UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Jean-Claude Franchitti, *Plaintiff*, v. Cognizant Technology Solutions Corporation et al., *Defendants*.	Civil Action No. 3:17-cv-06317 Hon. Peter G. Sheridan

[PROPOSED] BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RECONSIDERATION OR CERTIFICATION FOR INTERLOCUTORY APPEAL

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INTRODUCTION AND INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the Chamber) submits this *amicus* brief to underscore the urgent need for either reconsideration or certification for interlocutory appeal of this Court's order.

If not remedied, the Court's order would constitute a startling expansion of the False Claims Act (FCA). Across the country, there are numerous government permits, licenses, and other benefits that require an application fee. As the Court has construed a reverse false claim, any of the programs governing such benefits will be subject to FCA litigation upon an allegation that an applicant should have chosen an application with a more expensive fee. In the high-skilled immigration context alone, this breathtakingly expansive theory of reverse FCA liability could create billions of dollars of potential liability *every year*. And this is just a small fraction of the total impact of the Court's holding on the reverse false claims prong of the FCA.

Further consideration is warranted because, with respect, the Court's ruling on this specific issue is plainly wrong. Indeed, the theory underlying the Court's ruling has been squarely rejected by the only other court to address this legal theory. *See Lesnik v. Eisenmann SE*, 374 F. Supp. 3d 923, 939-941 (N.D. Cal. 2019). A reverse false claim turns on an allegation that, but for the alleged misrepresentation, the defendant would have owed the government (more) money. That is not this case: Here, if the government had known the alleged truth, it would have *denied* the

applications; defendants would not owe more money. That is generally true in the application context, and it is especially so with this regulatory framework. Not all alleged misdeeds are subject to the FCA, with its high statutory penalties, trebled damages, and *qui tam* enforcement.

The Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and 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. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber thus has a strong interest in ensuring that its members are not subjected to lawsuits threatening massive FCA liability for conduct that does not, properly understood, come within the statute's ambit.

ARGUMENT

If left undisturbed, the Court's reverse false claims holding would establish a wholly new, enormously expansive theory of FCA liability. The implications of this ruling are staggering, and not just for the high-skilled immigration context. Nationwide, there are myriad state and federal permits, licenses, and other kinds of benefits

for which an applicant must pay a fee to apply. This ruling may implicate all of them. Yet the Court's holding untethers a reverse FCA claim from its essential requirement—the existence of an "established duty."

A. The Court's ruling—which establishes a novel and expansive theory of FCA liability—will have enormous practical repercussions.

"The False Claims Act is not 'an all-purpose antifraud statute.'" *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 2003 (2016) (quoting *Allison Engine Co. v. United Sates ex rel. Sanders*, 553 U.S. 662, 672 (2008)). Nor is it "a vehicle for punishing garden-variety breaches of contract or regulatory violations" (*id.*), nor "a blunt instrument to enforce compliance with all regulations" (*United States ex rel. Petratos v. Genentech Inc.*, 855 F.3d 481, 490 (3d Cir. 2017) (quotation marks and ellipsis omitted)). *See also, e.g.*, *Olson v Fairview Health Servs. of Minn.*, 831 F.3d 1063, 1074 (8th Cir. 2016) ("[T]he FCA is not meant to cover all types of fraud."). Rather, the FCA prohibits several very specific types of fraudulent conduct—and punishes them severely.

Indeed, "Congress . . . has increased the Act's civil penalties so that liability is 'essentially punitive in nature.'" *Escobar*, 136 S. Ct. at 1996. "Defendants are subjected to treble damages plus civil penalties of up to $10,000 per false claim." *Id.* (citing 31 U.S.C. § 3729(a)). In fact, that $10,000 per-claim figure has now ballooned to over $23,000 to adjust for inflation. *See* 28 C.F.R. § 85.5. In light of this

"essentially punitive" penalty scheme—along with the FCA's unique *qui tam* mechanism, which encourages bounty-hunting by profit-motivated private relators (*see* 31 U.S.C. § 3730(b)(1), (d))—it is incumbent upon courts to ensure that novel theories of FCA liability are not permitted to take hold without vigorous examination.

The Court's decision in this case, however, opens up entire uncharted vistas of False Claims Act liability based upon a theory that no court has ever before countenanced—and that was rejected by the only other court ever to consider it. *See Lesnik v. Eisenmann SE*, 374 F. Supp. 3d 923, 939-941 (N.D. Cal. 2019).

1. To begin with, the Court's holding—that reverse false claim liability attaches when an individual or entity applies for one government benefit, but is actually eligible instead for a different benefit with a higher application fee—risks a shocking amount of potential liability for companies seeking to hire foreign workers.

American companies submit tens of thousands of temporary work-based visa applications for their prospective employees every year. In 2020 alone, United States Citizenship and Immigration Services (USCIS) received over 17,000 visa applications for H-2A temporary agricultural worker visas; more than 5,400 applications for H-2B temporary non-agricultural workers; over 40,000 L-1A and L-B applications; 22,000 applications for O extraordinary-ability visas; 8,000 applications for P entertainer/essential support personnel visas; over 7,000 R visas applications for religious workers; and 13,000 applications for TN NAFTA-professional visas, for a

total of more than 112,000 applications. *See* USCIS, *I-129 – Petition for a Nonimmigrant Worker by Fiscal Year, Month, and Case Status: October 1, 2015 - June 30, 2021*, perma.cc/SSG5-QTV5.

If Relator's theory takes hold, *every one* of those applications represents a potential reverse false claim lawsuit that will survive a motion to dismiss, so long as a relator can plausibly allege that the employer should have sought an H-1B visa instead. That amounts to over $2.5 billion in new potential statutory penalties alone—to say nothing of treble damages—for *a single year* of visa applications. *See* 28 C.F.R. § 85.5 (penalty of over $23,000 per violation). Further review is imperative prior to opening the floodgates for such similar lawsuits.

2. Moreover, the theory of liability that the Court's order approves is by no means limited to the immigration context. To the contrary, its logic applies *whenever* the government dispenses benefits of different classes, with different corresponding application fees, to different entities or individuals.

Such instances are endemic in the modern regulatory state. Relator's theory might impose liability on, for example, a small New Jersey farmer who applies for a non-commercial permit to fill a ditch under the Clean Water Act instead of a commercial permit (*see, e.g.*, U.S. Army Corps of Engineers New York District, *Regulatory Program Applicant Information Guide* 17 (2014), perma.cc/Z9JP-X3GE); a cruise operator who applies for a Certificate of Financial Responsibility (Casualty)

instead of a Certificate of Financial Responsibility (Performance) from the Federal Maritime Commission (*see* Federal Maritime Commission, *Summary of Fees*, perma.cc/63FV-RX26); or even any individual or institution that submits a permit application to conduct a "First Amendment demonstration" on the National Mall, if the planned event is better classified as a "parade" instead (*compare* National Park Service, *First Amendment Demonstration Permits*, perma.cc/5L74-UQ9Q (free application), *with* National Park Service, *Special Event Permits*, perma.cc/T54R-6YP7 ($120 application fee)).

Relator's theory is not even limited to interactions with the *federal* government. Almost every State has its own FCA analogue—many of which are directly modeled after the federal FCA—and state courts rely on federal FCA precedents in interpreting their scope.[1] The Court's ruling thus opens up businesses and individuals to reverse false claims liability for fees arising from their innumerable permitting

[1] *See, e.g. Mao's Kitchen Inc. v. Mundy*, 209 Cal. App. 4th 132, 149 (2012) (California False Claims Act "was modeled on the federal False Claims Act. . . . Accordingly, it is appropriate to turn to federal cases for guidance in interpreting the CFCA.") (citation omitted; alteration incorporated); *People ex rel. Lindblom v. Sears Brands, LLC*, 2019 IL App (1st) 180588, ¶ 29 ("Because the [Illinois False Claims Act] closely mirrors the federal False Claims Act, we may look to federal law for guidance in construing the Act.") (citation omitted); *United States ex rel. Pelullo v. Am. Int'l Grp., Inc.*, 757 F. App'x 15, 17 (2d Cir. 2018) ("The [New York False Claims Act] mirrors the federal FCA, and New York courts look to federal law to interpret the state statute."); *United States ex rel. Jersey Strong Pediatrics, LLC v. Wanaque Convalescent Ctr.*, 2017 WL 41222598, at *5 (D.N.J. Sept. 18, 2017) (New Jersey False Claims Act "mirror[s] the [federal] FCA and require[s] the same showings.") (collecting authorities).

and licensing interactions with *state and local* governments, as well. To take just one example, under Relator's theory, any Californian who applied for a "replacement" driver's license rather than the more expensive "renewal" license (*see* California Department of Motor Vehicles, *Licensing Fees*, perma.cc/U4ZD-7VRN), would be liable under the California False Claims Act, and subjected to the same thousands of dollars in statutory penalties as provided under federal law. *See* Cal. Gov. Code § 12651(a), (a)(7) (California False Claims Act, with a reverse false claim provision identical to federal law, and providing for penalties tied to the federal FCA).

There are countless other examples throughout state and federal law. Any time a regulatory scheme provides for different types of licenses or other benefits with different requirements and application fees, Relator's theory provides for massive FCA liability and enforcement by private relators. The huge expansion in liability wrought by the Court's decision counsels strongly in favor of reconsideration or certification for interlocutory appellate review by the Third Circuit.

B. Relator does not assert a cognizable reverse false claim theory.

Relator's application-based reverse false claim theory fails twice. The general theory claimed here—an applicant has violated the FCA if the applicant should have applied for a different permit, license, or other benefit with a more expensive fee—is outside the appropriate ambit of a reverse false claim. As explained below, because a reverse false claim requires an "obligation" at the time of the alleged wrongful

conduct, the submission of an allegedly erroneous application cannot establish an FCA claim, as such a submission does not give rise to any obligation to submit an application with a more expensive fee. Second, the specific regulatory framework applicable to the allegations in this case further precludes any alleged false claim.

1. The FCA's reverse false claims provision imposes liability on "any person who" knowingly "uses . . . a false record or statement material to an obligation to pay or transmit money or property to the Government," or "knowingly conceals or knowingly and improperly avoids or decreases" such an "obligation." 31 U.S.C. § 3729(a)(1)(G). The statute defines "obligation" to mean "an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment." *Id.* § 3729(b)(3).

The text of this provision makes clear that reverse false-claims liability cannot attach when a business or individual applies for one sort of visa, license, or other government benefit, but a different, more expensive benefit is more appropriate for what the applicant actually wants. In short, because the more expensive application has never been submitted, there exists no "obligation"—that is, no "established duty"—to pay the fees associated with it. 31 U.S.C. § 3729(b)(3).

As the Court correctly explained, the statutory text requires that the "'obligation' . . . to pay the government funds" must "exist[] *at the time of the improper*

conduct." Dkt. 32, at 10 (quoting *United States ex rel. Petras v. Simparel, Inc.*, 857 F.3d 497, 506 (3d Cir. 2017)) (emphasis added). That is, "[t]he obligation cannot be contingent" or "dependent on future, hypothetical, or discretionary events." *Id.*; *see also Petras*, 857 F.3d at 505 ("[A]n 'established duty' . . . does *not* include a duty that is dependent on a future discretionary act."); *id.* (holding that "the contingent nature of the 'obligations' at issue here precludes" reverse false claims liability).[2]

The Court erred, however, in its conclusion that "Cognizant's obligation to pay the correct visa application fee"—meaning the fee for "the more expensive H-1B visa"—"accrued upon its submission of the [B-1 or L-1] visa application." Dkt. 32, at 12-13. There is simply no authority for the proposition that an entity requesting a benefit from the government becomes *immediately liable* "to pay the government funds" for a different, more expensive benefit if the petitioner is ineligible for the cheaper benefit. *Petras*, 857 F.3d at 506. To the contrary, the only "obligation" that arose when Cognizant filed a L-1 or B-1 visa application is the obligation to pay the fee required for the application *that was actually filed*. *See, e.g.*, 8 C.F.R.

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[2] *See also Zelenka v. NFI Indus., Inc.*, 436 F. Supp. 2d 701, 704-705 (D.N.J. 2006) (rejecting the notion that "an obligation for the purposes of [the reverse false claim provision] encompasses a potential or contingent obligation, *such as a fee that would be assessed upon the occurrence of a possible future event*.") (emphasis added), *aff'd*, 260 F. App'x 493 (3d Cir. 2008); John T. Boese & Douglas W. Baruch, *Civil False Claims and Qui Tam Actions* § 2.01 (5th ed. 2021-3 Supp.) ("A growing body of case law . . . affirms that the [current statute's] reverse false claim provision contemplates only 'present' repayment obligations, not potential obligations.").

§ 106.2(a)(3)(vi) (providing that the fee "[f]or filing a petition or application for" an "L Nonimmigrant Worker" is "$805").[3]

This point is proven by consideration of what would have occurred had defendants submitted L-1 and B-1 applications using what Relator alleges was different, putatively truthful information. The Court has already supplied the answer: Relator alleges that defendants' "visa applications would likely have been rejected." Dkt. 32, at 13. The government certainly would not have transmuted those applications into H-1B applications, with the balance of the higher fee automatically becoming due. Rather, if defendants had wanted to request H-1B visas for its workers, it would have had to submit new H-1B applications following rejection of the L-1 or B-1 applications. (And, as we describe below (*see* pages 12-14, *infra*), defendants

[3] The Court appears to have reasoned that Cognizant became liable for the H-1B visa application fees under an "implied contractual" theory, notwithstanding that it actually filed B-1 or L-1 visa applications, because the "fee" is charged "for the privileges associated with [the] desired visa"—*i.e.*, the privileges of entering and lawfully working in this country in the case of H-1B applicants. Dkt. 32, at 12. But that premise is incorrect: "[V]isa fees are an obligation to pay upon *applying* for a visa the approximated cost to the government for visa related expenses." *Lesnik*, 374 F. Supp. 3d at 940 (emphasis altered); *see also* 8 C.F.R. § 106.2 (schedule of fees "[f]or *filing*" specified applications) (emphasis added). In other words, the application fee constitutes consideration for the government's *processing* of the visa application, not consideration for the substantive "privilege[]" of entering and working in the United States. *Cf.* Dkt. 32, at 12. If the opposite were true, unsuccessful visa applicants would be entitled to a refund of their application fees, since they would not have received the benefit of their bargain—but this is not the case. Moreover, the submission of an application for one kind of visa does not give rise to an implied agreement to keep applying for other visas, no matter the cost of such visas or the other consequences of doing so, in the event that the first application is rejected.

would first have to win a literal lottery to have the right to even file an H-1B application.). In so doing, defendants would have had to pay the higher application fees *in addition* to the original fee for the denied visa.

Accordingly, by definition, there was no immediate "'obligation' . . . to pay the government funds" for H-1B application fees that "exist[ed] at the time of the improper conduct" (*i.e.*, the L-1 or B-1 application). *Petras*, 857 F.3d at 506. Rather, any obligation to pay H-1B visa fees would be "contingent" and "dependent on [the] future, hypothetical" submission of an actual H-1B visa application. Dkt. 32, at 11. And as the Court itself explained, such a contingent obligation does not constitute an "established duty" actionable under the reverse false claims provision. 31 U.S.C. § 3729(b)(e); *see* Dkt. 32, at 11; *see also, e.g.*, *Zelenka v. NFI Indus., Inc.*, 436 F. Supp. 2d 701, 705 (D.N.J. 2006) ("[A] fee that would be assessed upon the occurrence of a possible future event" is not an "obligation for purposes of" the FCA).[4]

[4] This also explains why *United States ex rel. Customs Fraud Investigations, LLC v. Victaulic Co.*, 839 F.3d 242 (3d Cir. 2016), does not support Relator's position. *Cf.* Dkt. 32, at 11-12 (relying on *Victaulic*). Under the statutory scheme at issue in that case, the relevant financial obligations were "deemed to have accrued at the time of importation," and there was no dispute that "importation" had actually happened. *Victaulic*, 839 F.3d at 246, 254. Here, by contrast, "the obligation to pay the government [application fees] only arises upon *applying* for a visa" (*Lesnik*, 374 F. Supp. 3d at 940), and there is no allegation that defendants ever failed to pay fees for the H-1B applications that they submitted. This case is thus akin to *Petras*, in which the Third Circuit explicitly distinguished *Victaulic* on the grounds that the *Petras* plaintiff "has not alleged either of the two conditions under which the [] defendants' obligations would have arisen." *Petras*, 857 F.3d at 506 n.50.

Thus, as the only other court to have addressed the issue has explained, "there was no *obligation* to pay the government for a petition-based [*i.e.*, H-1B] visa because no visa application for a petition-based visa was ever actually submitted." *Lesnik*, 374 F. Supp. 3d at 940; *see also id.* (rejecting a theory identical to Relator's here because "Plaintiffs are predicating their reverse FCA claim on[] a *potential* liability incurred only if Moving Defendants had applied for the petition-based visas," which they did not). With respect, the *Lesnik* court was correct: No reverse false claim liability can lie based on a theory that an applicant *should have* submitted (but did not submit) a different kind of application, with higher corresponding fees.

2. Not only does the ruling contravene the essential limitations of a reverse FCA claim, it further fails to account for the regulatory framework that controls H-1B visa applications. In fact, the federal regulations governing the issuance of these visas provide yet a further reason why Relator's claim is "contingent" on "future, hypothetical" events (Dkt. 32, at 11), and therefore cannot survive. The short of it is this: No one is even *permitted* to file an H-1B petition—and thus to incur the related fees—without first being selected in a government-run lottery.

Because there is a much greater demand for H-1B visas than the 65,000 visas available each year (8 U.S.C. § 1184(g)(1)(A)(vii)), the government has instituted a pre-registration system to streamline the process of allocating those visas among too-numerous applicants. *See Registration Requirement for Petitioners Seeking to File*

H-1B Petitions on Behalf of Cap-Subject Aliens, 84 Fed. Reg. 888 (Jan. 31, 2019).

Under this process, United States Citizenship and Immigration Services (USCIS) announces in advance a registration period of at least 14 days, during which time any employer wishing to file a petition for a prospective H-1B worker must electronically register to do so, but may not yet file the petition itself. 8 C.F.R. § 214.2(h)(8)(iii)(A)(1). If more registrations are received during the registration period than the number projected to generate 65,000 H-1B visas—as has occurred every year for more than a decade, given the huge demand for these visas[5]—DHS "will randomly select from among the registrations properly submitted during the initial registration period the number of registrations deemed necessary to meet the H-1B regular cap." 8 C.F.R. § 214.2(h)(8)(iii)(A)(5)(ii).

Only those employers whose registrations are selected through this process are allowed to submit an actual *petition* for an H-1B visa—and thus to pay the fees associated with the application: "A petitioner [that is, an employer] may file an H-1B cap-subject petition on behalf of a registered beneficiary only after the petitioner's registration for that beneficiary has been selected for that fiscal year." 8 C.F.R. § 214.2(h)(8)(iii)(A)(1). And the filing fee for the initial registration is only $10. 8 C.F.R. § 106.2(c)(10); *see also* USCIS, *H-1B Electronic Registration Process*

[5] USCIS received 308,613 registrations for fiscal year 2022, and 274,237 for fiscal year 2021. USCIS, *H-1B Electronic Registration Process* (updated July 29, 2021), perma.cc/A6JR-B5WV.

(updated July 29, 2021), perma.cc/A6JR-B5WV.[6]

Accordingly, when Cognizant submitted an L-1 or B-1 visa application, not only did it undertake no obligation to pay an application fee for some other type of visa, but even the *opportunity* to file an H-1B petition—and thus to undertake an obligation to pay the corresponding fees—would have been contingent on having its registration selected in a random lottery.

It is hard to see what obligation could be more "contingent" or "dependent on future, hypothetical, or discretionary events" (Dkt. 32, at 11) than one that—by regulation—*could not possibly arise* unless a hypothetical future registration were selected by random chance. In other words, "[D]efendants could not have 'knowingly and improperly avoid[ed] or decrease[d] an obligation' to pay [H-1B application fees] at the time of their alleged misconduct because the obligation did not yet exist." *Petras*, 857 F.3d at 507.

* * *

For all of these reasons, there can be no reverse false claim liability premised on avoiding the filing fees associated with an application that was never actually

[6] Prior to the 2019 regulatory change, H-1B applicants filed completed I-129 petitions, but USCIS charged application fees for only those petitioners who actually won the lottery. *See* Registration Requirement for Petitioners Seeking To File H–1B Petitions on Behalf of Cap-Subject Aliens, 83 Fed. Reg. 62,409 (Dec. 3, 2018) ("USCIS returns the H-1B cap-subject petition and filing fees to unselected petitioners."). Thus, this earlier structure shared the same salient feature as the current H-1B program: An H-1B application fee is paid only after winning the H-1B lottery.

submitted—particularly when that application is for an H-1B visa, and therefore *cannot* be submitted absent winning a literal lottery. As the only other court to have confronted this question put it, Relator's theory fails because "there was no *obligation* to pay the government for a petition-based visa because no visa application for a petition-based visa was ever actually submitted." *Lesnik*, 374 F. Supp. 3d at 940.

This Court's departure from *Lesnik* demonstrates that there is "substantial ground for difference of opinion" as to the viability of Relator's application fee-based reverse false claim theory, so as to make certification appropriate. 28 U.S.C. § 1292(b); *see, e.g.*, *Litgo N.J., Inc. v. Martin*, 2011 WL 1134676, at *2 (D.N.J. 2011) (substantial ground for difference of opinion "can stem from conflicting precedent[] [or] the absence of controlling law on a particular issue."). Especially given the potentially extreme ramifications of the Court's holding (*see* pages 3-5, *supra*), the Court should reconsider its ruling or certify it for interlocutory appeal.[7]

CONCLUSION

The Court should grant the motion for reconsideration or certification for interlocutory appeal to the Third Circuit.

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[7] The Chamber likewise respectfully submits that the Court should grant defendants' request for reconsideration, or certification to the Third Circuit, of the Court's order with respect to the alleged tax underpayment claim. For reasons defendants explain (*see* Dkt. No. 33-1, at 11-13), to the extent that the order upheld a theory of False Claims Act liability based on such underpayments, the order has momentous implications for employers accused of underpaying employees, and, with respect, was an incorrect application of governing law.

Dated: September 9, 2021

Respectfully submitted,

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