No. 20-5637

In the United States Court of Appeals
For the Sixth Circuit

UNITED STATES OF AMERICA, EX REL.,
Amy Cook-Reska, et al., Relators-Appellants
v.

Community Health Systems, Inc., Defendant-Appellee

On Appeal from the United States District Court
For the Middle District of Tennessee
Hon. Marvin E. Aspen, No. 14-cv-02160

BRIEF OF *AMICUS CURIAE* TAXPAYERS AGAINST FRAUD EDUCATION FUND IN SUPPORT OF REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Taxpayers Against Fraud Education Fund ("TAFEF") states that it is a corporation organized under Section 501(c)(3) of the Internal Revenue Code. It has no parent corporation and no stock owned by a publicly owned company. TAFEF represents no parties in this matter and has no pecuniary interest in its outcome. However, TAFEF has an institutional interest in the effectiveness and correct interpretation of the federal False Claims Act.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases ***Page(s)***

Other ***Page(s)***

Pursuant to Rule 29 of the Rules of this Court, Taxpayers Against Fraud Education Fund respectfully submits this brief as *amicus curiae* in support of Appellants Cook-Reska, *et al*. Taxpayers Against Fraud Education Fund supports the Appellants for the reasons set forth below.[1]

I. STATEMENT OF INTEREST

A. Taxpayers Against Fraud Education Fund

Taxpayers Against Fraud Education Fund ("TAFEF") is a nonprofit, public interest organization dedicated to combating fraud against the Government and protecting public resources through public-private partnerships made possible by the False Claims Act ("FCA") and other federal and state statutes.

TAFEF is committed to the development and preservation of effective anti-fraud legislation. The organization has worked to publicize the *qui tam* provisions of the FCA, has participated in litigation as a *qui tam* relator and as *amicus curiae*, and has provided testimony to Congress about ways to improve the FCA. TAFEF has a strong interest in ensuring proper interpretation and application of the FCA. TAFEF is supported by whistleblowers and their counsel, by membership dues and fees, and by private donations. TAFEF is the § 501(c)(3) arm of Taxpayers Against Fraud, which was founded in 1986.

[1] No party's counsel authored this brief in whole or in part, and no person other than TAFEF, its members, and its counsel contributed money intended to fund the preparation or submission of this brief.

B. The Importance of this Litigation

In 1986, Congress amended the *qui tam* provisions of the FCA to increase the incentives for private individuals with knowledge about fraud to notify the Government and to assist the Government in pursuing violations of the FCA by filing cases in the United States' name. The 1986 Amendments expanded the role for whistleblowers in *qui tam* litigation including providing Relators a role as parties even when the Government intervenes in their cases, increasing potential rewards for whistleblowers, and providing protection from retaliation. Critically, Congress also required Defendants to pay Relator's counsel's necessary expenses and reasonable attorneys' fees and costs in successful *qui tam* actions.

Like other fee shifting mechanisms in civil rights or environmental enforcement statutes, the FCA fee shifting mechanism is intended to make it feasible for private individuals to pursue cases in the public interest. *See United States ex rel. Taxpayers Against Fraud v. Gen. Elec. Co*., 41 F.3d 1032, 1041 (6th Cir. 1994) (citing fourteen federal fee-shifting statutes, including the False Claims Act, to encourage individuals acting as "'private attorneys-general,' bringing causes of action for the common weal."). The twin goals of the FCA *qui tam* provisions—to incentivize citizens to report fraud and to encourage private attorneys to invest time and resources to pursue meritorious cases—can only be realized if there is assurance that Defendants shall be required to pay reasonable

fees and costs incurred by successful Relators as Congress intended. As Judge Stranch noted in the concurrence from the prior appeal of this case:

> The goal of the FCA to use *qui tam* complaints to increase the recovery of public monies will be impacted if relators' counsel are assigned work and not paid for doing it. As scholarly literature argues and legislative amendments confirm, the courts and government should approach FCA cases in ways that support and do not stifle the Act's goals and purposes. To achieve those . . . the government's litigation activity should encourage citizens to come forward and report fraud and attorneys to take their claims and put in the time and money it takes to make the case against those who defraud the public. If both parties are not fairly compensated, there is no incentive for relators to run the risks of blowing the whistle or for attorneys to put in the significant time and make the large expenditures necessary to prove a case. This is especially true (and particularly complicated) in the massive fraud cases that frequently include a number of relators and their separate counsel. But that is the nature of finding and proving frauds that operate on a large or national scale, a goal of the FCA. Those are the cases that should be nurtured because they are the type of suits that have returned billions of dollars to the public coffers and have served to deter future fraud.

United States ex rel. Doghramji v. Community Health Systems, 666 F. App'x 410, 420 (6th Cir. 2016) (Stranch, J., concurring).

These consolidated *qui tam* actions are paradigmatic examples of the "massive fraud" cases that require investment by private counsel of time and expenses, here at the request of the Government, so that funds are returned to the U.S. Treasury and future frauds are deterred. In 2011, the Government intervened in, and consolidated, these seven *qui tam* actions alleging multiple fraudulent

schemes by one of the largest for-profit hospital chains in the country. Litigation ensued and counsel for Relators incurred over 7,000 hours in attorney time assisting the Government at its request. In 2014, the Government announced a settlement with the Defendant hospital chain of $88 million and an award of $16.4 million to Relators divided among them according to a negotiated sharing agreement. All seven *qui tam* actions were dismissed with prejudice. The Settlement Agreement preserved Defendant's ability to challenge or object to Relators' claims for attorneys' fees, costs and expenses. *See Doghramji,* 666 F. App'x 410; *United States ex rel. Doghramji v. Community Health Systems*, No. 3:11 C 442, 2019 WL 4887190 (M.D. Tenn., Oct. 2, 2019).

At issue in this appeal is the District Court's order denying an award of attorneys' fees, costs, and expenses to counsel for all petitioning Relators. Order, R. 202. The District Court held that only "first to file" Relators could recover attorneys' fees and that none of the petitioning Relators were first to file. Order, R. 202, PAGE ID #2963. The District Court also held that to recover attorneys' fees, a Relator must demonstrate that their action was not based on public information. *Id*.

TAFEF submits this *amicus* brief to explain the critically important public policies underlying the FCA's mandatory fee shifting provision and to provide an explanation of how the District Court's holdings are at odds with the statutory

design intended to ensure an award of attorneys' fees to successful *qui tam* Relators. Where, as here, Defendant agreed to settle all intervened *qui tam* actions, payment of necessary expenses and reasonable fees and costs incurred by Relators and their counsel is mandatory under 31 U.S.C. § 3730(d)(1).[2] Once Defendant settled the merits of the case, it had no basis for raising arguments about issues it might have pursued if it had not settled the case. The District Court's order should be reversed.

II. ARGUMENT

A. The False Claims Act's Attorney Fee Shifting Provision is a Core Component of the Act's Design to Encourage Whistleblowers to Initiate and Pursue Cases to Redress Fraud Against the Government

Enactment of a mandatory fee shifting mechanism was an integral part of Congress's plan in amending the FCA in 1986 in order to incentivize whistleblowers to report fraud against the Government and to encourage private investment in fraud enforcement. Mindful that fraud permeated federal programs, the Senate Judiciary Committee took note of "serious roadblocks to obtaining information . . . [and] weaknesses in both investigative and litigative tools" and the need for legislative improvements to correct those weaknesses. S. REP. NO. 99-345, at 5269 (1986). The Committee observed that "perhaps the most serious

[2] If the Government does not proceed with the action, attorneys' fees and expenses are awarded under 31 U.S.C. § 3730(d)(2).

problem plaguing effective enforcement is a lack of resources on the part of Federal enforcement agencies." *Id.*at 5272. Lacking sufficient resources, "federal auditors, investigators, and attorneys are forced to make 'screening' decisions" about what cases they are able to pursue. *Id.* The Committee observed that allegations that could develop into very significant cases had been left unaddressed due to a judgment that devoting scare resources may not be efficient. *Id.* As this Court would later observe, "the scope of fraud against the government is much broader than the government's ability to detect it.'" *United States v. Health Possibilities, P.S.C.*, 207 F.3d 335, 340 (6th Cir. 2000).

Compounding these resource concerns, witnesses testified that "large, profitable corporations are the subject of a fraud investigation and [are] able to devote many times the manpower and resources available to the Government" and that in many instances "the Government's enforcement team is overmatched by the legal teams major contractors retain." S. REP. NO. 99-345, at 5273 (1986).

To counter this asymmetry, Congress concluded that encouraging assistance from private counsel in FCA cases could "make a significant impact on bolstering the Government's fraud enforcement effort" and that in other areas of enforcement such as antitrust and securities violations, the number of private enforcement actions far exceeds those brought by the Government. *Id.* To that end, Congress amended the FCA's *qui tam* mechanism to encourage more private enforcement

and to expand the role of relators in *qui tam* litigation. *Id.* at 5288-89. The 1986 amendments authorized *qui tam* Relators to continue as parties after intervention in part to act as a check that the Government does not neglect evidence or drop the case without legitimate cause. *Id.* at 5290-91. Recognizing the "risks and sacrifices" of the private relator, Congress also mandated a guaranteed range for share recovery. *Id.* at 5292-93. Even when a person brought suit based on public information, a relator share, albeit lower, was to be awarded. *Id.* at 5293. The 1986 amendments also established new whistleblower protections against harassment and other forms of retaliation, drawing on similar provisions in safety and environmental statutes. *Id.* at 5299-5300.

One of the most significant changes to the FCA that Congress made was to require defendants to reimburse successful *qui tam* Relators' reasonable attorneys' fees and expenses. *Id.* at 5294. The Senate Report notes that, prior to the 1986 amendments, the FCA did not provide a specific authorization for attorney fees. *Id.* Congress sought to rectify that gap, cognizant that the "[u]navailability of attorney fees inhibits and precludes many private individuals, as well as their attorneys, from bringing civil fraud suits." *Id.* Drawing on the experience with hundreds of other federal fee shifting statutes enabling private enforcement in the public interest, Congress provided that it would be the defendant, and not the Government, who would be liable for payment of fees "in addition to the forfeiture

and damages amount." *Id*. Congress also provided for payment of litigation costs and reasonable attorneys' fees for whistleblowers who were successful in pursuing retaliation cases. *Id.* at 5300.

In enacting the fee shifting mechanism, Congress legislated against the background of hundreds of other fee shifting statutes designed to incentivize counsel to invest resources to pursue cases in the public interest. *See generally* John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567 (1993) (describing fee shifting statutes). This Court has recognized the Congressional interest in laws that authorize whistleblowers to act as "'private attorneys-general' . . . in pursuit of an important public policy." *Taxpayers Against Fraud* 41 F.3d at 1042; *see also United States ex rel. Milam v. Univ. of Tex. M.D. Anderson Cancer Ctr.,* 961 F.2d 46, 49 (4th Cir.1992) ("Congress has let loose a posse of *ad hoc* deputies to uncover and prosecute frauds against the government. [Defendants] may prefer the dignity of being chased only by the regular troops; if so, they must seek relief from Congress.").

As this Court recognized in the prior appeal of this case, unless there is a guarantee of fair compensation "relators will not come forward (risking, in many cases, their livelihoods), and private attorneys will not undertake the extensive work and expense necessary to represent relators" and it is for that reason that

"even if the Government takes over the action, the relator is entitled to a share of 'the proceeds of the action or settlement of the claim' and his or her attorney is entitled to 'reasonable attorneys' fees and costs.'" *See Doghramji*, 666 F. App'x at 411. Likewise, without the assurance that Relators can recover expenses and attorneys' fees for successful cases, the Government may be deprived of the amplified resources needed to prosecute these actions.

1. Significant Investment of Private Resources is Needed to Match the Resources of Corporate Defendants in Protracted Investigations and Costly Litigation

Guaranteeing compensation for Relators and their counsel through recovery of a relator share and fees has "encouraged [the] working partnership" between the Government and the *qui tam* Relator envisioned by the sponsors of the 1986 amendments. *See* 132 Cong Rec. H9382-03 (Oct. 7, 1986) (Statement of Rep. Berman) (noting that "the public will be well served by having more legal resources brought to bear against those who defraud the Government."). While the relator share provision incentivizes Relators to contribute to the Government's investigation and recovery by basing the percentage of recovery on the substantial assistance provided the Government, *see United States ex rel. Alderson v. Quorum Health Group, Inc.,* 171 F. Supp. 2d 1323, 1333-34 (M.D. Fla. 2001), the fee shifting provision ensures that relator's counsel have the incentive to invest their resources.

It is precisely because there is a guarantee of compensation of fees and expenses for prevailing Relators that Relators and their counsel can afford to invest millions of dollars in attorney time and expenditures for litigation and expert costs. *See, e.g., Motion for Attorney Fees, Costs, and Expenses, United States ex rel. Lacey v. Visiting Nurse Serv. of New York*, No. 1:14-cv-05739 (S.D.N.Y. Jan. 15, 2021) (Dkt. 212) (Relator's counsel seeking $11,147,000 invested in fees and costs in health care fraud case); *United States ex rel. Higgins v. Healthsouth Corp.,* 2020 WL 1529563 (M.D. Florida, March 31, 2020) (Relator's counsel was awarded over $1 million in fees and costs in health care fraud case); *United States ex rel. Luke v. Healthsouth Corp.,* 202 WL 1169393 (D. Nevada, March 11, 2020) (same); *see also United States ex rel. Nichols v. Computer Scis. Corp.*, No. 12-CV-1750 (JSR), WL 6559194 (S.D.N.Y. Nov. 8, 2020) (holding that Relator's counsel entitled to recovery of fees and expenses spent on assisting Government with investigation as well as litigation); *United States ex rel. LeFan v. Gen. Elec. Co.*, No. 00-cv-222, 2008 WL 152091 (W.D. Ky. Jan. 15, 2008) (awarding fees for time spent assisting the Government with the Government's investigation).

This expansion of the incentives for Relators and their counsel to bring *qui tam* actions has been credited with a dramatic, desired increase in recoveries of federal funds. Since the 1986 amendments, FCA recoveries and enforcement actions have soared, attributable in large part to the success of the *qui tam*

provisions at revealing concealed information about fraud and funding litigation to pursue stolen dollars. Since 1986, more than $64 billion has been restored to the U.S. Treasury. *See* U.S. Dep't of Just., *Justice Department Recovers Over $2.2 Billion from False Claims Act Cases in Fiscal Year 2020* (Jan. 14, 2021), https://www.justice.gov/opa/pr/justice-department-recovers-over-22-billion-false-claims-act-cases-fiscal-year-2020. In 2020 alone, of the $2.2 billion in settlements and judgments from civil cases involving fraud and false claims, $1.6 billion was recovered in whistleblower-initiated *qui tam* actions. *Id.* The vast majority of cases that return funds to the Treasury are the result of *qui tam* cases often filed many years earlier. *Id.*; *see also Justice Department Recovers Over $2.8 Billion from False Claims Act Cases in Fiscal Year 2018*, U.S. DEP'T OF JUST., (Dec. 21, 2018), https://www.justice.gov/opa/pr/justice-department-recovers-over-28-billion-false-claims-act-cases-fiscal-year-2018.

Health care fraud enforcement, as in this case, has been particularly dependent on the investment of private counsel in *qui tam* whistleblower suits. As Judge Stranch observed in the concurrence in the prior appeal in this case:

> The FCA is one of the Government's most effective tools for combatting health care fraud. "To date, the FCA has helped the government recover more fraudulently spent Medicare dollars than any other mechanism within the federal government." Joshua A. Levy, *Lessons from the Private Enforcement of Health Care Fraud*, 53 AM. CRIM. L. REV. 117, 135 (2016). In 2014, for instance, while the Government recovered only $454 million through the Department of Health and Human Services' fraud prevention system, *id.* at 124, it recovered $2.3 billion from health care FCA cases, *id.*

> at 127. In addition, evidence provided by FCA whistleblowers "has resulted in dozens of criminal convictions and administrative exclusions that otherwise may not have occurred." *Id.* at 127.
>
> Most of these recoveries would not be possible without the FCA's *qui tam* provision. "Of the $21 billion recovered by the government between 1986 and 2008 under the Act, over 63 percent, or $13.7 billion, was recovered in cases filed under the FCA's *qui tam* provisions." Matthew S. Brockmeier, *Pulling the Plug on Health Care Fraud: The False Claims Act After Rockwell and Allison Engine*, 12 DEPAUL J. HEALTH CARE L. 277, 278–80 (2009). Brockmeier explains that if courts lose sight of the legislative intent behind the FCA and restrict opportunities for *qui tam* plaintiffs to succeed under the FCA, "the incidence of health care fraud against the government can only be expected to increase" and thereby increase health care costs "to a public already struggling to pay some of the highest health care prices in the industrialized world." *Id.* at 302–03. He concludes that it is crucial to approach the Act "with its primary goal of preventing fraud in mind," *id.*, which underscores the need to support and encourage *qui tam* plaintiffs in their use of the FCA.

Doghramji, 666 F. App'x at 419 (Stranch, J., concurring).

Fee shifting helps to address the substantial asymmetries in resources between large corporate defendants and the Government. Considering that the largest FCA recoveries have been achieved through settlement with or judgment against many highly profitable brand-name companies including GlaxoSmithKline, Pfizer, Merck, Johnson & Johnson, Bank of America, Northrup Grumman, Quest Laboratories, Verizon, and in this case, Community Hospital Systems, without the potential for recovery of attorneys' fees, law firms would not have an incentive to pursue these cases. Guaranteeing fee recovery also helps sustain private counsel who must often wait through many years of investigation and litigation before any

recovery, thereby diminishing the value of the contingent recovery alone. Fee shifting also encourages private counsel to take on representation of Relators in smaller dollar cases where the contingent fee recovery may be small but the public interest in prosecution may be high especially if the fraud implicates public health and safety.

2. Mandatory Fee Shifting Ensures Defendants Internalize the Costs of Misconduct and Deters Future Fraud

Additional policy concerns underlie Congress's decision to mandate attorneys' fees for successful actions. The FCA is premised in part on the theory that in order to prevent and deter fraud, the cost of engaging in fraud must exceed the benefit. *See* S. REP. NO. 99-345, at 5268 (1986) ("The sad truth is that crime against the Government often *does* pay.") (quoting U.S. GOV'T ACCOUNTABILITY OFF., AFMD-91-57 FRAUD IN GOVERNMENT PROGRAMS: -HOW EXTENSIVE IS IT?- HOW CAN IT BE CONTROLLED? (1981)). To remedy and deter fraud, the FCA provides for three times actual damages and penalties that may be awarded even when damages are not established. *Id.* at 5273.

By requiring that persons who are found liable for engaging in fraud to pay more than actual damages, the FCA ensures that they internalize the true cost of their fraudulent conduct, which includes the cost of enforcement. *Cf. Hutchinson v. William C. Barry, Inc.,* 50 F. Supp. 292, 298 (D. Mass. 1943) ("The fear of this liability for double damages and attorney's fees [under the Fair Labor Standards

Act] not only aids compliance, but promotes the settlement of controversies at the conference table or in the administrative office rather than the courts."). Fee shifting encourages compliance by requiring that the cost of prosecuting successful suits is borne "not by those who were victims but by those who have violated the regulations and caused the damage." *Id.* Numerous studies have documented the significant deterrent value of *qui tam* suits. *See, e.g.*, D. Howard, I. McCarthy, *Deterrence effects of antifraud and abuse enforcement in health care*, 75 J. HEALTH ECON. 102405 (January 2021) (calculating $19 billion in deterrence from $1.9 billion in recoveries); Claire Sylvia, Emily Stabile, *Rethinking Compliance: The Role of Whistleblowers*, 84 U. CIN. L. REV. 451, 462-470 (2016) (discussing and summarizing evidence of the deterrent effect of whistleblower suits).

3. Fee Shifting is Important in Consolidated Cases That Often Involve Complex Frauds That Might Not Have Been Revealed by a Single Whistleblower

The policy underlying the fee shifting provision is no less important when multiple relators file overlapping cases. A single whistleblower who knows only a portion of a fraud may not provide the Government with sufficient information to alert the Government to a widespread complex fraud. But multiple whistleblowers providing insights into a broader picture may be essential to show the Government the extent of a complex fraud. And the Government may benefit, as it did here, from enlisting the assistance of multiple Relators and their counsel to investigate

and pursue the complex fraud. If only the Relator and her counsel in the first intervened case has the incentive to provide those resources because later-filing attorneys will not be compensated for their time and investments, it is the Government that may be deprived of valuable information and resources. "Counsel routinely undertake this work without knowing whether other *qui tam* complaints have been filed under seal elsewhere. If the Government decides that the information provided would be useful to it in vindicating society's interests, it may share information about other *qui tam* cases and create a group of counsel to do the work that is necessary to prosecute the case. This work often takes years during which the Government runs the sealed case, including assigning tasks to various counsel and approaching the defendant about the claims and monetary settlement." *Doghramji*, 666 F. App'x at 420 (Stranch, J., concurring).

The United States' decision to intervene in and consolidate the seven *qui tam* actions here served the Government's interests in effectively pursuing allegations of health care fraud and resulted in a significant recovery of over $100 million returned to the Treasury. Interventions in multiple, consolidated *qui tam* actions is becoming increasingly common as a way for the United States to optimize resources by enlisting the support of multiple Relators and their private counsel in fraud enforcement efforts. Recoveries in the billions have been made as a result of Government intervention and settlement of multiple, related actions

where each Relator brings information and resources to assist the Government and attorneys' fees have been paid to multiple Relators' counsel in these settlements. *See, e.g., For-Profit Education Company to Pay $13 Million to Resolve Several Cases Alleging Submission of False Claims for Federal Student Aid*, U.S. DEP'T OF JUST., (June 24, 2015), https://www.justice.gov/opa/pr/profit-education-company-pay-13-million-resolve-several-cases-alleging-submission-false; *Universal Health Services, Inc. And Related Entities To Pay $122 Million To Settle False Claims Act Allegations Relating To Medically Unnecessary Inpatient Behavioral Health Services And Illegal Kickbacks*, U.S. DEP'T OF JUST., (July 10, 2020), https://www.justice.gov/opa/pr/universal-health-services-inc-and-related-entities-pay-122-million-settle-false-claims-act; *Justice Department Obtains $1.4 Billion from Reckitt Benckiser Group in Largest Recovery in a Case Concerning an Opioid Drug in United States History*, U.S. DEP'T OF JUST., (July 11, 2019), https://www.justice.gov/opa/pr/justice-department-obtains-14-billion-reckitt-benckiser-group-largest-recovery-case.

The decision of the United States to intervene in multiple, related actions, consolidate these actions and create a team of lawyers to assist Government lawyers is a critically important enforcement tool and is consistent with the statutory scheme enacted by Congress in the 1986 amendments.

Nor need there be concern that the availability of attorneys' fees as an incentive for whistleblowers and their counsel will over-incentivize *qui tam* litigation. Because recovery of costs and fees is only available to prevailing parties, *qui tam* counsel have an incentive to spend uncompensated time examining potential cases and pursuing only those with a high likelihood of success. The United States has the power to control the litigation by assuming responsibility for the litigation, or seeking limits on Relator's participation, and has the power to seek dismissal of the action. 31 U.S.C. § 3730(c). Further, FCA cases are subject to Federal Rule of Civil Procedure 9(b), which requires Relators to plead their claims with a heightened degree of particularity. These safeguards protect against unfounded or spurious suits.

Moreover, multiple avenues are available to the court to control fees. The statute limits recovery to "reasonable" fees, which allows a court to reduce an award for duplicative or excessive hours. *See Taxpayers Against Fraud*, 41 F.3d at 1048-49 (district judge may make modifications to lodestar to account for "unreasonable and excessive hours"); *see also Gonter v. Hunt Valve Co*., 510 F.3d 610, 616 (6th Cir. 2007) ("A reasonable fee is '*adequately compensatory to attract competent counsel without producing a windfall for lawyers*.'"). Awarding fees to multiple counsel in compensated cases does not mean awarding fees for duplicative or unnecessary work.

B. The FCA Requires Defendants to Reimburse Necessary Expenses and Reasonable Fees for Relator's Counsel in an Intervened and Settled Case

1. There are Only Three Requirements to Trigger an Award of Fees, Costs and Expenses under Section 3730(d)

Subsection 3730(d)(1) provides that if the government "proceeds with" an action brought by a person under subsection (b), "such person" shall receive a relator share award, subject to certain restrictions, and "such person shall also" receive an award of expenses necessarily incurred and reasonable attorneys' fees and costs. *United States ex rel. Le Fan v. General Electric,* 397 Fed. App'x 144 (6th Cir. 2010) (holding that payment of attorneys' fees for prevailing Relators is mandatory). In identifying whether a Relator qualifies as "such person" who may recover a share and fees, costs and expenses under (d)(1), three criteria must be met: (1) the Relator must have brought a civil action under subsection (b); (2) the Government must have intervened; and (3) the action must be successful, whether through settlement or judgment.

Upon settlement or judgment, Subsection (d)(1) provides that "such person" in the intervened case shall receive a relator share of between 15-25% of the proceeds of the action "depending upon the extent to which the person substantially contributed to the prosecution of the action."[3] "[S]uch person shall

[3] The share may be reduced below 10% if the action was based primarily on disclosures in specified public fora although, even there, the court is to consider

also receive" reasonable attorneys' fees and costs and reasonable expenses necessarily incurred. *Id.* These amounts "shall be awarded against the defendant." *Id.*

Here, the Government elected to proceed with seven *qui tam* actions brought under subsection (b) and to settle and dismiss those actions. The Relators in the seven consolidated actions were then "such persons" entitled to seek a share award and also to seek an award of attorneys' fees, costs and expenses to be paid by the defendant under (d)(1). Indeed, the District Court recognized that the reference to "such person" in (d)(1) does not refer to a person who has received a relator share but to "such person" who had brought the action under (b)(1). Under that common-sense reading, "such person" shall receive a relator share award and "such person" shall also receive an attorney fee award, and nothing in the statute makes recovery of fees and expenses dependent on recovery of share.[4] In any event, in this case, all Relators negotiated to each recover a portion of the lump sum share award, effectively mooting this point. But, even if Relators had not

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"the significance of the information and the role of the person bringing the action in advancing the case in litigation." 3730(d)(1).

[4] Only one District Court has adopted the argument that the reference to "such person" in the fees provision in subsection 3730(d)(1) is a reference to "such person" who receives a relator share and that decision is both erroneous and not binding. *See United States ex rel. Saidiani v. NextCase*, No. 3:11CV141, 2013 WL 431828 at *2 (W.D.N.C. Feb. 4, 2013).

negotiated this share, each Relator could have sought a relator share award from the Government, as well as attorneys' fees, costs and expenses from the Defendant, under (d)(1). *Le Fan*, 397 F. App'x at 147.

2. A Defendant Who Settles a Case on the Merits Cannot Raise Arguments that it Could Have Raised if it had Elected Not to Settle

Finally, Defendant's arguments that 31 U.S.C. § 3730(b)(5) and 31 U.S.C.§ 3730(e)(4) preclude recovery of fees are without support in the statutory text. Congress knew how to put conditions on an award of share and fees in § 3730(d)(1) and, instead, set forth specific criteria with no reference to other restrictions. The Eighth Circuit considered a similar question concerning the triggering of a share award in *United States ex rel. Rille v. Accenture*, 707 F.3d 1011 (2013). In *Rille*, the United States sought to deny Relator a share of a recovery based on an argument, advanced after settlement of the action, that Relator's complaint did not satisfy Federal Rule of Civil Procedure 9(b). The Court of Appeals rejected the argument that 9(b) plays a role in adjudicating relator share under subsection (d)(1) noting that section 3730(d) "comes into play at the conclusion of a case, after the action has already proceeded to a judgment or a settlement. If the government is allowed to contend at the conclusion of a case that a relator's initial allegations were insufficient, even though the government implicitly acknowledged the legal sufficiency of the pleadings by choosing to

intervene, the relator no longer has the opportunity to cure the deficiency." *Id*. at 1017-18.

Here, the argument adopted by the District Court that Defendant need not pay the fees of Relators in successive actions even though their intervened cases had been settled is similarly erroneous. The District Court declined to award fees under subsection (d)(1) on the grounds that the filing of each successive *qui tam* action had violated the "first to file" rule set forth in subsection (b)(5). The District Court reasoned that any subsequent complaint that alleged the "same general fraudulent scheme" was barred from being brought, citing this Court's decisions in *United States ex rel. Poteet v. Medtronic, Inc.*, 552 F.3d 503 (6th Cir. 2009) and *Walburn v. Lockheed Martin Corp*., 431 F.3d 966 (6th Cir. 2005). Based on this analysis, the Court held that the Relators who had filed successive, related actions were not "persons who had brought actions under subsection b" and, therefore, did not meet one of the requirements under (d)(1) for an award of expenses and fees. The District Court further held that one set of Relators ("the Doghramji relators") were also barred from a fee award because their complaint restated information already public at the time they filed and, therefore, would have been barred under subsection (e)(4).

But the Relators are unquestionably persons who brought actions under subsection (b), and the Government intervened and settled in their cases. The

statute contemplates continued involvement of the Relator as a party after intervention. *See* § 3730(c)(1) (upon intervention the Government shall have the primary responsibility for prosecuting the action" but "such person [the Relator] shall have the right to continue as a party."); *see also United States ex rel. Sansbury v. LB&B Associates*, 58 F. Supp 3d 37, 47 (D.D.C. 2014) (upon intervention, "relators remain a party to the Government's intervened claims and continue to have rights to participate in those claims under 31 U.S.C. § 3730(c)(1) and to receive any relator's recovery permitted by 31 U.S.C. § 3730(d)"); *see also United States ex rel. Cimzhhca v. UCB*, 970 F.3d 835, 841 (7th Cir. 2000) (noting that the 1986 amendments allow for continued participation of Relator as a party after intervention). Relators are "such persons" who brought their cases under subsection (b), remained such persons as parties after intervention under (c)(1) and are entitled to recover share and fees under (d)(1). Whether Relators' cases could have been dismissed for any number of reasons in litigation including failure to state a claim, is a moot point once the Defendant decided to settle their cases.

Walburn and *Poteet* are readily distinguishable and do not support the District Court's holding. Importantly, neither *Walburn* nor *Poteet* involved a petition for attorneys' fees in an intervened and successful settled *qui tam* case. In *Walburn*, there was no settlement at all. The Government declined intervention and Relator's case was dismissed on public disclosure grounds on Defendant's

motion. 431 F.3d at 973-76. In *Poteet*, the Defendant did not settle the Relator's case. 552 F.3d at 509-10. Rather, the Government declined to intervene in the *qui tam* action and moved to dismiss Relator while entering into a separate settlement with the Defendant. *Id.* This Court upheld dismissal of the *qui tam* complaint at the request of the Government and this Court also noted that a second filed complaint might have been jurisdictionally barred on first to file grounds if the earlier filed complaint had not been legally infirm. *Id.* at 514-17. Unlike *Poteet* and *Walburn*, no party here moved to dismiss any of the Relators. Instead, the Government intervened in the *qui tam* cases and the Defendant elected to settle the merits of their FCA claims, thus making those cases ones in which a person who filed a case under subsection (b) obtained intervention, continued in the action as a party, and resulted in a settlement or judgment. The Relators thus satisfied the only statutory conditions for a fee award under subsection (d)(1).

The District Court's decision to allow a Defendant to settle intervened *qui tam* actions and then refuse to pay expenses and fees as the statute requires is unprecedented and contrary to the statutory directive. Only one district court in the First Circuit has held that a Relator must be first to file to be awarded attorney fees, and that case is consistent with an attorney fee award to the relators here. S*ee United States ex rel. Allstate Insurance v. Millennium Labs*, 464 F. Supp. 3d 449, 453-54 (D. Mass 2020) (applying First Circuit reasoning that a relator must be first

to file to receive a relator share as articulated in *United States ex rel. McGuire v. Millennium Labs,* 923 F.3d 240 (1st Cir. 2019)). That situation did not involve compensating counsel for work performed at the behest of the Government in an intervened and successful action. In fact, it involved a wholly different situation where the Government intervened in some, but not all, pending *qui tam* actions and refused to award a share to an earlier filed relator whose allegations did not overlap with the fraud pursued by the Government in later-filed and intervened complaints. The First Circuit in *McGuire* directed that a Relator who had filed second in time, but whose action had been intervened in by the Government and whose case has been settled, would receive the relator share, essentially the same position advanced here by Appellants.

While it is not relevant to the straightforward application of section 3730(d), concerns underlying enactment of the first to file and public disclosure provisions also are not present here. Those provisions were enacted to deter filing of parasitic suits that may provide no benefit and simply drain Government resources or reduce the share and fee recoveries for earlier filed Relators with non-public information. *See United States ex rel. McKenzie v. BellSouth Telecommunications, Inc*., 123 F.3d 935, 938 (6th Cir. 1997) (discussing the purpose of the public disclosure bar to prevent parasitic *qui tam* suits); *Walburn*, 431 F.3d at 971 (discussing purpose of the first to file rule). By contrast, where, as here, the Government intervenes in

multiple, related actions as contemplated by subsection (b)(5), and draws on the resources of experienced *qui tam* counsel representing multiple Relators to advance prosecution of the consolidated action, there is no concern of duplicative actions and the multiple cases enhance, not obstruct, rigorous enforcement.

III. CONCLUSION

The statutory requirement that persons who bring actions that are intervened and successful be awarded reasonable attorneys' fees and expenses serves Congress's objectives to optimize enforcement through an investment of private counsel's time and resources and to require Defendants to internalize costs of suit as a deterrent to fraud. TAFEF respectfully urges this Court to reverse the holdings of the District Court precluding an award of attorneys' fees on first to file and public disclosure grounds and to instruct the District Court to proceed with evaluation of Relators' applications for recovery of expenses necessarily incurred and reasonable attorneys' fees and costs.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this document complies with the type-volume limit of Fed R. App. P. 32(a) (7) (B) (i) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and 6 Cir. R. 32(b) (1), this document contains 6,070 words.

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Dated: January 22, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on this 22d day of January, 2021, I caused a copy of the foregoing brief to be filed electronically with the Court's ECF system, and that all counsel will be served by the ECF system.

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