IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 17-2562

UNITED STATES OF AMERICA *ex rel.*, JEFFREY BERKOWITZ,
Plaintiff – Appellant,

v.

AUTOMATION AIDS INC., et al.,
Defendants – Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION OF TAXPAYERS AGAINST FRAUD EDUCATION FUND FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT THE PLAINTIFF-APPELLANT AND IN FAVOR OF REVERSAL OF THE DISTRICT COURT'S DECISION

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Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, Taxpayers Against Fraud Education Fund ("TAFEF") seeks leave to file a brief as *amicus curiae* supporting Plaintiff-Appellant. In support of this motion, Applicant states as follows:

1. Plaintiff-Appellant Jeffrey Berkowitz filed this *qui tam* action pursuant to the federal False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733, alleging that the Defendants-Appellees Automation Aids Inc; Caprice Electronics, Inc.; Supply Saver Corp.; Computech Data Systems; Support of Microcomputers Associated; Aprisa Technology, LLC; Vee Model Management Consulting; United Office Solutions, Inc.; and A&E Office and Industrial Supply defrauded the federal

government by expressly and impliedly falsely certifying compliance with the Trade Agreements Act ("TAA") before and during the performance of their government contracts and sold products to the government under those contracts that they knew were from manufactured in countries with which the United States did not trade, making the goods non-compliant with the TAA.

2. This case is before this Court upon Plaintiff-Appellant's appeal of the United States District Court for the Northern District of Illinois' orders granting the Defendants' motions to dismiss for failure to plead fraud with the requirement particularity under Federal Rule of Civil Procedure 9(b). The District Court's ruling would significantly undermine the prosecution of FCA cases and disregards the widely accepted rule that corporate knowledge can be established by showing that a corporation's various employees had the requisite knowledge to be held liable under the FCA. Prior decisions in this Circuit have established that one employee does not have to possess knowledge of all elements of a fraud in order to hold the corporation liable under the FCA.

3. TAFEF is the leading nonprofit public interest organization dedicated to combating fraud against the federal government through its education of the public, the legal community, legislators, and others about the FCA and its *qui tam* provisions. TAFEF supports vigorous enforcement of the FCA by contributing its understanding of the Act's proper interpretation and application and working in

partnership with *qui tam* plaintiffs, private attorneys, and the Government to effectively prosecute meritorious *qui tam* suits.

4. TAFEF, which is based in Washington, D.C., works with a network of more than 400 attorneys nationwide who represent *qui tam* plaintiffs in FCA litigation. In the past few years, TAFEF has greatly expanded its efforts toward public awareness and education regarding the FCA.

5. TAFEF publishes the *False Claims Act and* Qui Tam *Quarterly Review*, a quarterly publication that provides an overview of case decisions, settlements, and other developments under the FCA. Past issues of the publication are available online at: http://www.taf.org/publications/quarterly-review/archivepublic.

6. TAFEF presents a yearly educational conference for private and government FCA attorneys, typically attended by more than 300 practitioners.

7. TAFEF collects and disseminates information concerning the FCA and *qui tam*, as well as the whistleblower programs enforced by the Securities and Exchange Commission, the Commodities Futures Trading Commission, and the Internal Revenue Service. TAFEF regularly responds to inquiries from a variety of sources, including the general public, the legal community, the media, and Government officials. TAFEF maintains a comprehensive FCA library open to the public, and TAFEF has an educational presence on the Internet. TAFEF also has

provided congressional testimony, conference presentations, and assisted with training programs.

8. TAFEF and its sister nonprofit, the False Claims Act Legal Center, have filed *amicus curiae* briefs on important legal and policy issues in FCA cases before numerous federal courts, including the United States Supreme Court. TAFEF possesses extensive knowledge about the origin and purposes of the False Claims Act Amendments of 1986, 2009, and 2010, as well as unparalleled experience with its implementation. As such, TAFEF's brief will assist the Court's consideration of the FCA issues raised on appeal.

9. TAFEF contacted counsel for the appellant and counsel for the appellees. While counsel for the appellant consented to the filing of TAFEF's brief as *amicus curiae*, counsel for the various appellees did not consent to the filing of TAFEF's brief as *amicus curiae* or did not respond.

10. TAFEF respectfully requests that this motion be granted and that the Clerk be directed to file the enclosed brief.

Dated: October 27, 2017

Respectfully submitted,

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ORDER GRANTING MOTION OF TAXPAYERS AGAINST FRAUD EDUCATION FUND FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT THE PLAINTIFF-APPELLANT AND IN FAVOR OF REVERSAL OF THE DISTRICT COURT'S DECISION

Upon consideration of the Motion of Taxpayers Against Fraud Education Fund for Leave to File an *Amicus Curiae* Brief in Support of the Plaintiff-Appellant, the Court finds that the proposed *amicus curiae* brief may assist in the determination of the matters presented.

Accordingly, IT IS HEREBY ORDERED that the Application of *amicus curiae* is GRANTED.

IT IS SO ORDERED.

Dated:_____

CERTIFICATE OF SERVICE

I hereby certify that on October 27,2017, I electronically filed the foregoing motion with the Clerk of the Court by using the appellate CM/ECF system. I further certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Respectfully submitted,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

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

I. STATEMENT OF INTEREST

A. Taxpayers Against Fraud Education Fund

Pursuant to Rule 29 of the Federal Rules of Civil Procedure, Taxpayers Against Fraud Education Fund respectfully submits this brief as *amicus curiae* in support of Appellant Jeffrey Berkowitz ("Relator" or "Berkowitz"). Pursuant to Rule 29(c)(5), *amicus curiae* represents that no party's counsel has authored this brief in whole or in part; no party or party's counsel has contributed money that was intended to fund preparing or submitting the brief; and no person other than *amicus curiae*, its members, or its counsel has contributed money that was intended to fund preparing or submitting the brief.

Automation Aids Inc., Caprice Electronics, Inc., United Office Solutions, Inc., Support of Microcomputers Associated, Vee Model Management Consulting, Computech Data Systems, Supply Saver Corp., and A&E Office and Industrial Supply have not consented to the filing of this brief. Aprisa Technology, LLC has not responded to the request for consent.

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. TAFEF is committed to preserving effective anti-fraud legislation at the federal and state levels. The organization has worked to publicize the *qui tam* provisions of the

False Claims Act ("FCA"), regularly participates in litigation as *amicus curiae*, and has provided testimony to Congress about ways to strengthen and 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.

B. The Importance of the Outcome of this Litigation

TAFEF submits this *amicus curiae* brief to address a narrow issue of the FCA's intent requirement and the District Court's incorrect interpretation of Federal Rule of Civil Procedure 9(b) with respect to that requirement. The District Court's opinion could have broad implications for enforcement of the FCA and deter whistleblowers from bringing legitimate cases that would recover significant amounts of taxpayer dollars for the government.

II. ARGUMENT

A. The FCA's Knowledge Element Does Not Require One Corporate Employee to Have Knowledge of All Elements of a False Claim.

The Relator in this case alleged that nine government vendors violated the Trade Agreement Act ("TAA") by knowingly selling the government IT equipment which originated in "non-designated countries." In *United States ex rel. Berkowitz v. Automation Aids,* The relator also alleged that each of the defendants expressly and falsely certified compliance with the TAA in their government

contracts and sold products to the government under those contracts that they knew were manufactured in countries with which the United States did not trade, making the goods non-compliant with the TAA, and rendering false their claims for payment for those non-conforming goods. No. 13 C 08185, 2017 WL 1036575, *2-3 (N.D. Ill. March 16, 2017). In support of his FCA claim, the Relator alleged that each time the defendants sold the non-compliant goods to the government, they knowingly certified (implicitly and explicitly) that the goods were compliant. *Id.*

This brief addresses one critical sentence in the District Court's opinion. The District Court held that the plaintiff did not sufficiently plead knowledge under the FCA:

> Most important of all, there are no specific allegations from which to reasonably infer that ***someone*** in each company knew that the company was selling noncompliant products to the government; that ***the same someone also knew*** that the Trade Agreements Act required that the products be made only in certain countries; and that ***the same someone knew*** that the submitted claims amounted to an implied certification that the goods were in compliance with all statutory and regulatory requirements, ***so the someone*** decided to omit the country of origin from the submitted claims. Without more specific allegations about the fraud schemes executed by each of the Defendants, really what is alleged is a breach of contract, not fraud.

Id. at *7 (emphasis added). In other words, the District Court's holding would require that an FCA plaintiff – either the government or a private citizen – identify

a *single* individual within any corporate defendant who knew of the relevant regulatory, statutory, or contractual requirements and knew the corporation submitted a claim for payment in violation of those requirements. This holding would render enforcement of the FCA against corporate defendants almost impossible. Many of the most important and impactful FCA cases are against large corporate defendants with thousands or more employees and dozens of departments located across the county, if not around the globe. Under the District Court's formulation, corporations could simply silo individuals into different departments with different responsibilities in order to avoid FCA liability.

For example, imagine a prototypical FCA case where a large pharmaceutical company has offered illegal kickbacks to doctors to induce them to prescribe the company's products to Medicare recipients, all at a cost to Medicare of millions of dollars in unnecessary prescription reimbursements. Suppose the company's head of marketing gave an instruction to his sales representatives to bribe the doctors with cash to induce prescriptions for the company's product. Suppose the sales representatives who received no training and had no knowledge that the payments were illegal, followed the instructions, but did not give details to the head of the marketing. Suppose the analytics department reviewed the prescription statistics and saw that doctors who received the cash payments had increased their prescription writing of the company's products to Medicare patients. The

corporation in this hypothetical has committed a paradigmatic FCA violation by causing the submission of claims to Medicare for prescriptions that are tainted by illegal kickbacks. Yet, even with detailed allegations of each of the preceding facts, no one person at the company had knowledge of the entire scheme – only individual pieces of it. Under the District Court's ruling, no plaintiff – not even the government – can plead an FCA violation. That cannot be the right result.

Under the FCA, the collective knowledge of corporate employees can establish a knowing false claim by that corporation. This Court held in *United States v. Anchor Mortg. Corp.* that "[c]orporations . . . 'know' what their employees know, when the employees acquire knowledge within the scope of their employment" 711 F.3d 745, 747-48 (7th Cir. 2013). This court has explained that "[c]orporations do not have brains, but they do have employees. One fundamental rule of agency law is that corporations 'know' what their employees know – at least, what employees know about subjects that are within the scope of their duties." *Prime Eagle Grp. Ltd. v. Steel Dynamics, Inc.*, 614 F.3d 375, 378 (7th Cir. 2010); *see also United States v. Bank of New England, N.A.*, 821 F.2d 844, 855 (1st Cir. 1987) (finding that the "knowledge" of a corporation is "the sum of the knowledge of all of the employees.")

No court has held that a single employee has to have all of the relevant factual information in order to establish "knowing" conduct. Even those courts

who have declined to embrace the collective knowledge theory of liability have not accepted the District Court's reasoning that a single employee must have knowledge of all of the elements of the fraud. *See United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 919 (4th Cir. 2003). Rather, "a corporation is chargeable with the knowledge of its agents and employees acting within the scope of their authority." *Western Diversified Servs. v. Hyundai Motor Am., Inc*., 427 F.3d 1269, 1276 (10th Cir. 2005); *Grand Union Co. v. United States*, 696 F.2d 888, 891 (11th Cir. 1983) ("in cases brought under the False Claims Act [ ] the knowledge of an employee is imputed to the corporation when the employee acts for the benefit of the corporation and within the scope of his employment.").

To hold otherwise would lead to unintended and disastrous consequences for the FCA and the fight against corporate fraud. Corporations naturally divide duties amongst various employees throughout a diverse organizational structure. This corporate structure should not serve as a means of insulating them from FCA liability. *See Bank of New England*, 821 F.2d at 856 ("Corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of those components constitutes the corporation's knowledge of a particular operation. It is irrelevant whether employees administering one component of an operation know the

specific activities of employees administering another aspect of the operation.") Instead, courts should consider whether the corporation as an entity, acting through its employees, submitted false claims.

B. The False Claims Act Allows Intent to be Pled Generally

A plaintiff may establish an FCA violation where the defendant: (1) knowingly; (2) presents or causes to be presented; (3) a materially false or fraudulent claim for payment to the United States. 31 U.S.C. § 3729(a)(1). A defendant acts knowingly if it acts with actual knowledge, or in reckless disregard or with deliberate ignorance of the truth or falsity of the information. 31 U.S.C. § 3729(b)(1)(A). No specific intent to defraud is required. 31 U.S.C. § 3729(b)(1)(B); *United States ex rel. Durcholz v. FKW, Inc.*, 189 F.3d 542, 544 (7th Cir. 1999). The FCA is an anti-fraud statute and subject to the pleading requirements of Rule 9(b), which require the plaintiff to "state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b); *United States ex rel. Hanna v. City of Chicago*, 834 F. 3d 775, 778-79 (7th Cir. 2016). Under Rule 9(b), however, "intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b); *United States ex rel. Presser v. Acacia Mental Health Clinic, LLC*, 836 F.3d 770, 781 n.29 (7th Cir. 2016). Further, at the pleadings stage, all reasonable inferences must be drawn in the

plaintiff's favor. *United States ex rel. Zverev v. USA Vein Clinics of Chicago, LLC*, 244 F. Supp. 3d 737, 743 (N.D. Ill. 2017).

III. CONCLUSION

Because the District Court erroneously interpreted the requirements of the FCA and Rule 9(b) with respect to the FCA's knowledge requirement, the District Court's decision should be reversed and remanded.

Dated: October 27, 2017

Respectfully submitted,

/s/ David J. Chizewer

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 1,691 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point typeface.

/s/ David J. Chizewer
David J. Chizewer

Attorney for *Amicus Curiae* Taxpayers Against Fraud Education Fund

CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2017, the foregoing Brief of *Amicus Curiae* Taxpayers Against Fraud Education Fund in Support of Reversal United States of America *ex rel*. Jeffrey Berkowitz has been filed in the office of the Clerk for the United States Court of Appeals for the Seventh Circuit, and a true and correct copy of the same has been provided to all parties of record by the Court's CM/ECF system.

/s/ David J. Chizewer
David J. Chizewer

Attorney for *Amicus Curiae* Taxpayers Against Fraud Education Fund