NO. 16-1262

United States Court of Appeals

for the

Fourth Circuit

UNITED STATES EX REL. BENJAMIN CARTER,

Plaintiff-Appellant,

– v. –

HALLIBURTON CO.; KELLOGG BROWN & ROOT SERVICES, INC.; SERVICE EMPLOYEES INTERNATIONAL INC.; KBR, INC.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA IN CASE NO. 1:11-CV-00602
THE HONORABLE JAMES C. CACHERIS, SENIOR U.S. DISTRICT COURT JUDGE

REPLY BRIEF ON BEHALF OF PLAINTIFF-APPELLANT UNITED STATES EX REL. BENJAMIN CARTER

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I. INTRODUCTION

Plaintiff-Appellant Relator Benjamin Carter ("Plaintiff") and Defendants Halliburton Company, Kellogg Brown & Root Services, Service Employees International, Inc., and KBR Inc. (collectively, "Defendants") agree on one thing: this appeal will be decided on the proper interpretation of the False Claims Act's ("FCA") first-to-file bar. Plaintiff has been attempting for a decade to hold Defendants liable for engaging in massive fraud and placing American troops at risk of death or great bodily harm.

To this end, Plaintiff respectfully requests that this Court comport with the First Circuit, the Supreme Court, and multiple district courts (in and outside the Fourth Circuit) – which have all held that the first-to-file bar permits meritorious cases to proceed without refiling upon the dismissal of earlier-filed claims.

Defendants, having failed to convince the Supreme Court that the term "pending" in the first-to-file bar means the exact opposite of what was intended, now attempt to muddy the waters with technical waiver arguments and wrongly claim that the first-to-file bar requires Plaintiff's complaint to be dismissed and *then* refiled – a procedural redundancy that would elevate form over function and likely foreclose Plaintiff's claims due to the statute of limitations. In contrast, Plaintiff provides

three key developments in the proper analysis and implementation of the first-to-file bar which Defendants do not and cannot refute.

First, in this case, instead of ordering that Plaintiff's complaint be dismissed, an option squarely within their purview, the Supreme Court held that Plaintiff had, at the very least, "one live claim" which fell within the statute of limitations. Second, in a case with similar facts, the First Circuit directly interpreted the Supreme Court's decision in this case and held that first-to-file analysis had been fundamentally altered in its wake allowing subsequent events to cure a first-to-file issue without refiling, and the Supreme Court denied certiorari. Finally, district courts within the Fourth Circuit have applied similar reasoning to permit cases to proceed.

II. LEGAL ARGUMENT

A. The First-to-File Bar, the Supreme Court, and Recent Decisions from both Within and Beyond the Fourth Circuit Support Plaintiff's Claims

The most recent and on-point precedent regarding the proper interpretation and implementation of the first-to-file bar has moved uniformly towards intelligent, nuanced applications. Courts, from individual district courts within the Fourth Circuit to the First Circuit, have recognized that first-to-file bar issues can be resolved upon the termination of the earlier-filed complaint and do not dogmatically require refiling – which serves only to delay and jeopardize valid claims.

1. The First-to-File Bar is Designed to Weed Out Unnecessary Lawsuits, Not Block Meritorious Claims

The False Claims Act states that "[w]hen a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5) (2012) (the "first-to-file bar"). The statute does not require dismissal of a pending, later-filed complaint if an earlier-filed complaint has already been dismissed without ever reaching the merits. Defendants' argument to the contrary fails to recognize what the court in *Gadbois* called a shift in the "tectonic plates" represented by the Supreme Court's decision in this present matter. *United States ex rel. Gadbois v. PharMerica Corp.*, 809 F.3d 1, 3 (1st Cir. 2015) (citing *Kellogg Brown & Root Servs. v. United States ex rel. Carter,* 135 S. Ct. 1970 (2015) ("*Carter*")). Defendants' invented requirement violates the principles of statutory interpretation and would only frustrate Congress' intent and purpose. *See United States ex rel. Wilson v. Graham Cty. Soil & Water Conserv. Dist.,* 528 F.3d 292, 300 (4th Cir. 2008), *rev'd,* 559 U.S. 280 (2010) ("When interpreting a statute, the goal is always to ascertain and implement the intent of Congress.") (quoting *Scott v. United States,* 328 F.3d 132, 138 (4th Cir. 2003)).

First and foremost, the FCA is an anti-fraud statute and the "objective of Congress was broadly to protect the funds and property of the government." *United States ex rel. Owens v. First Kuwaiti Gen. Trading & Contr. Co.,* 612 F.3d 724, 728

(4th Cir. 2010) (quoting *Rainwater v. United States,* 356 U.S. 590, 592 (1958)). It is vital, especially when interpreting a statute as complex as the FCA, that Congressional intent be placed above narrow or bizarre interpretations of out-of-context words or phrases. *See Mann v. Heckler & Koch Def., Inc.*, 630 F.3d 338, 343 (4th Cir. 2010) (examining Congressional intent to determine the purpose of § 3730(h)); *see also United States ex rel. Beauchamp v. Academi Training Ctr., L.L.C.*, 816 F.3d 37, 43 (4th Cir. 2016) (examining purpose of the public-disclosure bar). Additionally, courts must not interpret statutes in ways which frustrate Congressional intent, especially where it would allow wrongdoers to escape liability based on overly-generous and self-serving contortions of procedural requirements. *Campbell v. Redding Med. Ctr.*, 421 F.3d 817, 821 (9th Cir. 2005) ("[S]uch an interpretation of § 3730(b)(5) would contravene the intent of Congress . . . [which] sought to provide incentives to qui tam whistleblowers to come forward, and we believe that an overly broad interpretation of the first-to-file bar, allowing even sham complaints to preclude subsequent meritorious complaints in a public disclosure case, would contravene this intention.").

Moreover, this Court has recognized that in order to achieve Congress' underlying purpose, the FCA's procedural provisions may be relaxed, or disregarded altogether. *Smith v. Clark/Smoot/Russell, A JV*, 796 F.3d 424, 430 (4th Cir. 2015) ("The False Claims Act's seal provision serves several purposes. . . . Here, the seal

violation did not incurably frustrate these purposes . . . [therefore] the False Claims Act does not support the district court's dismissal."). Courts are encouraged to avoid interpreting the FCA in literal or obtuse ways which would frustrate its true purpose. *United States v. Bornstein*, 423 U.S. 303, 311 (1976) (holding that an overly-literal interpretation of an FCA provision would "defeat the statutory purpose").

Defendants' reliance on isolated words such as "bring" and "action," devoid of their overall context disregards the rule that words in a provision must be read in context and be interpreted consistently with the language and purpose of the overall statute. *See Graham Cty. Soil & Water Conserv. Dist.*, 559 U.S. at 301.

The first-to-file bar is designed to ensure that meritorious claims go forward, not to hamstring whistleblowers with meritorious claims by forcing them into repetitive refilings. To support this irrational argument Defendants place undue reliance on *Shea*, a lone district court decision that failed to properly analyze *Carter* and ignored the Congressional intent behind the first-to-file bar. *United States ex rel. Shea v. Verizon Commc'ns., Inc.*, 160 F. Supp. 3d 16, 21 (D.D.C. 2015). *Shea*'s original interpretation of the first-to-file bar was rejected by *Carter*, and its most recent interpretation has found little support outside the Eastern District of Virginia. *United States ex rel. Carter v. Halliburton Co.*, 315 F.R.D. 56 (E.D. Va. 2016); *United States v. Unisys Corp.*, No. 1:14-CV-1217, 2016 WL 1367163, at *8 (E.D. Va. Apr. 5, 2016).

Defendants' reliance on a few easily distinguishable cases, most of which were decided prior to *Carter*, is unpersuasive. *Shea* commits the same errors as the District Court by failing to properly understand the importance of the Supreme Court's decision in *Carter*, relying on outdated dicta in *Chovanec*, and ultimately admitting that its decision to require refiling under the first-to-file bar resulted from an inability to find a way for the FCA's provisions to operate smoothly.[1] *Id.* at 30. Moreover, *Shea* attempts to use *Chovanec* as the foundation for holding that the first-to-file bar mandated that later-filed complaints be refiled, regardless of the dismissal of the earlier-filed complaint. *Id.* at 16. However, *Shea* fails to consider what courts in the Fourth Circuit recognized in rejecting *Shea*, despite the District Court's initial error: "on remand the district court in *Chovanec permitted the relator to file an amended complaint, in lieu of dismissal of the suit*." *United States ex rel. Palmieri v. Alpharma, Inc.*, 928 F. Supp. 2d 840, 850 (D. Md. 2013) (emphasis added); *see also United States ex rel. Kurnik v. PharMerica Corp.*, No. 3:11-CV-01464-JFA, 2015 WL 1524402, at *6 (D.S.C. Apr. 2, 2015).[2]

[1] Defendants' embrace of *Shea* is contradictory given their repeated insistence that the first-to-file bar is jurisdictional, a proposition fully rejected by *Shea*, 160 F. Supp. 3d at 21 ("[T]he FCA's first-to-file bar on qui tam lawsuits is not jurisdictional.") (citing *United States ex rel. Heath v. AT&T, Inc.*, 791 F.3d 112 (D.C. Cir. 2015)). Plaintiff agrees with *Heath*'s conclusion that the first-to-file bar is not jurisdictional, and Defendants are once again caught cherry-picking isolated language and holdings to suit their purposes.

[2] Defendants attempt to distinguish the district court's decision to grant *Chovanec* permission to file an amended complaint as part of settlement talks. Opp. Br. 44, n.

2. The Supreme Court Held that Carter's Remaining Claims that Fell Within the Statute of Limitations Survive

The Supreme Court dealt squarely with Plaintiff's claims under the first-to-file bar, and its subsequent decision fundamentally altered the application of the first-to-file bar – specifically for Plaintiff, as well as for *qui tam* cases generally. Defendants are mistaken that the Supreme Court was somehow unaware of Plaintiff's first-to-file status, or else were insufficiently briefed. Brief of Appellee, 16-1262, Doc. No. 32 ("Opp. Br.") at 27. To the contrary, Defendants were diligent in raising first-to-file issues and challenges, and in referencing the earlier-filed case throughout their briefing.

From the outset of its opinion, the Supreme Court acknowledged that Plaintiff's complaint had been filed while an earlier-filed complaint was still pending. *Carter,* 135 S. Ct. at 1972 ("The District Court dismissed this complaint with prejudice under the first-to-file rule because of a pending Maryland suit."). The Supreme Court explicitly acknowledged that proper application of the first-to-file bar was central to Plaintiff and Defendants' arguments:

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13. However, three district courts have found this decision by the district court in *Chovanec* to be a significant event which fundamentally undermines the holding in *Chovanec*, and further emphasizes the rationale that valid complaints should be allowed to proceed on amendment and not be forced to needlessly refile. *See Palmieri*, 928 F. Supp. 2d at 850; *see also Kurnik*, 2015 WL 1524402, at *6; *see also United States v. Cephalon, Inc.*, 159 F. Supp. 3d 550, 558 n.6 (E.D. Pa. 2016) ("*Cephalon*").

> [Defendants] sought dismissal of this third complaint under the first-to-file rule, pointing to two allegedly related cases, one in Maryland and one in Texas, that had been filed in the interim between the filing of *Carter I* and *Carter III*. This time, the [District Court] dismissed respondent's complaint with prejudice. The [District Court] held that the latest complaint was barred under the first-to-file rule because the Maryland suit was already pending when that complaint was filed…[the] Fourth Circuit reversed, rejecting the District Court's analysis.

Id. at 1974.

Although the Supreme Court's central focus was on invalidating Defendants' faulty interpretation of the first-to-file bar, it also clarified the role of and policy behind the first-to-file bar. *Id.* at 1979. Specifically, the Supreme Court held:

> Here, for example, the *Thorpe* suit, which provided the ground for the initial invocation of the first-to-file rule, was dismissed for failure to prosecute. Why would Congress want the abandonment of an earlier suit to bar a later potentially successful suit that might result in a large recovery for the Government?

Id.

There are two key elements to the Supreme Court's ruling regarding first-to-file that are instrumental to this current appeal. First, the Supreme Court referenced the "*Thorpe* suit," an earlier-filed suit that derailed Plaintiff's case just before it was set to go to trial, and "initiated a remarkable sequence of dismissals and filings . . . [although] *Thorpe* was dismissed for failure to prosecute." *Id.* at 1974. The Supreme Court identified that, under a narrow interpretation of the first-to-file bar which Defendants now propose, meritorious claims will be foreclosed simply because a

baseless or sham lawsuit had been filed earlier. Moreover, the Supreme Court anticipated the illogical contradiction in Defendants' arguments, one that that Defendants cannot resolve: why would Congress want the first-to-file bar to block meritorious claims? Why would Congress want Defendants to escape liability merely because an early-filed case existed at the time of filing, and was dismissed without ever reaching its merits?

The Supreme Court addressed these contradictions by holding that Congress would not want the first-to-file bar to be interpreted in such a self-defeating manner. *Id.* at 1979. However, the Supreme Court took one step further, holding that "the dismissal with prejudice of respondent's one live claim was error." *Id.* at 1970. The Supreme Court had before it the District Court's reasoning for dismissing this complaint with prejudice, but rejected the theory that Plaintiff's claims would be barred by the statute of limitations upon refiling. If the Supreme Court agreed with Defendants' interpretation, there would be no "live claim," there would only be claims barred under the first-to-file provision and by the statute of limitations.

3. ***Gadbois*** **is Directly On-Point and the Supreme Court Declined to Overrule the First Circuit**

Gadbois provides the most thorough analysis of the first-to-file bar post-*Carter*, and both its facts and legal analysis are directly on point and thus highly instructive. *Gadbois*, 809 F.3d at 3. As the First Circuit has provided an exact and appropriate remedy, one which the Supreme Court did not feel necessary to disturb,

any conclusion to the contrary could result in a circuit split which would unnecessarily require further intervention from the Supreme Court. Although normally little significance can be inferred from a denial of certiorari by itself, in this particular case it must be acknowledged that the *Carter* decision is very recent, and that defense counsel and their numerous amici directly challenged the First Circuit's holding which was squarely based on a fundamental misinterpretation of *Carter* and the first-to-file bar and that a parade of horribles were sure to follow. Despite this desperate entreaty from the defense bar, the Supreme Court denied certiorari. *PharMerica Corp. v. United States ex rel. Gadbois*, 136 S. Ct. 2517 (2016).[3]

Moreover, as discussed in greater detail *infra*, *Gadbois*' reasoning had already taken root within the Fourth Circuit, and later courts have found its reasoning to be highly persuasive. Given the many similarities between *Gadbois* and this case, as well as the strength of the First Circuit's first-to-file analysis, a similar conclusion which permits this action to proceed is required here.

In 2010, Gadbois diligently filed his *qui tam* action under seal, but years would pass while the government and the affected states investigated the claims,

[3] In their petition for certiorari, the *Gadbois* defendants specifically requested that the Supreme Court "should grant review to…prevent the effective neutering of the first-to-file bar that results from the First Circuit's misapplication of this Court's recent decision in [*Carter*]." *PharMerica Corporation v. United States, ex rel. Robert Gadbois*, No. 15-1309, Doc. No. 1.

ultimately declining intervention. *Gadbois*, 809 F.3d at 3. In 2014, Gadbois' claims were unsealed and PharMerica moved to dismiss under the first-to-file bar because of an earlier-filed action pending in the United States District Court for the Eastern District of Wisconsin. *Id.* Finding that the claims in *Gadbois* were substantially similar to those from the complaint in Wisconsin, the district court dismissed Gadbois under the first-to-file bar. Gadbois appealed the dismissal, but "[d]uring the course of briefing, the tectonic plates shifted. First, the Supreme Court handed down its decision in [Carter, which held that:], 'an earlier suit bars a later suit while the earlier suit remains undecided but ceases to bar that suit once it is dismissed' . . . [second,] the Wisconsin action was settled and dismissed." *Id.* at 3–4.

Based solely upon these two events—*Carter* and the dismissal of the earlier-filed complaint—Gadbois moved to supplement in order to satisfy the first-to-file bar, in place of dismissing his complaint without prejudice and refiling.[4] *Gadbois*, 809 F.3d at 4. PharMerica protested, claiming that the first-to-file bar only applies at the time of filing, and cannot be revisited regardless of later events. *Id.* at 5. The First Circuit agreed with Gadbois and held that, in light of these events, the first-to-

[4] Gadbois moved to supplement under Fed. R. Civ. P. 15(d), which the First Circuit found to be an appropriate jurisdictional event necessary to cure first-to-file concerns. *Gadbois*, 809 F.3d at 5. While Plaintiff has indicated that his motion to amend similarly creates an appropriate jurisdictional event, this Court could alternatively remand for supplementation under Rule 15(d) to achieve the same result.

file bar did not require dismissal and refiling. *Id.* at 6. Even though "dismissal may have been proper at the time it was entered . . . critical developments occurred during the pendency of that appeal." *Id.* The distinction is crucial, as the First Circuit applies *Carter*'s analysis of the first-to-file bar, and then takes the next logical step. *Id.* at 3. In *Carter*, Defendants proposed that the term "pending" in first-to-file bar should be misconstrued so as to forever bar later-filed complaints, regardless of the outcome of the earlier-filed claims. *Carter,* 135 S. Ct. 1970 ("Thus, as petitioners see things, the first-filed action remains "pending" even after it has been dismissed, and it forever bars any subsequent related action."). The Supreme Court rejected this theory, holding that such an argument "would lead to strange results that Congress is unlikely to have wanted." *Id.* at 1979.

Instead, the Supreme Court found that "an earlier suit bars a later suit while the earlier suit remains undecided but *ceases to bar* that suit once it is dismissed." *Id.* at 1978 (emphasis added). Unlike other statutory bars within the FCA, the first-to-file bar is temporal: a case may be barred at certain points in time, but not at others. *Kurnik*, 2015 WL 1524402, at *5–6. In short, the first-to-file bar may be "dissolved" by later events. *Gadbois*, 809 F.3d at 6.[5]

[5] *Gadbois* recognized that whether the first-to-file bar was jurisdictional or not was not the determining factor because in situations other than diversity jurisdiction, courts have often held that post-filing events can permit an action to proceed regardless of the state of affairs at time of filing. *Id.* at 5.

The Supreme Court held that the first-to-file bar may "cease to exist" based on the termination of the earlier-filed complaints, and the first-to-file bar must also be interpreted in accordance with Congressional intent, not just with the plain language of the statute. *Carter*, 135 S. Ct. at 1979. Therefore, the First Circuit held that "it would be a pointless formality to let the dismissal of the second amended complaint stand—and doing so would needlessly expose the relator to the vagaries of filing a new action." *Gadbois*, 809 F.3d at 6.

While the facts and procedural posture of *Gadbois* provide a near-perfect mirror, Plaintiff's need to amend instead of refile is even more pressing. [6] The First Circuit held that Gadbois should be allowed to supplement his complaint rather than dismiss and refile, as the latter "would be a pointless formality," and because even the mere potential dangers and "vagaries of filing a new action" were so grave. *Gadbois*, 809 F.3d at 6. The First Circuit reached its conclusion even though the only prejudice to the plaintiffs would be the vagaries of filing a new action. Opp. Br. at 46. Moreover, *Gadbois* held that refiling posed too many unjustifiable risks *even though* the claims still could be easily refiled within the statute of limitations.

[6] Additionally, although the First Circuit declined to consider whether the first-to-file bar is jurisdictional in "in light of *Carter* and the recent decision in [*Heath*]," Plaintiff invites this Court to reconsider its own position. However, this determination is not dispositive in this matter. *Gadbois*, 809 F.3d at 6 n.2; *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1632 (2015); *United States ex rel. Heath v. AT&T, Inc.*, 791 F.3d 112, 120 (D.C. Cir. 2015), *cert. denied sub nom.* 136 S. Ct. 2505 (2016).

Plaintiff, unlike *Gadbois*, faces more certain prejudice and a much higher likelihood of ultimate dismissal due to the statute of limitations (even though Carter's claims were originally filed well within the statute of limitations), and thus should be permitted to amend.

4. District Courts Within the Fourth Circuit Have Adopted Gadbois' Reasoning Both Before and After the decisions in *Carter* and *Gadbois*.

Plaintiff does not rely solely upon *Gadbois*, despite its persuasiveness, but on the reasoning and logic of *Gadbois* which was already accepted in the Fourth Circuit prior to *Carter*, and has since been incorporated by other district courts. Two district courts within the Fourth Circuit faced comparable situations, and both held that amendment satisfied the purposes of the first-to-file bar, whereas refiling only frustrated Congressional intent and exposed the whistleblower to a host of potential dangers. *Palmieri*, 928 F. Supp. 2d at 851; *Kurnik*, 2015 WL 1524402, at *6.

Defendants claim that *Palmieri* and *Kurnik* are readily distinguishable, yet only identify a single difference: that both claims would still fall within the statute of limitations. Opp. Br. at 47. As mentioned *supra*, this difference only strengthens Plaintiff's claims. The conclusion that *Palmieri* reached is not that amendment can cure first-to-file defects instead of refiling only when the issue is of lesser importance—it would be an absurd result for any court to rule that the first-to-file bar prevents amendment only when it matters little. *Palmieri* rejected the courts'

holding in *Branch Consultants*, which Defendants rely heavily upon, in favor of the more persuasive first-to-file analysis in *In re Natural Gas Royalties*, which examine the temporal nature of the first-to-file bar's implementation of the term "pending." *Palmieri*, 928 F. Supp. 2d at 851. Instead, *Palmieri* anticipates *Carter* and *Gadbois*, holding that it "would elevate form over substance to dismiss the Amended Complaint on first-to-file grounds at this juncture," embracing the focus of the first-to-file bar on the term "pending." *Id.* at 851–52.

Two years later, another district court within the Fourth Circuit reached the same conclusion from similar facts, building upon *Palmieri*'s reasoning. *Kurnik*, 2015 WL 1524402, at *4. *Kurnik* also found *In re Natural Gas Royalties*' analysis of the first-to-file rule persuasive, and held that permitting amendment instead of refiling "does not run afoul of the policy behind the FCA because it does not threaten Defendants with double recovery," which is the primary concern underlying the first-to-file bar. *Kurnik*, 2015 WL 1524402 (citing *Nat. Gas Royalties v. Exxon Co., USA* (*CO2 Appeals*), 566 F.3d 956, 964 (10th Cir. 2009)); *Kurnik*, 2015 WL 1524402. Similarly here, as Plaintiff possesses the only surviving claim, there are no concerns that Defendants will face liability for their actions twice.

The entire analysis which *Branch Consultants* and cases which rely upon *Branch Consultants* has been called into question due to *Kwai*. *Kwai*, 135 S. Ct. at 1632. Indeed, *Heath*, recognized that the Supreme Court's clarification of the law

of statutory interpretation regarding jurisdiction reversed its original position that the first-to-file bar is jurisdictional. *United States ex rel. Heath v. AT&T, Inc.*, 791 F.3d 112 (D.C. Cir. 2015) (D.C.C. 2015)). Both decisions within the Fourth Circuit interlock with the First Circuit's independent reasoning, and this approach has found favor in other circuits and districts. *Cephalon* provides an impressive example in this regard. *United States ex rel. Boise v. Cephalon, Inc.*, 159 F. Supp. 3d 550, 557 (E.D. Pa 2016). The court in *Cephalon* faced nearly the same issue where a meritorious complaint had been filed while a later-dismissed action as still pending, and stayed proceedings until the decision in *Carter* had been reached. *Id.* at 554. As a district court in the Third Circuit, *Cephalon* had no duty to give greater weight to decisions from the First Circuit, nor any reason to prefer the logic of *Kurnik* and *Palmieri* over the District Court's, *Branch Consultants*, and *Shea*. As a neutral observer, *Cephalon* provides a remarkably thorough analysis of the competing interpretations of the first-to-file bar, ultimately concluding "that it would be unjust to require relators to refile their claims." *Id.* at 558. *Cephalon* reached this conclusion by determining that the "approach in *Kurnik* is bolstered by the reasoning in *Carter* that Congress would not want an abandoned first suit to bar a potentially successful recovery for the government in a second suit." *Id.* This simple, effective approach underscores the persuasiveness of permitting Plaintiff to amend instead of dismissing his complaint without prejudice and demanding that he refile, an

approach that is growing more and more widely accepted due to the ubiquity of these situations under the FCA.

Defendants' reliance on *Unisys Corp.* is equally unavailing as the district court in that matter relied on the District Court's holdings in this case, as well as *Shea* (previously discussed and distinguished) while giving short shrift to the Supreme Court's ruling in this matter. *See Unisys Corp.*, 2016 WL 1367163, at *26-34, *27 n.16, *30 n.17 (involving an FCA complaint that was filed prior to the FCA complaint at issue but settled after same was filed). *Unisys* disregarded *Gadbois* and failed to consider the Supreme Court's observation that Congress would want a meritorious case to proceed and not be precluded by overly technical interpretations of procedural provisions. *Id.* at *28-34. *Unisys* ignored the important statements regarding policy and statutory interpretation in the *Carter* and instead relied heavily on *Shea* and other holdings in this case which preceded the Supreme Court's and the flawed reasoning of the District Court's which is the subject of this appeal. *Id.* at *25-32.

In addition, Defendants mistakenly rely on *United States ex rel. Moore v. Pennrose Props., L.L.C.*, No. 3:11-CV-121, 2015 WL 1358034 (S.D. Ohio, Mar. 24, 2015), which is inapplicable here as it was decided prior to *Carter*, is a district court opinion from outside this Circuit, and involved a matter concerning parasitic lawsuits insofar as the plaintiff-relator had "filed a number of qui tam actions against

Defendants" – one with a co-relator labor union, one with a co-relator individual naming the labor union as a defendant, and one with yet another co-relator individual. *Moore*, 2015 WL 1358034, at *1. In addressing the case's factual circumstances, the court specified that the first-to-file bar seeks to "prevent[] opportunistic plaintiffs from bringing parasitic lawsuits." *Id.* at *10 (internal citations and quotation marks omitted). Clearly, the facts at issue here are distinguishable from those of *Moore*.

Furthermore, Defendants' reliance on *United States v. Allstate Ins.*, 782 F. Supp. 2d 248 (E.D. La. 2011), is similarly misplaced as that matter was also decided prior to *Carter*, is a district court opinion from an outside circuit, and relied on the Seventh Circuit's opinion in *Chovanec*, which despite its holding resulted in the district court permitting the amended complaint on remand as opposed to dismissing the case without prejudice. *See Palmieri*, 928 F. Supp. 2d at 850; *Kurnik*, 2015 WL 1524402, at *6; *Cephalon*, 159 F. Supp. 3d at 558 n.6 (all three cases finding that the district court's decision permitting an amended complaint fundamentally undermines the Seventh Circuit's holding in *Chovanec*).

B. Carter's Current Appeal is Procedurally Sound

Defendants raise several procedural grounds for denying the relief sought by Plaintiff—but their arguments ultimately fall flat. Defendants' procedural arguments, stripped to their core, amount to nothing more than the following: While

Plaintiff did prevail in this Court in 2013 – he did not appeal ancillary issues this Court considered in passing and is now precluded from presenting arguments regarding the first-to-file bar.

Defendants provide no authority for the purported obligation that Plaintiff burden this Court by appealing issues that had little to no bearing on this Court's ultimate decision favoring him. In reality, this Court—with respect to issues not directly raised previously—has "discretion in its handling of [this] case in view of the special interests at stake and the apparent lack of any prejudice to the parties" and has "latitude in entering an order to achieve justice in the circumstances." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 29 (1983) (holding that the Fourth Circuit "acted within its authority" in addressing an issue not formally appealed where doing so furthered the Congressional intent of the Arbitration Act). In furtherance of Congress' intent for the FCA, this Court may analyze the first-to-file bar and conclude that it dissolves when the earlier-filed suit is terminated.

Besides this illogical expansion of the waiver doctrine – Defendants try in vain to raise procedural hurdles based on "law of the case" and the "mandate rule." These arguments are without merit.

1. The Law of the Case Doctrine is Inapplicable Because the Law Has Changed

The "law-of-the-case doctrine 'merely expresses the practice of courts generally'" to not "reopen issues decided in earlier stages of the same litigation."

Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 817 (1988) (quoting *Messenger v. Anderson*, 225 U.S. 436, 444 (1912)); *Agostini v. Felton*, 521 U.S. 203, 236 (1997).; *see also Am. Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 515 (4th Cir. 2003) ("Law of the case, which is itself a malleable doctrine meant to balance the interests of correctness and finality, can [] be calibrated . . . ."). The doctrine is "not a limit to [courts'] power" to reopen such issues. *Messenger v. Anderson*, 225 U.S. 436, 444 (1912). This power includes the discretion to "revisit prior decisions of its own" – especially "where the initial decision was 'clearly erroneous and would work a manifest injustice.'" *Christianson*, 486 U.S. at 817 (quoting *Arizona v. California*, 460 U.S. 605, 618 n.8 (1983)).

If an appellate court concludes that its own prior decision, or that of a lower or coordinate court—being presented as "law of the case"—is "clearly wrong," that court has the power (to wit, obligation) to correct it. *Id.* (making no mention of any procedural obligation of a party to preserve the relevant issue(s)). Notably, a "district court's adherence to law of the case cannot insulate an issue from appellate review . . . ." *Christianson*, 486 U.S. at 817 (citing *Messenger v. Anderson*, 225 U.S. 436, 444 (1912)); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 257-59 (1916).

The court in *Agostini* rejected a party's reliance upon "law of the case" where the underlying law had evolved:

> In light of our conclusion that *Aguilar* would be decided differently under our current Establishment Clause law, we think adherence to that decision would undoubtedly work a "manifest injustice," such that the law of the case doctrine does not apply.

Agostini, 521 U.S. at 236; *see also Davis v. United State*s, 417 U.S. 333, 342 (1974) (Court of Appeals erred in adhering to law of the case doctrine despite intervening Supreme Court precedent). To avoid "manifest injustice"—the *Agostino* court did not hesitate in rejecting arguments based on "law of the case" where it was derived from what had become outdated and inapplicable jurisprudence.

This Court should reject the district court's analysis of the first-to-file bar, as well as its own endorsement of it. Since the district court set forth its first-to-file analysis in 2011 (which Defendants now cling to as "law of the case") – the Supreme Court, the Court of Appeals for the First Circuit, and two sister courts in the Fourth Circuit have ruled to or supported the *contrary* – that key events, such as a motion to amend, require a reanalysis and contemporaneous reassessment of the first-to-file bar, and ultimately, that dismissal and refiling are unnecessary. *Carter,* 135 S. Ct. 1970; *Gadbois*, 809 F.3d 1; *Palmieri*, 928 F. Supp. 2d at 852; *Kurnik*, 2015 WL 1524402. *See* discussion *supra*, ARGUMENT § II.A.

Like the court in *Agostino*, this Court should reject Defendants' "law of the case" arguments as they are based on outdated and inapplicable law. The district court's first-to-file analysis, and this Court's regard for it, are not precedential as they stem from law that has been overruled. *Carter*, *Gadbois*, *Palmieri*, and *Kurnik*

represent a paradigm-shift in first-to-file jurisprudence, and a growing movement towards furthering the sound public policy underpinnings of and Congressional intent behind the False Claims Act. *Graham Cty. Soil & Water Conserv. Dist.*, 559 U.S. at 313 n.11.

2. The Appellate Mandate Rule Is Inapplicable Because There Is No Final Judgment, and There Are Exceptional Circumstances

Defendants' additionally argue that the *appellate mandate rule* precludes the district court from addressing an issue this Court previously referenced *only* in passing – a previously ancillary issue upon which it made no final judgment, and which was in no way within the scope of this Court's mandate issued in 2013. This issue, regarding how to analyze the first-to-file bar, was not central to this Court's 2013 ruling in which Plaintiff prevailed, and triggered no obligation for Plaintiff to have previously raised it. Moreover, the mandate rule's exceptions apply because the applicable legal authority has changed, and because the district court made a blatant error, which if uncorrected, will result in a serious injustice.

"The mandate rule is a specific application of the law of the case doctrine" to cases that have been remanded on appeal. *Volvo Trademark Holding Aktiebolaget v. Clark Mach. Co.*, 510 F.3d 474, 481 (4th Cir. 2007). "If no appeal of a judgment is taken . . . the orderly resolution of the litigation requires the district court to recognize those interests served by *final judgments* and to implement the appellate

mandate faithfully." *Doe v. Chao*, 511 F.3d 461, 466 (4th Cir. 2007) (emphasis added). The overarching purpose of the mandate rule is to keep the "lower court from considering on remand *matters decided* or *laid to rest* by the higher court." *United States v. Susi*, 674 F.3d 278, 283 (4th Cir. 2012) (emphasis added); *Bailey v. Moreno*, 547 F. App'x 196, 197 (4th Cir. 2013).

Significantly, the cases outlining the contours of the appellate mandate rule articulate that its applicability is limited to only those issues that have been "laid to rest" or for which the court has issued a "final judgment." *Doe*, 511 F.3d at 465; *Susi*, 674 F.3d at 283. A related concept is that "[w]hile a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues." *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 168 (1939) (holding an issue was not "foreclosed by the mandate" where that issue "was not directly in issue in the original proceedings" and was neither before the "Circuit Court of Appeals nor before [the Supreme Court]") (citing *In re Sanford Fork & Tool Co.,* 160 U.S. 247 (1895)).

In 2013, this Court obliquely referenced (in what is tantamount to dicta) the district court's analysis of the timing component of the first-to-file bar as part of a lengthy analysis to arrive at its final conclusion – that the FCA's "pending" term is not forever preclusive, and accordingly, that dismissal *with* prejudice of Plaintiff's complaint was improper. *United States ex rel. Carter v. Halliburton Co.*, 710 F.3d

171, 183 (4th Cir. 2013). Its one-sentence reference to the first-to-file analysis favored by the district court was *not* a final judgment, and by no means laid the issue to rest. Accordingly, Plaintiff was not obliged to previously raise it before any court, and it was not within the scope of this Court's mandate. Further, whatever weight it may have had as authority was lost when the Supreme Court subsequently remanded the case. Ultimately, this Court's analysis regarding the first-to-file bar is not insulated from the present scrutiny based on the mandate rule.

Further, courts "may deviate from the mandate rule in limited, exceptional circumstances." *United States v. Pileggi*, 703 F.3d 675, 681-82 (4th Cir. 2013) (describing exceptions to the mandate rule); *Bailey*, 547 F. App'x at 197; *Doe*, 511 F.3d at 465 ("The mandate rule prohibits lower courts, with limited exceptions, from considering questions that the mandate of a higher court has laid to rest.") (citing *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 168 (1939)). These exceptions include:

> (1) a showing that controlling legal authority has changed dramatically;
> . . .
> (3) that a blatant error in the prior decision will, if uncorrected, result in a serious injustice.

Pileggi, 703 F.3d at 681-82 (internal quotation marks and alterations omitted).

Here, the applicable legal authority has changed *and* the district court's blatant error, if uncorrected, will result in a serious injustice. As previously discussed, the Supreme Court, the Court of Appeals, and two district courts in the Fourth Circuit

had ruled and endorsed the rule that the first-to-file bar is to be contemporaneously reassessed upon certain triggering events—such as the dismissal of an earlier filed action. *Carter,* 135 S. Ct. at 1970; *Gadbois*, 809 F.3d at 1; *Palmieri*, 928 F. Supp. 2d 840; *Kurnik*, 2015 WL 1524402. *See* discussion *supra*, ARGUMENT § II.A.

Significantly, if Plaintiff is denied relief based on an outdated analysis of the first-to-file bar, a serious injustice with result. Namely, that Defendants have defrauded the government and will suffer no consequences, and, more fundamentally, that the kinds of unlawful behavior sought to be eradicated by the False Claims Act will have gone unchecked. Accordingly, this Court should reject Defendants' reliance upon the appellate mandate rule.

C. Carter's Interpretation of the First-to-File Bar Promotes Sound Public Policy and Requiring Refiling Would Greatly Prejudice Carter Due to the Statute of Limitations

Defendants additionally proffer flawed policy arguments which have repeatedly been rejected by the courts. Opp. Br. at 52.

The policies underlying the FCA and the first-to-file bar are not difficult to discern; none however, were intended to protect fraudster corporations who put profits ahead of the lives of American soldiers.[7] *Palmieri*, 928 F. Supp. 2d at 847.

[7] In fact, the FCA was originally designed to combat this exact form of reprehensible war profiteering. *Bornstein*, 423 U.S. at 309 ("The [FCA] was originally aimed principally at stopping the massive frauds perpetrated by large contractors during the Civil War.").

The first-to-file bar works to incentivize whistleblowers to come forward quickly and to separate worthwhile claims from repetitive, later filed claims—policies which are only advanced by permitting meritorious whistleblowers to proceed uninterrupted following the dismissal of prior claims. *Nat. Gas Royalties v. Exxon Co., USA* (*CO2 Appeals*), 566 F.3d 956, 961 (10th Cir. 2009).

Plaintiff has made no secret of the fact that, on the eve of trial, Plaintiff was waylaid by circumstances outside of his control and his claims now fall outside the statute of limitations, and thus he would likely face severe challenges if he were forced to refile. Both *Carter* and *Gadbois* stand for the proposition that Congress would not want meritorious whistleblowers to have their claims derailed because a prior, meritless action existed at the time of filing and defendants were successful in running out the clock. *Carter,* 135 S. Ct. at 1970; *Gadbois*, 809 F.3d at 1. Plaintiff's need to avoid refiling is only strengthened by recent precedent, which found that the mere possibility of further concerns arising due to refiling (as Plaintiff provides many examples of) are unacceptable. Plaintiff's concerns over refiling are not theoretical, but are very real and thus such dangers must be mitigated when the benefit is so small to the courts and the government, whereas there is no harm to the Defendants, save that they may one day face liability for their actions.

Nevertheless, Defendants claim that Plaintiff is responsible for over six years of delays. Ironically, Plaintiff filed his claims well within the statute of limitations

and indeed substantial discovery had been concluded and a trial was looming when the delays Defendants complain of began. Opp. Br. at 53. These delays only served one party in this litigation, and Defendants have sought every opportunity to hinder Plaintiff's entry into the courtroom. Meanwhile, Plaintiff has suffered greatly at the hands of numerous arguably erroneous district court decisions, requiring Plaintiff to repeatedly file his claims, a lengthy appeals process all the way to the Supreme Court and back, and statutorily mandated delays, which have collectively driven his timely-filed complaint past the statute of limitations.[8]

Moreover, *Carter*, *Gadbois*, *Palmieri*, *Kurnik*, and *Cephalon*'s interpretation of the first-to-file bar only serves to strengthen its operation. Even if multiple complaints are filed, only one will be operative at a time. Defendants will not face double liability, as only one case can succeed. Earlier-filed whistleblowers will still be favored, and meritorious claims will rise above sham complaints. Courts will be spared the procedural headache of revisiting complaints which have been repeatedly refiled. The first-to-file interpretation argued by Plaintiff will result in the most efficient use of the governments' and the courts' resources since complaints are filed

[8] As described greater in detail in Plaintiff's opening brief, Plaintiff witnessed Defendants' fraudulent activities in January, 2005. By February, 2006, Plaintiff had filed his initial complaint, but four years would pass before it was revealed that an earlier-filed complaint was pending, initiating "a remarkable sequence of dismissals and filings." *Carter,* 135 S. Ct. at 1974. As a result, Plaintiff was forced to repeatedly refile his complaint, this operative complaint having been filed in June, 2011. Br. at 4-9; JA33, 38, 169 – 203.

and remain under seal often for years. If refiling were required every time a first-filed complaint is dismissed, this process would have to be repeated with a new complaint being filed under seal and a new obligation to investigate that complaint. Under the rule of *Gadbois*, the complaint would merely have to be amended with no further disruption to the court or the government.

CONCLUSION

For the reasons set forth above, Plaintiff-Appellant Benjamin Carter respectfully requests that this Court reverse the District Court's decisions dismissing his claims under the False Claims Act.

Dated: September 30, 2016

Respectfully submitted,

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STATEMENT CONCERNING ORAL ARGUMENT (FOURTH CIRCUIT LOCAL RULE 34(a))

Pursuant to Local Rule 34(a), Plaintiff respectfully requests oral argument. Given the complexity and history of this appeal, oral argument would assist the Court's consideration.

CERTIFICATE OF COMPLIANCE

The Reply Brief of Plaintiff-Appellant-Relator complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii) because it contains 6,931 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

The Reply Brief of Plaintiff-Appellant-Relator complies with the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point font, Times New Roman.

It is so Certified this 30th day of September, 2016:

s/ David S. Stone
David S. Stone

CERTIFICATE OF SERVICE

I hereby certify that, on this 30th day of September, 2016, Plaintiff-Appellant-Relator Benjamin Carter's Reply Brief was electronically filed with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users. Counsel who are not so registered will be served by first-class U.S. mail, postage prepaid.

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