No. 14-60160

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES EX REL. CORI RIGSBY AND KERRI RIGSBY,

Plaintiffs-Appellants/Cross-Appellees,

v.

STATE FARM FIRE & CASUALTY CO.,

Defendant-Appellee/Cross-Appellant.

Appeal from the United States District Court
for the Southern District of Mississippi, Southern Division
No. 1:06cv433-HSO-RHW

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE/CROSS-APPELLANT

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SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

Plaintiffs-Appellants/Cross-Appellees, Defendant-Appellee/Cross-Appellant, and *amicus curiae* National Association of Mutual Insurance Companies (NAMIC) have set forth the interested parties in this case at pages i, ii-iv, & i-ii of their respective opening briefs. Pursuant to Fifth Circuit Rule 29.2, which requires "a supplemental statement of interested parties, if necessary to fully disclose all those with an interest in the *amicus* brief," undersigned counsel of record certifies that, in addition to those persons listed in the parties' and NAMIC's statements, the following listed persons have an interest in this *amicus curiae* brief. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

i) The Chamber of Commerce of the United States of America ("Chamber"), *amicus curiae* in this case. The Chamber is a non-profit 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;

(ii) Attorneys for *amicus curiae*: Robert A. Long, Jr., David M. Zionts (Covington & Burling LLP); Steven P. Lehotsky, Tyler R. Green (U.S. Chamber Litigation Center).

Dated: September 23, 2014

/s/ Robert A. Long
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INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents an underlying membership of more than three million businesses 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 briefs in cases that raise issues of concern to the Nation's business community, including cases involving the False Claims Act ("FCA").

This is such a case. As the district court explained, the plaintiffs "seek far-reaching, unfettered discovery in order to search for new claims beyond . . . the only false claim of which they have firsthand knowledge." Mem. Op. & Order Granting in Part and Denying in Part Relators' Motion to Initiate Discovery, Impose Maximum Penalty, Award Maximum Relators' Share, and Award Relators Their Attorneys' Fees, Expenses, and Costs ("Order"), at 9. This far-reaching

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), no party's counsel authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than the *amicus curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief. Pursuant to Federal Rule of Appellate Procedure 29(a), all parties have consented to the filing of this brief.

theory threatens to license unwarranted fishing expeditions and add to the great costs that FCA litigation already imposes.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case went to trial on a single FCA claim, alleging that Defendant State Farm mischaracterized the damage from Hurricane Katrina to a particular house as flood loss rather than wind loss, causing the government to pay the claim. After trial, the Relators requested, and the district court denied, "far-reaching, unfettered discovery in order to search for new claims." Order at 9. Although the Relators appeal from this discovery order, they couch their position in grander terms, seeking a dramatic re-interpretation of this Court's Rule 9(b) jurisprudence. In their view, a relator need only allege the general outlines of a scheme and a *single* example of an actual false claim submitted to the government, and they can then launch burdensome discovery efforts to uncover *other*, hypothetical claims of which they have no knowledge and lack any basis to identify.

This Court should reject that expansive theory. The FCA is a powerful tool with well-documented potential for abuse. Both a district court's inherent control over the discovery process, as well as the heightened pleading requirements of Rule 9(b), serve as important bulwarks against unduly burdensome fishing expeditions. These protections would be illusory if relators were entitled to

"unfettered" discovery in search of hypothetical claims whenever they can plead with particularity a *single* claim as part of a supposed scheme.

1. It is well-settled that district courts have broad discretion to limit discovery. The ability to control discovery is vital in the context of the FCA, where private relators have every incentive to leverage the threat of massive discovery costs in order to extract settlements. As a recent First Circuit decision in an analogous case exemplifies, district courts can and should prohibit relators from gaining access to sweeping discovery to look for unknown claims on the strength of a single claim about which they have some knowledge. *United States ex rel. Duxbury v. Ortho Biotech Prods., L.P.*, 719 F.3d 31 (1st Cir. 2013).

2. Under this Court's precedents, if a relator pleads with particularity a fraudulent scheme and reliable indicia that a false claim was actually presented to the government, she has adequately pleaded an FCA violation *with respect to that claim*; she has not pleaded *other* false claims that she cannot identify. Far from endorsing such a theory, this Court has emphasized the importance of pleading sufficient details of the actual claims that were allegedly submitted. *See United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 190 (5th Cir. 2009). Any other result would disregard the fact that the FCA is concerned with false *claims*, not false *schemes*.

3. The Relators' contrary approach would allow them to "smuggle" hypothetical claims into their case, and launch unconstrained discovery simply to test whether such claims actually exist. If they are permitted to succeed, it will exacerbate the already serious costs of abusive litigation by relators. Faced with even greater discovery costs, Defendants will be under increased pressure to settle even meritless claims. This result may benefit private relators and their counsel, but it will not serve the FCA's goals, and it will impose unjustified burdens on the business community.

ARGUMENT

I. District Courts Have Broad Discretion To Control And Limit Discovery To Prevent FCA Abuse.

As Defendant's brief explains, this is at heart a case about discovery. Specifically, it is about a district court's substantial authority to impose reasonable limits on discovery to curtail abusive litigation. This principle takes on special importance in the context of the FCA. Although the FCA serves important interests when it is interpreted and applied correctly, it has led to costly abuse. Limitations on discovery like the one adopted below strike a vital balance. Relators' view of the law, in contrast, would license harmful fishing expeditions and erode a significant check on abuse of the FCA.

"Trial courts have the right to exercise appropriate control of the discovery process when necessary and may deny, limit, or qualify it." *Associated Metals &*

Minerals Corp. v. S.S. Geert Howaldt, 348 F.2d 457, 459 (5th Cir. 1965). This judicial policy is based on the fact that district courts are in the trenches of the discovery and trial process, and so are "in the best position to control" discovery with appropriate limitations. *Six Flags, Inc. v. Westchester Surplus Lines Ins. Co.*, 565 F.3d 948, 963 (5th Cir. 2009).

Strict judicial control of the discovery process is particularly important in FCA cases. In recent years the judicial system has experienced a massive increase in the filing of FCA lawsuits by private relators. By 2012, the number of *qui tam* lawsuits had increased to 647 per year. U.S. Dep't of Justice, Fraud Statistics—Overview: Oct. 1, 1987 – Sept. 30, 2012, 1-2 (Dec. 23, 2013), www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf. Since "profit-motivated private enforcers" are "indifferen[t] to social cost," they have every incentive "to initiate so-called in terrorem lawsuits, using the threat of massive discovery costs or bad publicity to extract settlements when the social cost of adjudication would exceed any possible benefit or, worse, where culpability is entirely absent." David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence From Qui Tam Litigation*, 112 Colum. L. Rev. 1244, 1254 (2012). Relators have even asked courts to "relax" pleading standards and allow them discovery simply in the hopes of discovering misconduct. *See, e.g., United States ex rel. Joshi v. St. Luke's Hosp., Inc.*, 441 F.3d 552, 559 (8th Cir. 2006).

A recent First Circuit decision exemplifies how courts can exercise their discretion to prevent unduly burdensome discovery in FCA litigation. In *United States ex rel. Duxbury v. Ortho Biotech Products, L.P.*, 719 F.3d 31 (1st Cir. 2013), the relator alleged a "common nationwide scheme" by the defendant to "induce Medicare providers to submit false and fraudulent reimbursement claims for" its pharmaceutical product. *Id.* at 34. Notwithstanding this generic claim, the district court limited discovery temporally, geographically, and substantively to five specific accounts "as to which [the relator] had direct and independent knowledge." *Id.* at 37. The First Circuit rebuffed the relator's request to vacate those limitations and order "nationwide" discovery, finding that the district court had acted within its "broad discretion in managing discovery." *Id.* at 38; *see also id.* at 39 (noting the district court's "'considerable latitude' in assessing the proper scope of discovery" (quoting *Mack v. Great Atl. & Pac. Tea Co.*, 871 F.2d 179, 187 (1st Cir. 1989))).

The district court here exercised its discretion in a similarly responsible way. Having just presided over a trial concerning Relators' main claim, the district court sensibly rejected a plea to expand the case by orders of magnitude. The court pointed out that Relators had not proffered "enough detail to permit the Court to craft reasonable discovery parameters," and concluded that the expanded discovery Relators sought "would *necessarily* be overly broad." Order at 9 (emphasis

added). The court thus properly refused to allow Relators to engage in "an inappropriate fishing expedition for new claims." *Id.*

Rather than accept Relators' framing of their appeal as a test of Rule 9(b) pleading standards, this Court should recognize it for what it is: a challenge to the district court's authority to conclude that expanded discovery would be unconstrained and "overly broad." The Court should confirm the district courts' substantial discretion to police this form of FCA abuse.

II. Pleading Details Of A Single Alleged False Claim Does Not Entitle Relators To Unfettered Discovery To Seek Evidence Supporting Other Hypothetical Claims.

Even if this case is viewed through the lens of pleading standards, Relators' expansive and dangerous theory should be rejected. In their view, all a private relator needs to allege are (1) a fraudulent "scheme" and (2) details supporting the existence of a *single* false claim. If they meet this minimal pleading requirement, they contend, they have stated a claim not just for the single false bill of which they are aware, but for *any* hypothetical false bill that might have fallen within the alleged "scheme." And despite lacking any parameters for narrowing the search for these hypothetical claims, they believe they are entitled to an unconstrained "ticket to the federal discovery apparatus." Pls. Br. 42 (quoting *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 190 (5th Cir. 2009)).

Furthermore, Relators' embrace of the "fishing expedition" metaphor is telling. They claim that their expedition is authorized, because they have "demonstrated that the pond is stocked" by "point[ing] to a fish" – a *single* fish. Pls. Br. 42. The implication of their preferred rule is clear: plead a single false claim with particularity, and it is open season.

Far from endorsing this broad theory, this Court's decision in *Grubbs* illustrates why it cannot be right. In *Grubbs*, the Court determined that Rule 9(b) does not necessarily require a relator to plead "the specific contents of actually submitted claims, such as billing numbers, dates, and amounts." 565 F.3d at 186. Instead, it held that a relator could plead "the existence of a billing scheme and offer[] particular and reliable indicia that false bills were actually submitted as a result of the scheme—such as dates that services were fraudulently provided or recorded, by whom, and evidence of the department's standard billing procedure." *Id.* at 189-90.

The Court applied this test to an alleged scheme to defraud Medicare by billing services that were never performed. Significantly, the complaint did far more than plead the outlines of the scheme and then simply identify a single procedure that was fraudulently billed. Rather, as the Court emphasized in its analysis, the complaint alleged a "list of dates that specified, unprovided services were recorded." *Id.* at 192; *see also id.* ("Also alleged are specific dates that each

doctor falsely claimed to have provided services to patients and often the type of medical service or its Current Procedural Terminology code that would have been used in the bill."). Although the Court did not demand that the complaint "include exact billing numbers or amounts," it was satisfied that specific false claims had been pleaded with particularity. *Id.* at 192.

More recently, this Court has cautioned relators not to over-read *Grubbs*. Rejecting the view that "*Grubbs* absolves *qui tam* relators of the heightened pleading requirements under Rule 9(b) and in the FCA itself," the Court emphasized that relators must plead *both* the existence of a scheme and the presentment of false claims with particularity. *United States ex rel. Nunnally v. W. Calcasieu Cameron Hosp.*, 519 F. App'x 890, 892-95 (5th Cir. 2013). Whereas in *Grubbs* the relator had "alleged several specific incidents," in *Nunnally* the complaint did "not contain any detail of comparable particularity." *Id.* at 895.

Other courts have similarly recognized that *Grubbs* did not eliminate the requirement that the actual presentment of specific false claims be pleaded with particularity. For example, the Fourth Circuit noted that the *Grubbs* relator was allowed to proceed "because the complaint included the dates of specific services that were recorded by the physicians but never were provided." *United States ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, 707 F.3d 451, 457 (4th Cir. 2013), *cert denied*, 134 S. Ct. 1759 (2014). Where there are no details in the complaint "to

support the allegation that an actual false claim was presented to the government," Rule 9(b) is not satisfied as to that claim. *Id.* "Indeed, without such plausible allegations of presentment, a relator not only fails to meet the particularity requirement of Rule 9(b), but also does not satisfy the general plausibility standard of *Iqbal*." *Id.*

Any other interpretation of the *Grubbs* standard would be at odds with the text of the FCA itself. The FCA penalizes "false or fraudulent *claim[s]*"—not false or fraudulent *schemes*. 31 U.S.C. § 3729(a)(1)(A) (emphasis added). Even if "reliable indicia," and not concrete details, suffice as to a *particular* false claim, that does not mean that a complaint has automatically pleaded the existence of *other* "false or fraudulent claims." Indeed, the Supreme Court has expressly rejected this form of "claim-smuggling" in the closely-related context of the original source requirement. *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 476 (2007). "The plaintiff's decision to join all of his or her claims in a single lawsuit should not rescue the claims that would have been doomed . . . if they had been asserted in a separate action." *Id.* (quoting *United States v. ex rel. Merena v. SmithKline Beecham Corp.*, 205 F.3d 97, 102 (3d Cir. 2000) (Alito, J.)). So too here: a relator cannot simply plead with particularity a single false claim and then attempt to bootstrap into the case an undefined set of additional, hypothetical "false claims."

Notably, other courts have worried that "the *Grubbs* standard borders on requiring no particularity for the 'claim' element at all." *United States ex rel. Kester v. Novartis Pharms. Corp.*, __ F. Supp. 2d __, No. 11 Civ. 8196, 2014 WL 2324465, at *11 (S.D.N.Y. May 29, 2014). *Grubbs* is, of course, circuit precedent. But Relators' claim-smuggling interpretation of *Grubbs*—which *would* read the "claim" element out of pleading "false claims" with particularity—is not. This Court should confirm that when it authorized pleading of "reliable indicia" that *one* false claim was submitted, it did not allow relators to proceed with discovery as to *all* possible claims, without any specifics or even "indicia" that such claims were submitted.

III. Relators' Claim-Smuggling Approach Is Contrary To The Important Policies Underlying Rule 9(b).

"Rule 9(b) is designed 'to preclude litigants from filing baseless complaints and then attempting to discover unknown wrongs.'" *Shushany v. Allwaste, Inc.*, 992 F.2d 517, 521 (5th Cir. 1993) (quoting *Guidry v. Bank of LaPlace*, 740 F. Supp. 1208, 1216 (E.D. La. 1990)). It recognizes the ease with which unsubstantiated fraud claims may be lodged, and is intended "to discourage 'strike suits,' and to prevent the filing of suits that simply hope to uncover relevant information during discovery." *Doyle v. Hasbro, Inc.*, 103 F.3d 186, 194 (1st Cir. 1996).

The Relators here seek a rule that would subvert these protections. They seek to leverage actual knowledge of a single alleged false claim, and on that basis launch an unrestrained fishing expedition where they "simply hope to uncover" additional possible claims.

This interpretation of Rule 9(b) would have broad and unsettling implications for litigation under the FCA. While a huge number of *qui tam* suits are filed every year, the Government intervenes in only 20 percent, and the remainder are usually found to lack merit. Press Release, U.S. Dep't of Justice, Acting Assistant Attorney General Stuart F. Delery Speaks at the American Bar Association's Ninth National Institute on the Civil False Claims Act and Qui Tam Enforcement (June 7, 2012); David Freeman Engstrom, *Public Regulation of Private Enforcement: Empirical Analysis of DOJ Oversight of Qui Tam Litigation Under the False Claims Act*, 107 Nw. U. L. Rev. 1689, 1720-21 (2013). Indeed, from 1987-2012, only 3.2% of total *qui tam* monetary settlements and judgments involved cases where the Government declined to intervene. U.S. Dep't of Justice, Fraud Statistics – Overview: Oct. 1, 1987-Sept. 30, 2012, *supra*, at 1-2.

Even when a *qui tam* case proves meritless, however, defending it entails a "tremendous expenditure of time and energy." Todd J. Canni, *Who's Making False Claims, The Qui Tam Plaintiff or the Government Contractor?*, 37 Pub. Cont. L.J. 1, 11 n.66 (2007). The "threat of massive discovery costs" in particular

exerts a powerful "*in terrorem*" effect. Engstrom, *supra*, 112 Colum. L. Rev. at 1254. As a result, defendants have incentives to settle even cases that are devoid of merit. *See* Canni, *supra*, 37 Pub. Cont. L.J. at 11-12. As FCA litigation continues to proliferate, American businesses are increasingly vulnerable to the costs imposed by meritless lawsuits.

Re-interpreting Rule 9(b) to allow "claim-smuggling" will exacerbate all of these trends. Relators who are able to plead some "indicia of reliability" that a *single* false claim was presented to the Government will be able to proceed to discovery not just on that claim, but on all other possible claims. As *Duxbury* illustrates, relators will invoke this logic to extend FCA cases far beyond their own knowledge into a "nationwide" search for new claims. 719 F.3d at 38. Simple logic dictates that as prospective discovery costs multiply, the pressure on businesses to settle even meritless claims will grow as well.

The requirement that fraud claims be stated with particularity, as well as a district court's discretionary control over the discovery process, are important bulwarks against the sort of abuse that is unfortunately present in much contemporary FCA litigation. If these principles are watered down as Relators urge, it is likely to result in substantial burdens and expense for the business community. And although individual relators and their counsel may see corresponding settlement benefits, an increase in unsupported and unjustified

fishing expeditions will distract from, rather than advance, the FCA's goals of smoking out true fraud.

CONCLUSION

For the foregoing reasons, and the reasons set forth in Defendant-Appellee/Cross-Appellant's opening brief, the district court's decision not to expand discovery should be affirmed.

Respectfully submitted,

Dated: September 23, 2014

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CERTIFICATE OF COMPLIANCE

I CERTIFY, pursuant to Federal Rules of Appellate Procedure 29(d) and 32(a)(7), that the foregoing Brief contains 3,108 words, excluding the parts of the Brief exempted under Federal Rule of Appellate Procedure 32. In accordance with Federal Rule of Appellate Procedure 32(a)(5)-(6), this Brief has been prepared in 14-point Times New Roman font.

Dated: September 23, 2014

/s/ Robert A. Long
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CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2014, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: September 23, 2014

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