nearly as important as the underlying fraudulent scheme:

> The particular circumstances constituting the fraudulent presentment are often harbored in the scheme. A hand in the cookie jar does not itself amount to fraud separate from the fib that the treat has been earned when in fact the chores remain undone. Standing alone, raw bills – even with numbers, dates, and amounts – are not fraud without an underlying scheme to submit the bills for unperformed or unnecessary work. It is the scheme in which particular circumstances constituting fraud may be found that make it highly likely that the fraud was consummated with the presentment of false bills.

465 F.3d at 190.

The Fifth Circuit concluded that a relator meets the requirements of Rule 9(b) "by alleging particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted." *Id.* Thus, the court held that the complaint was sufficient because it set forth in detail the scheme to defraud the government even though the complaint did "not include exact billing numbers or amounts." *Id.* at 192.

In *U.S. ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849 (7th Cir. 2009), the court held that the relator had satisfied Rule 9(b) when he set forth specific allegations that Rolls-

Royce had defrauded the United States about the quality of the turbine blades provided in the Rolls-Royce engine. Although the relator knew all the details of the substituted materials. the district court had held that "unless Lusby has at least one of Rolls-Royce's billing packages, he lacks the required particularity." *Id.* at 854. But the court of appeals held that the district court's ruling improperly "takes a big bite out of *qui tam* litigation" because "a relator is unlikely to have those documents unless he works in the defendants' accounting department." *Id.*

The Association also argues that Rule 9(b) should require the relator to identify the "*specific* regulations with which the defendant falsely certified compliance." (Assoc. Br. at 14) (emphasis in original). Certainly, in order to assert a fraudulent scheme, the relator needs to allege why the conduct of the defendant is fraudulent, but there is no basis in Rule 9(b) to require relators to identify each and every regulation that may be applicable. The relator should not have to plead the law with such specificity, as long as the defendant has notice of the reason why the scheme perpetrates a fraud on the federal government. Thus, the fact that respondents here may not have cited a particular Massachusetts regulation should not be a fatal defect where petitioner has had ample notice of the claim; namely, that petitioner had used unlicensed and unsupervised personnel in violation of numerous Massachusetts regulations but submitted request for payment as if it had.

II. Most Relators Will Not Have Access to the Individual Claims for Payment Made By the Defendant.

To require a relator to produce copies of claims or invoices or to specifically reference the date, time, and circumstances of particular requests for payment would undermine many *qui tam* actions. The typical whistleblower will become aware of the fraudulent practices undertaken by the defendant by virtue of his or her position with the company. For example, McGrath, because of his Technical Planning position in a Microsemi subsidiary, became aware of Microsemi's flagrant disregard of national security regulations and was able to allege in his complaint that Microsemi and its subsidiaries submitted requests for payment under various contracts while knowingly violating national security regulations relating to those contracts. But McGrath did not have, and could not have, access to the specific billings made by Microsemi or its subsidiary that expressly or impliedly certified compliance with the appropriate regulations. Those invoices were sent by a separate department. McGrath knew that Microsemi billed for work and got paid and he had personal knowledge that Microsemi failed to comply with the applicable regulations yet falsely certified that it had complied. That should be sufficient to meet Rule 9(b).

The Association argues that "the only parties that will be impeded by courts following the correct approach to Rule 9(b) are improper relators – those who lack personal, nonpublic knowledge of alleged fraud." (Assoc. Br. at 21). That statement is demonstrably false. Relators such as McGrath, the relators in the instant case, the relator in

Heath, and the relator in *Grubbs,* all had detailed, non-public knowledge of the fraudulent scheme and could allege it with particularity despite the fact they did not have access to the particular invoices sent directly or indirectly to the federal government. Yet, if the Association had its way, all of these cases would be dismissed, despite the existence of a scheme to defraud the government.

Finally, the Association argues that "proper application of Rule 9(b) will have little or no effect on the deterrence of fraud through *qui tam* litigation." (Assoc. Br. at 21). The Association argues that the vast majority of successful *qui tam* suits are those in which the government intervenes, and in those cases the government has access to claims submitted by a potential defendant. While it may be true that actions in which the government intervenes are statistically more successful than those in which it does not, the Association cites to no statistics concerning the success rates of *qui tam* actions in which the government does not intervene. The government often chooses not to intervene for reasons unrelated to the merits and, where the government does not intervene, there is no justification for an arbitrary rule that would essentially give a pass to dishonest contractors who can easily control access to invoices and other transactional documents to prevent them from falling into the hands of potential whistleblowers.

Moreover, before the government can intervene in an action, there needs to be a *qui tam* action to intervene in. The government must rely on the whistleblower who has made the decision to "go public." That entails obtaining counsel, convincing counsel of the merits, and bearing all the consequences of being a whistleblower. If the

Association's interpretation of Rule 9(b) were adopted, many potential whistleblowers with meritorious claims would be further discouraged from blowing the whistle.

III. A Properly Applied Rule 9(b) Is Sufficient to Weed out Meritless FCA Claims.

There is already an extremely high bar for a *qui tam* relator to survive a motion to dismiss. He or she must set forth the fraudulent scheme with particularity, and, if there has been a qualifying public disclosure, demonstrate that he or she is an original source.

If the relator is an employee, he or she must consider the very likely adverse consequences of filing suit, including loss of employment and possible ostracization from an entire industry. All of these factors act as an adequate deterrent to the bringing of a frivolous action.

CONCLUSION

For all the foregoing reasons, this Court should affirm the decision of the court of appeals and, in particular, its holding that respondent adequately alleged a false claim in compliance with Rule 9(b).

Respectfully submitted,

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