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December 28, 2016

Patricia S. Connor, Clerk
United States Court of Appeals
for the Fourth Circuit
Lewis F. Powell, Jr. United States
Courthouse Annex
1100 East Main Street, Suite 501
Richmond, Virginia 23219-3517

Re: Federal Rule of Appellate Procedure 28(j) letter for *U.S. ex rel. Carter v. Halliburton Co.*, No. 16-1262 (tentatively calendared for argument during the March 21-24, 2017, session)

Dear Ms. Connor:

Defendants-Appellees advise the Court of recent decisions in *State Farm Fire & Casualty Co. v. U.S. ex rel. Rigsby*, 137 S. Ct. 436 (2016), and *U.S. ex rel. Palmieri v. Alpharma, Inc.* ("*Palmieri 2016*"), No. 10-cv-1601, 2016 WL 7324629 (D. Md. Dec. 16, 2016) (both enclosed).

1. On December 6, the Supreme Court in *Rigsby* explained that "the [False Claims Act ('FCA')] has a number of provisions that do require, in express terms, the dismissal of a relator's action," citing the first-to-file bar as an example of such a provision. *Rigsby*, 137 S. Ct. at 442-43. This directly contradicts Appellant Carter's positions that the first-to-file bar does not compel dismissal, that dismissal can be avoided through amendment, and that *Kellogg Brown & Root Services, Inc. v. U.S. ex rel. Carter*, 135 S. Ct. 1970 (2015), supports those arguments. *See* Carter.Br.16-18, 23-37; *see also* KBR.Br.27-33, 41-50.

2. On December 16, the district court in *Palmieri 2016* reconsidered *U.S. ex rel. Palmieri v. Alpharma, Inc.* ("*Palmieri 2013*"), 928 F. Supp. 2d 840, 850-52 (D. Md. 2013), concluding it was overruled by *U.S. ex rel. Carter v. Halliburton Co.*, 710 F.3d 171 (4th Cir. 2013):

> *Carter* makes clear that because . . . a substantially similar FCA action[] was pending when Palmieri first filed his suit, Palmieri's case should have been dismissed, without prejudice to Palmieri's right to file a new suit. I erred in [*Palmieri 2013*] when I determined that it would elevate form over substance to dismiss without prejudice, merely because Palmieri could refile his suit. That is what the first-to-file rule required.

*Palmieri 2016*, 2016 WL 7324629, at *9-12.

Appellant Carter relies heavily on *Palmieri 2013* throughout his briefs. Carter.Br.23-29, 35-36, 40-41; Reply.Br.6-7 & n.2, 14-16, 18, 21, 25, 27. Appellees have argued *Palmieri 2013* is distinguishable and this Court's *Carter* decision requires dismissal. KBR.Br.3-4, 26-35, 47-49. The district court's reconsideration of *Palmieri 2013* confirms Carter's reliance on it was mistaken, and also deprives *U.S. ex rel. Kurnik v. PharMerica Corp.*, No. 11-cv-1464, 2015 WL 1524402, at *4-6 (D.S.C. Apr. 2, 2015), of persuasive value because *Kurnik* followed *Palmieri 2013*'s now-repudiated reasoning.

Respectfully,

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Enclosure
cc: see attached certificate of service

**CERTIFICATE OF SERVICE**

The undersigned certifies that on December 28, 2016, I electronically filed the foregoing letter with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. All counsel of record in this case are registered CM/ECF users and will be served with the letter by the appellate CM/ECF system. A paper copy of the letter will be served on this date via First-Class Mail on the following:

Richard W. Sponseller
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Dated: December 28, 2016

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137 S.Ct. 436
Supreme Court of the United States

STATE FARM FIRE AND CASUALTY COMPANY, Petitioner
v.
UNITED STATES, ex rel. Cori RIGSBY, et al.

No. 15–513.
|
Argued Nov. 1, 2016.
|
Decided Dec. 6, 2016.

**Synopsis**

**Background:** Relators brought qui tam action under False Claims Act (FCA) against insurer that issued homeowners policies and government-backed flood policies, alleging that insurer submitted false claims to government for payment on flood policies arising out of damage caused by Hurricane Katrina. Following denial of insurer's motions to dismiss for lack of subject matter jurisdiction and failure to state a claim, 2009 WL 2461733, and motion to dismiss for violation of a seal order, 2011 WL 8107251, the United States District Court for the Southern District of Mississippi entered judgment on a jury verdict in relators' favor, denied relators' request to conduct further discovery, and denied insurer's motions for a new trial and judgment notwithstanding verdict. Relators and insurer cross-appealed. The United States Court of Appeals for the Fifth Circuit, Carl E. Stewart, Chief Judge, 794 F.3d 457, affirmed in part, reversed in part, and remanded. Certiorari was granted.

**[Holding:]** The Supreme Court, Justice Kennedy, held that violation of FCA's seal requirement did not mandate automatic dismissal of relators' complaint, abrogating *United States ex rel. Summers v. LHC Group Inc.*, 623 F.3d 287.

Affirmed.

***437** *Syllabus* [*]

The False Claims Act (FCA) authorizes private parties (known as relators) to seek recovery from persons who make false or fraudulent payment claims to the Federal Government, 31 U.S.C. §§ 3729–3730, and permits the Attorney General to intervene in a relator's action or bring an FCA suit in the first instance, §§ 3730(a)– ***438** (b). This system is designed to benefit both the relator and the Government. A relator who initiates a meritorious *qui tam* suit receives, *inter alia,* a percentage of the ultimate damages award, § 3730(d), while " 'encourag[ing] more private enforcement suits' " serves " 'to strengthen the Government's hand in fighting false claims,' " *Graham County Soil and Water Conservation Dist. v. United States ex rel. Wilson,* 559 U.S. 280, 298, 130 S.Ct. 1396, 176 L.Ed.2d 225. The FCA establishes specific procedures for relators to follow, including the requirement relevant here: "The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders." § 3730(b)(2).

In the years before Hurricane Katrina, petitioner State Farm issued, as pertinent here, both Federal Government-backed flood insurance policies and petitioner's own general homeowner policies. Respondents Cori and Kerri Rigsby, former claims adjusters for one of petitioner's contractors, E.A. Renfroe & Co., filed a complaint under seal in April 2006, claiming that petitioner instructed them and other adjusters to misclassify wind damage as flood damage in order to shift

Exhibit 1
KBR's Dec. 28, 2016 R. 28(j) Ltr.

  

petitioner's insurance liability to the Government. The District Court extended the length of the seal several times at the Government's request, but lifted the seal in part in January 2007, allowing disclosure of the action to another District Court hearing a suit by E.A. Renfroe against respondents. In August 2007, the District Court lifted the seal in full. The Government subsequently declined to intervene.

Petitioner moved to dismiss the suit on the grounds that respondents had violated the seal requirement. Specifically, it alleged, respondents' former attorney had disclosed the complaint's existence to several news outlets, which issued stories about the fraud allegations, but did not mention the existence of the FCA complaint; and respondents had met with a Congressman who later spoke out against the purported fraud. The District Court applied the test for dismissal set out in *United States ex rel. Lujan v. Hughes Aircraft Co.,* 67 F.3d 242, 245–247. Balancing three factors—actual harm to the Government, severity of the violations, and evidence of bad faith—the court decided against dismissal. Petitioner did not request a lesser sanction. The Fifth Circuit affirmed. It first concluded that a seal violation does not require mandatory dismissal of a relator's complaint. It then considered the same factors weighed by the District Court and reached a similar conclusion.

*Held* :

1. A seal violation does not mandate dismissal of a relator's complaint. Pp. 422 – 444.

(a) The FCA does not enact so harsh a rule. Section 3730(b)(2)'s requirement that a complaint "shall" be kept under seal is a mandatory rule for relators. But the statute says nothing about the remedy for violating that rule; and absent congressional guidance regarding a remedy, "the sanction for breach [of a mandatory duty] is not loss of all later powers to act." *United States v. Montalvo–Murillo,* 495 U.S. 711, 718, 110 S.Ct. 2072, 109 L.Ed.2d 720. The FCA's structure supports this result. The FCA has a number of provisions requiring, in express terms, the dismissal of a relator's action. *E.g.*, §§ 3730(b)(5), (e)(1)–(2). It is thus proper to infer that Congress did not intend to require dismissal for a violation of the seal requirement. See *Marx v. General Revenue Corp.,* 568 U.S. ——, ——, 133 S.Ct. 1166, 185 L.Ed.2d 242. This result is also consistent with the general purpose of ***439** § 3730(b)(2), which was enacted as part of a set of reforms meant to "encourage more private enforcement suits," S. Rep. No. 99–345, pp. 23–24, and which was intended to protect the Government's interests, allaying its concern that a relator filing a civil complaint would alert defendants to a pending federal criminal investigation. It would thus make little sense to adopt a rigid interpretation that prejudices the Government by depriving it of needed assistance from private parties. Pp. 442 – 443.

(b) Petitioner's arguments to the contrary are unavailing. There is no textual indication that Congress conditioned the authority to file a private right of action on compliance with the seal requirement or that the relator's ability to bring suit depends on adherence to the seal requirement. And the Senate Committee Report's recitation of the FCA's general purpose is best understood to support respondents rather than a mandatory dismissal rule. Moreover, because the FCA's text and structure are clear, there is no need to accept petitioner's invitation to consider a few stray sentences from the legislative history. Pp. 443 – 444.

2. The District Court did not abuse its discretion by denying petitioner's motion to dismiss. The question whether dismissal is appropriate should be left to the sound discretion of the district court. While the *Hughes Aircraft* factors appear to be appropriate, it is unnecessary to explore these and other relevant considerations, which can be discussed in the course of later cases. Pp. 444 – 445.

3. On this record, where petitioner requested no sanction other than dismissal, the question whether a lesser sanction—such as monetary penalties—is warranted is not preserved. Pp. 444 – 445.

794 F.3d 457, affirmed.

KENNEDY, J., delivered the opinion for a unanimous Court.

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**Opinion**

Justice KENNEDY delivered the opinion of the Court.

This case addresses the question of the proper remedy when there is a violation of the False Claims Act (FCA) requirement that certain complaints must be sealed for a limited time period. See 31 U.S.C. § 3730(b)(2). There are two questions presented before this Court. First, do any and all violations of the seal requirement mandate dismissal of a private party's complaint with prejudice? Second, if dismissal is not mandatory, did the District ***440** Court here abuse its discretion by declining to dismiss respondents' complaint?

I

A

The FCA imposes civil liability on an individual who, *inter alia,* "knowingly presents ... a false or fraudulent claim for payment or approval" to the Federal Government. § 3729(a)(1)(A). Almost unique to the FCA are its *qui tam* enforcement provisions, which allow a private party known as a "relator" to bring an FCA action on behalf of the Government. § 3730(b)(1); *Vermont Agency of Natural Resources v. United States ex rel. Stevens,* 529 U.S. 765, 768, n. 1, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000) (listing three other *qui tam* statutes). The Attorney General retains the authority to intervene in a relator's ongoing action or to bring an FCA suit in the first instance. §§ 3730(a)–(b).

This system is designed to benefit both the relator and the Government. A relator who initiates a meritorious *qui tam* suit receives a percentage of the ultimate damages award, plus attorney's fees and costs. § 3730(d). In turn, " 'encourag[ing] more private enforcement suits' " serves " 'to strengthen the Government's hand in fighting false claims.' " *Graham County Soil and Water Conservation Dist. v. United States ex rel. Wilson,* 559 U.S. 280, 298, 130 S.Ct. 1396, 176 L.Ed.2d 225 (2010).

**[1]** The FCA places a number of restrictions on suits by relators. For example, under the provision known as the "first-to-file bar," a relator may not " 'bring a related action based on the facts underlying [a] pending action.' " *Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter,* 575 U.S. ——, ——, 135 S.Ct. 1970, 1978, 191 L.Ed.2d 899 (2015) (quoting § 3730(b)(5); emphasis deleted). Other FCA provisions require compliance with statutory requirements

as express conditions on the relators' ability to bring suit. The paragraph known as the "public disclosure bar," for instance, provided at the time this suit was filed that " '[n]o court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions ... unless the action is brought by the Attorney General or ... an original source of the information.' " *Graham County Soil and Water Conservation Dist. v. United States ex rel. Wilson, supra,* at 283, n. 1, 285–286, 130 S.Ct. 1396 (quoting 31 U.S.C. § 3730(e)(4)(A) (2006 ed.); footnote omitted).

The FCA also establishes specific procedures for the relator to follow when filing the complaint. Among other things, the relator must serve on the Government "[a] copy of the complaint and written disclosure of substantially all material evidence and information the [relator] possesses." § 3730(b)(2). Most relevant here, the FCA provides: "The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders." *Ibid.*

B

Petitioner State Farm is an insurance company. In the years before Hurricane Katrina, petitioner issued two types of homeowner-insurance policies that are relevant in this case: (1) Federal Government-backed flood insurance policies and (2) petitioner's own general homeowner insurance policies. The practical effect for homeowners who were affected by Hurricane Katrina and who purchased both policies was that petitioner would be responsible for paying for wind damage, while the Government would pay for flood damage. As the Court of Appeals noted, this arrangement ***441** created a potential conflict of interest: Petitioner had "an incentive to classify hurricane damage as flood-related to limit its economic exposure." 794 F.3d 457, 462 (C.A.5 2015).

Respondents Cori and Kerri Rigsby are former claims adjusters for one of petitioner's contractors, E.A. Renfroe & Co. Together with other adjusters, they were responsible for visiting the damaged homes of petitioner's customers to determine the extent to which a homeowner was entitled to an insurance payout. According to respondents, petitioner instructed them and other adjusters to misclassify wind damage as flood damage in order to shift petitioner's insurance liability to the Government. See *id.,* at 463–464 (summarizing trial evidence).

In April 2006, respondents filed their *qui tam* complaint under seal. At the Government's request, the District Court extended the length of the seal a number of times. In January 2007, the court lifted the seal in part, allowing disclosure of the *qui tam* action to another District Court hearing a suit by E.A. Renfroe against respondents for purported misappropriation of documents related to petitioner's alleged fraud. See *E.A. Renfroe & Co. v. Moran,* No. 2:06–cv–1752 (ND Ala.). In August 2007, the District Court lifted the seal in full. In January 2008, the Government declined to intervene.

In January 2011, petitioner moved to dismiss respondents' suit on the grounds that they had violated the seal requirement. The parties do not dispute the essential background. In the months before the seal was lifted in part, respondents' then-attorney, one Dickie Scruggs, e-mailed a sealed evidentiary filing that disclosed the complaint's existence to journalists at ABC, the Associated Press, and the New York Times. All three outlets issued stories discussing the fraud allegations, but none revealed the existence of the FCA complaint. Respondents themselves met with Mississippi Congressman Gene Taylor, who later spoke out in public against petitioner's purported fraud, although he did not mention the existence of the FCA suit at that time. After the seal was lifted in part, Scruggs disclosed the existence of the suit to various others, including a public relations firm and CBS News.

At the time of the motion to dismiss in 2011, respondents were represented neither by Scruggs nor by any of the attorneys who had worked with him. In March 2008, Scruggs withdrew from respondents' case after he was indicted for attempting to bribe a state-court judge. Two months later, the District Court removed the remaining Scruggs-affiliated attorneys from the case, based on their alleged involvement in improper payments made from Scruggs to respondents. The District

Court did not punish respondents themselves for the payments because they were not made "aware of the ethical implications" and, as laypersons, "are not bound by the rules of professional conduct that apply to" attorneys. App. 21.

In deciding petitioner's motion the District Court considered only the seal violations that occurred before the seal was lifted in part, reasoning the partial lifting in effect had mooted the seal. Applying the test for dismissal set out in *United States ex rel. Lujan v. Hughes Aircraft Co.,* 67 F.3d 242, 245–247 (C.A.9 1995), the District Court balanced three factors: (1) the actual harm to the Government, (2) the severity of the violations, and (3) the evidence of bad faith. The court decided against dismissal. Petitioner did not request some lesser sanction. The case went to trial, resulting in a victory for respondents on what the Court of Appeals referred to as a "bellwether" claim regarding ***442** a single damaged home. 794 F.3d, at 462.

The Court of Appeals for the Fifth Circuit affirmed the denial of petitioner's motion to dismiss. The court recognized that the case presented two related issues of the first impression under its case law: (1) whether a seal violation requires mandatory dismissal of a relator's complaint and, if not, (2) what standard governs a district court's decision to dismiss. The court noted that the Courts of Appeals for the Second and Ninth Circuits had held that the FCA does not require automatic dismissal for a seal violation, while the Court of Appeals for the Sixth Circuit had held that dismissal is mandatory. See *United States ex rel. Pilon v. Martin Marietta Corp.,* 60 F.3d 995, 998 (C.A.2 1995); *United States ex rel. Lujan v. Hughes Aircraft Co., supra,* at 245; *United States ex rel. Summers v. LHC Group Inc.,* 623 F.3d 287, 296 (C.A.6 2010); see also *United States ex rel. Smith v. Clark/Smoot/Russell,* 796 F.3d 424, 430 (C.A.4 2015) (following *Pilon* ).

After a careful analysis, the Court of Appeals for the Fifth Circuit held automatic dismissal is not required by the FCA. 794 F.3d, at 470–471. It then considered the same factors the District Court had weighed and came to a similar conclusion. *Id.,* at 471–472. First, the Court of Appeals held the Government was in all likelihood not harmed by the disclosures because none of them led to the publication of the pendency of the suit before the seal was lifted in part. Second, the Court of Appeals determined the violations were not severe in their repercussions because respondents had complied with the seal requirement when they first filed their suit. Third, the Court of Appeals assumed, without deciding, that the bad behavior of respondents' then-attorney could be imputed to respondents; but it held that, even presuming the attribution of bad faith, the other factors favored respondents.

This Court granted certiorari, 578 U.S. ——, 136 S.Ct. 2386, 195 L.Ed.2d 761 (2016), and now affirms.

## II

### A

**[2]** Petitioner's primary contention is that a violation of the seal provision necessarily requires a relator's complaint to be dismissed. The FCA does not enact so harsh a rule.

**[3]** **[4]** Section 3730(b)(2)'s text provides that a complaint "shall" be kept under seal. True, this language creates a mandatory rule the relator must follow. See *Rockwell Int'l Corp. v. United States,* 549 U.S. 457, 464, 127 S.Ct. 1397, 167 L.Ed.2d 190 (2007) ("As required under the Act, [the relator] filed his complaint under seal ..."); see also *Kingdomware Technologies, Inc. v. United States,* 579 U.S. ——, ——, 136 S.Ct. 1969, 1977, 195 L.Ed.2d 334 (2016) ("[T]he word 'shall' usually connotes a requirement"). The statute says nothing, however, about the remedy for a violation of that rule. In the absence of congressional guidance regarding a remedy, "[a]lthough the duty is mandatory, the sanction for breach is not loss of all later powers to act." *United States v. Montalvo–Murillo,* 495 U.S. 711, 718, 110 S.Ct. 2072, 109 L.Ed.2d 720 (1990).

**[5]** The FCA's structure is itself an indication that violating the seal requirement does not mandate dismissal. This Court adheres to the general principle that Congress' use of "explicit language" in one provision "cautions against inferring" the same limitation in another provision. *Marx v. General Revenue Corp.,* 568 U.S. ——, ——, 133 S.Ct. 1166, 1177, 185 L.Ed.2d 242 (2013). And the FCA has a ***443** number of provisions that do require, in express terms, the dismissal of a relator's action. *Supra,* at 440 (citing § 3730(b)(5)); see also §§ 3730(e)(1)–(2) ("[n]o court shall have jurisdiction" over certain FCA claims by relators against a member of the military or of the judicial, legislative, or executive branches). It is proper to infer that, had Congress intended to require dismissal for a violation of the seal requirement, it would have said so.

The Court's conclusion is consistent with the general purpose of § 3730(b)(2). The seal provision was enacted in the 1980's as part of a set of reforms that were meant to "encourage more private enforcement suits." S. Rep. No. 99–345, pp. 23–24 (1986). At the time, "perhaps the most serious problem plaguing effective enforcement" of the FCA was "a lack of resources on the part of Federal enforcement agencies." *Id.,* at 7. The Senate Committee Report indicates that the seal provision was meant to allay the Government's concern that a relator filing a civil complaint would alert defendants to a pending federal criminal investigation. *Id.,* at 24. Because the seal requirement was intended in main to protect the Government's interests, it would make little sense to adopt a rigid interpretation of the seal provision that prejudices the Government by depriving it of needed assistance from private parties. The Federal Government agrees with this interpretation. It informs the Court that petitioner's test "would undermine the very governmental interests that the seal provision is meant to protect." Brief for United States as *Amicus Curiae* 10.

B

Petitioner's arguments to the contrary are unavailing. First, petitioner urges that because the seal provision appears in the subsection of the FCA creating the relator's private right of action, Congress intended to condition the right to bring suit on compliance with the seal requirement. It is true that, as discussed further below, the Court sometimes has concluded that Congress conditioned the authority to file a private right of action on compliance with a statutory mandate. *E.g., Hallstrom v. Tillamook County,* 493 U.S. 20, 25–26, 110 S.Ct. 304, 107 L.Ed.2d 237 (1989). There is no textual indication, however, that Congress did so here.

Section 3730(b)(2) does not tie the seal requirement to the right to bring the *qui tam* suit in conditional terms. As noted above, the statute just provides: "The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders."

The text at issue in *Hallstrom,* by contrast, was quite different than the statutory language that controls here. The *Hallstrom* statute, part of the Resource Conservation and Recovery Act of 1976, provided: " 'No action may be commenced ... prior to sixty days after the plaintiff has given notice of the violation' " to the Government. 493 U.S., at 25, 110 S.Ct. 304.

Petitioner cites two additional cases to support its argument, but those decisions concerned statutes that used even clearer conditional words, like "if" and "unless." See *United States ex rel. Texas Portland Cement Co. v. McCord,* 233 U.S. 157, 161, 34 S.Ct. 550, 58 L.Ed. 893 (1914) (statute allowed creditors of Government contractors to bring suit " 'if no suit should be brought by the United States within six months from the completion and final settlement of said contract' "); *McNeil v. United States,* 508 U.S. 106, 107, n. 1, 113 S.Ct. 1980, 124 L.Ed.2d 21 (1993) (statute provided that " '[a]n action shall not be ***444** instituted upon a claim against the United States for money damages ... unless the claimant shall have first presented the claim to the appropriate Federal agency' ").

Again, the FCA's structure shows that Congress knew how to draft the kind of statutory language that petitioner seeks to read into § 3730(b)(2). The applicable version of the public disclosure bar, for example, requires a district court to

dismiss an action when the underlying information has already been made available to the public, " 'unless' " the plaintiff is the Attorney General or an original source. *Graham County Soil and Water Conservation Dist. v. United States ex rel. Wilson,* 559 U.S., at 286, 130 S.Ct. 1396.

Second, petitioner contends that because this Court has described the FCA's *qui tam* provisions as "effecting a partial assignment of the Government's damages claim," *Vermont Agency of Natural Resources v. United States ex rel. Stevens,* 529 U.S., at 773, 120 S.Ct. 1858 adherence to all of the FCA's mandatory requirements—no matter how small—is a condition of the assignment. This argument fails for the same reason as the one discussed above: Petitioner can show no textual indication in the statute suggesting that the relator's ability to bring suit depends on adherence to the seal requirement.

Third, petitioner points to a few stray sentences in the Senate Committee Report that it claims support the mandatory dismissal rule. As explained above, however, the Report's recitation of the general purpose of the statute is best understood to support respondents. *Supra,* at 442. And, furthermore, because the meaning of the FCA's text and structure is "plain and unambiguous, we need not accept petitioner['s] invitation to consider the legislative history." *Whitfield v. United States,* 543 U.S. 209, 215, 125 S.Ct. 687, 160 L.Ed.2d 611 (2005).

III

Petitioner's secondary argument is that the District Court did not consider the proper factors when declining to dismiss respondents' complaint or, at a minimum, that it was plain error not to consider respondents' conduct after the seal was lifted in part. This Court holds the District Court did not abuse its discretion by denying petitioner's motion, much less commit plain error. In light of the questionable conduct of respondents' prior attorney, it well may not have been reversible error had the District Court granted the motion; that possibility, however, need not be considered here.

**[6]** In general, the question whether dismissal is appropriate should be left to the sound discretion of the district court. While the factors articulated in *United States ex rel. Lujan v. Hughes Aircraft Co.* appear to be appropriate, it is unnecessary to explore these and other relevant considerations. These standards can be discussed in the course of later cases.

IV

**[7]** **[8]** Petitioner and its *amici* place great emphasis on the reputational harm FCA defendants may suffer when the seal requirement is violated. But even if every seal violation does not mandate dismissal, that sanction remains a possible form of relief. District courts have inherent power, moreover, to impose sanctions short of dismissal for violations of court orders. See *Chambers v. NASCO, Inc.,* 501 U.S. 32, 43–46, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991). Remedial tools like monetary penalties or attorney discipline remain available to punish and deter seal violations even when dismissal is not appropriate.

***445** **[9]** Of note in this case, petitioner did not request any sanction other than dismissal. Tr. of Oral Arg. 3–4, 17. Had petitioner sought some lesser sanctions, the District Court might have taken a different course. Yet petitioner failed to do so. On this record, the question whether a lesser sanction is warranted is not preserved.

The judgment of the Court of Appeals for the Fifth Circuit is

*Affirmed.*

  

**All Citations**

137 S.Ct. 436

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

**End of Document**

2016 WL 7324629
Only the Westlaw citation is currently available.
United States District Court,
D. Maryland.

United States, et al., Plaintiffs,
ex rel. Jerome Palmieri, Relator,
v.
Alpharma, Inc., et al., Defendants.

Civil Action No. ELH-10-1601

Signed 12/16/2016

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State of California, pro se.

State of Delaware, pro se.

State of Florida, pro se.

State of Georgia, pro se.

State of Hawaii, pro se.

State of Illinois, pro se.

State of Indiana, pro se.

State of Louisiana, pro se.

State of Michigan, pro se.

State of Montana, pro se.

State of Nevada, pro se.

State of New Hampshire, pro se.

State of New Jersey, pro se.

State of New Mexico, pro se.

State of New York, pro se.

State of Oklahoma, pro se.

State of Rhode Island, pro se.

Exhibit 2

  

State of Tennessee, pro se.

State of Texas, pro se.

State of Wisconsin, pro se.

The District of Columbia, pro se.

Brigham Cannon, Bryan Mark O. Keefe, Michele Elaine Gutrick, Kirkland & Ellis, LLP, Washington, DC, Henry J. Depippo, Steven Menashi, Kirkland and Ellis LLP, New York, NY, Jonathan C. Bunge, Kirkland and Ellis LLP, Chicago, IL, for Defendants.

**MEMORANDUM OPINION**

Ellen Lipton Hollander, United States District Judge

***1** Jerome Palmieri filed a *qui tam* action on April 20, 2010, on behalf of the United States and various states (collectively, the "*Qui Tam* States"), pursuant to the False Claims Act ("FCA" or the "Act"), 31 U.S.C. §§ 3729 *et seq.*, and analogous state statutes. ECF 2. [1] Initially, Palmieri sued Alpharma, Inc. and its subsidiary, Alpharma Pharmaceuticals, LLC (collectively, "Alpharma") as well as King Pharmaceuticals, Inc. ("King"). Palmieri added Pfizer, Inc. ("Pfizer") as a defendant in his First Amended Complaint (sometimes referred to as "FAC"), filed on October 25, 2011. ECF 43. [2]

The Act "imposes liability on individuals and entities who defraud government programs." *United States ex rel. Bunk and Ammons v. Government Logistics N.V.*, 842 F.3d 261, 2016 WL 6695787, at *2 n. 3 (4th Cir. Nov. 15, 2016). It permits a private party, as relator, to sue on behalf of the United States to recover damages from a defendant who has caused fraudulent claims for payment to be submitted against the public fisc. As an incentive to bring such suits, a successful relator is entitled to share in the government's recovery from the defendant. *See generally Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 404 (2011);*ACLU v. Holder*, 673 F.3d 245, 246-51 (4th Cir. 2011) (describing history and current provisions of FCA). [3]

On April 26, 2011, about a year after suit was filed, the government and the *Qui Tam* States gave notice of their decision not to intervene. ECF 11. Palmieri elected to pursue the suit on his own, and the case was unsealed on July 5, 2011. [4] As noted, Palmieri filed his FAC on October 25, 2011. He filed his Second Amended Complaint (sometimes referred to as "SAC") on April 2, 2013. ECF 77. The SAC includes conduct that allegedly occurred before and after 2010 – the year that the Act was amended. *See Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 283 n.1 (2010).

***2** In an opinion issued on March 21, 2014, I dismissed the suit, concluding that the SAC failed to plead fraud with the particularity required by the heightened pleading standard under Fed. R. Civ. P. 9(b). *See* ECF 88 (Memorandum Opinion); ECF 89 (Order); *see also N. Am. Catholic Educ. Programming Found., Inc. v. Cardinale*, 567 F.3d 8, 13 (1st Cir. 2009); *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 783-84 (4th Cir. 1999).

Thereafter, Palmieri noted an appeal to the United States Court of Appeals for the Fourth Circuit. On April 26, 2016, the Fourth Circuit vacated and remanded. *U.S. ex rel. Palmieri v. Alpharma, Inc.*, 647 Fed.Appx. 166 (4th Cir. 2016) (per curiam); *see also* ECF 94; ECF 98 (Mandate). In its ruling, the Fourth Circuit determined that I erred because I "did not address Defendants' arguments that Palmieri's claims were precluded by the FCA's first-to-file bar ... and public-disclosure bar," and "[u]nder the pre-2010 version of § 3730 that governs Palmieri's action ... both the first-to-file and public disclosure defenses are jurisdictional in nature ..." *Palmieri*, 647 Fed.Appx. at 166 (citations omitted). [5]

Accordingly, the Fourth Circuit remanded to this Court for "consideration in the first instance of whether the FCA's first-to-file bar *or* public-disclosure bar deprived the district court of subject-matter jurisdiction." *Id.* at 167 (emphasis added).

## I. Factual Background [6]

Defendants manufacture and market Flector Patch, a transdermal patch that delivers, via absorption through the patient's skin, a topical pain application of 1.3% diclofenac epolamine. *See* SAC, ECF 77, ¶¶ 88–89. The Food and Drug Administration ("FDA") approved Flector Patch for prescription use in December 2007 (*id.* ¶ 93) as a " 'topical treatment of acute pain due to minor strains, sprains, and contusions.' " *Id.* ¶ 95 (citation omitted in original). However, the use was approved only for up to fourteen days. *Id.* ¶¶ 102, 115–16. Flector Patch carries risks of cardiovascular and gastrointestinal side effects that increase with drug usage. *Id.* ¶ 91. Therefore, Flector Patch's FDA-approved label contains a warning that a patient should use only " 'the lowest effective dose for the shortest duration consistent with individual treatment goals.' " *Id.* (citation omitted in original).

In 2001, Palmieri began working for Alpharma, and later King and Pfizer, as a sales representative to market prescription pain medications, including Flector Patch, to physicians who treat patients with chronic pain. SAC, ECF 77, ¶ 23.

***3** Federal law does not prohibit a physician from prescribing an approved drug for a non-approved, or "off-label," use. *See* 21 U.S.C. § 396. However, "it is unlawful for a manufacturer to introduce a drug into interstate commerce with an intent that it be used for an off-label purpose, and a manufacturer illegally 'misbrands' a drug if the drug's labeling includes information about its unapproved uses." *Washington Legal Found. v. Henney*, 202 F.3d 331, 332-33 (D.C. Cir. 2000) (internal citations omitted). "[A] manufacturer's direct advertising or explicit promotion of a product's off-label uses is likely to provoke an FDA misbranding or 'intended use' enforcement action." *Id.* at 333; *see also* 21 C.F.R. § 202.1(e)(4)(ii) (stating that an advertisement for an FDA-approved prescription drug generally "may recommend and suggest the drug only for those uses contained in the [FDA-approved] labeling thereof"). Moreover, government-funded health care programs, such as Medicare and Medicaid, generally do not permit reimbursement for off-label uses. *See* 42 U.S.C. § 1396r-8(k)(2)-(3), (6).

Palmieri alleges that defendants engaged in an illegal scheme to promote off-label use of Flector Patch. According to the Relator, defendants instructed their sales representatives to market Flector Patch aggressively to physicians, such as pain management specialists, rheumatologists, and neurologists, who by the nature of their specialties treated only chronic pain and not the acute, localized pain for which Flector Patch was approved. *See* SAC, ECF 77, ¶¶ 200–07. In addition, defendants allegedly promoted Flector Patch for continuous use, rather than for short-term use. *See id.* ¶¶ 212–28. Defendants also allegedly instructed their sales representatives to discourage shorter prescriptions as "subtherapeutic," and to cease promotional efforts toward emergency room and urgent care physicians, who routinely treat patients for acute pain and who often resisted prescribing Flector Patch at the 60-patch level. *See id.* In addition, defendants allegedly marketed Flector Patch as an alternative to other prescription medications that are FDA-approved only for the treatment of chronic pain. *See id.* ¶¶ 239–54. According to the Relator, some of these prescriptions were submitted to federal and state government agencies for reimbursement, thereby causing the presentment of false claims. *See generally* SAC, ECF 77. Furthermore, Palmieri alleges that some of defendants' promotional activities with respect to Flector Patch violated the Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b). *Id.* ¶¶ 305-14.

In the Second Amended Complaint (ECF 77), the Relator added allegations concerning prescriptions provided by two Pennsylvania doctors to nine patients. Specifically, the Relator alleged that for eight Medicare patients, Dr. Daniel Rubino prescribed Flector Patch off-label and, "upon information and belief," these eight persons "filled their prescriptions which were submitted to Medicare for payment because they returned to Dr. Rubino for one or more refills." *Id.* ¶ 274. Similarly, the Relator alleges that a Medicare patient of Dr. Kenan Aksu received an off-label

Flector Patch prescription and, based on a subsequent refill request, it would have been submitted to Medicare for reimbursement. *See id.* ¶ 285. [7]

Additional facts are included in the Discussion.

## II. Procedural Background

As indicated, Palmieri filed suit on April 20, 2010. In April 2011, about a year after the suit was filed, the government declined to intervene. Palmieri filed his First Amended Complaint in October 2011, which defendants moved to dismiss. ECF 70 (the "First Motion"). In particular, they argued that the first-to-file rule, 31 U.S.C. § 3730(b)(5), deprived this Court of subject matter jurisdiction. In addition, they contended that, in light of the heightened pleading requirements applicable to fraud claims under Fed. R. Civ. P. 9(b), the FAC failed to state a claim.

***4** With respect to the first-to-file rule, the defense pointed to the case of *United States ex rel. Littlewood*, ELH-10-973 (D. Md.) ("*Littlewood*"), which alleged essentially the same fraudulent scheme set forth by Palmieri. *Littlewood* was filed four days before Palmieri filed his suit. [8] But, as in this case, the government declined to intervene in *Littlewood*. *Id.*, ECF 16; ECF 18. And, the relator chose not to exercise her right to litigate the suit on her own. Rather, on August 17, 2011, she voluntarily dismissed the case, with the government's consent, and without prejudice. *Id.*, ECF 19; ECF 21; *see also United States ex rel. Littlewood,* 806 F. Supp. 2d 833 (D. Md. 2011). Palmieri filed his First Amended Complaint in October 2011, *after Littlewood* had been voluntarily dismissed.

In *United States ex rel. Palmieri v. Alpharma, Inc.*, 928 F. Supp. 2d 840 (D. Md. 2013) (ECF 75, "*Palmieri I*"), I concluded that the first-to-file rule in § 3730(b)(5) did not bar the Relator's claim. I relied, *inter alia*, on *United States ex rel. Chovanec v. Apria Healthcare Grp. Inc.*, 606 F.3d 361 (7th Cir. 2010) (Easterbrook, J.). *See Palmieri I*, 928 F. Supp. 2d at 847; 849; 850-51. Because *Littlewood* was no longer pending when Palmieri filed his FAC, I recognized that Palmieri could simply file a new action if I dismissed the case. Given that circumstance, I concluded that it would "elevate form over substance" to require dismissal, only to have Palmieri refile his case. *Id.* at 851–52. Instead, I allowed the case to proceed, as amended, and I then considered the merits of defendants' First Motion in the context of the FAC. I determined that Palmieri failed to state a claim, because he did not satisfy the Rule 9(b) standard for pleading fraud with particularity. *Id.* at 851–52, 857. [9]

***5** In light of the pleading deficiencies, I granted the First Motion and dismissed the FAC, without prejudice. ECF 76 (Order). I also directed the Clerk to close the case, with the right to reopen if plaintiff submitted an amended complaint. *Id.* However, I did not require plaintiff to file an entirely new suit. *Palmieri I*, at 857-58.

On April 2, 2013, the Relator filed his Second Amended Complaint, using the original case number. ECF 77. As noted, the SAC included new allegations regarding prescriptions written for nine patients by two Pennsylvania physicians, Dr. Rubino and Dr. Aksu. *See* SAC, ECF 77, ¶¶ 275-85. Although the Complaint, the FAC, and the SAC referred to conduct that occurred prior to 2010, the SAC also referred to conduct that occurred after 2010. *See* SAC, ECF 77, ¶¶ 274-295 (including allegations as early as 2008 and as late as fall 2011).

Defendants moved to dismiss the SAC (ECF 84), supported by a memorandum (ECF 84-1), (collectively, the "Second Motion"). They challenged the SAC on jurisdictional grounds, based on the "first-to-file" bar under 31 U.S.C. § 3730(b)(5), and also based on the public disclosure bar under 31 U.S.C. § 3730(e)(4)(A). In addition, they argued that the SAC did not satisfy the Rule 9(b) heightened pleading standard. *See* ECF 84. The Relator filed an Opposition (ECF 85, "Opposition"), and defendants submitted a Reply. ECF 86.

In *United States ex rel. Palmieri v. Alpharma, Inc.*, ELH-10-1601, 2014 WL 1168953 (D. Md. Mar. 21, 2014) (ECF 88) ("*Palmieri II*"), I concluded that the SAC failed to satisfy the Rule 9(b) standard. I also said that, "[b]ecause the relator's allegations fail under Rule 9(b), it is unnecessary to reach defendants' arguments concerning the first-to-file rule and the public disclosure bar." ECF 88 at 4 n.8. *Cf. United States ex rel. Brooks v. Lockheed Martin Corp.*, 423 F. Supp. 2d 522, 528 (D. Md. 2006) (stating that because a relator "failed to satisfy the requirements of Rule 9(b), it is not necessary to examine [defendants'] arguments" related to the first-to-file rule), *dismissed in part, aff'd in part on other grounds*, 237 Fed.Appx. 802 (4th Cir. 2007). Thus, by Memorandum Opinion (ECF 88) and Order (ECF 89) of March 21, 2014, I granted the Second Motion and dismissed the case, with prejudice, as to the FCA claims, and without prejudice as to the related state law claims. Palmieri noted an appeal.

As indicated, on April 26, 2016, the Fourth Circuit vacated *Palmieri II*. It concluded that both the first-to-file bar and the public disclosure bar are jurisdictional under the "pre-2010 version" of the FCA, and that the pre-2010 version of the Act "governs" this case. *Palmieri*, 647 Fed.Appx. at 166. Moreover, it concluded that I should have determined whether this Court has jurisdiction before deciding the Rule 9(b) issue. Accordingly, the Fourth Circuit remanded to this Court for a determination as to jurisdiction.

By Order of the same date (April 26, 2016), I directed counsel to inform the Court as to "whether I should review the [jurisdictional claims] based on existing filings or, instead, whether the parties wish to supplement and update their submissions." ECF 95. In a status report filed on May 16, 2016, the parties advised that "they jointly believe that the Court should evaluate these jurisdictional issues based on the pre-existing briefing and that no evidentiary hearing is necessary to resolve these jurisdictional issues." ECF 97. The parties referred the Court to the following submissions and case law, *id.* at 1–2:

- Memorandum of Law in Support of Defendants' Motion to Dismiss Second Amended Complaint, ECF 84-1 at 14-26

***6** - Relator's Memorandum of Law in Opposition to Defendants' Motion to Dismiss Second Amended Complaint, ECF 85 at 17-25 ("Opposition")

- Reply Memorandum of Law in Support of Defendants' Motion to Dismiss Second Amended Complaint, ECF 86 at 16-25

- *United States ex rel. Carter v. Halliburton Co.*, 710 F.3d 171 (4th Cir. 2013), *rev'd in part*, *Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970 (2015)

The SAC, which was the subject of the appeal to the Fourth Circuit, included allegations of conduct that occurred before and after 2010. Effective March 23, 2010, the Patient Protection and Affordable Care Act of 2010 ("PPACA"), Pub. L. No. 111-148, 124 Stat. 119, amended the public disclosure bar of the FCA. 31 U.S.C. § 3730(e)(4)(A) (2010) (as amended by § 10104(j)(2) of PPACA); *see Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 283 n.1 (2010). However, the 2010 amendment to the public disclosure bar does not apply to conduct that occurred before March 23, 2010. *Id.* at 283 n.1; *see United States ex el. May v. Purdue Pharma L.P.*, 737 F.3d 908, 915 (4th Cir. 2013) (explaining that the 2010 FCA amendment "retroactivity inquiry looks to when the underlying conduct occurred, not when the complaint was filed"); *accord United States ex rel. Black v. Health & Hosp. Corp. of Marion Cnty.*, 494 Fed.Appx. 285, 291 n. 9 (4th Cir. 2012) (per curiam) (pointing out that the "Supreme Court has observed that the new [FCA] lacks the explicit language that would make it retroactive").

The Fourth Circuit has recognized that the 2010 amendments "significantly changed the scope of the public disclosure bar." *May*, 737 F.3d at 917. As amended, the public disclosure bar "is no longer jurisdictional." *Id.* In other words, "[p]ost-amendment, the public-disclosure bar is a grounds for dismissal—effectively, an affirmative defense—rather than

a jurisdictional bar." *Beauchamp v. Academi Training Ctr.*, 816 F.3d 37, 40 (4th Cir. 2016) (citing *United States ex rel. Osheroff v. Humana, Inc.*, 776 F.3d 805, 810 (11th Cir. 2015)).

Because the Fourth Circuit stated that the pre-2010 version of the Act "governs" here, by Order of September 21, 2016 (ECF 99), I asked counsel to submit memoranda addressing whether, in their view, I should consider the Complaint, the First Amended Complaint, and/or the Second Amended Complaint when analyzing the public disclosure bar. I also asked counsel to address whether the pre-2010 version of the FCA, the post-2010 version, or both apply to any or all of Palmieri's claims. *Id.* at 2. The parties submitted their memoranda on October 6, 2016. *See* ECF 100 (Def. Supp. Mem.); ECF 101 (Relator Supp. Mem.). They also filed replies on October 20, 2016. *See* ECF 102 (Def. Supp. Reply); ECF 103 (Relator Supp. Reply).

## III. Discussion

### A. The First-to-File Bar

The Act's "first-to-file" rule is codified in 31 U.S.C. § 3730(b)(5). [10] It provides: "When a person brings [a false claims action], no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." The first-to-file rule was one of several amendments to the Act in 1986 that sought to achieve "the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own." *United States ex rel. Springfield Terminal Ry. v. Quinn,* 14 F.3d 645, 650 (D.C. Cir. 1994); *see United States ex rel. LaCorte v. Wagner*, 185 F.3d 188, 191 (4th Cir. 1999) (stating that the 1986 amendments "struck a careful balance between encouraging citizens to report fraud and stifling parasitic lawsuits").

***7** The statutory "command is simple: as long as a first-filed complaint remains pending, no related complaint may be filed." *United States ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204, 1210 (D.C. Cir. 2011). In other words, "if one person 'brings an action' then no one other than the Government may 'bring a related action' while the first is 'pending.' " *United States ex rel. Chovanec v. Apria Healthcare Gp. Inc.*, 606 F.3d 361, 362 (7th Cir. 2010) (quoting statute).

The first-to-file rule creates "an incentive for relators with valuable information to file— and file quickly." *In re Nat. Gas Royalties Qui Tam Litigation (CO$_2$ Appeals)*, 566 F.3d 956, 961 (10th Cir. 2009). In effect, it sets off "a race to the courthouse among those with knowledge of fraud." *Campbell v. Redding Med. Ctr.*, 421 F.3d 817, 821 (9th Cir. 2005). And, as the Fourth Circuit recently explained in *United States ex rel. Carter v. Halliburton Co.*, 710 F.3d 171, 181 (4th Cir. 2013), *rev'd in part on other grounds*, *Kellogg Brown & Root Services, Inc. v. U.S. ex rel. Carter*, ——U.S. ——, 135 S. Ct. 1970 (2016), "whoever wins the race to the courthouse prevails and the other case *must be dismissed.*" (Emphasis added).

Under the first-to-file rule, the *qui tam* relator who wins the race to the courthouse need not "share in ... recovery with third parties who do no more than tack on additional factual allegations to the same essential claim." *Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1279 (10th Cir. 2004). Thus, the first-to-file rule "functions both to eliminate parasitic plaintiffs who piggyback off the claims of a prior relator, and to encourage legitimate relators to file quickly by protecting the spoils of the first to bring a claim." *In re Nat. Gas Royalties*, 566 F.3d at 961. The rule also precludes " 'a double recovery' " against the defendant. *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 31 F.3d 1015, 1018 (10th Cir. 1994) (quoting *Erickson ex rel. United States v. Am. Inst. of Bio. Sci.*, 716 F. Supp. 908, 918 (E.D. Va. 1989)). [11]

The federal courts consistently view the first-to-file rule as a jurisdictional bar. *See, e.g.*, *Carter*, 710 F.3d at 181;*United States ex rel. Duxbury v. Ortho Biotech Prods., L.P.*, 579 F.3d 13, 16 (1st Cir. 2009) (describing first-to-file rule as a "jurisdictional bar[ ] that limit[s] a district court's subject matter jurisdiction over qui tam actions"); *United States ex*

*rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 376-77 (5th Cir. 2009) ("Congress has placed a number of jurisdictional limits on the FCA's *qui tam* provisions, including § 3730(b)(5)'s first-to-file bar.[ ]] Under this provision, if [the relator's] claim had already been filed by another, the district court lacked subject matter jurisdiction and was required to dismiss the action."); *Walburn v. Lockheed Martin Corp.*, 432 F.3d 966, 970 (6th Cir. 2005) (describing first-to-file rule as a "jurisdictional limitation[ ] on *qui tam* actions"); *Grynberg, supra*, 390 F.3d at 1278 (stating that § 3730(b)(5) "is a jurisdictional limit on the courts' power to hear certain duplicative qui tam suits").

***8** With respect to § 3730(b)(5), "every court of appeals to consider" the meaning of the statutory phrase " 'a related action based on the facts underlying [a] pending action' " has construed it to mean an action based on the same "*material* facts" or the same "essential facts" as the pending action, rather than "identical facts." *Chovanec*, 606 F.3d at 363 (quoting statute) (collecting cases) (emphasis in original); *see Carter*, 710 F.3d at 182. Moreover, the "circuits that have addressed this subject understand the 'material' or 'essential' facts to be those on which the original Relator is entitled to compensation if the suit prevails." *Chovanec*, 606 F.3d at 363. This, in turn, depends on a comparison of the date and content of the pleadings in the pending case with the date and content of the other pleadings. *See, e.g.*, *In re Nat. Gas Royalties*, 566 F.3d at 964 ("The first-to-file bar is designed to be quickly and easily determinable, simply requiring a side-by-side comparison of the complaints.").

Here, the Relator filed his FCA Complaint (ECF 2) on April 20, 2010. On April 26, 2011, the government and the states notified the Court of their decision not to intervene (ECF 11) and the suit was unsealed on July 5, 2011. *See* ECF 20. On October 25, 2011, the Relator filed the First Amended Complaint (ECF 43), which was the operative pleading at the time of my decision in *Palmieri I*, 928 F. Supp. 2d 840. In their First Motion (ECF 70), defendants argued that the case was barred by the first-to-file rule, because *Littlewood*, another *qui tam* suit alleging essentially the same fraudulent scheme, was filed on April 16, 2010, four days before Palmieri filed his Complaint in this case. *See United States ex rel. Littlewood v. King Pharmaceuticals, Inc., et al.*, ELH-10-973 (D. Md.).

Without question, *Littlewood* alleged the same material facts. *See Anderson v. Fed. Deposit Ins. Corp.*, 918 F.2d 1139, 1141 n.1 (4th Cir. 1990) (stating, in the context of a Rule 12(b)(1) motion to dismiss, that "a district court should properly take judicial notice of its own records"). Like Palmieri, the relator in *Littlewood* was a sales representative with Alpharma. *Littlewood*, 806 F. Supp. 2d at 834. Like Palmieri, she alleged that Alpharma and its parent companies engaged in a scheme to market Flector Patch for off-label uses with the intent and effect of causing false claims to be submitted to governmental health care programs. *Id.* In addition, *Littlewood* and this case included the same *Qui Tam* States. *Id.* at 835 n. 2. And, as noted, the United States declined to intervene in *Littlewood*. Thereafter, the realtor dismissed the case. Although *Littlewood* was no longer "pending" when Palmieri filed his First Amended Complaint on October 25, 2011, it was certainly pending when Palmieri first filed his suit.

As mentioned, in *Palmieri I*, I recognized the jurisdictional nature of the first-to-file bar. *Palmieri I*, 928 F. Supp. 2d at 848-52. I also recognized that "*Littlewood* was already 'pending' when this case began.[ ]" *Id.* at 849. However, it had since been dismissed, before Palmieri filed his FAC. I concluded that if I were to dismiss the suit, it would be without prejudice to Palmieri's right to refile suit, based on my analysis of *Chovanec*, 606 F.3d at 365 (holding that the district court's dismissal of a *qui tam* suit on the basis of the first-to-file bar should have been without prejudice because the first-filed *qui tam* action was "no longer pending ...") and *In re Natural Gas Royalties, supra*, 566 F.3d at 964 ("[I]f that prior claim is no longer pending, the first-to-file bar no longer applies.... when he drops his action another relator who qualifies as an original source may pursue his own"). Therefore, I reasoned, *id.* at 851–52 (citing 31 U.S.C. § 3730(b)(5)):

> If the Court were to dismiss the Amended Complaint, it would do so without prejudice, and the first-to-file rule would not preclude Mr. Palmieri from filing an identical pleading under a new case number tomorrow.... It would elevate form over substance to dismiss the Amended Complaint on first-to-file grounds at this juncture. Accordingly, I conclude that the first-to-file rule does not bar Mr. Palmieri's [First] Amended Complaint.

***9** Accordingly, I proceeded to consider other contentions in the First Motion. And, as discussed, I dismissed the FAC, without prejudice, and with leave to amend, because, in my view, it failed to comply with the pleading standards of Rule 9(b). *Id.* at 857.

On March 18, 2013, just a few weeks after I issued *Palmieri I*, the Fourth Circuit decided *United States ex rel. Carter v. Halliburton Co., supra*, 710 F.3d 171. In *Carter*, the Fourth Circuit characterized the first-to-file bar "as an absolute, unambiguous exception-free rule." *Id.* at 181. Soon after, on April 2, 2013, Palmieri filed his SAC. ECF 77. [12] Again, defendants moved to dismiss. ECF 84.

In the Second Motion, defendants renewed their argument that this Court lacks jurisdiction based on the first-to-file rule. *See* ECF 84-1 at 18–20. In particular, defendants relied on the Fourth Circuit's ruling in *Carter*, claiming that the first-to-file rule mandated dismissal of the suit because a similar action was pending when Palmieri filed suit. ECF 84-1 at 18. They asserted: "That Palmieri has since filed an amended complaint does not cure the original jurisdictional defect." *Id.* at 19. Moreover, defendants argued that dismissal of the Second Amended Complaint would not elevate form over substance. *Id.* According to defendants, "whether the case proceeds under the same caption or as a newly filed case has substantive consequences." *Id.*

In his Opposition (ECF 85), the Relator characterized *Carter* differently. *Id.* at 22–23. According to Palmieri, the Fourth Circuit "concluded" that the "district court erred in dismissing Carter's complaint with prejudice." *Id.* at 22. He argued that, "as the Fourth Circuit explained, and contrary to Defendants' suggestions, 'the first-to-file bar allows a plaintiff to bring a claim later' " and that " 'this is precisely what a dismissal without prejudice allows a plaintiff to do as well.' " *Id.* at 22–23 (quoting *Carter*). The Relator maintained that "nothing in the holding of the Fourth Circuit's decision in *Carter* suggests that this Court should revise its earlier decision on this issue." ECF 85 at 23.

In analyzing the jurisdictional issue here, it is helpful to review the factual and procedural background of *Carter*, as recounted by the Supreme Court, 135 S. Ct. at 1974-75:

> From January to April 2005, [the Relator] worked in Iraq for one of the petitioners as a water purification operator. He subsequently filed a *qui tam* complaint against petitioners (*Carter I*), alleging that they had fraudulently billed the Government for water purification services that were not performed or not performed properly. The Government declined to intervene.
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> In 2010, shortly before trial, the Government informed the parties about an earlier filed *qui tam* lawsuit, *United States ex rel. Thorpe v. Halliburton Co.*, No. 05–cv–08924 (C.D. Cal., filed Dec. 23, 2005), that arguably contained similar claims. This initiated a remarkable sequence of dismissals and filings.
>
> The District Court held that respondent's suit was related to *Thorpe* and thus dismissed his case without prejudice under the first-to-file bar. Respondent appealed, and while his appeal was pending, *Thorpe* was dismissed for failure to prosecute. Respondent quickly filed a new complaint (*Carter II*), but the District Court dismissed this second complaint under the first-to-file rule because respondent's own earlier case was still pending on appeal. Respondent then voluntarily dismissed this appeal, and in June 2011, more than six years after the alleged fraud, he filed yet another complaint (*Carter III*)....
>
> ***10** Petitioners 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 court dismissed respondent's complaint with prejudice. The 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 court also ruled that the WSLA applies only to criminal charges and thus did not suspend the time for filing

respondent's civil claims. As a result, the court concluded, all but one of those claims were untimely because they were filed more than six years after the alleged wrongdoing.

The Fourth Circuit reversed, rejecting the District Court's analysis of both the WSLA and first-to-file issues. *United States ex rel. Carter v. Halliburton Co.,* 710 F.3d 171 (2013). Concluding that the WSLA applies to civil claims based on fraud committed during the conflict in Iraq,[ ] the Court of Appeals held that respondent's claims had been filed on time. The Court of Appeals also held that the first-to-file bar ceases to apply once a related action is dismissed. Since the Maryland and Texas cases had been dismissed by the time of the Fourth Circuit's decision, the court held that respondent had the right to refile his case. The Court of Appeals thus remanded *Carter III* with instructions to dismiss without prejudice.

After this was done, respondent filed *Carter IV*, but the District Court dismissed *Carter IV* on the ground that the petition for a writ of certiorari in *Carter III* (the case now before us) was still pending.

Notably, the relator in *Carter* had argued that the subsequent dismissals of the earlier related cases meant they were no longer "pending" and that they could not "continue to have a preclusive effect on his action." 710 F.3d at 182. The Fourth Circuit rejected that view, stating: "Following the plain language of the first-to-file bar, Carter's action *will be barred* by [the earlier actions] if either case was pending *when Carter filed suit.*" *Id.* at 183 (emphasis added). Observing that "both actions were pending when Carter filed his complaint," and that courts must "look at the facts as they existed when the claim was brought to determine whether an action is barred by the first-to-file bar," the Court concluded that Carter's claims were barred. *Id.*

The Fourth Circuit also stated that "a later suit is barred if it is based upon the 'same material elements of fraud' as the earlier suit, even though the subsequent suit may 'incorporate somewhat different details.' " *Carter*, 710 F.3d at 182 (quoting *United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1183 (9th Cir. 2001)). Adopting the "material elements test," the Fourth Circuit explained that the first-to-file rule "prevents the less vigilant whistle-blower from using insignificant factual variations to allege what is essentially the same fraudulent scheme already made known to the government." *Carter*, 710 F.3d at 182 (citations and quotations omitted). Applying the "material elements test," the Court determined that the actions pending when Carter suit initially filed suit were "substantially similar," and therefore the first-to-file bar was triggered. *Id.* And, of particular significance here, the Fourth Circuit highlighted that, "if a case is brought while the original case is pending it must be dismissed 'rather than left on ice.' " *Id.* at 183 (quoting *Chovanec*, 606 F.3d at 365).

"However," the Fourth Circuit continued, "this [did] not end [the] inquiry." *Carter*, 710 F.3d at 183 (alteration added). Although the Fourth Circuit was clear that dismissal was required, it proceeded to analyze whether the first-to-file bar required dismissal of the suit with or without prejudice. *Id.* Relying on *Chovanec*, 606 F.3d at 365, and *In re Natural Gas Royalties*, 566 F.3d at 963–64, the Fourth Circuit concluded that "the district court erred in dismissing Carter's complaint with prejudice." *Carter*, 710 F.3d at 183.

***11** The *Carter* Court said: "Although the doctrine of claim preclusion may prevent the filing of subsequent cases, § 3730(b)(5) does not." *Id.* In addition, it stated, *id.* (emphasis added):

> We agree that once a case is no longer pending the first-to-file bar does not stop a relator *from filing a related case.* In this case, both of the original actions have been dismissed. Because of this, the first-to-file bar does not preclude Carter *from filing an action. The first-to-file bar allows a plaintiff to bring a claim later; this is precisely what a dismissal without prejudice allows a plaintiff to do as well.* Therefore, Carter's only impediment at the moment is the district court's dismissal *with prejudice.* And, as we have already concluded the district court erred in dismissing Carter's complaint *with prejudice.*

The Fourth Circuit unequivocally announced in *Carter*, 710 F.3d at 181: "Under the first-to-file bar, if Carter's claims had been previously filed by another relator, then the district court lacked subject matter jurisdiction." And, it opined that "whoever wins the race to the courthouse prevails and the other case *must be dismissed.*" *Id.* (alteration and emphasis added). It reasoned: "Section *3730(b)(5) is jurisdictional* and if an action is later filed that is based on the facts underlying the pending case, *the court must dismiss the later case for lack of jurisdiction.*" *Id.* (emphasis added). [13]

Because *Littlewood* was pending when this case began in 2010, and because *Littlewood* and the case *sub judice* allege essentially the same fraudulent scheme to promote Flector Patch, this case was barred at its inception by the first-to-file rule, and the first-to-file bar deprived this Court of subject matter jurisdiction. *See Carter*, 710 F.3d at 181–183; *see also Walburn, supra*, 431 F.3d at 972 n.5 ("[T]he ultimate fate of an earlier-filed action does not determine whether it bars a later action under § 3730(b)(5); rather, the question is only whether the earlier action was 'pending' at the time the later action was filed."); *Lujan*, 243 F.3d at 1188 ("To hold that a later dismissed action was not a then-pending action would be contrary to the plain language of the statute and the legislative intent."); *see also United States ex rel. Branch Consultants, LLC v. Allstate Ins. Co.*, 782 F. Supp. 2d 248, 259–260 (E.D. La. 2011) (stating that, "if [the relator's] action was barred under [jurisdictional limits in the FCA] at the time the original complaint was filed, the Court must dismiss the case, notwithstanding any amendments" to the complaint); *see, e.g.*, *United States ex rel. Sandager v. Dell Marketing, L.P.*, 872 F. Supp. 801, 811 (D. Minn. 2012) (dismissing claims based on the first-to-file bar); *United States ex rel. Folliard v. Synnex Corp.*, 789 F. Supp. 2d 66, 77 (D.D.C. 2011) (same); *United States ex rel. Ortega v. Columbia Healthcare, Inc.*, 240 F. Supp. 2d 8, 20–21 (D.D.C. 2003) (same, among other grounds).

***12** *Carter* makes clear that because *Littlewood*, a substantially similar FCA action, was pending when Palmieri first filed his suit, Palmieri's case should have been dismissed, without prejudice to Palmieri's right to file a new suit. I erred in *Palmieri I* when I determined that it would elevate form over substance to dismiss without prejudice, merely because Palmieri could refile his suit. That is what the first-to-file rule required. I also erred in *Palmieri II* by proceeding to the Rule 9(b) issue without revisiting my earlier jurisdictional ruling in light of the *Carter* decision.

### B. The Public Disclosure Bar

The public disclosure bar will often bar second-filed *qui tam* suits even when the first-to-file bar does not. *See Chovanec*, 606 F.3d at 365.

The public disclosure bar, 31 U.S.C. § 3730(e)(4), "disqualifies private suits based on fraud already disclosed in particular settings—such as hearings, government reports, or news reports—unless the relator meets the definition of an 'original source.' " *United States ex rel. Beauchamp*, *supra*, 816 F.3d at 39. It "aims 'to strike a balance between encouraging private persons to root out fraud and stifling parasitic lawsuits' in which a relator, instead of plowing new ground, attempts to free-ride by merely reiterating previously disclosed fraudulent acts." *Id.* at 43 (quoting *Graham Cnty. Soil & Water Conservation Dist.*, 559 U.S. at 295).

Because I conclude that the first-to-file rule deprives the Court of jurisdiction, I need not decide whether the public disclosure bar would also deprive the Court of jurisdiction.

## IV. Conclusion

For the foregoing reasons, I conclude that this Court lacks subject matter jurisdiction under the FCA's first-to-file rule.

An Order follows.

**All Citations**

Slip Copy, 2016 WL 7324629

Footnotes

1 Suit was filed in the Eastern District of Pennsylvania (ECF 2) and transferred to the District of Maryland on June 11, 2010, pursuant to the motion of the United States. The case was originally assigned to Judge Catherine Blake and was reassigned to me on January 13, 2011.

The *Qui Tam* States are California; Delaware; Florida; Georgia; Hawaii; Illinois; Indiana; Louisiana; Michigan; Montana; Nevada; New Hampshire; New Jersey; New Mexico; New York; Oklahoma; Rhode Island; Tennessee; Texas; and Wisconsin; the Commonwealths of Massachusetts and Virginia; and the District of Columbia. A district court with jurisdiction under the FCA also has jurisdiction as to state law claims "aris[ing] from the same transaction or occurrence." 31 U.S.C. § 3732(b).

2 Alpharma became a wholly owned subsidiary of King in December 2008. In October 2010, King merged with Pfizer. *See* ECF 77, SAC, ¶¶ 25-27.

3 If the United States declines to intervene in the suit, the relator "litigates alone and recovers proceeds under the FCA...." *Holder*, 673 F.3d at 251 (citing 31 U.S.C. § 3730(d)(2)).

4 The delay in unsealing was occasioned by the Relator's request to extend the seal (ECF 12), which Judge Garbis approved. ECF 16.

5 I had considered the first-to-file rule in an earlier opinion, issued on March 5, 2013, in the context of the First Amended Complaint. *See* ECF 75; ECF 76; *see also United States ex rel. Palmieri v. Alpharma, Inc.*, 928 F. Supp. 2d 840, 846-852 (D. Md. 2013). I also note that Congress amended the public disclosure bar on March 23, 2010. As discussed, *infra*, the original suit and the FAC are limited to conduct that occurred before 2010. But, the SAC includes post-2010 conduct. Although the Fourth Circuit did not indicate why the pre-2010 version of the FCA applies, I assume it is because my jurisdictional analysis must turn on the original Complaint.

6 The facts are gleaned largely from the Relator's Second Amended Complaint (ECF 77) and my earlier opinions. ECF 75; ECF 88.

7 The Relator identified the second physician as both "Aksu" and "Asku." *Compare* ECF 77, SAC, ¶¶ 283-85 and ECF 85 at 9 (using "Aksu") *with* ECF 77, SAC, ¶ 284 and ECF 85 at 10 n.5 (using "Asku").

8 *Littlewood* was an action in this district, and I was the presiding judge. According to the docket in *Littlewood*, the complaint was not entered on the docket until April 20, 2010, the same day that the original Complaint was filed in this case. However, both sides agree that *Littlewood* was actually filed on April 16, 2010. *See United States, ex rel. Littlewood v. King Pharmaceuticals, Inc.*, 806 F. Supp. 2d 833, 834 (D. Md. 2011).

9 With regard to the merits of the First Motion, I determined that FAC failed to allege adequately any particular instance in which an off-label or excessive prescription for Flector Patch was submitted to a government health program for reimbursement. I noted that the FAC did not identify any instances in which doctors to whom defendants allegedly gave illegal kickbacks had prescribed Flector Patch to patients covered by government prescription programs. Rather, the FAC recounted the total volume of Flector Patch prescriptions submitted to Medicaid and Medicare since 2008, and the amounts of money paid in reimbursements for those prescriptions, to suggest that at least some of these prescriptions must have been off-label or excessive. *See Palmieri I*, 840 F. Supp. 2d at 846.

I concluded that the FAC was insufficient because, according to Palmieri's allegations, defendants' conduct " '*could* have led, but *need not necessarily* have led, to the submission of false claims.' " *Id.* at 856 (quoting *United States ex rel. Nathan v. Takeda Pharms. N. Am., Inc.*, 707 F.3d 451, 457 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 1759 (2014)). Although Palmieri "allege[d] an illegal scheme that could have resulted in the submission of false claims to the government, he d[id] not provide details of any false claim that actually was submitted." *Palmieri I*, 840 F. Supp. 2d at 857. Those allegations, I concluded, plainly failed to meet the Rule 9(b) pleading standard under *Nathan*, 707 F.3d 451. *See Palmieri I*, 928 F. Supp. 2d at 856-57.

10 The current version of § 3730(b)(5) is identical to the version in effect at the time the Relator's claims arose.

11 Each of the false claims acts of the *Qui Tam* States also contains a first-to-file rule. *See* Cal. Gov't Code § 12652(c)(10); Del. Code Ann. tit. 6, § 1203(b)(5); Fla. Stat. Ann. § 68.083(7); Ga. Code Ann. § 49-4-168.2(c)(6); Haw. Rev. Stat. § 661-25(e); 740 Ill. Comp. Stat. § 175/4(b)(5); Ind. Code Ann. § 5-11-5.5-4(g); La. Rev. Stat. Ann. § 46:439.2(A)(3); Mich. Comp. Laws Ann. § 400.610a(4); Mont. Code Ann. § 17-8-406(7); Nev. Rev. Stat. Ann. § 357.080(2); N.H. Rev. Stat. Ann. § 167:61-c(II)(b); N.J. Stat. Ann. § 2A:32C-5(i); N.M. Stat. Ann. § 44-9-5(E); N.Y. State Fin. Law § 190(4); Okla. Stat. Ann. tit. 63, § 5053.2(B)(5);

R.I. Gen. Laws Ann. § 9-1.1-4(b)(5); Tenn. Code Ann. § 4-18-104(c)(10); Tex. Hum. Res. Code Ann. § 36.106; Wis. Stat. Ann. § 20.931(5)(e), now repealed by 2015 Wis. Act 55, § 945n; Mass. Gen. Laws Ann. ch. 12, § 5C(6); Va. Code Ann. § 8.01-216.5(E); D.C. Code § 2-381.03(b)(6).

12 In light of *Carter*, it is puzzling that the Relator persisted in amending his suit, in lieu of filing a new case.

13 On appeal to the Supreme Court, *Carter* was reversed in part on grounds unrelated to the first-to-file rule. *See Kellogg Brown & Root Services, Inc. v. United States, ex rel Carter*, —— U.S. ——, 135 S. Ct. 1970 (2016). Much of the Supreme Court's opinion focused on the application of the Wartime Suspension of Limitations Act. *See id.* at 1975–78. With respect to the first-to-file rule, the Court clarified the meaning of "pending" under the FCA, abiding by its "ordinary meaning" (*id.* at 1978), and noting that "a *qui tam* suit under the FCA ceases to be 'pending' once it is dismissed." *Id.* Notably, the Supreme Court did not disturb the Fourth Circuit's analysis as to the first-to-file rule.

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