22-18

IN THE
United States Court of Appeals for the Second Circuit

UNITED STATES OF AMERICA, EX REL. JOSEPH PIACENTILE AND KEVIN B. KILCOYNE, STATE OF CALIFORNIA, STATE OF DELAWARE, STATE OF FLORIDA, STATE OF GEORGIA, STATE OF HAWAII, STATE OF ILLINOIS, STATE OF INDIANA, STATE OF LOUISIANA, COMMONWEALTH OF MASSACHUSETTS, STATE OF MICHIGAN, STATE OF NEVADA, STATE OF NEW HAMPSHIRE, STATE OF NEW JERSEY, STATE OF NEW MEXICO, STATE OF OKLAHOMA, STATE OF RHODE ISLAND, STATE OF TENNESSEE, STATE OF TEXAS, COMMONWEALTH OF VIRGINIA, STATE OF WISCONSIN, DISTRICT OF COLUMBIA, STATE OF NEW YORK,
Plaintiffs,

(caption continued on inside cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING APPELLEE SEEKING AFFIRMANCE

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JOSEPH PIACENTILE AND KEVIN B. KILCOYNE,
Relators-Appellants,

– *v.* –

U.S. ONCOLOGY,
Defendant-Appellee,

AMGEN, INC., AMERISOURCE BERGEN CORP.,
AMERISOURCE BERGEN SPECIALTY GROUP, INC., INTERNATIONAL
PHYSICIANS NETWORK, INTERNATIONAL ONCOLOGY NETWORK,
Defendants.

CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America (the Chamber) is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has ten percent or greater ownership in the Chamber.

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STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 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.[1]

The False Claims Act, 31 U.S.C. §§ 3729–3733, touches nearly every sector of the American economy, including defense, health care, life sciences, education, banking, and technology. In its current form, the False Claims Act combines the threat of treble damages and per-payment-claim civil penalties exceeding $25,000. *See* 31 U.S.C. § 3729(a)(1); 28 C.F.R. § 85.5. As a result, liability under the False Claims Act is "essentially punitive in nature." *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 579 U.S. 176, 182 (2016) (internal quotation marks and citation omitted); *see also United States ex rel. Brensilber v. Bausch & Lomb Optical Co.*, 131 F.2d 545, 547 (2d

[1] The undersigned certifies that the parties have consented to the filing of this brief, that no counsel for a party authored this brief in whole or in part, and that no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

Cir. 1942) (per curiam) (holding that earlier, more lenient version of the False Claims Act was "not only penal, but drastically penal"), *aff'd without opinion by an equally divided Court*, 320 U.S. 711 (1943).

The False Claims Act is a tool ripe for abuse by *qui tam* relators who are "motivated primarily by prospects of monetary reward rather than the public good." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997); *see also* 31 U.S.C. § 3730(d)(2) (providing that in cases such as this one in which the Federal Government declines to intervene, the relator is entitled to between 25 and 30 percent of any judgment or settlement, as well as attorney's fees and costs). Meritless *qui tam* cases exact a substantial toll on American businesses and, in turn, on the U.S. economy—a toll that goes largely unseen by the general public. Businesses can spend hundreds of thousands or even several million dollars fielding pre-unsealing civil investigative demands, *see* 31 U.S.C. § 3733, as well as discovery requests in a single unsealed case that will end without recovery. Moreover, given the combination of potential punitive liability, enormous litigation costs, and potential exclusion from future participation in federal programs in the event of an adverse judgment, marginal or even meritless cases can be and are used to extract settlements. As a result, cases involving the proper application of the False Claims Act are of particular concern to the Chamber and its members.

This appeal involves two important safeguards for weeding out opportunistic *qui tam* cases: one statutory, the other rule-based.

First, the version of the False Claims Act that governs this case, which was originally filed in 2004, states in pertinent part:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or [General] Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. § 3730(e)(4) (2000 & Supp. IV 2004).[2]

Second, Rule 9(b) of the Federal Rules of Civil Procedure instructs that "[i]n alleging fraud, a party must state with particularity the circumstances constituting fraud . . . ."

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[2] All references to the public disclosure bar are to that version in effect in 2004. While an amended version of the bar was enacted in 2010, *see* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10104(j)(2), 124 Stat. 119, 901 (2010), the amended version does not apply to cases, like this one, that were pending when the amended version was enacted, *see Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 283 n.1 (2010).

The federal district court dismissed this *qui tam* action filed by Relators Joseph Piacentile and Kevin B. Kilcoyne (collectively, Relators) against U.S. Oncology after finding that the public disclosure bar deprived the district court of subject-matter jurisdiction. SPA035. Specifically, the district court concluded that three non-*qui tam* cases filed against Amgen Inc. (an original defendant in this action) triggered the public disclosure bar *vis-à-vis* its alleged customer U.S. Oncology because the earlier-filed actions publicly disclosed substantially similar alleged conduct by Amgen and its customers. *See* SPA030. Alternatively, the district court concluded that Relators' Fourth Amended Complaint failed to plead fraud with particularity as required by Rule 9(b). SPA044. This appeal by Relators followed.

SUMMARY OF ARGUMENT

The Court should reject Relators' request to weaken the public disclosure bar. Relators ask the Court to adopt a standard whereby a public disclosure must involve the exact same allegations and must specifically name the defendant in order to trigger the public disclosure bar. However, such a standard finds no support in the statutory language at issue and has been rejected by persuasive case law from other circuits. Relators' policy-based argument in support of such a standard also ignores the fact that the Government retains its ability to bring False Claims Act cases even in those instances where the public disclosure bar precludes a bounty-seeking relator from doing so. Moreover, Relators' argument that they each qualify as an "original source" fails for the simple reason that Relators presented no evidence to support the Fourth

Amended Complaint's boilerplate allegation that the Relators provided their information to the Government before filing this action, which is a condition precedent to original-source status and is an issue on which Relators bore the burden of proof in responding to U.S. Oncology's factual challenge to subject-matter jurisdiction.

The Court should also reject Relators' request to further weaken Rule 9(b)'s application in False Claims Act cases. Relators acknowledge that their Fourth Amended Complaint does not identify a single payment claim submitted by U.S. Oncology that was supposedly false. Relators nonetheless argue that the Fourth Amended Complaint satisfies the standard established by this Court in *United States ex rel. Chorches for Bankruptcy Estate of Fabula v. American Medical Response, Inc.*, 865 F.3d 71 (2d Cir. 2017) (*Chorches*). However, *Chorches* held that Rule 9(b) "does not require that every *qui tam* complaint provide details of actual bills or invoices submitted to the government, *so long as* the relator makes plausible allegations [in the relator's operative pleading] that lead to a strong inference that specific claims were indeed submitted *and that information about the details of the claims submitted are peculiarly within the opposing party's knowledge*." *Id.* at 93 (emphasis added). The Fourth Amended Complaint makes no effort to plead facts demonstrating that information about the details of submitted payment claims is peculiarly within the knowledge of U.S. Oncology. Therefore, the district court correctly held that the Fourth Amended Complaint does not satisfy the *Chorches* standard.

ARGUMENT

I. The Court Should Reject Relators' Request to Weaken the Public Disclosure Bar

Among other things, the public disclosure bar seeks to discourage "parasitic lawsuits by those who learn of the fraud through public channels and seek remuneration although they contributed nothing to the exposure of the fraud." *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 319 (2d Cir. 1992). When, as here, a defendant asserts a factual challenge to subject-matter jurisdiction under the version of the public disclosure bar at issue here, the relator has the "burden to show by a preponderance of the evidence that the . . . public disclosure bar did not deprive the district court of jurisdiction." *United States ex rel. Hanks v. United States*, 961 F.3d 131, 136 (2d Cir. 2020). The district court correctly held that Relators failed to carry their burden.

A. Relators' Proposed Public Disclosure Standard Has No Basis in the Statutory Language and Conflicts With Persuasive Case Law from Other Circuits

So when is a *qui tam* action "based upon the public disclosure of allegations or transactions" within the meaning of the public disclosure bar? Relators suggest that the bar is triggered only if the allegations of the relator's complaint "'are the same as those that had been publicly disclosed prior to the filing of the *qui tam* suit.'" Blue Br. at 20 (quoting *John Doe Corp.*, 960 F.2d at 324). However, *John Doe Corp.* did not purport to establish a "same" legal standard, such that sets of allegations must be identical in order to trigger the bar. It just so happened that the relator's allegations in

John Doe Corp. were the same as those that had been disclosed previously, and thus the case represented a particularly brazen violation of the public disclosure bar. *See John Doe Corp.*, 960 F.2d at 324; *see also United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 14 (2d Cir. 1990) (finding public disclosure bar applied in case where relators copied allegations in earlier-filed racketeering action).

Moreover, this Court has held that a *qui tam* action need not be based "solely" on a public disclosure for the bar to apply. *United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1158 (2d Cir. 1993). It is sufficient if the *qui tam* action is based in any part upon publicly disclosed allegations or transactions. *See id.* (citing *United States ex rel. Precision Co. v. Koch Indus.*, 971 F.2d 548, 553 (10th Cir. 1992)). And as the Tenth Circuit explained in an opinion cited with approval by this Court on the meaning of the public disclosure bar generally, "the phrase 'based upon' is properly understood to mean 'supported by.' In this context, [a] *qui tam* action even partly based upon publicly disclosed allegations or transactions is nonetheless 'based upon' such allegations or transactions." *Precision Co.*, 971 F.2d at 552.

The plain language of the public disclosure bar also does not impose a requirement that a defendant be specifically named in a qualifying public disclosure in order to trigger the bar. For example, the Sixth Circuit addressed a case similar to this one in *United States ex rel. Poteet v. Medtronic, Inc.*, 552 F.3d 503 (6th Cir. 2009).

In *Poteet*, a former employee of a medical device manufacturer filed a wrongful termination case against the manufacturer alleging that he had been fired "because he

had refused to comply with his supervisors' directives to pay illegal kickbacks and bribes to [the device manufacturer's] physician customers," some of whom were identified in the wrongful termination complaint. 552 F.3d at 508. More than two years later, a second former employee of the manufacturer filed a *qui tam* action against the manufacturer and named as defendants certain *other* customers of the manufacturer, alleging that those customers' receipt of kickbacks meant that the customers had, in turn, submitted false claims to the Medicare and Medicaid programs. *See id.* The district court eventually dismissed the *qui tam* action under the public disclosure bar. *See id.* at 510.

The Sixth Circuit affirmed. "For a relator's *qui tam* action to be barred by a prior 'public disclosure' of the underlying fraud," the court of appeals explained, "the disclosure must have (1) been public, and (2) revealed the same kind of fraudulent activity against the government as alleged by the relator." *Id.* at 511. Regarding the second element, the Sixth Circuit explained that a "public disclosure reveals fraud if the information is sufficient to put the government on notice of the likelihood of related fraudulent activity." *Id.* at 512 (internal quotation marks and citation omitted). And "[t]o qualify as a public disclosure of fraud, the disclosure is not required to use the word 'fraud' or provide a specific allegation of fraud." *Id.*

Applying the foregoing legal standard, the Sixth Circuit found that the wrongful termination case constituted a qualifying public disclosure of fraud because the allegations in that case were sufficient to put the Government "on notice of potential

fraud by [the device manufacturer] *and* its physician customers." *Id.* at 513 (emphasis added). The Sixth Circuit then found that the *qui tam* action was "based on" that public disclosure because it was supported at least in part by that public disclosure. "Despite the presence of one major allegation that was not made in the [wrongful termination] complaint—namely, [the relator's] claim that the named defendants [in the *qui tam* action] had filed false claims for Medicare and Medicaid reimbursement in violation of the [False Claims Act]—the primary focus of [the relator's] complaint is the same . . . illegal kickback scheme which [the wrongful termination plaintiff] described in his complaint." *Id.* at 514. "Moreover, even though the particular details concerning the kickbacks paid and the defendants involved are slightly different," the Sixth Circuit found that the "illegal kickback scheme described in [the relator's] complaint is essentially the same as the scheme alleged by [the wrongful termination plaintiff] in his complaint." *Id.*

The Tenth Circuit follows the same standard. *See, e.g.*, *In re Natural Gas Royalties Qui Tam Litig.*, 562 F.3d 1032, 1042 (10th Cir. 2009) (finding public disclosure bar applied even though previous public disclosures did not specifically identify certain defendants named by relator, where previous public disclosures "provided specific details about the fraudulent scheme and the types of actors involved in it" that would permit the Government to investigate further).

This Court, which appears not to have addressed the question previously, should adopt the same standard and should affirm the district court's finding that the

non-*qui tam* complaints against Amgen were sufficient to trigger the public disclosure bar *vis-à-vis* U.S. Oncology. For example, one of the non-*qui tam* complaints specifically alleged that Amgen used "impermissible inducements to stimulate sales of its drugs. These inducements were designed to result in a lower net cost to the provider while concealing the actual wholesale price beneath a high invoice price." JA355. That non-*qui tam* complaint supported its assertion by citing a report issued by the Office of Inspector General of the Department of Health and Human Services, which supposedly "detailed how Amgen gave substantial year-end rebates *to its customers* . . . ." *Id.* (emphasis added). Relators, in turn, base this action on the same fundamental allegation. *See, e.g.*, 4th Am. Compl. ¶ 38, JA416 (alleging that Amgen paid "kickbacks" to U.S. Oncology "in the form of rebate checks").

In contrast, Relators contend that their proffered legal standard—such that "when the disclosures do not identify the defendant, no disclosure has occurred"—is "supported by good sense." Blue Br. at 29–30. According to Relators, failing to adopt such a standard would "discourage the filing of meritorious *qui tam* actions" and would create a "presumptive defense to liability for violations of" the False Claims Act in those instances where a "single participant in an industry-wide scheme is sued . . . ." *Id.* at 30.

However, Relators' policy-based argument essentially ignores the underlying statutory language ("based upon the public disclosure of allegations or transactions") and instead mistakenly relies on certain of the supposed purposes of the public

disclosure bar, which is also true of the principal authority on which Relators rely. *See Cooper v. Blue Cross & Blue Shield*, 19 F.3d 562, 566 (11th Cir. 1994) (per curiam) ("This result [finding that the public disclosure bar did not apply because the public disclosures at issue did not specifically identify the corporate entity named as a defendant] *seems* consistent with the purposes of the [False Claims Act] and [its] 1986 amendments.") (emphasis added). *But see Natural Gas Royalties Qui Tam Litig.*, 562 F.3d at 1041 (declining to follow *Cooper* "where the public disclosures at issue are sufficient to set the government squarely upon the trail of the alleged fraud"). Relators' argument also ignores the fact that application of the public disclosure bar does not eliminate potential liability for False Claims Act violations, nor does it create any "presumptive defense" to such liability. The bar merely serves as a procedural limitation as to who may prosecute such an action (the Government or a *qui tam* relator who qualifies as an "original source"). *See* 31 U.S.C. § 3730(e)(4)(A) (2000 & Supp. IV 2004) ("No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions . . . *unless* the action is brought by the Attorney General or the person bringing the action is an original source of the information.") (emphasis added).

B. Relators Failed to Produce Evidence Necessary to Establish Original-Source Status

Relators contend that even if their allegations are "based upon the public disclosure of allegations or transactions" within the meaning of the public disclosure bar,

they each qualify as an "original source." *See* Blue Br. at 37–42. In so arguing, they ask the Court to hold that an aspect of this Court's decision in *Long Island Lighting*—which found that a relator must have been a source to the entity that publicly disclosed the allegations on which the relator's suit is based—was abrogated by the Supreme Court's subsequent decision in *Rockwell International Corp. v. United States*, 549 U.S. 457 (2007). Blue Br. at 41.

The Court need not address that issue, because Relators otherwise failed to carry their burden to establish that they each qualify as an "original source." In relevant part, the statutory definition of "original source" instructs that an individual must have "voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. § 3730(e)(4)(B) (2000 & Supp. IV 2004). Relators' argument on this point amounts to a single sentence in their brief, which states: "'The complaint also alleges that [R]elators provided their information to the government before filing the complaint; that allegation should be taken as true for present purposes, and therefore the second 'original source' requirement is also met." Blue Br. at 40; *see also* 4th Am. Compl. ¶ 30, JA414 (unverified allegation that "Relators are an 'original source' of the information herein, given that they have provided their information voluntarily to the Government before filing their original complaint"—even though Relator Kilcoyne was not named as a relator in the original complaint).

In order to survive a factual challenge to subject-matter jurisdiction under the public disclosure bar, a relator cannot simply rely on such boilerplate allegations. *See, e.g.*, *Hanks*, 961 F.3d at 138 (decision of this Court remanding matter to district court with instructions to address original-source issue while emphasizing "it is [the relator's] burden to establish subject-matter jurisdiction over his claims by a preponderance of the evidence"); *accord United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1160 (10th Cir. 1999) ("If jurisdiction is challenged, the burden is on the party claiming jurisdiction to show it by a preponderance of the evidence. . . . Thus, [the relators] bear the burden of alleging the facts essential to show jurisdiction and supporting those facts with competent proof. . . . Mere conclusory allegations of jurisdiction are not enough."); *Precision Co.*, 971 F.2d at 551 ("Since federal courts are courts of limited jurisdiction, we presume no jurisdiction exists absent a showing of proof by the party asserting federal jurisdiction. . . . Therefore, [the relator], the party invoking federal jurisdiction in this case, must allege in its pleading the facts essential to show jurisdiction, and must support those facts by competent proof.") (internal quotation marks, citations, and alterations omitted).

II. The Court Should Reject Relators' Request to Further Weaken Rule 9(b)'s Application in False Claims Act Cases

If the Court finds that the public disclosure bar applies, the Court need go no further in resolving this appeal. However, if the Court reaches the Rule 9(b) question, it should still affirm the judgment below.

Relators' Fourth Amended Complaint does not identify a single payment claim submitted by U.S. Oncology, nor does the Fourth Amended Complaint identify a single beneficiary of a federal health care program who allegedly received one of the allegedly kickback-tainted drugs at issue or specifically when any such beneficiary is alleged to have received such a drug. As a result, Relators argue that the Fourth Amended Complaint satisfies the standard established in *Chorches*, 865 F.3d 71. There, this Court found that Rule 9(b) "does not require that every *qui tam* complaint provide details of actual bills or invoices submitted to the government, *so long as* the relator makes plausible allegations, as [the relators in *Chorches* did] in [their third amended complaint], that lead to a strong inference that specific claims were indeed submitted *and that information about the details of the claims submitted are peculiarly within the opposing party's knowledge*." *Chorches*, 865 F.3d at 93 (emphasis added); *see also id.* at 86 ("A relator must make allegations that lead to a strong inference that specific claims were indeed submitted *and also plead that the particulars of those claims were peculiarly within the opposing party's knowledge*.") (emphasis added).

The Supreme Court may address Rule 9(b)'s application in False Claims Act cases in its next Term, as the Supreme Court has before it three petitions for writs of certiorari seeking guidance on that issue: two petitions filed by relators on which the Supreme Court called for the views of the Solicitor General of the United States, the other petition filed by defendants and supported by an *amicus* brief submitted by the Chamber. *Compare Estate of Helmly v. Bethany Hospice & Palliative Care of Coastal Ga.,*

LLC, 853 F. App'x 496, 497 (11th Cir. 2021) (per curiam) (concluding that relators who asserted kickback-related theory similar to that at issue here did not satisfy Rule 9(b) because they "were required to plead with particularity the submission of an actual false claim to the government"), *petition for cert. filed sub nom. Johnson v. Bethany Hospice & Palliative Care LLC*, No. 21-462 (U.S. Sept. 23, 2021), *and United States ex rel. Owsley v. Fazzi Assocs., Inc.*, 16 F.4th 192, 194 (6th Cir. 2021) (concluding that relator failed to satisfy Rule 9(b) because her pleading "provided few details that would allow the defendants to identify any specific claims—of the hundreds or likely thousands they presumably submitted—that she thinks were fraudulent"), *petition for cert. filed*, No. 21-936 (U.S. Dec. 21, 2021), *with United States ex rel. Prose v. Molina Healthcare of Ill., Inc.*, 17 F.4th 733, 741 (7th Cir. 2021) (concluding that relator satisfied Rule 9(b) even though his pleading did not identify with specificity the identity of any Medicaid managed care enrollee for which false claims were allegedly submitted), *petition for cert. filed sub nom. Molina Healthcare of Ill., Inc. v. Prose*, No. 21-1145 (U.S. Feb. 14, 2022).

It appears that the Supreme Court has deferred ruling on all three petitions until the Solicitor General files her brief in *Owsley* (such a brief having been filed in *Bethany Hospice* shortly before the Supreme Court's summer recess). However, even if the Supreme Court were to deny review of that issue or were to eventually endorse

the *Chorches* standard, the district court's judgment should still be affirmed because Relators' Fourth Amended Complaint simply does not satisfy the *Chorches* standard.[3]

The two relators in *Chorches*—an emergency medical technician (EMT) formerly employed by the defendant ambulance company and the trustee of the EMT's bankruptcy estate—filed an operative complaint alleging that the ambulance company "engaged in a scheme to fraudulently obtain reimbursement from Medicare by falsely certifying ambulance transports as medically necessary and submitting claims that [the company] knew were not properly reimbursable under the rules and regulations governing payments by Medicare." 865 F.3d at 75–76. The complaint alleged that based on information the EMT learned firsthand during his employment by the ambulance company, the company routinely made its EMTs revise their patient care reports to include false statements demonstrating medical necessity in order to ensure that Medicare paid for the services provided. *See id.* at 76. The complaint also provided ten specific examples of ambulance runs for which the EMT alleged that he

[3] In its *amicus* brief supporting Supreme Court review in *Molina*, the Chamber argues in favor of the legal standard adopted by certain of this Court's sister circuits whereby a relator must identify at least one false payment claim with specificity and "cannot rely on bare assertions, statistical probabilities, or allegations of a widespread pattern or practice to sufficiently plead the existence of a false claim." Br. of Chamber of Commerce of U.S. as *Amicus Curiae* in Supp. of Petitioners at 5, *Molina Healthcare of Ill., Inc. v. Prose*, No. 21-1145 (U.S. Mar. 21, 2022). However, the Chamber recognizes that *Chorches* established circuit precedent on how to apply Rule 9(b) in cases, like this one, where the relator fails to identify at least one false payment claim. As explained above, Relators fall short of the *Chorches* standard.

was ordered by his supervisor to alter patient care reports to include false information. *See id.* at 77.

Importantly, although the operative complaint at issue in *Chorches* did not identify exact billing numbers, dates, or amounts for claims submitted to Medicare, the pleading contained detailed factual allegations "establishing specific reasons why such information regarding the particular bills that were submitted for reimbursement [was] *peculiarly* within [the ambulance company's] knowledge." *Id.* at 82 (internal quotation marks and citation omitted) (emphasis added). For example, the pleading alleged that the ambulance company barred all EMTs from participating in the billing process and from gaining entrance to those areas of the company's administrative building where billing took place. *See id.* This Court explained that "[i]n light of those particular circumstances, which are based on specific factual allegations that are within [the EMT's] knowledge and that we must assume to be true for present purposes, [the EMT] (and hence [the trustee of his bankruptcy estate]) was unable, without the benefit of discovery, to provide billing details for claims that [the ambulance company] submitted to the government for reimbursement." *Id.* at 83.

Therefore, in order to satisfy the *Chorches* standard, a relator's operative pleading must contain factual allegations demonstrating that information about the details of payment claims submitted are *peculiarly* within the defendant's knowledge. Relators' Fourth Amended Complaint contains no such allegations even though it was filed over a year after *Chorches* was decided and approximately two months after the district

court cited *Chorches* in dismissing Relators' Third Amended Complaint with leave to amend. *See* JA381. That the Fourth Amended Complaint contains no such allegations is hardly surprising. Unlike the EMT in *Chorches* and the vast majority of all *qui tam* relators, Relators were never employed by the defendant in this case and therefore lack knowledge of the defendant's billing processes and procedures.

As the district court explained, the Fourth Amended Complaint "does not attempt to explain the lack of particularity by asserting that the facts relating to the claims U.S. Oncology filed with the federal and state governments are *peculiarly* within the knowledge of U.S. Oncology." SPA041 (emphasis added). Relators' brief in this Court ignores that aspect of the district court's opinion entirely, focusing instead on *Chorches*'s "strong inference" requirement, *see* Blue Br. at 43, 50–51; and obliquely trying to modify the legal standard adopted in *Chorches* such that it would be satisfied in virtually every single False Claims Act case, *see* Blue Br. at 43 (asserting that the *Chorches* standard is satisfied when billing information is "within the defendant's knowledge and control," with no mention of *Chorches*'s "peculiarly" prerequisite). The Court should apply the *Chorches* standard as written and affirm the district court's finding that the Fourth Amended Complaint fails to satisfy Rule 9(b).

CONCLUSION

For the foregoing reasons and those contained in U.S. Oncology's brief, the Court should affirm the district court's judgment.

Dated: Washington, District of Columbia
August 1, 2022

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CERTIFICATE OF COMPLIANCE

On this first day of August, 2022, the undersigned certifies that:

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(d) and Local Rule 29.1(c) because this brief contains 4,752 words, as determined by the word-count function of Microsoft Word 2010, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Garamond font.

s/James F. Segroves
James F. Segroves

CERTIFICATE OF SERVICE

The undersigned certifies that on this first day of August, 2022, he electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/James F. Segroves
James F. Segroves