15-3930-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PAUL FABULA, EX REL. USA, BRINGING THIS ACTION ON BEHALF OF HIMSELF AND THE UNITED STATES OF AMERICA,
Plaintiff-Appellant,

RONALD I. CHORCHES, TRUSTEE FOR THE BANKRUPTCY ESTATE,
Trustee-Appellant,

UNITED STATES OF AMERICA,
Plaintiff,

v.

AMERICAN MEDICAL RESPONSE, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of Connecticut (Hon. Michael P. Shea)

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent corporation. No publicly held corporation owns ten percent or more of its stock.

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U.S. ex rel. Karvelas v. Melrose-Wakefield Hosp.,
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United States v. Purdue Pharma L.P.,
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United States v. Quest Diagnostics Inc.,
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United States v. Rivera,
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Universal Health Servs., Inc. v. U.S. ex rel. Escobar,
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31 U.S.C. § 3733(a)(1) 13

Federal Civil Penalties Inflation Adjustment Act Improvements
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Securities Exchange Act,
Pub. L. No. 104-67, 109 Stat. 737 (1995),
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Fed. R. Civ. P. 9(b) .... *passim*

Other Authorities

Andrews, Mathew,
Note, *The Growth of Litigation Finance in DOJ Whistleblower Suits: Implications and Recommendations*,
123 YALE L.J. 2422 (2014) 21

Belanger, James J. & Bennett, Scott M.,
The Continued Expansion of the False Claims Act,
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Broderick, Christina Orsini,
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Canni, Todd J.,
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Cohen, Beverly,
KABOOM! The Explosion of Qui Tam False Claims Under the Health Reform Law,
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Elameto, Sean,
Guarding the Guardians: Accountability in Qui Tam Litigation Under the Civil False Claims Act,
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Engstrom, David Freeman,
Harnessing the Private Attorney General: Evidence from Qui Tam Litigation,
112 COLUM. L. REV. 1244 (2012) 18

Loftus, Peter,
Invoking Anti-Fraud Law, Louisiana Doctor Gets Rich, WALL ST. J. (July 24, 2014),

www.wsj.com/articles/invoking-anti-fraud-law-louisiana-doctor-gets-rich-1406169003 20

Rich, Michael,
Prosecutorial Indiscretion: Encouraging the Department of Justice To Rein in Out-of-Control Qui Tam Litigation Under the Civil False Claims Act,
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U.S. Chamber Inst. for Legal Reform,
Fixing the False Claims Act (2013),
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U.S. Chamber Inst. for Legal Reform,
The New Lawsuit Ecosystem 63 (Oct. 2013),
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U.S. Dep't of Justice, *Fraud Statistics—Overview*,
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Wright, C., et al.,
FEDERAL PRACTICE & PROCEDURE (3d ed. 2004 & supp. 2016) 4

INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber thus regularly files *amicus curiae* briefs in cases raising issues of vital concern to the Nation's business community, including cases involving the False Claims Act.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court should affirm that, as the district court held, Rule 9(b) requires a relator bringing a *qui tam* action under the False Claims Act to set forth specific facts regarding at least one false or fraudulent claim. That requirement flows from the well-established meaning of Rule 9(b), which this Court, like other courts, has long interpreted as

[1] No party's counsel authored this brief in whole or in part, and no person or entity, other than the *amicus curiae*, its members, and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

obliging a plaintiff alleging fraud to identify the specific statements that he contends were fraudulent. In the context of the False Claims Act, those statements are the allegedly false or fraudulent claims submitted to the government. Requiring a *qui tam* relator to identify at least one such claim with particularity is not a rigid or overly demanding rule; it simply insists that the relator state his allegations with the same specificity that is required of all other plaintiffs alleging fraud in federal court.

There is no justification for relaxing the traditional Rule 9(b) standards in *qui tam* actions under the False Claims Act. Appellants' protestation that *qui tam* relators may not have access to a defendant's claims ignores that the government, the real party in interest on whose behalf relators act, does have such access. The government is required to investigate the allegations in a False Claims Act complaint before the complaint is unsealed and served on the defendant, and it can share some information, if it chooses, with the relator even when it decides not to intervene. There is, accordingly, no reason why a *qui tam* complaint, in a meritorious case, cannot include the requisite level of detail

about at least one false claim by the time the complaint has reached the stage of a Rule 9(b) challenge.

If anything, the reasons for enforcing Rule 9(b)'s particularity requirement carry even more force in *qui tam* lawsuits under the False Claims Act than in more traditional fraud actions brought by plaintiffs who have suffered an actual injury. Unlike such plaintiffs, *qui tam* relators are motivated primarily by the possibility of a massive financial bounty, which makes them especially likely to pursue unfounded litigation in the hope of extracting a nuisance settlement. Indeed, while False Claims Act *qui tam* litigation has exploded in recent years, statistics confirm that the vast majority of non-intervened *qui tam* actions are meritless: only six percent of such cases result in favorable settlements or judgments for the relator and the government. It would be perverse to relax the requirements of Rule 9(b) for *qui tam* lawsuits that are especially likely to produce the sort of unjustified accusations of fraud for which the rule has always been intended.

ARGUMENT

I. Rule 9(b) Requires A False Claims Act Plaintiff To Specify At Least One Allegedly False Claim.

Rule 9(b)'s requirement that plaintiffs plead the "circumstances constituting fraud" with particularity is longstanding and well understood. There is no serious debate over what the rule demands in ordinary fraud cases. Courts have recognized that to satisfy Rule 9(b), a complaint must set forth the details of any alleged fraud, including the time, place, and contents of the alleged false representations. *See generally* 5A C. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 1297, at 74 (3d ed. 2004 & supp. 2016). As this Court has put it, the complaint must "'(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent.'" *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994) (quoting *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1175 (2d Cir. 1993)).

That same Rule 9(b) standard applies to complaints filed under the False Claims Act. *See U.S. ex rel. Ladas v. Exelis, Inc.*, No. 14-4155, 2016 WL 3003674, at *7 (2d Cir. May 25, 2016) (quoting *Shields*, 25

F.3d at 1128); *see also Universal Health Servs., Inc. v. U.S. ex rel. Escobar*, No. 15-7, 2016 WL 3317565, at *12 n.6 (U.S. June 16, 2016) (noting that False Claims Act plaintiffs must plead their claims with particularity under Rule 9(b)).

Nor is there any great difficulty in applying Rule 9(b)'s well-established meaning to cases brought under the False Claims Act. In a typical case brought under the Act, the "statements that the plaintiff contends were fraudulent," *Shields*, 25 F.3d at 1128, are the "false or fraudulent claim[s]" that the defendant is alleged to have "present[ed] . . . for payment or approval." 31 U.S.C. § 3729(a)(1)(A). They also include any "false record[s] or statement[s] material to" those false or fraudulent claims. *Id.* § 3729(a)(1)(B). A "claim" is a "request or demand . . . for money or property" that is presented to the federal government or, in some circumstances, to a federal contractor or grantee. *Id.* § 3729(b)(2)(A).

Thus, a straightforward application of Rule 9(b) as traditionally understood by this Court and other courts requires the plaintiff in a suit under the False Claims Act—whether that plaintiff is the government or a *qui tam* relator—to specify at least one allegedly false or fraudulent

claim for payment; identify where, when, and by whom the claim was submitted; and explain why the claim was false.

It is no surprise that Rule 9(b) requires a plaintiff suing under the False *Claims* Act to allege details about a false or fraudulent *claim*. After all, the Act "focuses on the submission of a claim, and does not concern itself with whether or to what extent there exists a menacing underlying scheme." *U.S. ex rel. Aflatooni v. Kitsap Physicians Serv.*, 314 F.3d 995, 1002 (9th Cir. 2002). A false or fraudulent *claim* is, in other words, the "'*sine qua non*'" of a False Claims Act violation. *U.S. ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 225 (1st Cir. 2004) (quoting *U.S. ex rel. Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1311 (11th Cir. 2002)), *abrogated in part on other grounds*, *Allison Engine Co. v. U.S. ex rel. Sanders*, 553 U.S. 662 (2008); *see also, e.g.*, *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 785 (4th Cir. 1999) ("'The statute attaches liability, not to the underlying fraudulent activity or to the government's wrongful payment, but to the "*claim for payment*."'" (quoting *United States v. Rivera*, 55 F.3d 703, 709 (1st Cir. 1995)).

It is therefore not enough for a False Claims Act plaintiff to allege the existence of a "scheme" writ large: the plaintiff must also plead with particularity that the defendant presented at least one false or fraudulent *claim* for payment or approval. As several courts of appeals have held, pleading such a claim with particularity is "an indispensable element" of Rule 9(b) compliance in False Claims Act cases. *U.S. ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 501 F.3d 493, 504 (6th Cir. 2007); *see also, e.g.*, *U.S. ex rel. Dunn v. N. Mem'l Health Care*, 739 F.3d 417, 420 (8th Cir. 2014); *U.S. ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, 707 F.3d 451, 457 (4th Cir. 2013); *Clausen*, 290 F.3d at 1311. It would contravene the plain language of the False Claims Act to treat the act of submitting a claim as a mere ministerial detail to be disregarded when the plaintiff alleges an underlying fraudulent scheme.

The Court should reject appellants' request to replace the well-established Rule 9(b) standard with a relaxed one under which a False Claims Act *qui tam* complaint need only create "a reasonable inference that false claims were submitted to the government." Appellants' Br. 22. Such a rule would be inconsistent with the ample precedent, which appellants do not acknowledge, interpreting Rule 9(b) to require that a

fraud complaint "specify" the allegedly fraudulent statements, including where, when, and by whom they were made. *E.g.*, *Shields*, 25 F.3d at 1128.

Appellants' "reasonable inference" standard is, in fact, a watered-down version of this Court's standard for pleading scienter in fraud cases—an element that Rule 9(b) does *not* require plaintiffs to plead with particularity. *See Loreley Fin. (Jersey) No. 3 Ltd v. Wells Fargo Secs., LLC*, 797 F.3d 160, 171 (2d Cir. 2015) (to satisfy Rule 9(b), a complaint must "allege facts 'that give rise to a *strong* inference of fraudulent intent'" (quoting *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 290–91 (2d Cir. 2006)) (emphasis added)). Unlike scienter, the submission of a false claim is one of the core "circumstances constituting fraud" that plaintiffs must plead with particularity to comply with Rule 9(b). To give effect to the rule's text, therefore, the standard for pleading a false claim must be more demanding than the standard for pleading scienter. There is no basis for applying a less rigorous pleading standard to an element (the fraudulent statement) for which Rule 9(b) requires partic-

ularity than to an element (scienter) that the rule allows to be pleaded generally.[2]

Requiring a False Claims Act plaintiff to allege specific facts concerning at least one false or fraudulent claim is not the "rigid" requirement caricatured in Appellants' brief. It does not, for example, demand that every complaint under the Act include highly technical "billing data" such as invoice numbers. Appellants' Br. 22. The complaint simply must set forth enough details to permit the identification of at least one specific allegedly false claim for payment. Depending on the circumstances, the details necessary to satisfy Rule 9(b) may include invoice numbers; but claims may also be identified by other distinguishing information, such as the bill date, place of submission, author, and specific subject matter of the claim. What matters is that the specific claim

[2] In the Private Securities Litigation Reform Act of 1995, Congress codified this Circuit's "strong inference of fraudulent intent" standard for securities-fraud actions under § 10(b) of the Securities Exchange Act of 1934. *See* Pub. L. No. 104-67, § 101(b), sec. 21D(b)(2), 109 Stat. 737, 747 (1995) (codified as amended at 15 U.S.C. § 78u-4(b)(2)(A)). That codification did not affect this Court's application of the standard in other fraud cases governed by Rule 9(b). *See, e.g.*, *Loreley Fin.*, 797 F.3d at 171; *Campaniello Imports, Ltd. v. Saporiti Italia S.p.A.*, 117 F.3d 655, 663 (2d Cir. 1997); *see also Wood ex rel. U.S. v. Applied Research Assocs., Inc.*, 328 F. App'x 744, 747 (2d Cir. 2009) (applying "strong inference of fraudulent intent" standard in a False Claims Act case).

and not just the underlying "scheme" be pleaded with particularity. Such allegations satisfy Rule 9(b) so long as they identify the claims with particularity and enable the defendant to single out and investigate specific, allegedly fraudulent *claims*, rather than being forced to respond to general and sweeping allegations about a fraudulent scheme.

Here the district court does not appear to have applied Rule 9(b) in an "'overly strict'" way. Appellants' Br. 38. The court examined the complaint and concluded that while it "allege[d], in some detail, a scheme of fraud" involving the falsification of Patient Care Reports, it did not "identify or describe with particularity any specific false claims that were actually submitted to the federal government for payment." SA38 n.6. That failure was especially significant, the court observed, because a large portion of the defendant's ambulance services—possibly more than half—were billed not to the government but to private insurers, patients, or "no one at all." SA43.

To be sure, the court observed that the complaint failed to specify "invoice numbers, invoice dates, or amounts billed or reimbursed." SA21–22. But in context it is clear the court meant those as examples of how a plaintiff might identify specific false claims, not an inflexible

"'checklist,'" Appellants' Br. 28, to be applied in every case. The bottom line was that the complaint pleaded "no factual detail" whatsoever regarding any "actual requests for payment submitted to the government." SA21.

In short, in determining whether the complaint satisfied Rule 9(b), the district court used the correct legal standard: it asked whether the complaint "provide[d] details about any false claims that were actually submitted to the federal government for reimbursement." SA38.

II. There Is No Reason To Relax Rule 9(b)'s Requirements For *Qui Tam* Relators.

There is no basis for appellants' call not to "impose the same pleading requirements on [False Claims Act] plaintiffs" as courts have imposed on all other plaintiffs alleging fraud under Rule 9(b). Appellants' Br. 29. If Congress wants courts to evaluate *qui tam* complaints under the False Claims Act using a pleading standard other than the traditional Rule 9(b) standard, it is free to say so. *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 400 (2010) (recognizing that Congress "has ultimate authority over the Federal Rules of Civil Procedure" and "can create exceptions to an individual rule as it

sees fit"). Otherwise the same Rule 9(b) standard applies in False Claims Act cases as in other fraud cases.

Appellants, however, insist that the Court should lighten a *qui tam* relator's pleading burden under Rule 9(b) because the relator may not have "access" to the allegedly false or fraudulent claims. *See* Appellants' Br. 3–4, 22, 36, 38. That argument ignores that the government—the recipient of the allegedly fraudulent claims—is the real party in interest in every FCA case. *See U.S. ex rel. Eisenstein v. City of N.Y.*, 556 U.S. 928, 934–35 (2009); *United States v. Quest Diagnostics Inc.*, 734 F.3d 154, 166 (2d Cir. 2013). The government has access to any claims for payment that were submitted to it by the defendant, even if the relator does not have full and direct access to the claims. *See, e.g.*, *U.S. ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1360 n.17 (11th Cir. 2006); *U.S. ex rel. Russell v. Epic Healthcare Mgmt. Grp.*, 193 F.3d 304, 308 (5th Cir. 1999), *abrogated in part on other grounds*, *Eisenstein*, 556 U.S. 928.

The government, moreover, is not a passive bystander in *qui tam* actions under the False Claims Act, even those in which it ultimately chooses not to intervene. The relator must serve the government with a

copy of the complaint and all the "material evidence and information" in his possession. 31 U.S.C. § 3730(b)(2); *see also id.* § 3730(e)(4)(B). The Department of Justice must "diligently . . . investigate" the alleged violation. *Id.* § 3730(a). As part of that investigation, the Department will ordinarily "consult with . . . personnel within the federal agency that is the alleged fraud victim." *ACLU v. Holder*, 673 F.3d 245, 250 (4th Cir. 2011). It may also issue "civil investigative demands" to collect documents or written or oral testimony from anyone who may have information about the alleged fraud, and it may share any information it obtains with the relator, with appropriate redactions if necessary. 31 U.S.C. § 3733(a)(1). While the Justice Department investigates whether the defendant defrauded the government, the relator's *qui tam* complaint remains under seal and is not served on the defendant. *See id.* § 3730(b)(2)–(4).

After investigating, the government decides whether and in what form the case may proceed. It can dismiss the case outright over the relator's objection. *See id.* § 3730(c)(2)(A). If it decides to intervene and prosecute the case itself, it can file its own complaint or amend the relator's complaint to "add detail to the claims." *Id.* § 3731(c). And if the

government declines to intervene but allows the relator to proceed with the case rather than dismissing it, the relator can amend his complaint to incorporate any information the government chooses to share with him—all before the defendant's first opportunity to object to the complaint's adequacy under Rule 9(b). *See, e.g.*, *United States v. Purdue Pharma L.P.*, 600 F.3d 319, 321 (4th Cir. 2010) (relator "filed three separate amended complaints" while case was under seal).

There is thus no good reason for a False Claims Act *qui tam* complaint that has been unsealed, served on the defendant, and challenged under Rule 9(b) not to include the requisite level of detail about the allegedly false claims. The government—the real party in interest on whose behalf the suit is brought—has that information and is free either to include it in a complaint in intervention or to share it with the relator (in an appropriately redacted form) so that he can amend his complaint. Given that "the claim itself belongs to the United States," *U.S. ex rel. Mergent Servs. v. Flaherty*, 540 F.3d 89, 93 (2d Cir. 2008), and the relator is acting on the government's behalf as its partial assignee, *see Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 773–74 (2000), the relator should not be allowed to reduce his pleading

burden by denying that he has access to information that is in the government's possession. As the Eleventh Circuit observed, such a rule "might encourage the government to evade its burden by merely recruiting a willing relator to file a *qui tam* action." *McInteer*, 470 F.3d at 1360. At a minimum, it would remove the government's incentive, when it allows a relator to proceed with a *qui tam* action rather than intervening or dismissing the case, to ensure that the defendant is in no worse position than it would be if the government were directly prosecuting the claim.

Appellants get things exactly backward when they argue that a relaxed Rule 9(b) standard should apply to False Claims Act *qui tam* complaints because the government has its own records of claims submitted to it and does not need the relator's "'assistance to identify'" the defendant's specific claims. Appellants' Br. 29–30 (quoting *U.S. ex rel. Heath v. AT&T, Inc.*, 791 F.3d 112, 126 (D.C. Cir. 2015)). That argument overlooks that Rule 9(b)'s pleading requirements exist to protect *the defendant*, not the government. *See, e.g.*, *Campaniello Imports, Ltd. v. Saporiti Italia S.p.A.*, 117 F.3d 655, 663 (2d Cir. 1997). The fact that the government can identify the claims at issue from its records is not a

basis for withholding that information from the defendant. Just the opposite: it is an additional, powerful reason for requiring the relator, who is suing on the government's behalf and by its indulgence, to comply with Rule 9(b) and specify the allegedly false claims in the complaint that is served on the defendant.

III. Watering Down Rule 9(b) Would Promote Abusive, Meritless *Qui Tam* Litigation.

For the reasons set forth above, there is no legal justification for relaxing Rule 9(b)'s pleading requirements in False Claims Act *qui tam* lawsuits. If anything, enforcing Rule 9(b) is even more vital in *qui tam* actions than in more traditional fraud cases. The Supreme Court has observed that "[a]s a class of plaintiffs, *qui tam* relators are different in kind than the Government. They are motivated primarily by prospects of monetary reward rather than the public good." *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 949 (1997). That makes *qui tam* relators "'particularly likely'" to burden government contractors with the sort of costly but meritless litigation that Rule 9(b) is meant to screen out. *U.S. ex rel. Owens v. First Kuwaiti Gen. Trading & Contracting Co.*, 612 F.3d 724, 732 (4th Cir. 2010) (quoting *Karvelas*, 360 F.3d at 231).

The majority of False Claims Act lawsuits today are filed and prosecuted by private relators. From 2010 to 2015, relators filed an average of 660 *qui tam* actions per year, while the government averaged only 120 actions per year. *See* U.S. Dep't of Justice, *Fraud Statistics—Overview* 2, https://www.justice.gov/opa/file/796866/download. In each of the last three years, *qui tam* filings outnumbered government-initiated cases by at least six to one. *See id.* The healthcare industry in particular has been rocked by an "explosion" in False Claims Act *qui tam* litigation. *See* Beverly Cohen, *KABOOM! The Explosion of Qui Tam False Claims Under the Health Reform Law*, 116 PENN ST. L. REV. 77 (2011); James J. Belanger & Scott M. Bennett, *The Continued Expansion of the False Claims Act*, 4 J. HEALTH & LIFE SCI. L. 26 (2010).

The government declines to pursue the majority of *qui tam* claims brought by private relators. The United States generally intervenes in only about a quarter of filed *qui tam* actions. *See* U.S. Chamber Inst. for Legal Reform, *The New Lawsuit Ecosystem* 63 (Oct. 2013), http://www.instituteforlegalreform.com/uploads/sites/1/The_New_Lawsuit_Ecosystem_pages_web.pdf; *see also* Christina Orsini Broderick, Note, *Qui Tam Provisions and the Public Interest: An Empirical Analysis*, 107

Colum. L. Rev. 949, 971 (2007) (finding that the government intervened in roughly 22% of filed *qui tam* actions from 1987 to 2004).

There is strong statistical evidence that the overwhelming majority of *qui tam* actions in which the government declines to intervene are meritless. Only 6% of non-intervened cases result in a favorable settlement or judgment. *See* U.S. Chamber Inst. for Legal Reform, *Fixing the False Claims Act* 7 (2013), http://www.instituteforlegalreform.com/uploads/sites/1/Fixing_The_FCA_Pages_Web.pdf; *see also* Broderick, 107 Colum. L. Rev. at 975 (finding that roughly 92% of non-intervened *qui tam* actions from 1987 to 2004 were dismissed without recovery). Indeed, "nearly all cases the DOJ joins are successful and nearly all cases it declines are not." David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 COLUM. L. REV. 1244, 1275 (2012). That "immense disparity" suggests "that most *qui tam* actions brought without government intervention assert meritless or frivolous claims." Sean Elameto, *Guarding the Guardians: Accountability in Qui Tam Litigation Under the Civil False Claims Act*, 41 PUB. CONTR. L.J. 813, 826 (2012).

In theory, the Justice Department could (and perhaps should) exercise its authority to dismiss *qui tam* actions that it has investigated and found to be either factually or legally without merit. *See* 31 U.S.C. § 3730(c)(2)(A). In practice, however, the government exercises its dismissal authority only in exceptional circumstances and allows nearly all *qui tam* actions to proceed unabated regardless of their merit. *See* Michael Rich, *Prosecutorial Indiscretion: Encouraging the Department of Justice To Rein in Out-of-Control Qui Tam Litigation Under the Civil False Claims Act*, 76 U. CIN. L. REV. 1233, 1263–65 (2008); *cf. U.S. ex rel. Roach v. Obama*, No. 14-470, 2014 WL 7240520 (D.D.C. Dec. 18, 2014) (government exercised authority to dismiss *qui tam* suit alleging that President Obama was "not a natural born citizen").

The proliferation of meritless False Claims Act *qui tam* litigation is hardly surprising. The False Claims Act imposes liability that is "'essentially punitive in nature.'" *Universal Health Servs.*, 2016 WL 3317565, at *5 (quoting *Stevens*, 529 U.S. at 784). A company that violates the Act is liable for up to three times the amount of the United States' damages plus civil penalties of $5,500 to $11,000 per claim, amounts that are set to increase substantially later this year. 31 U.S.C.

§ 3729(a)(1); 28 C.F.R. § 85.3(a)(9); *see* Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. No. 114-74, § 701, 129 Stat. 584, 599. In cases where many invoices are issued for small dollar amounts (which is especially common in healthcare cases), relators regularly seek civil penalties for alleged violations that are far larger than any actual harm to the government. These potentially crippling outcomes give *qui tam* relators substantial bargaining power to force a settlement once a case reaches discovery.

The potential for such staggering awards has produced a veritable cottage industry of False Claims Act *qui tam* litigation. Scholars have remarked on the "rapid growth of a private *qui tam* bar" eager to benefit from "minimal judicial and regulatory policing." Elameto, 41 PUB. CONTR. L.J. at 815. The current regime has also led to the emergence of so-called "serial whistleblowers": since 1986, more than two dozen people or groups have each filed five or more *qui tam* actions. *See* Peter Loftus, *Invoking Anti-Fraud Law, Louisiana Doctor Gets Rich*, WALL ST. J. (July 24, 2014), www.wsj.com/articles/invoking-anti-fraud-law-louisiana-doctor-gets-rich-1406169003. One entity has sued at least 35 healthcare companies. *Id.* *Qui tam* litigation is even attracting the in-

terest of private-finance firms willing to speculate on False Claims Act litigation, a development that is likely to further increase "filings of dubious merit." Mathew Andrews, Note, *The Growth of Litigation Finance in DOJ Whistleblower Suits: Implications and Recommendations*, 123 YALE L.J. 2422, 2473 (2014).

This flood of meritless *qui tam* litigation burdens the courts and has little benefit for the government because it is largely unsuccessful. *See* pp. 17–18, *supra*. But it imposes disproportionate costs on companies that do business with the government. As Rule 9(b) recognizes, even meritless accusations of fraud are costly and damaging. For a government contractor, "merely being the subject of [a False Claims Act] suit carries grave consequences." Todd J. Canni, *Who's Making False Claims, the* Qui Tam *Plaintiff or the Government Contractor?*, 37 PUB. CONTR. L.J. 1, 11 (2007). Allegations of fraud, though unfounded, can poison the defendant's relationships with government agencies and other business partners and affect its ability to obtain credit from financial institutions. *See id.* at 11 & n.65. In addition to the reputational damage that stems from such allegations, the discovery and litigation burdens on the defendant can be enormous. Litigation can drag on for

years, during which time it drains the business of "hundreds of thousands of dollars, if not millions," *id.*, and requires a "tremendous expenditure of time and energy," *id.* at 11 n.66. And even companies that eventually prevail against meritless False Claims Act allegations still face "the arduous and expensive task of repairing [their] reputations." *Id.* at 10.

Especially given the continuing explosion of meritless *qui tam* litigation, proper enforcement of Rule 9(b)'s pleading standards is vital to protect innocent businesses and prevent abuse of the *qui tam* regime. Enforcing Rule 9(b) will help stem the tide of frivolous False Claims Act complaints and ensure that defendants have enough information about the allegations against them to prepare a defense. Conversely, relaxing Rule 9(b) will encourage relators to file meritless *qui tam* lawsuits in the hope of pressuring defendants to settle rather than incur potentially crippling litigation and reputational costs.

CONCLUSION

The Court should affirm that Rule 9(b) requires a False Claims Act *qui tam* relator to set forth specific facts regarding at least one allegedly false or fraudulent claim submitted to the government.

Respectfully submitted,

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June 22, 2016

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a) and Circuit Rule 32.1(a), I certify that the foregoing brief, exclusive of the exempted portions as provided in Fed. R. App. P. 32(a)(7)(B)(iii), contains 4,480 words and therefore complies with the type-volume limitations of Fed. R. App. P. 32(a)(7).

/s/ Jeffrey S. Bucholtz
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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25, I certify that on June 22, 2016, I served the foregoing Brief via the Court's CM/ECF on all counsel of record.

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