15-6280

In the United States Court of Appeals for the Sixth Circuit

UNITED STATES OF AMERICA *EX REL.*
JAMES DOGHRAMJI, SHEREE COOK, AND RACHEL BRYANT,
Relators-Appellees,

v.

COMMUNITY HEALTH SYSTEMS, INC., *ET AL.*,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

BRIEF FOR APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 6 Cir. R. 26.1, Appellants state as follows: Community Health Systems, Inc. ("CHSI") is a publicly held company. It does not have a corporate parent, and no publicly traded company currently owns 10% or more of its stock. All other Appellants are privately held companies in which Appellant CHSI has an indirect ownership interest.

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PRELIMINARY STATEMENT

In 2011, Appellants Community Health Systems, Inc., and certain of its affiliated hospitals (collectively referred to as "CHSI") entered into a settlement agreement with the Government to resolve allegations that CHSI's affiliated hospitals had violated the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733.[1] The Agreement also resolved seven *qui tam* actions filed by various relators against CHSI and affiliated facilities, including the lawsuit filed by Relators-Appellees James Doghramji, Sheree Cook, and Rachel Bryant (collectively referred to as "Doghramji"). But it did not resolve entrenched disagreements over the relators' claimed entitlement to attorneys' fees. Instead, the Agreement punted that issue:

> All Parties agree that nothing in this [Agreement] shall be construed in any way to release, waive or otherwise affect the ability of [CHSI] to challenge or object to Relators' claims for attorneys' fees, expenses, and costs pursuant to 31 U.S.C. § 3730(d).

That broad reservation of rights carved out of the settlement all disputes over fees.

There were seven relators, and the FCA is crystal clear that fees may be awarded only to the *single* relator who files first. 31 U.S.C. § 3730(b)(5). The FCA also denies fees to any relator whose claims already have been disclosed to

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[1] CHSI is a publicly traded holding company with no employees. CHSI's indirect subsidiaries own and operate hospitals. CHSI does not operate any of the hospitals that it indirectly owns.

the public. *Id*. § 3730(e)(4)(A). CHSI consistently maintained that the FCA's fee limitations applied to the relators who are appellees in this Court.

Anxious about these statutory limits, the relators originally proposed that the Agreement explicitly affirm their entitlement to fees. But CHSI quickly struck that language from the draft, and instead added the provision quoted above to reserve all potential challenges to the relators' fee requests. This provision complemented another term broadly reserving all disputes over "any claims Relators may have for reasonable attorneys' fees, expenses, and costs pursuant to § 3730(d)."

Everybody understood the significance of CHSI's change to the Agreement. Indeed, shortly before the parties signed it, lawyers for CHSI, the Government, and several relators acknowledged in e-mail exchanges that the Agreement was silent on the relators' asserted entitlement to fees. Nonetheless, in the decision below the district court held that the provision quoted above unambiguously waived CHSI's right to challenge appellees' entitlement to fees.

Elementary principles of contract law require reversal here. If those principles leave any ambiguity in the meaning of the Agreement—and they do not—every shred of extrinsic evidence supports CHSI's position. Furthermore, even if appellees' reading is credited, CHSI remains entitled to raise the first-to-file statutory bar that appellees are so desperate to avoid.

STATEMENT IN SUPPORT OF ORAL ARGUMENT

This case presents questions about the meaning of a $97 million settlement agreement signed by the Government, CHSI, and seven *qui tam* relators, and millions of dollars in attorneys' fees are directly at stake. This case also implicates important policies underlying the FCA. CHSI respectfully requests oral argument to address any questions the Court may have about the parties' course of dealings, the Agreement, and the proper interpretation of the FCA.

STATEMENT OF JURISDICTION

In filing their *qui tam* complaints, appellees purported to invoke the jurisdiction of the district court under 28 U.S.C. §§ 1331 and 1345, and 31 U.S.C. §§ 3730 and 3732. *E.g.*, Doghramji Complaint, RE 1, Page ID #17. After the parties finalized the Agreement, the district court entered an order pursuant to Fed. R. Civ. P. 41(a)(1)(A) dismissing the FCA claim, but not dismissing appellees' claims for fees. Revised Order of Dismissal, RE 104, Page ID #1346. That order also provided that "[t]he Court will retain jurisdiction over the United States, all defendants, and Relator to the extent necessary to enforce the terms and conditions of the [Agreement], and to adjudicate Relator's claims for statutory attorneys' fees and costs pursuant to 31 U.S.C. § 3730(d)." *Id.* at Page ID #1347. Thus, when presented by appellees with fee petitions, the district court had jurisdiction to adjudicate the merits of those petitions and enforce the terms of the Agreement.

See, e.g., *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381 (1994); *RE/MAX Int'l, Inc. v. Realty One, Inc.*, 271 F.3d 633, 641 (6th Cir. 2001). The district court entered its final order and judgment on November 6, 2015. Final Order, RE 218, Page ID #6229-6323; Judgment, RE 219, Page ID #6233. CHSI filed a notice of appeal on November 12, 2015. Notice of Appeal, RE 220, Page ID #6234. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

This case concerns the scope of a broad and unqualified reservation of rights intended to carve all fee-related disputes out of the Agreement. Although the parties' dispute implicates many other provisions in the Agreement, it centers on this term: "All Parties agree that nothing in this [Agreement] shall be construed in any way to release, waive or otherwise affect the ability of [CHSI] to challenge or object to Relators' claims for attorneys' fees, expenses, and costs pursuant to 31 U.S.C. § 3730(d)." This appeal presents the following questions:

1. Whether the Agreement preserved CHSI's ability to challenge or object to a relator's claim of entitlement to attorneys' fees, expenses, and costs.

2. Whether, if the Agreement's reservation of rights is ambiguous, extrinsic evidence confirms that the parties understood it to permit CHSI to challenge a relator's claimed entitlement to attorneys' fees, expenses, and costs.

3. Whether, under an interpretation of the Agreement limiting it only to objections under § 3730(d), CHSI may argue that appellees' *qui tam* lawsuits do not qualify as actions "brought by a person under subsection (b)"—as is required by § 3730(d)—because they do not satisfy the jurisdictional first-to-file rule set forth in subsection (b).

STATEMENT OF THE CASE

1. The FCA Statutory Framework

The FCA empowers the federal government to recover funds obtained from it by fraud. *See* 31 U.S.C. § 3729(a)(1). The Government itself may file suit under the FCA, but the Act also permits private parties—known as "relators"—to file civil *qui tam* suits on behalf of the Government. *Id.* § 3730(b). Relators must abide by detailed statutory requirements, one of which allows the Government an opportunity to take over the prosecution of a *qui tam* suit. *Id.* § 3730(b)(4). If the Government ultimately obtains a recovery, whether by litigation or by settlement, the relator is entitled under § 3730(d) to a share of those proceeds, plus reasonable attorneys' fees, expenses, and costs. *Id.* § 3730(d)(1).

Not all self-proclaimed relators, however, are entitled to file claims or share in a recovery. The FCA imposes two relevant limitations on *qui tam* suits.

First, "[w]hen a person brings an [FCA action], no person other than the Government may intervene or bring a related action based on the facts underlying

the pending action." 31 U.S.C. § 3730(b)(5). This provision "'unambiguously establishes a first-to-file bar, preventing successive plaintiffs from bringing related actions based on the same underlying facts.'" *United States ex rel. Poteet v. Medtronic, Inc.*, 552 F.3d 503, 515 (6th Cir. 2009).

There is usually only a single legitimate *qui tam* relator for any given instance of alleged wrongdoing. After one relator files a lawsuit alerting the Government to potential fraud, a second (or third or fourth) party cannot lay claim to the spoils of a *qui tam* suit just by filing a similar complaint. When such duplicative actions are initiated, the later-filed suits add little to the Government's knowledge of possible fraud but raise the troubling specter of parasitic litigation. *See Poteet*, 552 F.3d at 507. A strict first-to-file rule also encourages "prompt disclosure of fraud by creating a race to the courthouse among those with knowledge of fraud." *Campbell v. Redding Med. Ctr.*, 421 F.3d 817, 821 (9th Cir. 2005). Thus, a relator must be a "true whistleblower" to collect a bounty, and is barred from recovering under § 3730(d) "if someone else has filed the claim first." *Poteet*, 552 F.3d at 515-16. The first-to-file doctrine is so vital to the FCA statutory scheme that this Court has held it to be a "jurisdictional limit on the courts' power to hear certain duplicative *qui tam* suits." *Id.* at 516.[2]

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[2] Nearly every other Circuit agrees that the first-to-file bar is jurisdictional. *United States ex rel. Hartpence v. Kinetic Concepts, Inc.*, 792 F.3d 1121, 1123 (9th Cir.

At times, it is understandable that a particular *qui tam* relator may perceive the categorical first-to-file rule as unduly rigid. A *qui tam* relator may have spent considerable time and effort investigating a claim, but still collide with the first-to-file bar. Congress was aware of that possibility, however, and nonetheless declined to create a "good Samaritan" or "really did help the Government" exception for later-filing *qui tam* plaintiffs. Doing so would have undermined the rule's basic purposes. Practice under the original, pre-1943 version of the FCA illustrated the problem. That statute allowed relators to file suits and receive a share of the recovery even if they did not first reveal an alleged fraud. *See United States ex rel. LaCorte v. SmithKline Beecham Clinical Labs., Inc.*, 149 F.3d 227, 233 (3d Cir. 1998). The result was disastrous: a flood of suits copied from preexisting indictments, as "opportunistic private litigants chased after generous cash bounties." *Id.*

Learning from experience, Congress crafted a rule to achieve "the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no

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2015); *United States ex rel. Ven-A-Care of the Florida Keys, Inc. v. Baxter Healthcare Corp.*, 772 F.3d 932, 936 (1st Cir. 2014); *In re Nat. Gas Royalties Qui Tam Litig. (CO2 Appeals)*, 566 F.3d 956, 961 (10th Cir. 2009); *United States ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 376 (5th Cir. 2009). Only the D.C. Circuit has held to the contrary. *United States ex rel. Heath v. AT&T, Inc.*, 791 F.3d 112, 120 (D.C. Cir. 2015).

significant information to contribute of their own." *LaCorte*, 149 F.3d at 234. The first-to-file rule can serve that purpose only if applied without exception. Relators, witnesses, good Samaritans, law firms, and others who help the Government investigate alleged fraud are not all entitled to a fee award. Instead, the FCA rewards only those who *first* set the Government onto the trail of alleged fraud with non-public information.

A similar policy judgment underlies a second statutory limitation on relators: the public disclosure bar. Set forth in 31 U.S.C. § 3730(e), it prohibits jurisdiction over any *qui tam* action that largely relies on previously disclosed information. Thus, when "substantially the same allegations" made in a complaint already have been "publicly disclosed"—including disclosure by the news media or in other court filings not under seal—the action must be dismissed unless brought by the Attorney General or the "original source of the information." 31 U.S.C. § 3730(e)(4)(A); *see Walburn v. Lockheed Martin Corp.*, 431 F.3d 966, 973-76 (6th Cir. 2005).[3]

[3] Congress amended the public disclosure bar in 2010 as part of the Patient Protection & Affordable Care Act. See Pub. L. No. 111-148, § 10104(j)(2), 124 Stat. 119. This Court has held that the 2010 amendments lack retroactive effect. *See United States ex rel. Antoon v. Cleveland Clinic Found.*, 788 F.3d 605, 615 (6th Cir. 2015). Here, virtually all of appellees' allegations relate to conduct occurring before the 2010 amendments to the public disclosure bar.

Together, the first-to-file rule and public disclosure bar are Congress's chosen means to protect the FCA's virtues and minimize its vices. True first filers are rewarded for their efforts with a share of the proceeds from the Government's recovery and a statutory entitlement to fees. In contrast, those who add little or no new information are denied undeserved bounties and discouraged from filing valueless litigation.

2. Factual Background

a. The Seven *Qui Tam* Complaints

This case concerns the meaning of a settlement agreement among CHSI, the Government, and seven relators. The Agreement resolved an allegation that hospitals affiliated with Community Health Systems, Inc., knowingly billed federal healthcare programs for medically unnecessary inpatient admissions in emergency departments (the "National ED Claim"). The settlement was reached after the Government spent several years investigating the National ED Claim, assisted in limited respects by some of the relators. As contemplated by the FCA, the Government played the main role in this investigation, took control of the relators' cases, and negotiated the settlement that resolved all claims against CHSI. The National ED Claim filed in the name of the Government thus properly became the Government's own, and the Government saw to that claim's resolution. This much is undisputed.

In connection with the Agreement, all seven relators asserted entitlement to credit (and money) for their adjunct roles in bringing the National ED Claim to fruition. Those individuals had filed their *qui tam* complaints, under seal, over a 29-month period. Most of the fee petitions thus faced obvious hurdles under the text and purpose of the first-to-file rule. After all, it does not require seven blows of the metaphorical whistle over more than two years to *first* alert the Government to potential fraud. Doghramji's fee petition was especially problematic. He had filed his *qui tam* complaint dead last, in May 2011, and after numerous high-profile public disclosures of the National ED Claim's essential facts.

The first two relators, Nancy Reuille and Amy Cook-Reska, filed complaints in January and May 2009. Their filings, however, addressed only individual hospitals and lacked any claims about a *national* policy or practice.[4] Rather, it was the third relator, Dr. Scott Plantz, who first articulated the National ED Claim. In February 2011—three full months before Doghramji arrived at court—Plantz filed a detailed complaint naming 119 CHSI-affiliated entities as defendants and alleging an intentional corporate-wide scheme to overbill the Government for unnecessary ED admissions. *See United States ex rel. Plantz v. Health Mgmt.*

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[4] *See United States ex rel. Reuille v. Cmty. Health Sys. Prof'l Servs., Corp., et al.*, No. 1:09-cv-00007 (N.D. Ind. Jan. 7, 2009); *United States et al. ex rel. Cook-Reska v. Cmty. Health Sys., Inc.*, *et al.*, No. 4:09-cv-01565 (S.D. Tex. May 22, 2009), *complaint amended on* Dec. 21, 2010 ("*Cook-Reska*").

Assocs., Inc., et al., No. 1:10-cv-00959 (N.D. Ill. Feb. 11, 2010) (*Plantz* Complaint). Plantz comprehensively described the specific policies and conduct allegedly at the heart of the National ED Claim. *See Plantz* Complaint ¶¶ 74-190, 246-65.

Plantz's complaint established him as the true first source of the allegations that led to the settlement. He triggered and guided the Government's investigation and settlement of the National ED Claim. The Government later recognized his role by awarding him the entire relator's share of the National ED Claim settlement proceeds.[5] In so doing, the Government necessarily found that Plantz alone met the requirements of § 3730(d), which governs entitlement to both proceeds and fees. CHSI also acknowledged Plantz's role and paid him millions of dollars for his attorneys' work.

Four more relators filed complaints after Plantz.[6] Doghramji filed last, in May 2011.[7]

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[5] *See* Plantz Settlement Agreement, RE 115-15, Page ID # 2760-2763.

[6] The next three relators to file before James Doghramji were Kathleen Bryant, Bryan Carnithan, and Thomas Mason. *See United States ex rel. Bryant v. Cmty. Health Sys., Inc., et al.*, 4:10-cv-02695 (S.D. Tex. July 29, 2010), *complaint amended on* Aug. 21, 2014; *United States et al. ex rel. Carnithan v. Cmty. Health Sys., Inc., et al.*, No. 3:11-CV-312 (S.D. Ill. Apr. 14, 2011), *complaint amended on* Aug. 5, 2011; *United States et al. ex rel. Mason v. Cmty. Health Sys., Inc.*, No. 3:12-cv-00817 (W.D.N.C. Apr. 18, 2011), *complaint amended on* Apr. 12, 2012 & Jan. 9, 2013; *United States ex rel. Serv. Employees Int'l Union, et al. v. Cmty. Health Sys., Inc., et al.*, No. 3:11-cv-00442 (M.D. Tenn. May 10, 2011).

[7] *See* Complaint, RE 1, Page ID #176.

Even ignoring the other five relators who beat him to the courthouse, a comparison of his complaint to Plantz's demonstrates that Doghramji was no first-filer. His complaint relied on the same essential factual allegations as the Plantz filing—in many instances on identical allegations—and did not give rise to any distinct recovery by the Government. He named as defendants 74 CHSI-affiliated hospitals, every one of which Plantz had named; he repeated many of the particular means of wrongdoing already alleged by Plantz; and, like Plantz, he noted statistics comparing CHSI-affiliated facilities with all hospitals in the United States.[8] Although Doghramji did produce a new quantitative analysis, that study just added decoration to a framework of factual allegations constructed more than a year earlier by Plantz. *See Poteet*, 552 F.3d at 516 ("If both complaints allege all the essential facts of the underlying fraud, the earlier filed action bars the later action, even if the later complaint incorporates somewhat different details." (quotation marks and alterations omitted)). Doghramji's case was thus squarely barred by the first-to-file rule. *See Poteet*, 552 F.3d at 515-16; *Walburn*, 431 F.3d at 971.

[8] *See* Defendants' Memorandum in Opposition to Relators' Supplemental Memoranda for Entitlement to Fees at 20-23, RE 165, Page ID #3876-3879 (hereinafter "Opposition to Supplemental Memoranda").

Doghramji's filing also presented a paradigm case for the public disclosure bar. *See* 31 U.S.C. § 3730(e)(4)(A).[9] A full month before Doghramji filed his complaint, Tenet Healthcare Corporation began a widely publicized securities fraud case against CHSI resting on the very same allegations of improper ED admissions nationwide. *See Tenet Healthcare Corp. v. Cmty. Health Sys., Inc.*, No. 3:11-cv-00732-M (N.D. Tex. Apr. 11, 2011). Tenet's claims, which included a statistical analysis similar to that later offered by Doghramji, were reported in the *New York Times* and *Financial Times*. *See* Michael J. de la Merced, *Tenet Accuses Community Health of Overbilling Medicare*, N.Y. TIMES, Apr. 11, 2011; Alan Rappeport, *Tenet Launches Lawsuit Against CHS*, FIN. TIMES, Apr. 12, 2011. Shortly thereafter, CHSI disclosed in SEC filings the claims made in the Tenet suit and the existence of a federal investigation. *See* Cmty Health Sys., Inc., Form 8-Ks (Apr. 15, 2011; Apr. 22, 2011; Apr. 25, 2011). As of May 2011, Doghramji's seventh-filed complaint was long on well-known facts but short on anything new.

b. Settlement Talks: Reserving the Issue of Entitlement to Fees

By the time the Government's investigation reached its conclusion and negotiations over the Agreement began, appellees were aware that the first-to-file and public disclosure rules might prohibit their recovery on the National ED

[9] *See* Opposition to Supplemental Memoranda at 29-36, RE 165, Page ID #3885-3892. Because Doghramji relied on public information obtained second-hand, he does not qualify as an original source. *See* 31 U.S.C. § 3730(e)(4)(B).

Claim. As early as 2011, around the time they produced their seventh-filed complaint, Doghramji's attorneys had begun holding internal conferences and conducting research on the first-to-file bar. *See* Buschner Declaration, RE 89, Page ID #993, 1058. So it surely came as no surprise when CHSI made clear that it would not agree to any settlement requiring it to pay all seven of the relators' fee claims.

Nonetheless, the relators tried (and failed) to secure language in the Agreement that would confirm their entitlement to fees. They sent to CHSI, through the Government, a draft that included the following provision:

> In exchange for . . . Relators' [] obligations contained in this Agreement, *[CHSI] agrees to pay to Relators their reasonable expenses, attorneys' fees and costs*. Any disputes between [CHSI] and any Relator regarding the reasonableness of that Relator's request for expenses, attorneys' fees and costs shall be brought in the United States District Court in which that Relator's action is pending.

See Waldman Declaration, RE 164-1, Page ID #3756 (emphasis added).

CHSI deleted that proposed term. Then, driving home the meaning of that erasure, CHSI proposed a clause stating that the Agreement did *not* waive CHSI's right to challenge the relators' fee petitions on *any* ground. Specifically, on June 9, 2014, CHSI circulated a revised draft striking the relators' proposed language and adding this provision: "All Parties agree that nothing in this [Agreement] shall be construed in any way to release, waive or otherwise affect the ability of [CHSI] to challenge or object to Relators' claims for attorneys' fees, expenses, and costs

pursuant to 31 U.S.C. § 3730(d)." *Id.* at Page ID #3809, 3813. CHSI thereby conveyed to all parties—openly and transparently—its unwillingness to concede the relators' entitlement to fees pursuant to § 3730(d). In the e-mail that accompanied this draft, CHSI's counsel told Melissa Handrigan, the Government's attorney, that "the attached makes clear that . . . [CHSI] is preserving its rights to object to the various relators' claims for attorneys fees." *Id.* at RE 164-2, Page ID #3802.

CHSI's reservations of rights in the Agreement mirrored those of the Government. Section 3730(d) governs relators' entitlement to both fees and a share of the Government's proceeds. The Government—like CHSI—did not want to concede entitlement on the part of all relators. It therefore added two provisions. The first dealt solely with proceeds of the settlement and made clear that the Agreement did not "waive or otherwise affect the ability of the United States to contend that provisions in the [FCA], including 31 U.S.C. §§ 3730(d)(3) and 3730(e), bar Relators from sharing in the proceeds of this Agreement." *See id.* at RE 164-1, Page ID #3760. The Government's second term dealt with attorneys' fees and settlement proceeds together:

> Provided, however, that the following claims shall not be dismissed, unless they are settled, adjudicated, or otherwise resolved . . .
>
> > (1) Relators' claims for reasonable attorneys' fees, expenses, and costs pursuant to 31 U.S.C. § 3730(d); …

(3) Relators' claims for a relator's share under § 3730(d) . . .

See id. at Page ID #3766. In the e-mail to which this draft was attached, Handrigan explained that, "[w]ith regard to share/fees, those issues were carved out of this agreement so we can move the settlement along quickly. They can be addressed in separate agreements with relators." *See id.* at Page ID #3749. Thus, CHSI and the Government understood the Agreement to treat attorneys' fees and relator's share of the proceeds the same way: No concessions were made about entitlement under § 3730(d).

Three weeks after these drafts were exchanged, but more than a month before the Agreement was signed, counsel to CHSI received an e-mail from Matthew Organ, with copies to Jan Soifer, Pat O'Connell, and David Chizewer. Those four lawyers represent (either alone or in combination) Plantz and two other relators. Making clear his understanding of CHSI's changes to the Agreement, Organ wrote:

> Your most recent revisions to the CHS settlement agreement eliminated the paragraph providing that CHS would pay Relators' reasonable expenses, attorneys' fees and costs, in exchange for Relators' agreement to file notices of dismissal of all their claims. In our view, because the Government is intervening in Relators' cases, and Relators are dismissing their claims in their entirety, Relators are entitled to their reasonable expenses, attorneys' fees and costs. Accordingly, we object to the deletion of what was paragraph 2.

See id. at RE 164-3, Page ID #3850. But "paragraph 2" *was* deleted in the final

agreement. And counsel for the relators plainly grasped the natural implication of the changes made by CHSI: The seven relators' disputed claims of entitlement to fees pursuant to § 3730(d) would now be subject to future resolution.

c. The Agreement and the Government's § 3730(d) Finding

The parties signed the Agreement on July 29, 2014. *See* US Notice of Settlement, RE 75-1, Page ID #601-616 (hereinafter "Agreement"). CHSI agreed to pay $88 million to settle the National ED Claim and $9 million to settle unrelated claims. *See id.* at Term 1, Page ID #606. CHSI further agreed to enter into a corporate integrity agreement, though it expressly denied the allegations against it. *See id.* at Recital F and Term 4, Page ID #605, 607-608. The Government's reservation regarding entitlement to proceeds was specified in Term 7; CHSI's reservation regarding entitlement to fees was specified in Term 8; and the more general reservation regarding claims for both fees and proceeds was specified in Term 15(c). *See id.* at Page ID #609-610, 614-615. The relators' proposed paragraph 2, which had CHSI agreeing to pay relators' reasonable fees, was nowhere in the Agreement.

After the Agreement was finalized, the Government addressed the relators' claimed entitlement to a share of the proceeds under § 3730(d). Neither Doghramji nor the other late-filers received any share of the proceeds from the final recovery. Only Plantz was found to satisfy § 3730(d). This did not mean, however, that

Doghramji was left out in the cold. Long before that settlement was completed, Plantz and the other relators had orchestrated a private proceed-sharing deal, ensuring that they all would receive a reward for their involvement in the investigation. *See* Cook-Reska, Dkt. 73 at ¶¶ 12, 18. Through this side deal among relators, Doghramji (the last relator to file) apparently received approximately 14% or $2.3 million of the $16.4 million relator's share awarded for the National ED Claim. *See* RE 87 at 13 n.7, Page ID # 722-723. Presumably this side deal was arranged because several relators knew they stood on shaky footing if their claims were tested against the FCA's first-to-file and public disclosure bars.

That said, it is notable that the Government—which knows better than anyone who fulfilled the FCA's purposes of unearthing alleged fraud—made a judgment to award the *entirety* of the relator's share of the settlement proceeds to Plantz. Even if the Government knew that the proceeds would be re-distributed, it was still obliged to follow the FCA's mandate and not itself pay any share of the proceeds to relators who cannot meet the requirements of § 3730(d). *See U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001) ("[A] presumption of regularity attaches to the actions of Government agencies."). Doghramji's seventh-filed *qui tam* complaint failed that test.

3. District Court Proceedings

With settlement talks successfully concluded, and the issue of their claimed entitlement to fees still on the table, all seven relators informed CHSI that they intended to file fee petitions. Three of the remaining cases were then transferred to the district court in Tennessee, which already had the *Doghramji* case before it.[10] In transferring Amy Cook-Reska's case, Judge Lake of the Southern District of Texas explained that several issues awaited resolution, including the relators' entitlement to fees pursuant to § 3730(d): "The Settlement Agreement does not provide for any monetary award to the Relators . . . . *The Settlement Agreement also reserves the issue of which Relator (if any) is entitled to recovery attorneys' fees under 31 U.S.C. § 3730(d).*" *Cook-Reska,* Dkt. 106 at 4-5 (emphasis added). For this last point, Judge Lake cited Term 15(c)'s broad reservation of rights.

In February 2015, the district court below first considered the issues presented by the cases and consolidated the fee disputes.[11] *See* Order, RE 143, Page ID #3484-3488. In that order, the district court observed—consistent with the prior understanding of CHSI, the Government, relators' lawyers, and Judge

[10] Only Bryan Carnithan's case was not transferred. It is still being litigated in the Southern District of Illinois. CHSI has reached settlements with two other relators.

[11] By this point, Doghramji and CHSI had fully briefed the question of Doghramji's entitlement to fees. In its consolidation order, the district court dismissed Doghramji's earlier-filed fee petition without prejudice. *See* Order, RE 143, Page ID ##3487-3488.

Lake—that the Agreement "reserved the parties' arguments relative to attorneys' fees and, more fundamentally, the threshold issue of which Relator was entitled to fees, if any." *Id.* at Page ID #3485. Nonetheless, the parties were subsequently ordered to brief two issues: whether the Agreement prohibits CHSI from arguing that the relators lack entitlement to fees; and whether each relator should receive the fee award for which he or she petitioned. *See* Order, RE 147, Page ID #3564-3565.

In August 2015, the district court issued an opinion concluding that the Agreement unambiguously bars CHSI from contesting the relators' entitlement to fees.[12] *See* Memorandum, RE 184, Page ID #4567 ("Opinion"). It held that Term 8 preserves only CHSI's *objections made pursuant to § 3730(d)*, rather than objections addressing a *fee request made pursuant to § 3730(d)*. *See id.* at 12-13, Page ID #4578-4579. In other words, the district court held that CHSI may challenge *only* the reasonableness of the seven relators' fee petitions, and is entirely forbidden to raise the more basic question of whether a relator is entitled to fees in the first place.

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[12] The district court also rejected the relators' contention that it lacked subject-matter jurisdiction. That conclusion was correct. Of course, if relators are right about the district court's lack of jurisdiction, the result is that their fee petition must necessarily be dismissed. There is no such thing as jurisdiction to grant fees but lack of jurisdiction to deny them.

The district court offered two grounds to support this interpretation of the Agreement. First, it reasoned that CHSI could have specified the exact grounds on which it intended to object to the relators' entitlement to fees (first-to-file and public disclosure), but declined to do so. *See* Opinion at 12-13, Page ID #4578-4579. Because the Agreement identifies two specific challenges that the Government might raise against any claim of entitlement to a share of the proceeds, the district court concluded that the absence of specific statutory citations in Term 8 meant CHSI must have waived all challenges to fees based on those grounds. Second, the district court noted and treated as highly significant CHSI's "silence" in response to Recital G, which states: "Relators and their counsel claim entitlement under 31 U.S.C. § 3730(d) . . . to [their] reasonable expenses, attorneys' fees, and costs." *Id.* at 12, Page ID #4578. Finally, in just a few lines, the district court held that first-to-file objections under the FCA do not qualify as arguments "made pursuant to § 3730(d)," and therefore are barred by the terms of the Agreement. *Id.* at 11-12, Page ID #4577-4578.

The decision also was laced with suggestions that CHSI was being "too clever by a half," and with insinuations that CHSI sought to hoodwink the relators. The district court, however, cited no evidentiary support for that view and did not address any of the extrinsic evidence (*see* pp. 43-46, *infra*) showing CHSI's candor during settlement talks. *See* Opinion at 11-15, Page ID #4577-4581.

After the district court issued this opinion, Doghramji renewed his fee petition. Relators' Renewed and Supplemental Motion for Fee Award, RE 190, Page ID #4679. CHSI and appellees subsequently submitted a joint stipulation agreeing on the amount of a reasonable fee award for relators, but reserving CHSI's right to appeal the district court's decision about entitlement. Stipulation, RE 214, Page ID #6208-6212. The parties then filed a joint motion for approval of the stipulation. Joint Motion, RE 215, Page ID # 6215-6216. The district court granted the parties' joint motion and entered its final order and judgment on November 6, 2015. Final Order, RE 218, Page ID #6229-6323; Judgment, RE 219, Page ID #6233. CHSI timely filed its notice of appeal six days later. Notice of Appeal, RE 220, Page ID # 6234.

STANDARD OF REVIEW

This Court reviews the district court's legal conclusions and interpretation of the Agreement *de novo*. *See Orrand v. Scassa Asphalt, Inc.*, 794 F.3d 556, 560-61 (6th Cir. 2015); *FDIC v. AmFin Fin. Corp.*, 757 F.3d 530, 533 (6th Cir. 2014).

SUMMARY OF THE ARGUMENT

I. There is only one reasonable interpretation of the Agreement: It allows CHSI to object on any ground to Doghramji's claim for fees pursuant to § 3730(d). Term 8 provides that "nothing in this [Agreement] shall be construed in any way to release, waive or otherwise affect the ability of [CHSI] to challenge or object to

Relators' claims for attorneys' fees, expenses, and costs pursuant to 31 U.S.C. § 3730(d)." Term 8 is not a waiver provision, but a statement that CHSI is *not* waiving its objections. The district court's transformation of this reservation of rights into a waiver—solely on the basis that CHSI's reservation of rights could have been even broader—is therefore suspect on its face. Furthermore, as a matter of ordinary grammar, the limiting clause in Term 8 ("pursuant to 31 U.S.C. § 3730(d)") refers *only* to the last antecedent ("Relators' claims for [fees]"). Term 8 thus cites § 3730(d) to describe the basis of the relators' fee request—which may be objected to on *any* ground—not the basis of CHSI's challenges to that request. *See United States v. Hayes,* 555 U.S. 415, 425 (2009).

Even apart from Term 8's reservation-of-rights function and the well-established "last antecedent" rule, this interpretation is confirmed by the presumption of consistent usage. *See McLane & McLane v. Prudential Ins. Co. of Am.*, 735 F.2d 1194, 1195 (9th Cir. 1984). Every single time the Terms and Conditions refer to the relators' claim for fees, they describe the claim as one for "attorneys' fees, expenses, and costs pursuant to 31 U.S.C. § 3730(d)." Indeed, every reference to the relators' other claims follows this pattern and cites a statute to describe the basis for the claim. Yet, under the district court's reading, Term 8 is a singular departure from this constant pattern of how claims are described. Instead of merely identifying the statutory basis for relators' fee claim, Term 8's

citation of § 3730(d) identifies the only permissible basis for CHSI to object to relators' claim, and therefore serves a totally different function than identical citations everywhere else in the same Agreement. It makes no sense to single out Term 8 this way. The natural reading is that § 3730(d) describes the fee claim, not CHSI's objections.

Difficulties with the district court's interpretation grow when the Agreement is read as a whole. *See Henry v. Chesapeake Appalachia, L.L.C.*, 739 F.3d 909, 912 (6th Cir. 2014). The district court held that Term 8 forecloses any objections to Doghramji's entitlement to fees, but Term 15(c)(1) —reserving "[a]ny claims Relators may have" for fees—plainly allows such arguments. Moreover, the district court's view of Term 8 renders Recital G superfluous: There is no need to recite a claim of entitlement to fees when other provisions of the Agreement separately ensure that entitlement. The district court thus introduced needless inconsistencies and superfluities into the Agreement. *See Kellogg Co. v. Sabhlok*, 471 F.3d 629, 636 (6th Cir. 2006). CHSI, in contrast, makes sense of the Agreement as a coherent whole.

CHSI's position is confirmed by the Agreement's identical treatment of attorneys' fees and the relator's share of the proceeds. Whereas the district court drove a wedge into the Agreement's resolution of disputes under § 3730(d), CHSI recognizes the Agreement's underlying symmetry. Under a proper reading of the

Agreement, *all* disputes concerning the relators' claimed entitlement to payment pursuant to § 3730(d) —*i.e.*, both attorneys' fees and relator's share—are set aside for future resolution, as evidenced by the parallel structure of applicable provisions.

II. If this Court concludes the Agreement is ambiguous, extrinsic evidence resolves that ambiguity in CHSI's favor. *Schachner v. Blue Cross & Blue Shield of Ohio*, 77 F.3d 889, 893 (6th Cir. 1996). Here, every last piece of extrinsic evidence supports CHSI's interpretation: (1) E-mails in which counsel to CHSI, the Government, and several relators acknowledge that the Agreement permits challenges to a relator's entitlement to fees; (2) E-mails between counsel to CHSI and the Government remarking favorably upon the parallel treatment of fees and proceeds under the Agreement; (3) Drafts of the Agreement in which language affirming the relators' claim for fees was removed and replaced by an unqualified reservation of rights; and (4) Records showing that the relators anticipated CHSI's first-to-file objections while negotiating the Agreement and thus were not caught by surprise. In light of this evidentiary record, CHSI's interpretation demonstrably reflects the parties' intent. The district court's interpretation, in contrast, defies that intent. It effectively resurrects a concession that CHSI would pay relators' fees after that exact concession was stricken from the Agreement during negotiations and replaced with a term requiring the opposite conclusion.

III. In any event, CHSI prevails even under Doghramji's interpretation of the Agreement, which still permits CHSI to raise objections pursuant to § 3730(d) against his fee petition. Under § 3730(d), a fee award is allowed only in "an action brought by a person under subsection (b)." Subsection (b) creates—in clause (b)(1)—the *qui tam* action. In the same breath, it limits who can sue in the name of the Government. Clause (5) of subsection (b) provides that "no person" may file a *qui tam* suit based on claims already alleged in another complaint. Thus, § 3730(b)(5) excludes from all of § 3730(b) any action brought by a person whose suit is barred by the first-to-file rule. Giving the statute its plain meaning, § 3730(d)'s reference to "an action brought by a person under subsection (b)" does not include an action brought by a person barred from court by subsection (b). This interpretation is confirmed by statutory purpose: There is no reason to think Congress would have contemplated a fee award for relators whose cases are not properly heard in federal court, and there is every reason to conclude that § 3730(d)'s reference to § 3730(b) encompasses that subsection's jurisdictional limits. Thus, appellees' petitions cannot satisfy the most basic requirement of § 3730(d).

ARGUMENT

The district court was right that the Agreement is unambiguous, but wrong about what its unambiguous meaning is. Application of the normal tools of contract interpretation to the Agreement readily yields the conclusion that CHSI, not appellees and the district court, correctly construes the Agreement, which unambiguously preserves CHSI's right to challenge fee applications on any grounds. Even if that were not true, however, the power of CHSI's arguments, coupled with the weakness of the district court's analysis of the contractual text, would make the Agreement at least ambiguous enough to justify resort to extrinsic evidence. The extrinsic evidence is not just favorable to CHSI, but overwhelmingly so: CHSI told appellees and the Government that the disputed provision was intended to preserve CHSI's ability to challenge any fee awards to appellees, appellees acknowledged that reading, and the provision via which appellees tried to negotiate a contrary result was omitted from the final Agreement. Finally, and perhaps somewhat ironically, the district court's decision was wrong even if the Court somehow construed the Agreement correctly, because even under that interpretation the Agreement preserves all challenges "pursuant to 31 U.S.C. § 3730(d)," and the challenges CHSI wishes to make fall within the meaning of that phrase as a matter of statutory construction.

I. THE AGREEMENT UNAMBIGUOUSLY PRESERVES CHSI'S ABILITY TO CHALLENGE APPELLEES' ENTITLEMENT TO FEES

The Agreement is "governed by the laws of the United States." Agreement at Term 18, Page ID #615. This Court therefore applies federal common law. *See Cassidy v. Akzo Nobel Salt, Inc.*, 308 F.3d 613, 615 (6th Cir. 2002).

"Where a contract's meaning is clear on its face, that meaning controls." *In re AmTrust Fin. Corp.*, 694 F.3d 741, 750 (6th Cir. 2012). Here, the Agreement could not be clearer. It unambiguously memorializes the parties' intention that no term or condition "shall be construed in any way to release, waive or otherwise affect the ability of [CHSI] to challenge or object to Relators' claims for attorneys' fees, expenses, and costs pursuant to 31 U.S.C. § 3730(d)." Agreement at Term 8, Page ID #610.

The first noteworthy feature of the language of Term 8 is that it is a reservation-of-rights term, not a waiver term. It states what the Agreement does *not* "release, waive or otherwise affect." To construe Term 8 *to* waive any aspect of "the ability of CHSI to challenge or object to Relators' claims for . . . fees" is odd, at best. In other words, *even if* the last phrase of Term 8—"pursuant to 31 U.S.C. § 3730(d)"—limited what Term 8 preserves "the ability of [CHSI] to challenge," the most that could be said of Term 8 would be that it does not by itself affirmatively preserve other challenges. Nothing in the words of Term 8 purports

to "release, waive or otherwise affect" *anything*. To waive a viable defense, one would expect a contracting party to include some affirmative language of waiver. Yet the district court here identified no purported waiver *other than* Term 8, forcing it to hold that CHSI had waived its rights by indirection—by limiting the scope of what it said it was *not* waiving. That is not how parties usually write contracts.

A second noteworthy feature of the language of Term 8 is the unmistakable breadth of language it employs in reserving of CHSI's rights. "[N]othing" in the Agreement, Term 8 states, shall be construed "in any way" to "release, waive or otherwise affect" CHSI's ability to "challenge or object to" relators' claims for fees. In multiple ways, these words effectuate a broad reservation of CHSI's ability to object to any claims for fees. There are therefore two strong reasons to doubt the district court's interpretation right off the bat.

But there is much more. The district court's interpretation not only misreads Term 8, but also makes a mess of the Agreement as a whole. Only CHSI's interpretation respects traditional rules of grammar, follows the presumption of consistent usage, avoids the creation of inconsistencies and superfluities, gives terms their plain meaning, and harmoniously integrates every provision of the contract. It therefore must prevail over the interpretation offered by appellees and accepted by the district court.

A. The Last-Antecedent Rule Requires CHSI's Interpretation

Starting with a close examination of Term 8, the district court's reading of the Agreement is foreclosed by the rule of the last antecedent, which provides "that 'a limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it immediately follows.'" *Crestwood Farm Bloodstock v. Everest Stables, Inc.*, 751 F.3d 434, 446 (6th Cir. 2014) (quoting *United States v. Hayes*, 555 U.S. 415, 425 (2009)). Although this rule is not "absolute," the Supreme Court has noted that it is "'quite sensible as a matter of grammar.'" *Barnhart v. Thomas*, 540 U.S. 20, 26-27 (2003). Accordingly, those who would violate this grammatical precept must "overcome" the rule with "other indicia of meaning." *Id.; see also* 2A N. SINGER, SUTHERLAND ON STATUTORY CONSTRUCTION § 47.33, at 369 (6th rev. ed. 2000) ("Referential and qualifying words and phrases, where no contrary intention appears, refer *solely* to the last antecedent" (emphasis added)). Several examples that helpfully illustrate the rule of the last antecedent can be found in ANTONIN SCALIA AND BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 144-146 (2012).

This Court has relied on the last-antecedent rule to guide its interpretation of provisions analogous to Term 8. For example, in *In re Sanders*, this Court interpreted a bankruptcy statute providing that a Chapter 13 debtor may not receive a discharge of his debts if he "'received a discharge . . . in a case filed under chapter

7 . . . of this title during the 4-year period preceding [the filing of the Chapter 13 petition].'" 551 F.3d 397, 398 (6th Cir. 2008) (quoting 11 U.S.C. § 1328(f)). This Court had to decide when the 4-year clock started running. The question presented was whether the limiting clause ("during the 4-year period preceding [the filing of the Chapter 13 petition]") applied to receipt of a discharge or to the filing of a case under Chapter 7. Applying the last-antecedent rule, this Court held that the limiting clause applied only to the phrase that immediately preceded it: "filed under chapter 7." *See id.* at 399-400. Thus, the 4-year clock starts to run upon the filing of a chapter 7 petition. As the Court explained, the last-antecedent rule "creates at least a rough presumption that [] qualifying phrases attach only to the nearest available target." *Id.* at 399.

Invoking it as a rule of grammar and a canon of interpretation, this Court has repeatedly relied on the last-antecedent principle. *See United States v. Mateen*, 764 F.3d 627, 631 (6th Cir. 2014) (en banc); *Engleson v. Unum Life Ins. Co. of America*, 723 F.3d 611, 621 (6th Cir. 2013); *United States v. Martin*, 438 F.3d 621, 631 (6th Cir. 2006). Here, that rule compels CHSI's reading of Term 8. Again, this term states: "All Parties agree that nothing in this Paragraph or this Agreement shall be construed in any way to release, waive or otherwise affect the ability of [CHSI] to challenge or object to Relators' claims for attorneys' fees, expenses, and costs pursuant to 31 U.S.C. § 3730(d)." Page ID #610.

In this sentence, "pursuant to 31 U.S.C. § 3730(d)" is the limiting clause, and thus must be presumed to modify only the last antecedent—namely, "Relators' claims for attorneys' fees, expenses, and costs." Read this way, Term 8 describes what kind of fee request may be challenged (one pursuant to 31 U.S.C. § 3730(d)), not what kinds of challenges may be raised.[13] The Agreement thus allows CHSI to "challenge or object" on *any* ground to appellees' fee requests—requests made pursuant to § 3730(d). Just like its counterpart in *In re Sanders*, Term 8's limiting clause attaches to "the nearest available target." 551 F.3d at 399.

The district court's interpretation, in contrast, pole vaults over the last antecedent and applies Term 8's limiting clause only to the first half of the sentence. There is no special justification for such linguistic gymnastics here. *See In re Sanders*, 551 F.3d at 400 (rejecting an interpretation that read the limiting clause "as reaching back" over the last antecedent). All this Court need do is employ settled rules of grammar—recognized by this Court and the Supreme Court as useful in construing legal texts—to interpret Term 8 properly.

[13] More precisely, Term 8 describes what kind of fee request CHSI does *not* "release, waive or otherwise affect [its] ability . . . to challenge or object to." To repeat a point we made earlier, Term 8 by its words does not affirmatively waive anything, and specifying certain challenges that one is *not* waiving is not the same thing as waiving all other challenges.

B. The Presumption of Consistent Usage Requires CHSI's Interpretation

The unambiguous incorrectness of appellees' interpretation becomes even clearer when tested against the presumption that "words have the same meaning throughout the contract." *McLane & McLane v. Prudential Ins. Co. of Am.*, 735 F.2d 1194, 1195 (9th Cir. 1984). Courts have applied this principle to both single words and discrete phrases that recur in a contract. *See, e.g.*, *Thompson v. Amoco Oil Co.*, 903 F.2d 1118, 1121 (7th Cir. 1990).

The "Terms and Conditions" section of the Agreement refers three times to a "claim" for fees by the relators: in Terms 3, 8, and 15(c)(1). Every time, that claim is described as one for "attorneys' fees, expenses, and costs pursuant to 31 U.S.C. § 3730(d)." Agreement at Page ID #607, 610, 615. Term 18, the forum selection clause, also addresses disputes arising from a "request for attorneys' fees pursuant to 31 U.S.C. § 3730(d)." Agreement at Page ID #616. Just like Terms 3, 8, and 15(c), Term 18 uses a limiting clause to describe the statutory basis of the claim for fees. Thus, every single time the "Terms and Conditions" of the Agreement address a relator's fee claim, they recite the statutory basis for the claim and use the same limiting clause to do so ("pursuant to 31 U.S.C. § 3730(d)").

The relators' fee claims under § 3730(d) are not the only examples of this rule. Throughout the Terms and Conditions, whenever the relators' claims are

mentioned, they are *always* described by reference to the statute or specific cause of action that forms the basis for those claims. For example, every time the Agreement discusses the relators' claims for a share of the settlement proceeds, it describes "claims for a relator's share *under § 3730(d)*." *See* Agreement at Terms 3 and 15(c)(3), Page ID #607, 615 (emphasis added). Every time the Agreement refers to the relators' claims of retaliation under the FCA, it refers to any claims a relator "may have *under § 3730(h) and comparable state laws*." *See* Agreement at Terms 3 and 15(c)(2), Page ID #607, 615 (emphasis added).

Under the controlling presumption of consistent usage, Term 8's citation of § 3730(d) describes only the basis for a relator's fee request. It has nothing to do with the grounds on which CHSI may object to that request.

The district court's reading, in contrast, would leave Term 8 as the only Term in the entire Agreement to address a claim for "attorneys' fees, expenses, and costs" *without* noting the statutory basis for the claim. In Term 8, but nowhere else, the phrase "pursuant to 31 U.S.C. § 3730(d)" would modify *another* part of the sentence ("the ability of [CHSI] to challenge or object")—violating the presumption of consistent usage (in addition to the last-antecedent rule). It would be surpassingly odd if Term 8 were the only term to leave the relators' fee claims naked. And that oddity would be compounded by the arbitrariness of that departure from the Agreement's uniform method of describing all of the relators'

other claims. The far more natural conclusion is that Term 8 stays true to the Agreement's unvarying practice of reciting a specific basis every time it describes a relator's claim.

C. Only CHSI's Interpretation Avoids Inconsistencies and Superfluities

CHSI's interpretation is confirmed by other provisions bearing on the relators' asserted right to fees. In reading a contract, "the meaning of separate contract provisions should be considered in light of one another and the context of the entire agreement." *Taracorp, Inc. v. NL Indus., Inc.*, 73 F.3d 738, 745 (7th Cir. 1996). Thus, "[a]n interpretation which gives effect to all provisions of the contract is preferred to one which renders part of the writing superfluous, useless, or inexplicable." 11 WILLISTON ON CONTRACTS § 32:5 (4th ed. 2007); *accord Henry v. Chesapeake Appalachia, L.L.C.*, 739 F.3d 909, 912 (6th Cir. 2014).

The district court's interpretation offends these principles. To start, it needlessly brings Term 8 into conflict with Term 15(c)(1). Term 15(c) lists five issues and, without qualification, makes clear that all disputes over those matters are reserved for future resolution. The first of the five reserved issues is fees. Term 15(c) provides: "[T]he following claims shall not be dismissed, unless they are settled, adjudicated, or otherwise resolved . . . (1) Any claims Relators may have for reasonable attorneys' fees, expenses, and costs pursuant to 31 U.S.C. § 3730(d)." Agreement at Page ID #615. The plain meaning of Term 15(c)(1) is

that the Agreement does not resolve disputes over *any* claim for fees—including a claim for "reasonable" fees. Term 15(c)(1) thus contemplates that, even if a relator seeks reasonable fees, his or her claim may be challenged. Of course, any such challenge would concern the issue of entitlement. This reading is so natural that Judge Lake cited Term 15(c)(1), without hesitation, for the proposition that "[t]he [Agreement] also reserves the issue of which Relator (if any) is entitled to recover attorneys' fees under 31 U.S.C. § 3730(d)." *Cook-Reska*, Dkt. 106 at 5. Indeed, it appears the district court originally read Term 15(c)(1) this way. *See* Order, RE 143, Page ID # 3485.

The interpretation of Term 8 ultimately adopted by the district court renders Term 8 inconsistent with the plain meaning of Term 15(c)(1), and should therefore be rejected. *See, e.g.*, *Kellogg Co. v. Sabhlok*, 471 F.3d 629, 636 (6th Cir. 2006) ("[C]ontracts must be construed . . . in a manner that avoids absurd results"). Indeed, the district court declared Term 8 to be unambiguously supportive of appellees' position without mentioning or grappling with the patent inconsistency between that position and Term 15(c)(1). Unless there is absolutely no alternative—and here there is one—a contract should not be read to allow and disallow challenges to the same claim simultaneously.

The district court's interpretation also renders Recital G superfluous. Recital G states that "Relators and their counsel claim entitlement under 31 U.S.C.

§ 3730(d) . . . to [their] reasonable expenses, attorneys' fees, and costs." Page ID #605. In Term 3, however, the Parties agree that "nothing in this [Agreement] shall be construed in any way to release . . . any claims Relators may have for reasonable attorneys' fees, expenses, and costs pursuant to 31 U.S.C. § 3730(d)." Page ID #607. Under Term 3 alone, then, appellees' fee *claims* are preserved. According to the district court, CHSI, through Term 8, concedes appellees' *right* to a fee award. Terms 3 and 8, on the district court's reading, thus ensure each appellee's entitlement to a reasonable fee award. Recital G is utterly vestigial.

CHSI's interpretation, in contrast, makes perfect sense of these provisions. In Recital G, the relators "claim entitlement" to a fee award. The use of the word "claim" is significant. In its ordinary sense, a claim is "an assertion of a right to something." COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 451 (OUP 1971). To claim entitlement is to *assert* entitlement, rather than *to be* entitled. So, in Recital G, the relators *assert* that they are entitled to fees. In Term 8, CHSI reserves the right to challenge that assertion. Recital G and Term 8 together frame the central disagreement over entitlement to fees that the Agreement leaves for another day. Term 3 confirms that the fee claim is preserved despite any other waivers in the Agreement, and Term 15(c) sets forth in broad terms the reservation of this dispute for future resolution. Thus, where the district court's interpretation leads to inconsistency and superfluity, CHSI's finds order and structure.

D. The Agreement's Provisions Addressing Relator's Share of the Proceeds Support CHSI's Interpretation of the Agreement's Fee Provisions

A comparison of the Agreement's provisions addressing the relator's share of the proceeds and attorneys' fees under § 3730(d) further confirms CHSI's interpretation. *See* 11 WILLISTON ON CONTRACTS, *supra*, § 32:3 ("A contract will be read as a whole and every part will be read with reference to the whole."). This comparison is especially helpful because, in general, entitlement to fees and a share of the proceeds under § 3730(d) is a single inquiry.[14] And just as CHSI maintains that certain relators (including Doghramji) are not entitled to fees under § 3730(d), so did the Government find that certain relators (including Doghramji) are not entitled to share in the proceeds under that provision.

The Agreement addresses fees four times: Recital G, and Terms 3, 8, and 15(c)(1).[15] It also addresses relator's share four times: Recital G, and Terms 3, 7, and 15(c)(3). These provisions create identical dispute-resolution structures:

I. In Recital G, the relators assert entitlement to both fees and a share of the proceeds under § 3730(d);

[14] A recent statement of this point can be found in *United States v. NextCare, Inc.*: "The plain language of the FCA demonstrates that a relator is only entitled to attorneys' fees if that relator also obtained a relator's share following a court award or settlement." No. 3:11-Civ-141, 2013 WL 431828, at *2 (W.D.N.C. Feb. 4, 2013). Although this case interpreted a state law, it expressly tied its analysis to an identity in structure between that state statute and the FCA. *See id.*

[15] The forum selection clause—Term 18—also briefly references fees.

II. In Term 3, the Parties agree that no other provision of the Agreement waives the relators' claims for fees and a share of the proceeds;

III. The Government reserves relators' entitlement to a share of the proceeds in Term 7, and CHSI reserves relators' entitlement to fees in Term 8;

IV. Term 15(c), which describes the procedural path forward after the *qui tam* suits are dismissed, addresses fees and relator's share together and unqualifiedly reserves both issues for future resolution.

In sum, there is no indication that a share of the proceeds and attorneys' fees were meant to be treated differently, and there is considerable indication they are to be treated the same.

The district court not only missed this connection, but inverted it, holding that the Agreement's treatment of relators' share of the proceeds proves that CHSI must have conceded appellees' entitlement to fees. The district court reasoned that Term 7 is more specific than Term 8 about possible bases for challenging the relators' entitlement to payment, and that Term 8 must therefore waive any such objections.

This was the keystone of the district court's analysis, and it was mistaken for a simple reason: Term 7 does not reserve fewer—or more specific—objections than Term 8. Just consider Term 7's limitless language:

> [This Agreement does not affect] the ability of the United States to contend that provisions in the [FCA], including 31 U.S.C.

> §§ 3730(d)(3) and 3730(e), bar Relators from sharing in the proceeds of this Agreement. Moreover, the United States and [Relators] agree that they each retain all of their rights pursuant to the [FCA] on the issue of the share percentage, if any, that Relators should receive of any proceeds of the settlement of their claims.

To be sure, unlike Term 8, the first sentence of Term 7 cites two specific grounds on which the Government might challenge the relators' entitlement to share in the proceeds. But that specificity is a mirage. Those citations are introduced by the term "including," which denotes a non-exhaustive list and thus leaves the door wide open. *See Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 561 (1985). And then comes the second sentence of Term 7, which blasts that open door off its hinges. There, the Government retains "all of [its] rights" to challenge what proceeds, "if any," a relator is entitled to receive. In other words, the Government expressly can object on *any* ground—mentioned in the Agreement or not—to a relator's request for a share of the proceeds. It is hard to see how this reservation somehow qualifies as so specific that it must control interpretation of Term 8. Instead, a proper reading would treat Terms 7 and 8 as equally general: They both reserve all possible challenges to the relators' asserted entitlement under § 3730(d).

Moreover, as a matter of general contract law, CHSI was not required to list exhaustively every possible objection it might someday raise. And nowhere does the Agreement itself impose or imply a demand for such meticulous, comprehen-

sive disclosure of every future legal contention. Although some terms in the Agreement are specific in the statutory or constitutional issues they address, others are much more general. In Term 2, for example, the Government releases CHSI from a variety of specific causes of action, and then includes a sweeping catch-all. *See* Page ID #606-607. And Term 6 contains a series of reservations allowing the Government to bring claims against CHSI if they involve, among other things, "any criminal liability" or "any liability arising under Title 26, U.S. Code (Internal Revenue Code)." *See* Page ID #608-609. There is no apparent norm in the Agreement that terms be stated at a particular level of specificity. Some cite specific statutory subsections, some cite whole statutes, some cite entire sections of the U.S. Code, and some refer to all claims of a general type. The district court thus erred in relying on the example objections noted in Term 7 to hold that Term 8 must be read as waiving all objections it did not explicitly enumerate as preserved.

CHSI's objections, moreover, are not limited to the first-to-file rule and public disclosure bar. They include arguments unique to specific relators. For example, CHSI objects to Amy Cook-Reska's fee petition on the ground that her allegations concerned only a single hospital in Texas and did not even mention the Emergency Department, and thus did not properly constitute an allegation of the National ED Claim. It would have been awkward and impractical to enumerate

this kind of objection in the Agreement, which is why the parties agreed to reserve *all* of CHSI's objections—whatever their basis—for future resolution.

The Agreement's identical treatment of proceeds and fees also shows why the district court's reliance on Recital G was misplaced. In Recital G, the relators "claim entitlement" to both proceeds and fees. The district court concluded that CHSI's "silence" in response to Recital G "speaks volumes." Opinion at 12, Page ID #4578. Of course, recitals rarely "speak volumes" in contract interpretation, as many authorities hold that recitals cannot create legal obligations and are entitled to little weight in interpreting the operative provisions of a contract. *See, e.g.*, *McKissick v. Yuen*, 618 F.3d 1177, 1186 (10th Cir. 2010); *Pieper, Inc. v. Land O'Lakes Farmland Feed, LLC*, 390 F.3d 1062, 1065 (8th Cir. 2004); *Whetstone Candy Co., Inc. v. Kraft Foods, Inc.*, 351 F.3d 1067, 1074 (11th Cir. 2003). Silence in response to a recital "speaks" even less. In any event, all Recital G does is record the relator's *claimed* entitlement. It does not say they "are entitled."

Nor would it be sensible to read the Agreement that way. The Government is no more or less "silent" in response to Recital G than CHSI is, yet no fair reader of the Agreement would think that the Government's "silence" here constitutes a waiver of any rights it might reserve elsewhere in the contract, including the Government's right to bar relators from a share of the proceeds. The far more sensible conclusion is that, by reserving rights elsewhere in the Agreement, neither

the Government nor CHSI has in fact been "silent" in response to Recital G. Moreover, "[w]hen general and specific clauses conflict, the specific clause governs the meaning of the contract." 11 WILLISTON ON CONTRACTS, *supra*, § 32:10. Here, that means that Terms 7 and 8, which specifically reserve disputes over entitlement to a share of the proceeds and attorneys' fees, control Recital G, which generally asserts the relators' claim of entitlement. Far from speaking "volumes," what the district court called "silence" says nothing at all.

* * *

At every level of interpretation, the Agreement unambiguously authorizes CHSI to challenge appellees' entitlement to fees. The district court's conclusion that Term 8 waives all objections to a fee award other than unreasonableness thus raises a host of incongruities and cannot stand. To affirm it, this Court would have to construe a reservation of rights as a waiver of rights, jettison the last-antecedent rule, overcome the presumption of consistent usage, accept an inconsistency between Terms 8 and 15(c), resign itself to the superfluity of Recital G, and conclude that the Agreement—despite all contrary indications—treats fees and relator's share in radically different ways. Instead, this Court should hold that CHSI has unambiguously preserved its ability to challenge the relators' entitlement to fees. That path properly respects the text and structure of the Agreement, and vindicates the contracting parties' manifest intent as reflected in unambiguous text.

II. IF THE AGREEMENT IS AMBIGUOUS, EXTRINSIC EVIDENCE PROVES THAT CHSI'S READING IS CORRECT

When faced with a contract subject to multiple reasonable interpretations, a court may consider extrinsic evidence of the parties' intent to resolve the ambiguity. *See Schachner v. Blue Cross & Blue Shield of Ohio*, 77 F.3d 889, 893 (6th Cir. 1996).[16] If this Court determines that the Agreement is ambiguous regarding the scope of CHSI's reservation of rights, the Agreement's drafting history and the parties' course of negotiations uniformly and resoundingly confirm CHSI's interpretation.

The Agreement emerged from comprehensive negotiations among CHSI, the Government, and the relators, with the Government serving as the lead negotiator for plaintiffs and an intermediary between the relators and CHSI. Everyone involved in those talks understood that CHSI believed numerous relators were not entitled to fees under § 3730(d). CHSI made no secret of its view. On June 9, 2014, it bluntly told the Government in an e-mail that "[CHSI] is preserving its

[16] In the district court, appellees raised one objection to consideration of the extrinsic evidence introduced by CHSI: the "settlement privilege" recognized by this Court in *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 980 (6th Cir. 2003). That objection is misplaced: *Goodyear* held only that communications made in furtherance of settlement talks are not discoverable by a third party in another action. *See id.* at 979-82. It did not speak to whether a court may consider communications between the parties to a settlement agreement when interpreting the meaning of that very agreement. The "settlement privilege" argument thus fails.

rights to object to the various relators' claims for attorneys fees." *See* Waldman Declaration, RE 164-2, Page ID #3802. That same day, it circulated a draft striking language that would have entitled the relators to fees and adding new language—the language that appears in the final Agreement—to reserve that question for future resolution. *Id.* at Page ID #3809, 3813. This change alone was as clear a signal as any relator could possibly require about what CHSI intended its proposed (and eventually adopted) new language to mean. After all, there is no mystery when a lawyer receives the following changes in a draft settlement:

> **Deletion**: "CHS agrees to pay to Relators their reasonable expenses, attorneys' fees and costs"
>
> **Addition**: "All Parties agree that nothing in this [Agreement] shall be construed in any way to release, waive or otherwise affect the ability of CHS to challenge or object to Relators' claims for attorneys' fees, expenses, and costs pursuant to 31 U.S.C. § 3730(d)."

Id. If the meaning of the added paragraph were as relators and the district court contend—that CHSI was agreeing to pay relators' reasonable attorneys' fees and not to challenge entitlement—there would have been no reason to make this change: The sentence that CHSI deleted already said exactly that. The meaning of such changes is especially clear when the lawyer knows that his counterpart maintains that nearly all disputed fee claims are statutorily prohibited.

Dispelling any possible lingering doubt, counsel to CHSI sent an e-mail to several relators on June 25, 2015, setting forth CHSI's view that only Plantz could recover under the first-to-file rule. *See* Waldman Declaration at RE 164-3, Page ID #3849. In responding to that e-mail, Matthew Organ—counsel to a relator—acknowledged that CHSI had changed the Agreement to reserve questions about the relators' entitlement to fees under § 3730(d). *See id.* at RE 164-3, Page ID #3850 ("Your most recent revisions to the [CHSI] settlement agreement eliminated the paragraph providing that [CHSI] would pay Relators' reasonable expenses, attorneys' fees and costs. . ."). Indeed, when Organ responded to CHSI's deletion of the relators' proposed language by re-asserting that "Relators are entitled to their reasonable expenses, attorneys' fees and costs," he proved his understanding that CHSI's changes had called that very claim into doubt. *See id.* Certainly Organ did not find comfort in Term 8 or betray any belief that the revised Agreement still guaranteed his fee award. Lawyers for several other relators were copied on that e-mail exchange. There can be no question that all relevant parties knew of CHSI's position on fees and recognized that the Agreement enshrined that position.

In fact, the Government not only knew of CHSI's desire to reserve disputes over entitlement, but also agreed with CHSI and added still more language to the Agreement consistent with that view. In particular, the Government added what

ultimately became Terms 7 and 15(c) of the final agreement. *See* Waldman Declaration at RE 164-1, Page ID #3760, 3766. As the Government's lawyer explained in an e-mail to CHSI's counsel, "[w]ith regard to share/fees, those issues were carved out of this agreement so we can move the settlement along quickly." *See id.*at Page ID # 3749.

In the district court, appellees repeatedly professed surprise at CHSI's interpretation of the Agreement. But, in addition to all of the clear statements and signals from CHSI, Doghramji's lawyers had studied first-to-file issues as early as 2011. *See* Buschner Declaration, RE 89, Page ID #993, 1058. In light of that research, CHSI's position could hardly have come as a shock to Doghramji—a seventh-filing *qui tam* relator whose allegations had been publicly disclosed by the *New York Times* and in a high-profile securities fraud suit.

If the Court concludes that the Agreement is ambiguous, it can find clarity in this extrinsic evidence. Given that this constitutes the entirety of the evidentiary record, and that appellees declined to submit any other evidence of the parties' intent when afforded an opportunity to do so, the proper course in that event would be to reverse the judgment of the district court and remand for adjudication on the merits of CHSI's first-to-file and public disclosure arguments.

III. CHSI MAY RAISE FIRST-TO-FILE OBJECTIONS EVEN UNDER APPELLEES' INTERPRETATION OF THE AGREEMENT

On appellees' reading, the Agreement would allow CHSI to challenge their fee petitions only for failure to satisfy § 3730(d). But that reservation encompasses arguments based on the first-to-file rule. Accordingly, even if this Court agrees with the district court's interpretation, the judgment below should be reversed.

A. Section 3730(d) Incorporates § 3730(b)'s First-To-File Rule

Section 3730(d)(1) applies to suits in which the Government takes over the prosecution of a relator's case and obtains a recovery. It thus governs this case. By its plain terms, § 3730(d)(1) authorizes fees only where the action was "brought by a person under subsection (b)."

Subsection (b) creates the FCA's *qui tam* form of action. Subsection (b)(1) establishes the basic rule: "A person may bring a civil action for a violation of [the FCA] for the person and for the United States Government . . . ." By virtue of this statutory structure, when § 3730(d)(1) refers to an action "brought by a person under subsection (b)," it generally refers to any action brought under § 3730(b)(1).

There is a catch, though. Although the next few provisions of § 3730(b) list the procedures applicable to *qui tam* suits, the fifth and final provision is different. Section 3730(b)(5) returns to the original question of who may invoke the *qui tam* mantle created by § 3730(b). And it states that some *qui tam* plaintiffs who claim

to be relators under § 3730(b) do not qualify. Specifically, it creates the first-to-file rule: "When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." Once a first relator has filed a *qui tam* complaint, "no person" may file another case based on the same facts. A proposed action based on the facts underlying the pending action is not recognized as legitimate under subsection (b) and therefore is not "brought by a person under subsection (b)."

As a straightforward matter of statutory interpretation, this first-to-file rule excludes *any* later-filed *qui tam* action from being one "brought by a person under subsection (b)." Under the plain text, a later-filed action does not qualify as "brought by a person under subsection (b)" if a provision of that very subsection flatly proscribes the *qui tam* suit. The language here is notable: A later filer cannot be "*a person*" filing "under subsection (b)," 31 U.S.C. § 3730(d) (emphasis added), when that subsection states that "*no person*" may file after the true first-filer.

This reading is bolstered by the structure of § 3730(b), which first creates *qui tam* suits, then imposes limits on relators, and ends by making clear that late-filed *qui tam* actions are excluded from § 3730(b) entirely. *See Castillo v. United States*, 530 U.S. 120, 124 (2000) (emphasizing "overall structure" of a statute). The FCA's purpose also supports this view. *See Maracich v. Spears*, 133 S. Ct.

2191, 2209 (2013). The first-to-file bar is essential to the scheme of private enforcement established under the FCA, and Congress therefore placed that limit—and that limit alone—in the provision defining who can file *qui tam* suits. This choice, as reflected in statutory structure, commands respect. *See U.S. Nat. Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 454 (1993). Finally, the jurisdictional status of the first-to-file rule confirms CHSI's interpretation. *Poteet*, 552 F.3d at 516. It would be absurd to say that a *qui tam* complaint that can *never* be heard—as no federal court could properly exercise subject-matter jurisdiction over it—qualifies as an action "brought by a person under subsection (b)."

The broader structure of the FCA strengthens this conclusion. *See Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2441 (2014) ("[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme."). It would be passing strange for § 3730(d) to authorize an award of fees and proceeds to a person whose *qui tam* suit was never properly before a federal court. There is no reason why Congress would have required dismissal of a relator's claim on first-to-file grounds while at the same time requiring an award of fees and a share of the proceeds to that relator. Presumably, this is one reason why the drafters of § 3730(d) chose to refer back to § 3730(b).

Ultimately, this is a case where "common sense, which is a fortunate (though not inevitable) side-benefit of construing statutory terms fairly," simplifies

matters. *See Abramski v. United States*, 134 S. Ct. 2259, 2267 (2014). The FCA was not designed for situations like this one. In general, a party who fails to satisfy § 3730(b)(5) should be kicked out of court long before any questions arise about his entitlement to fees under § 3730(d). Here, however, the Agreement—if read as appellees insist—artificially limits the parties' dispute to § 3730(d). The question, then, is whether Congress allowed an award of fees to a party who should never have been able to invoke § 3730(d) in the first place (since an antecedent provision of the very same statute already excludes him from court). And the best evidence we have of statutory structure and purpose is a cross-reference in § 3730(d) to *all of* § 3730(b), which includes the first-to-file bar. Common sense confirms what formal analysis requires. CHSI is entitled to raise first-to-file arguments under § 3730(d)—*even if* the district court's interpretation of the Agreement is right.

B. The Reasons Given by the District Court and Appellees for Excluding the First-to-File Bar From § 3730(d) Are Incorrect

The district court rejected CHSI's logic in just a few sentences. Its only basis for that rejection was a quotation from CHSI's brief—specifically, from a section of the brief arguing that the Agreement should be interpreted as allowing *all* challenges to appellees' entitlement to fees. In that part of its district court brief, CHSI contended that the phrase "pursuant to § 3730(d)" in Term 8 refers *only* to the basis for appellees' fee requests, not to the types of objections CHSI

could raise. *See* Defendants' Memorandum in Opposition to Relators' Joint Motion at 14, RE 163, Page ID #3718. The district court saw this as a concession that § 3730(d) has "nothing to do" with § 3730(b). Opinion at 12, Page ID #4578.

That was error. When CHSI argued that the phrase "under § 3730(d)" (actually, "pursuant to § 3730(d)," a phrase CHSI inadvertently and immaterially misquoted below) has "nothing to do with how or on what grounds Defendants might challenge or object to those attorneys' fee claims," RE 163 at Page ID #3718, it was making a point about the grammatical structure of Term 8, not the statutory structure of 31 U.S.C. § 3730. Moreover, CHSI was advancing an argument in the alternative: The relation between § 3730(d) and § 3730(b) would matter *only* if the district court rejected CHSI's interpretation of the Agreement. Quoting two lines from CHSI's brief out of context and applying them to an entirely different issue did not answer CHSI's argument.

Although the district court did not address CHSI's arguments, appellees' reply brief did raise an objection on the merits. It argued that § 3730(d) must refer *only* to § 3730(b)(1), and not to all of § 3730(b), because other provisions of the FCA not contained in § 3730(b) also can bar a relator's recovery (*e.g.*, the public disclosure bar). This contention fails for three independent reasons.

The first and most obvious flaw in Doghramji's argument is that it departs from the statute's plain language without special justification. "Absent any 'indi-

cation that doing so would frustrate Congress's clear intention or yield patent absurdity, [the judicial] obligation is to apply the statute as Congress wrote it.'" *Dunn v. CFTC*, 519 U.S. 465, 470 (1997). Here, there is no textual warrant in § 3730(d) to rewrite "a person under subsection (b)" as "a person under subsection (b)(1)." Certainly it is not "patently absurd" to think that Congress meant to incorporate the first-to-file rule in a provision restricting entitlement to fees and proceeds. *See Dunn*, 519 U.S. at 470.

A second error in appellees' argument is that it rests on a doubtful premise: that Congress haphazardly sprinkled jurisdictional limits on a relator's recovery throughout the FCA. As the Supreme Court has made clear time and again, the opposite premise guides statutory interpretation. *See King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) ("Our duty, after all, is 'to construe statutes, not isolated provisions.'"); *United Sav. Ass'n of Texas v. Timbers of Inwood Forest, Ltd.*, 484 U.S. 365, 371 (1988) (Scalia, J., for a unanimous Court) ("Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . .").

The first-to-file rule is not an afterthought in the FCA. It is uniquely important to the statutory scheme, has been amended numerous times by Congress, and reflects a carefully planned balance between competing incentives. *See Poteet*, 552 F.3d at 515-17; *LaCorte*, 149 F.3d at 233-34. There is every reason to treat its

location in § 3730(b) as a deliberate choice, not mere happenstance. The fact that other bars to recovery are located elsewhere in the FCA hardly makes it absurd to read § 3730(d) as referring to *all* of § 3730(b), as the plain text clearly provides. *See Dunn*, 519 U.S. at 470.

In all events, appellees' argument runs aground for a third reason: Several courts—including this one—have held that other jurisdictional limits on recovery in the FCA also can preclude a fee award under § 3730(d). This Court addressed the question in *United States ex rel. Taxpayers Against Fraud v. Gen. Elec. Co.*, 41 F.3d 1032 (6th Cir. 1994). Holding the record lacked sufficient information to permit review of a fee award under § 3730(d), the Court remanded for further proceedings. *See id.* at 1044. Providing further instruction, the Court ordered the district court to broaden its inquiry, and explained that, if one of the co-relators lacked standing under the public disclosure bar, the fee award "must be reduced by the amount of the award attributable to [the co-relator's] legal fees." *Id.* The clear implication is that a relator without standing under § 3730(e)(4)(A) may not be awarded fees pursuant to § 3730(d). Indeed, that is how the Fifth Circuit read *Taxpayers Against Fraud* just one year later. *See Fed. Recovery Servs., Inc. v. United States*, 72 F.3d 447, 450 (5th Cir. 1995) ("Only those parties that are properly a part of the *qui tam* action are statutorily entitled to the award of attorneys' fees and expenses." (citing *Taxpayers Against Fraud*, 41 F.3d at 1044)). The Third Circuit

also has held that the public disclosure bar applies to prohibit an award of fees under § 3730(d). *See United States ex rel. Merena v. SmithKline Beecham Corp.*, 205 F.3d 97, 108 (3d Cir. 2000), *as amended* (Apr. 21, 2000).

Thus, appellees' argument is triply flawed: Not only does it fail to account for § 3730(b)'s plain text and statutory structure, but it also assigns false significance to the presence elsewhere in the FCA of additional bars to a relator's recovery. Those bars, too, may prohibit a relator from recovering fees under § 3730(d).

* * * * *

Even if the district court's interpretation of the Agreement is accepted, CHSI can still challenge or object to appellees' fee petitions by raising arguments "pursuant to § 3730(d)." And as the foregoing analysis demonstrates, that reservation of rights encompasses CHSI's argument that appellees' recovery is precluded by the first-to-file bar. Accordingly, if this Court agrees with the district court's reading of the Agreement, the proper course would be to reverse and remand for plenary consideration of CHSI's first-to-file arguments.

CONCLUSION

The judgment below should be reversed and the case remanded for further proceedings to resolve CHSI's objections to appellees' claimed entitlement to fees pursuant to § 3730(d).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) because the brief contains 13,489 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(a)(7)(b)(iii) and Sixth Circuit Rule 32(b)(1).

This brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5) because it is written in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2016, I electronically filed the foregoing brief with the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. All participants in this case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

Dated: January 19, 2016

/s/ Roy T. Englert, Jr.

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ADDENDUM 1
DESIGNATION OF DISTRICT COURT RECORD

Appellants hereby designate the following district court documents:

RE#	DESCRIPTION	Page ID#
1	Doghramji Complaint	1-178
75	Notice of Settlement	598-599
75-1	Settlement Agreement	601-642
77	Order of Dismissal	645
78	Motion for Modification of Dismissal Order	646-650
89	Declaration of Traci Buschner	916-1086
104	Revised Order of Dismissal	1346-1347
143	Order Consolidating *Reuille*, *Cook-Reska*, *Bryant*, and *Doghramji* Actions	3483-3488
150	Joint Motion to Affirm Relators' Entitlement To Fees	3579-3585
151	Relators' Joint Memorandum in Support of Joint Motion to Affirm	3586-3617
152	Doghramji's Supplemental Memorandum in Support of Joint Motion to Affirm	3618-3621
163	Defendants' Memorandum in Opposition to Joint Motion to Affirm	3701-3743
164	Declaration of Michael Waldman	3744-3850
165	Defendants' Memorandum in Opposition to Supplemental Memoranda	3851-4015
167	Relators' Joint Reply Brief	4023-4059
168	Doghramji's Supplemental Reply Brief	4060-4140
176	Defendants' Surreply in Opposition to Joint Motion to Affirm	4509-4523
177	Defendants' Surreply in Opposition to Supplemental Memoranda	4524-4537
184	Memorandum Opinion and Order	4567-4581
186	Transcript of July 20, 2015 Proceedings	4584-4656
190	Doghramji's Renewed and Supplemental Motion for Fee Award	4679-4683
214	Stipulation	6208-6214
218	Final Order	6229-6232
219	Judgment	6233
220	Notice of Appeal	6234-6240

ADDENDUM 2
SELECTED PROVISIONS OF 31 U.S.C.A. § 3730

§ 3730. Civil actions for false claims
Effective: July 22, 2010.

(b) Actions by private persons.—

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

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure.[1] The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the

action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

. . .

(d) Award to qui tam plaintiff.—

(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government[2] Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) Certain actions barred.—

(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)

(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of

section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)

(A) The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed--

(i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;
(ii) in a congressional, Government[2] Accountability Office, or other Federal report, hearing, audit, or investigation; or
(iii) 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 either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.

CREDIT(S)

(Pub.L. 97-258, Sept. 13, 1982, 96 Stat. 978; Pub.L. 99-562, §§ 3, 4, Oct. 27, 1986, 100 Stat. 3154, 3157; Pub.L. 100-700, § 9, Nov. 19, 1988, 102 Stat. 4638; Pub.L. 101-280, § 10(a), May 4, 1990, 104 Stat. 162; Pub.L. 103-272, § 4(f)(1)(P), July 5, 1994, 108 Stat. 1362; Pub.L. 111-21, § 4(d), May 20, 2009, 123 Stat. 1624; Pub.L.

111-148, Title X, § 10104(j)(2), Mar. 23, 2010, 124 Stat. 901; Pub.L. 111-203, Title X, § 1079A(c), July 21, 2010, 124 Stat. 2079.)

Footnotes

1

See, now, Rule 4(i) of the Federal Rules of Civil Procedure.

2

So in original. Probably should be "General".