COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

_____

NO. 2017-P-0569

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PHONE RECOVERY SERVICES, LLC
Plaintiffs/Appellants,

v.

VERIZON OF NEW ENGLAND, INC., ET AL.
Defendants/Appellees.

_____

On Appeal from a Judgment of the Superior Court of Suffolk County

_____

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

_____

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September 11, 2017

(Additional Counsel Listed on Signature Block)

CORPORATE DISCLOSURE STATEMENT

Pursuant to S.J.C. Rule 1:21, The Chamber of Commerce of the United States of America makes the following disclosure:

The Chamber of Commerce of the United States has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.

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STATEMENT OF THE AMICUS CURIAE

The Chamber of Commerce of the United States of America ("Chamber") 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 economic 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 state and federal legislatures, executive branches, and courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

This case presents questions of significant importance to the Chamber's members—namely, the scope of the Massachusetts False Claim Act's tax bar, bar on corporate relators, and public disclosure bar, as well as the pleading requirements of Massachusetts Civil Procedure Rule 9(b). This Court's interpretation of those provisions will affect the Chamber's members not only in this Commonwealth, but also in the considerable number of States with similar laws.

ARGUMENT

The Massachusetts False Claims Act (MFCA) reflects the General Court of Massachusetts's careful balancing of two "competing policies." *Scannell v. Att'y Gen.*, 70 Mass App. Ct. 46, 51 (2007). On the one hand, it promotes "'the common good'" by "encourag[ing] individuals with direct and independent knowledge of information that an entity is defrauding the Commonwealth to come forward by awarding to such individuals a percentage of the Commonwealth's recovery from the defrauding entity." *Id.* at 48-51. On the other, it shields courts, businesses, and the public from the costs of wasteful litigation by imposing precise limits designed to "'discourage opportunistic plaintiffs from bringing parasitic lawsuits,'" *id.* at 51, limits that circumscribe the types of claims that may be brought under the Act, and by whom.

This case concerns four particularly important limits: the tax bar, G.L. c. 12, § 5B(d); the bar on corporate relators, *id.* § 5A; the public disclosure bar, *id.* § 5G(c); and the pleading-specificity requirement of Massachusetts Civil Procedure Rule 9(b). Each plays a critical role in ensuring that the

costs of the MFCA's bounty system do not outstrip its benefits, and so each must be rigorously enforced. Because the trial court correctly determined that the suit by Relator-Appellant Phone Recovery Services, LLC ("PRS") would transgress the first of those limits (it had no occasion to reach the other three), its judgment should be affirmed.

I. The MFCA's Tax Bar Reflects A Careful Legislative Decision To Reserve Tax-Enforcement Authority To The Executive

The MFCA, like its federal counterpart, expressly provides that the Act "shall not apply to claims, records or statements made or presented to establish, limit, reduce or evade liability for the payment of tax." G.L. c. 12, § 5B(d); *see also* 31 U.S.C. § 3729(d). Known as the "tax bar," that provision reflects a recognition by the General Court that tax fraud "is directly addressed and remedied" by Executive enforcement, and that private lawsuits covering the same ground would be not only unnecessary, but actively harmful. *United States ex rel. Lissack v. Sakura Glob. Capital Mkts., Inc.*, 377

F.3d 145, 156 (2d Cir. 2004).[1] That recognition rests on several considerations.

First, private false-claims actions to collect taxes risk "interfering with the [Executive's] efforts to enforce the tax laws." *Lissack*, 377 F.3d at 156. The Executive's responsibility for carrying out those laws necessarily involves determining which of those laws and which potential defendants constitute high enforcement priorities and which do not. New York, for instance, declined for many years to enforce its income tax laws against individuals who briefly traveled into the State for work because it determined that "imposing onerous burdens" on those doing business in the State, only to collect "small amounts of revenue," was contrary to public policy.[2] At the same time, the Executive is charged with "ensur[ing]

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[1] Because "the MFCA was modeled on the similarly worded Federal False Claims Act" and there is "little decisional law" or "legislative history" regarding the MFCA itself, Massachusetts courts routinely "look for guidance to cases and treatises interpreting" the analogous federal statute. *Scannell*, 70 Mass. App. Ct. at 49. *Lissack* is the "seminal case applying the [federal] Tax Bar." Ayres & McGuire, *Using the False Claims Act to Remedy Tax-Expenditure Fraud*, 66 Duke L.J. 535, 544 (2016).

[2] Rampell, *States Look Beyond Borders to Collect Owed Taxes*, N.Y. Times (Mar. 21, 2010), http://www.nytimes.com/2010/03/22/business/22tax.html (quoting former New York State Tax Commissioner).

uniform enforcement of the tax law," *Deal v. Comm'r*, 78 T.C.M. (CCH) 638, 1999 WL 967076, at *2 (T.C. 1999), such that the laws that are enforced are imposed equally on all similarly situated taxpayers. MFCA actions to collect taxes would interfere with both of those duties by allowing private litigants to usurp the Executive's discretion and enforce particular tax laws against particular defendants of their choosing—regardless of whether the Executive has determined that enforcement would be appropriate or counterproductive, or whether other, similarly situated taxpayers have received the same treatment. An "evident purpose" of the tax bar, courts have recognized, is precisely "to prevent" that result. *Lissack*, 377 F.3d at 156.

Indeed, this Court recently relied on the tax bar in dismissing an MFCA suit that threatened just that kind of interference. In *Chawla v. Gonzales*, an individual brought suit under the MFCA seeking to collect taxes on the proceeds from the sale of illegal drugs. 90 Mass. App. Ct. 1102, 2016 WL 4426379, at *1 (Mass. App. Ct. Aug. 22, 2016) (unpublished). Although income from such sales is taxable, this Court explained, the Executive had for more than a decade

declined to pursue efforts to collect that revenue, opting instead to prioritize the "potentially competing interest[]" of "prosecuting drug defendants under" the criminal law. *Id.* at *4. By filing suit under the MFCA, the relator had, in effect, attempted to "force the executive to switch its prosecutorial priorities" both "generally" and in "individual cases." *Id.* And that, this Court held, a "relator cannot" do. *Id.* By enacting the tax bar, it said, "the Legislature indicated that assessment and collection efforts were not to be second-guessed by private citizens." *Id.* at *4 n.11.[3]

Massachusetts is not alone in recognizing the threats to Executive enforcement efforts created by qui tam tax suits. A former revenue director for Illinois—which has a more limited tax bar than Massachusetts, one that applies only to *income* taxes—"described false claims suits by individuals as one of

[3] Indeed, courts have recognized that the risk of interference exists—and hence the tax bar applies—even when the false-claims suit does not seek the *assessment* or *collection* of taxes, but merely is predicated on a violation of tax-related laws, so long as the Executive may seek a remedy for that violation. *Lissack*, 377 F.3d at 153.

his Department's biggest challenges."[4] And a court in Minnesota, considering a nearly identical suit to this one (also brought by PRS), explained that an attempt to privately collect 911 surcharges runs headlong into "the policies behind the adoption of the … tax bar" and would interfere with "the sole authority and discretion of state executive and legislative bodies to set and enforce" tax policy. *Phone Recovery Servs., LLC. v. CenturyLink, Inc.*, 2016 WL 8578377, at *7 (Minn. Dist. Ct. Nov. 21, 2016), *aff'd*, 2017 WL 3378870 (Minn. Ct. App. Aug. 7, 2017).

Second, private false-claims actions to collect taxes threaten to over-deter businesses from staking out cutting-edge tax positions. As a matter of simple economics, the higher the penalty for a tax violation, the more likely taxpayers are to take a relatively conservative approach and "claim tax positions that are not in their best financial interest[s] but that may enable them to face the lowest chance of an audit." Blank & Levin, *When Is Tax Enforcement Publicized*, 30 Va. Tax Rev. 1, 35 (2010). Put another

[4] Council on State Taxation, False Claims Acts Should Exclude State & Local Taxes, http://www.cost.org/uploadedFiles/About_COST/Policy_Statement/COST%20FCA%20Policy%20Statement%20Final.pdf (last visited Sept. 11, 2017).

way, the threat of substantial penalties deters not just tax cheats, but also legitimate taxpayers staking out good-faith, taxpayer-friendly positions when the law is uncertain. Tax penalties, effectively inflated through private false-claims suits, can thus lead to an increase in the effective tax rates that companies pay. While that may provide more tax revenue for the Commonwealth in the short term, saddling businesses with higher taxes than the General Court intended will lead to deleterious consequences in the long term—impeding companies' growth and potentially driving them to relocate to other, lower-tax jurisdictions. Accordingly, tax penalties are designed to strike a balance: They must be large enough to encourage compliance with the law, without being so large as to "over-deter individual taxpayers" from claiming benefits to which they are legitimately entitled. *Id.*

If the MFCA could be used to impose liability on companies for tax violations, it would effectively raise the Commonwealth's carefully calculated penalties and create precisely the over-deterrence just described. As the Second Circuit has explained, false-claims liability "'arising from the identical conduct'" that triggers ordinary tax penalties, would

simply "'duplicate those remedies'" that already exist under the tax laws. *Lissack*, 377 F.3d at 156. In doing so, tax-based MFCA claims would increase the effective penalties taxpayers face for violating the tax laws, requiring them to pay twice—once under the tax laws, and once under the MFCA.

That MFCA liability is formally limited to instances of "fraud" does not mitigate that risk. As Judge Posner recognized in the analogous securities fraud context, even though "fraud is nominally a species of deliberate wrongdoing" there is still a real "danger of overdeterrence." *Fry v. UAL Corp.*, 84 F.3d 936, 938 (7th Cir. 1996). That is so, he explained, because the legal rules at issue, as well as "the application of [those] doctrines to particular factual situations[,] are so difficult, complex, and uncertain that there is a serious danger of erroneous impositions of liability." *Id.* All of that is true when it comes to tax law violations as well: As in the securities context, there is a realistic risk that a court will (erroneously) treat a wrongful tax position as a fraudulent one. Thus, penalties ostensibly targeted at fraud can, as a practical matter, (over-)deter non-fraudulent conduct as well.

Experience in jurisdictions without tax bars confirms that such a chilling effect on businesses is far from hypothetical. Experts have documented a notable uptick in *qui tam* false-claims actions based on tax violations in jurisdictions that allow those suits. *See* Dolan & McCormally, *Which Way the Wind Blows, Mitigating Whistleblowing Risk*, 139 Tax Notes 1537, 1537 (2013). Accordingly, "corporations have grown increasingly fearful of" such actions, Houghton et al., *Qui Tam Lawsuits: Recommendation for Meaningful Reform—Part 1*, 67 State Tax Notes 595, 596 (2013), and as a result are being advised "[w]hen deciding whether to take a particular tax position, [to] consider not just the possible penalties and interest associated with an adverse audit determination, but also the risk of FCA or class action litigation." Martire & Ferrante, *A Decade of Lessons from Litigating State Tax False Claims Act Cases*, 70 State Tax Notes 127, 130 (2013).

Third, because relators generally have less relevant expertise than executive agencies charged with enforcing the tax laws, they are more likely to file suits based on erroneous understandings of the law and hence to impose unnecessary costs on courts

and litigants. Tax laws are frequently complex; and tax agencies, by virtue of their role as administrators and enforcers of those laws, develop expertise in navigating and interpreting them. That expertise, however, is not shared by members of the general public, including relators. *See generally* Jones, *Much Ado About* Qui Tam *for State Taxes*, 73 State Tax Notes 585 (2014) ("[T]he administrative body … has the enforcement power because private enforcement models lack the expertise to evaluate such claims."). Hence, when the Executive declines to bring suit, but "opportunistic members of the public with significantly less knowledge than the departments of revenue that have chosen not to pursue the taxpayers being sued" nevertheless press forward, there is good reason to think that the relators' legal theory is misguided. Lutz et al., *A Recipe for Bad Tax Policy: False Claims Acts and State Taxation*, J. of Multistate Tax'n & Incentives (Jan. 2013). Indeed, a study examining the outcomes in decades' worth of federal false-claims suits concluded that "most qui tam actions brought without government intervention assert meritless or frivolous claims." Elameto, *Guarding the Guardians: Accountability in Qui Tam*

Litigation Under the Civil False Claims Act, 41 Pub. Cont. L.J. 813, 826 (2012). There is little benefit, and much cost, in requiring businesses to defend against—and courts to adjudicate—such meritless claims.

* * *

The General Court of Massachusetts had good reason to categorically bar private plaintiffs from usurping the Executive's role in enforcing the Commonwealth's tax laws. Privatization of public tax enforcement imposes significant costs on the Commonwealth and its businesses, with little to show for it. This Court should honor the General Court's judgment and apply the tax bar with full force.

II. The MFCA's Bar On Corporate Relators Safeguards Against Wasteful *Qui Tam* Litigation By Professional Relators

No less important than the MFCA's restrictions on the *kinds* of *claims* that may be brought are limits the MFCA places on *who* may bring claims. The MFCA provides that a relator must be an "individual"—i.e., a natural person, and not a corporate entity. *See Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1707 (2012) ("'individual' ordinarily means 'a human being, a person,'" and not "a corporation").

The General Court's decision to require a relator to be an "individual" reflects a conspicuous departure from the federal statute on which the MFCA is based, which uses the broader term "person" and thus encompasses both individuals and corporations, 31 U.S.C. § 3730(b)(1). That departure is not surprising. The federal False Claims Act's *qui tam* provision has long been criticized for inviting far more litigation than the suits by "traditional whistle-blowers who often risk careers and livelihoods to expose corporate fraud" that its drafters envisioned. Kolz, *The Professional*, Am. Law., June 1, 2010, at 30; Matthew, *The Moral Hazard Problem with Privatization of Public Enforcement*, 40 U. Mich. J.L. Reform 281, 316-319, 333 (2007); Qian, *Necessary Evils: How to Stop Worrying and Love Qui Tam*, 2013 Colum. Bus. L. Rev. 594, 605 (2013) (noting that FCA "professional relators" have been criticized for decades). Indeed, as commentators have observed, one of the federal act's unintended consequences has been the creation of a cottage industry of "professional qui tam relators" who, spurred on by the act's "lucrative financial incentives," make their living filing false-claims lawsuits. Matthew, 40 U. Mich.

J.L. Reform at 316-319, 333; *see also* Ashcroft et al., *Whistleblowers Cash In, Unwary Corporations Pay*, 40 Hofstra L. Rev. 367, 370 (2011) (describing this "growing" and "unique cottage industry"). As illustrated by PRS here, corporate relators are a far cry from the whistleblowers the General Court intended to reward, and indeed are particularly likely to pursue *qui tam* cases full time.[5] *See* Verizon Br. 3 (explaining that "PRS is a serial corporate plaintiff").

The proliferation of these professional relators poses a serious threat to the functioning of the *qui tam* system. Whereas traditional whistleblowers often have a stake (sometimes, as in the case of a corporate executive, a significant one) in the success of their companies, and hence an incentive to attempt to "use[] their information of wrongdoing … to effect change

[5] For other examples beyond PRS, *see* Matthew, 40 U. Mich. J.L. Reform at 316-317 (describing former healthcare company that "now operates [exclusively] as a professional qui tam relator"); Russ, *Early Exit Strategies for Qui Tam Suits*, 19 Andrews Gov't Cont. Litig. Rep. 13 (2005) (describing "professional relator organization that is motivated by the prospect of monetary returns"); McGinty et al., *Recent Developments & Unsealed Cases*, https://www.mintz.com/newsletter/2013/Newsletters/3406-0913-NAT-LIT/index.html (Sept. 2013) (describing FCA case filed by Caryatid, LLC, "a self-styled 'professional relator'").

within the organization[]" before filing suit, professional relators who depend on bounties for their livelihood tend to take a sue-first-ask-questions-later approach. Matthew, 40 U. Mich. J.L. Reform at 319. In addition, professional relators' reliance on payouts from *qui tam* lawsuits—combined with the fact that much of the "litigation and enforcement costs [are] not internalized by the private plaintiff" but rather borne by the defendant and court—tends to lead to overenforcement: pursuing an aggressive and novel development in the law that the Executive considers overly burdensome and hence contrary to the public good; enforcing where the Executive has determined that the public would benefit from restraint; and bringing negative-value suits that, while profitable for the professional relator, are costly to society as a whole. Matthew, 40 U. Mich. J.L. Reform at 333; *see generally* Landes & Posner, *The Private Enforcement of Law*, 4 J. Legal Stud. 1, 38-41 (1975).

Importantly, professional relators are unlikely to be deterred solely by limits that make it harder to prevail generally under the MFCA. Professional relators make money, in part, because they are able to secure payments even in lawsuits that they are

unlikely to succeed on the merits. As "Judge Friendly, who was not given to hyperbole," explained, it is not uncommon for plaintiffs to procure "settlements induced by a small probability of an immense judgment"—what he referred to as "'blackmail settlements.'" *In re Phone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995).

Accordingly, the Commonwealth pursued a different tack, categorically barring all corporate relators, i.e., those (like PRS) most likely to make their money primarily by filing false-claims suits. It did so in significant part to tamp down on the problem of professional relators. To be sure, not all professional relators are corporations; but many corporate relators are professionals. *See supra* n.5. The General Court's decision to reduce the number of professional relators by barring that class of relators was thus a rational one. This Court should honor its choice.

III. The Public Disclosure Bar Helps To Prevent Free-Riding Relators From Claiming A Windfall At The Commonwealth's Expense

Another significant safeguard for ensuring that the MFCA's benefits outweigh its costs is its public disclosure bar. That provision, as its name suggests,

prevents a relator from bringing suit based on allegations that already "were publicly disclosed." G.L. c. 12, § 5G(c). In doing so, the public disclosure bar ensures that bounties are reserved "for whistle-blowing insiders" rather than "opportunistic plaintiffs who have no significant information to contribute of their own." *United States ex rel. Ven-A-Care v. Baxter Healthcare Corp.*, 772 F.3d 932, 944 (1st Cir. 2014).

That limitation is important. As commentators have noted, there are strong incentives for private relators to simply "piggyback" on others' efforts, rather than to bring suits based on truly novel information. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 Md. L. Rev. 215, 267 (1983). "[T]ag[ging] along in the wake of [others'] cases" involves "lower risk, vastly lower search costs, and shorter deferral of payment" to the relator than "develop[ing] original cases." *Id.* Accordingly, relators have reason—and indeed, have often attempted—to "free-ride by merely repastinating previously disclosed badges of fraud" publicly available documents. *United States ex rel. Poteet v. Bahler*

Med., Inc., 619 F.3d 104, 112 (1st Cir. 2010) (describing relator who copied allegations from state-court compliants).

But when relators do no more than play follow-the-leader, they provide little benefit to the Commonwealth. The entire purpose of the MFCA's bounty provisions, after all, is to "encourage individuals *with direct and independent knowledge* of information that an entity is defrauding the Commonwealth to come forward." *Scannell*, 70 Mass. App. Ct. at 48 (emphasis added). Because private relators do not advance that goal by filing suit when facts "lead[ing] to a plausible inference of fraud" already exist in the public domain, there is no reason to allow them to do so—especially when they seek a bounty payment from funds that otherwise belong to the public. *United States ex rel. Winkelman v. CVS Caremark Corp.*, 827 F.3d 201, 208, 210 (1st Cir. 2016). By prohibiting such suits, the public disclosure bar ensures that the Commonwealth's funds are used to pay relators only when they bring to light information that the government could not have found on its own, and hence

provide the public a benefit that exceeds the cost of paying the relator's bounty.[6]

IV. The Pleading Requirements Of Rule 9(b) Are Essential To The MFCA's Operation

Civil Procedure Rule 9(b) provides that "[i]n all averments of fraud … the circumstances constituting fraud … shall be stated with particularity." Although that requirement is not located within the MFCA itself, it is no less essential than the limits discussed above to the MFCA's effective operation.

As a general matter, Rule 9(b) serves a number of important purposes in any case alleging fraud: "to give notice to defendants of the plaintiffs' claim, to protect defendants whose reputation may be harmed by meritless claims of fraud, to discourage 'strike suits,' and to prevent the filing of suits that simply hope to uncover relevant information during discovery." *United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 226 (1st Cir.

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[6] For all the same reasons, the exception to the public disclosure bar for an "original source" of the relevant information is a jealously guarded one. Because the temptation for a relator to free-ride on others' efforts is so high, courts require an individual claiming "original source" status to specifically "show how the knowledge he obtained was 'direct.'" *United States ex rel. Estate of Cunningham v. Millennium Labs. of Cal., Inc.*, 713 F.3d 662, 674 (1st Cir. 2013).

2004).[7] Each of those is sufficient justification for this Court to enforce its pleading requirements carefully.

In the MFCA context, however, Rule 9(b) takes on a heightened importance, as it serves the additional and crucial function of "ensuring that qui tam complaints include only as-yet nonpublic information that the government may need in order to decide whether to take the case over." *United States ex rel. Nargol v. DePuy Orthopaedics, Inc.*, 865 F.3d 29, 38 (1st Cir. 2017) (citing *United States ex rel. Russell v. Epic Healthcare Mgmt. Grp.*, 193 F.3d 304, 308-309 (5th Cir. 1999)). The MFCA, like its federal counterpart, grants the Executive the option of taking over any false-claims action filed by a private relator. G.L. c. 12, § 5C. If the Executive elects to do so, however, and successfully recovers from the defendant, it is obligated to pay the relator a bounty. *Id.* § 5F. The MFCA thus grants the Executive, in essence, an option "to purchase

[7] As with the MFCA, so in interpreting Civil Procedure Rule 9(b), courts in Massachusetts follow "the federal courts in their consideration of the cognate Federal Rules 12(b)(6) and 9(b)." *Equipment & Sys. for Indus., Inc. v. Northmeadows Constr. Co.*, 59 Mass. App. Ct. 931, 932 (2003).

information"—i.e., the evidence of fraud that underlies the relator's suit— "that it might not otherwise acquire." *Epic Healthcare*, 193 F.3d at 309. Rule 9(b) guarantees that the Executive can exercise that option in an informed manner: It ensures that the complaint upon which the Executive "must" base her decision, *id.*, contains factual detail sufficient to demonstrate whether the relator's information is worth its cost. *Id.* Rule 9(b) thus dovetails with the MFCA's public disclosure bar, with the one requiring a relator to bring forth new, undisclosed information, and the other aiding courts and the Executive in determining whether the relator has satisfied that obligation. Rule 9(b) is thus integral to the operation of the MFCA, and this Court should vigorously enforce it.

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, this Court should affirm the judgment of the trial court.

Respectfully submitted,

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Rule 16(k) Certification

I, Jonathan G. Cedarbaum, certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including Mass. R. A. P. 16(a)(6); 16(e); 16(f); 16(h); 18; and 20, as applicable.

/s/ Janine M. Lopez
Janine M. Lopez

CERTIFICATE OF SERVICE

I, Janine M. Lopez, certify that a true copy of the foregoing Brief of Amicus Curiae The Chamber of Commerce of the United State of America was filed on September 11, 2017 through eFileMA and will be sent electronically to counsel of record for Plaintiff-Appellant and Defendants-Appellees.

/s/ Janine M. Lopez
Janine M. Lopez

ADDENDUM

STATUTORY ADDENDUM

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M.G.L. c. 12, § 5A

TITLE II. EXECUTIVE AND ADMINISTRATIVE OFFICERS OF THE COMMONWEALTH

CHAPTER 12. DEPARTMENT OF THE ATTORNEY GENERAL AND THE DISTRICT ATTORNEYS

§ 5A. False claims; definitions applicable to Secs. 5A to 5O

As used in sections 5A to 5O, inclusive, the following words shall, unless the context clearly requires otherwise, have the following meanings:--

* * *

"Relator", an individual who brings an action under paragraph (2) of section 5C.

STATUTORY ADDENDUM

M.G.L. c. 12, § 5B(d)

TITLE II. EXECUTIVE AND ADMINISTRATIVE OFFICERS OF THE COMMONWEALTH

CHAPTER 12. DEPARTMENT OF THE ATTORNEY GENERAL AND THE DISTRICT ATTORNEYS

§ 5B. False claims; liability

(d) Sections 5B to 5O, inclusive, shall not apply to claims, records or statements made or presented to establish, limit, reduce or evade liability for the payment of tax to the commonwealth or other governmental authority.

STATUTORY ADDENDUM

M.G.L. c. 12, § 5C

TITLE II. EXECUTIVE AND ADMINISTRATIVE OFFICERS OF THE COMMONWEALTH

CHAPTER 12. DEPARTMENT OF THE ATTORNEY GENERAL AND THE DISTRICT ATTORNEYS

§ 5C. Violations under Secs. 5B to 5O; investigation by attorney general; relators; civil actions

(1) The attorney general shall investigate violations under sections 5B to 5O, inclusive, involving state funds or funds from any political subdivision. If the attorney general finds that a person has violated or is violating said sections 5B to 5O, inclusive, the attorney general may bring a civil action in superior court against the person.

(2) An individual, hereafter referred to as relator, may bring a civil action in superior court for a violation of said sections 5B to 5O, inclusive, on behalf of the relator and the commonwealth or any political subdivision thereof. The action shall be brought in the name of the commonwealth or the political subdivision thereof. The action may be dismissed only if the attorney general gives written reasons for consenting to the dismissal and the court approves the dismissal. Notwithstanding any general or special law to the contrary, it shall not be a cause for dismissal or a basis for a defense that the relator could have brought another action based on the same or similar facts under any other law or administrative proceeding.

(3) When a relator brings an action under said sections 5B to 5O, inclusive, a copy of the complaint and written disclosure of substantially all material evidence and information the relator possesses shall be served on the attorney general pursuant to Rule 4(d) (3) of the Massachusetts Rules of Civil Procedure. The complaint shall be filed under seal and shall remain so for 120 days after service upon the attorney general. Notwithstanding any other general or special law or procedural rule to the contrary,

service on the defendant shall not be required until the period provided in paragraph (5). The attorney general may, for good cause shown, ask the court for extensions during which the complaint shall remain under seal. Any such motions may be supported by affidavits or other submissions under seal. The attorney general may elect to intervene and proceed with the action on behalf of the commonwealth or political subdivision within the 120-day period or during any extension, after the attorney general receives both the complaint and the material evidence and information. Any information or documents furnished by the relator to the attorney general in connection with an action or investigation under said sections 5B to 5O, inclusive, shall be exempt from disclosure under section 10 of chapter 66.

(4) Before the expiration of the initial 120 day period or any extensions obtained under paragraph (3), the attorney general shall; (i) assume control of the action, in which case the action shall be conducted by the attorney general; or (ii) notify the court that he declines to take over the action, in which case the relator shall have the right to conduct the action.

(5) If the attorney general decides to proceed with the action, the complaint shall be unsealed and served promptly thereafter. The defendant shall not be required to respond to any complaint filed under said sections 5B to 5O, inclusive, until 20 days after the complaint is unsealed and served upon the defendant pursuant to rule 4 of the Massachusetts rules of civil procedure.

(6) When a relator brings an action pursuant to this section, no person other than the attorney general may intervene or bring a related action based on the facts underlying the pending action.

(7) With respect to any federal, state or local government that is named as a co-plaintiff with the commonwealth in an action brought pursuant to sections 5B to 5O, inclusive, a seal on the action ordered by the court under paragraph (3) shall not preclude the commonwealth or the relator from serving the complaint, any other pleadings or the written disclosure of substantially all material evidence and

information possessed by the relator on the law enforcement authorities that are authorized under the law of that federal, state or local government to investigate and prosecute such actions on behalf of such governments, except that such seal shall apply to the law enforcement authorities so served to the same extent as the seal applies to other parties in the action.

STATUTORY ADDENDUM

M.G.L. c. 12, § 5F

TITLE II. EXECUTIVE AND ADMINISTRATIVE OFFICERS OF THE COMMONWEALTH

CHAPTER 12. DEPARTMENT OF THE ATTORNEY GENERAL AND THE DISTRICT ATTORNEYS

§ 5F. Payments to relators; limitations

(1) If the attorney general proceeds with an action brought by a relator pursuant to section 5C, the relator shall receive at least 15 per cent but not more than 25 per cent of the proceeds recovered and collected in the action or in settlement of the claim depending upon the extent to which the relator substantially contributed to the prosecution of the action.

(2) Where the action is one which the court finds to be based primarily on disclosures of specific information, other than information provided by the relator, relating to allegations or transactions in a criminal, civil, or administrative hearing; in a legislative, administrative, auditor or inspector general hearing, audit, or investigation; or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 per cent of the proceeds, taking into account the significance of the information and the role of the relator bringing the action in advancing the case to litigation.

(3) Any payment to a relator pursuant to this section shall be made only from the proceeds recovered and collected in the action or in settlement of the claim. Any such relator shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, including reasonable attorney's fees and costs. All such expenses, fees and costs shall be awarded against the defendant.

(4) If the attorney general does not proceed with an action pursuant to section 5C, the relator bringing the action or settling the claim shall receive an

amount which the court decides is reasonable for collecting the civil penalty and damages on behalf of the commonwealth or any political subdivision thereof. The amount shall be not less than 25 per cent nor more than 30 per cent of the proceeds recovered and collected in the action or settlement of the claim, and shall be paid out of such proceeds. The relator shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, including reasonable attorney's fees and costs. All such expenses, fees and costs shall be awarded against the defendant.

(5) Whether or not the attorney general proceeds with the action, if the court finds that the action was brought by a relator who planned and initiated the violation of sections 5B to 5O, inclusive, upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce or eliminate the share of the proceeds of the action which the relator would otherwise receive pursuant to this section, taking into account the role of the relator in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the relator bringing the action is convicted of criminal conduct arising from his role in the violation of this section, the relator shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the attorney general to continue the action.

STATUTORY ADDENDUM

M.G.L. c. 12, § 5G(c)

TITLE II. EXECUTIVE AND ADMINISTRATIVE OFFICERS OF THE COMMONWEALTH

CHAPTER 12. DEPARTMENT OF THE ATTORNEY GENERAL AND THE DISTRICT ATTORNEYS

§ 5G. Actions brought against governor, lieutenant governor, attorney general, treasurer, secretary of state, etc.; jurisdiction

(c) The court shall dismiss an action or claim pursuant to sections 5B to 5O, inclusive, unless opposed by the commonwealth or any political subdivision thereof, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed: (1) in a Massachusetts criminal, civil or administrative hearing in which the commonwealth is a party; (2) in a Massachusetts legislative, administrative, auditor's or inspector general's report, hearing, audit or investigation; or (3) from the news media, unless the action is brought by the attorney general, or the relator is an original source of the information.

STATUTORY ADDENDUM

Mass. R. Civ. P. 9(b)

(b) Fraud, Mistake, Duress, Undue Influence, Condition of the Mind. In all averments of fraud, mistake, duress or undue influence, the circumstances constituting fraud, mistake, duress or undue influence shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

STATUTORY ADDENDUM

31 U.S.C. § 3729(d)

TITLE 31. MONEY AND FINANCE

CHAPTER 37. CLAIMS

§ 3729. False claims

(c) Exclusion. This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

STATUTORY ADDENDUM

31 U.S.C. § 3730(b)(1)

TITLE 31. MONEY AND FINANCE

CHAPTER 37. CLAIMS

§ 3730. Civil actions for false claims

(b) Actions by Private Persons.

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.