No. 15-363

IN THE

Supreme Court of the United States

AT&T, INC., ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA EX REL. TODD HEATH,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Manufacturers ("NAM") is the largest association of manufacturers in the United States, with a membership of approximately 14,000 small and large manufacturers, in every industrial sector and in all 50 states. Manufacturing supports an estimated 17.6 million jobs in the United States, contributes more than $2 trillion annually to the American economy, has the largest economic impact of any major sector, and accounts for three-quarters of all private-sector research and development. NAM advocates for sensible approaches to the law that help manufacturers compete in the global economy and create jobs across the United States.

NAM has a direct interest in the outcome of this case. Numerous NAM members contract directly or indirectly with the United States Government for the provision of goods and/or services. These members are subject to the False Claims Act, 31 U.S.C. §§ 3729-3733 ("FCA"), as interpreted and applied by the federal courts, including judicial enforcement of pleading requirements for claims initiated under the FCA's *qui tam* provisions. Accordingly, NAM has appeared before this Court

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than *amicus* has made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief. The parties were provided the notice required by Supreme Court Rule 37.2, and consent letters from the parties have been filed with the Clerk.

and other federal courts in cases addressing important issues with respect to the FCA.

NAM has a particular concern about the proliferation of *qui tam* FCA cases, the number of which has increased dramatically over just the past few years. According to the Department of Justice, relators filed 754 and 713 *qui tam* cases in 2013 and 2014, respectively, compared with 365 in 2007 and 379 in 2008.[2]

The United States routinely declines to intervene in the vast majority of these cases; indeed, the United States intervenes in fewer than 25% of the FCA actions commenced by *qui tam* relators.[3] In a declined case, therefore, if the action proceeds, it is

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[2] *See* Department of Justice, Fraud Statistics – Overview, *available at* http://www.justice.gov/file/fcastatspdf/download.

[3] *See* Letter from the Department of Justice and the Department of Health & Human Services to the Hon. Charles E. Grassley, at 14-15 (Jan. 24, 2011) (for period of 2006 through January 2011, Government intervened in 22.2% of filed *qui tam* cases), *available at* http://www.friedfrank.com/files/QTam/DOJ-HHS-joint-letter-toGrassley%20Jan24_2011%20(2).pdf; *see also* U.S. Gov't Accountability Office, GAO-06-320R, Information on False Claims Act Litigation, Briefing for Congressional Requestors (Dec. 15, 2005), at 29, *available at* http://www.gao.gov/new.items/d06320r.pdf (presenting DOJ statistics from 1987-2005); Department of Justice, Eastern District of Pennsylvania, Memorandum, "False Claims Act Cases: Government Intervention in Qui Tam (Whistleblower) Suits" at 2, *available at* http://www.justice.gov/sites/default/files/usaoedpa/legacy/2011/04/18/fcaprocess2_0.pdf ("Fewer than 25% of filed qui tam actions result in an intervention on any count by the Department of Justice.").

on the basis of the pleading filed by the relator, 31 U.S.C. §§ 3730(b)(3) and (c)(3), but without any Department of Justice sponsorship or approval of the allegations.

Relators have a strong financial motivation to plead marginal and speculative FCA claims in the hope that either the Department of Justice will investigate, uncover some wrong, and intervene in the matter to pursue a recovery, or the defendant will succumb to business pressures, including the significant risk of reputational harm, to settle the claims. None of the factors that should inform the Government's decision to pursue an FCA claim — such as the impact of the litigation on the Government and fairness to potential defendants — influences a relator's decision to file and pursue an FCA suit. Instead, a powerful financial reward (i.e., the prospect of reaping a bounty of up to 30% of the recovery) incentivizes relators to allege fraud broadly and assert speculation and conclusions in the absence of specific facts.

NAM's members, along with other companies that do business with the Government, often are the targets of *qui tam* complaints under the FCA. As such, they incur the substantial costs and the reputational harm that accompany publicized FCA allegations. Moreover, where *qui tam* cases are permitted to proceed on the basis of generalized accusations of fraudulent schemes and unspecified false claims for payment, these businesses bear the expense and disruption of burdensome discovery and motions practice.

Abusive FCA *qui tam* litigation against manufacturers harms those businesses, their employees, their owners, shareholders, the public at large, and even the Government. The growing volume of unmeritorious FCA suits threatens the legitimate business activities of NAM's members. NAM therefore has a strong interest in ensuring that the courts uniformly and properly apply the existing safeguards against non-particularized FCA pleadings, including Federal Rule of Civil Procedure 9(b) ("Rule 9(b)").

SUMMARY OF ARGUMENT

This Court has never before decided whether a complaint alleging FCA violations satisfied the Rule 9(b) pleading standards. While there is no judicial conflict or controversy on the question of whether Rule 9(b) applies to FCA pleadings,[4] the lower courts have issued numerous conflicting decisions regarding the application of that rule.

The decision below exacerbates that conflict. The D.C. Circuit ruled that a *qui tam* relator need not plead the submission of a false claim to the

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[4] All of the circuit courts have agreed that Rule 9(b) applies to FCA cases. *See, e.g., United States ex rel. Dunn v. N. Mem'l Health Care*, 739 F.3d 417, 420 (8th Cir. 2014) (Rule 9(b)'s particularity requirement requires dismissal of FCA complaint alleging broadly that "every claim submitted from 1996 until the present is false"); *United States ex rel. Totten v. Bombardier Corp.*, 286 F.3d 542, 551-52 (D.C. Cir. 2002) ("Every circuit to consider the issue has held that, because the False Claims Act is self-evidently an anti-fraud statute, complaints brought under it must comply with Rule 9(b).").

Government in order to comply with the particularity requirements of Rule 9(b). The court rationalized this holding in part by finding that (a) in the context of an FCA claim, "providing identifying details about specific payments is less important to put the defendant on notice," and (b) the Government "already has records of those payments" and therefore the relator need not plead them. Pet. App. at 24a.

The court's decision cannot be squared with Rule 9(b)'s plain language. Rule 9(b) does not "relax" the fraud pleading requirements for FCA cases (or any other category of cases). Rule 9(b) instead provides that "a party must state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b). For an FCA case, by necessity, the "circumstances constituting fraud" include the submission of a false claim to the Government. 31 U.S.C. §§ 3729(a)(1)(A)-(B) & (b)(2) (requiring and defining "claim" for purposes of principal FCA violations). This circumstance "must" be pleaded "with particularity," not omitted.

Nor can the D.C. Circuit's decision be squared with precedent from other circuits recognizing that "the submission of a false claim is the *sine qua non* of a False Claims Act violation" and must be pleaded with particularity under Rule 9(b). *Hopper v. Solvay Pharm., Inc.*, 588 F.3d 1318, 1328 (11th Cir. 2009) (citation and internal quotation marks omitted); *see also, e.g.*, *Sanderson v. HCA – The Healthcare Co.*, 447 F.3d 873, 878 (6th Cir. 2006) ("[T]he fraudulent claim is the *sine qua non* of a False Claims Act

violation.") (citation and internal quotation marks omitted).

There is no reasonable dispute about the presence of this conflict among the circuits, as:

- The case law recognizes the conflict. *See, e.g., Foglia v. Renal Ventures Mgmt., LLC*, 754 F.3d 153, 155 (3d Cir. 2014) ("the various Circuits disagree as to what a plaintiff . . . must show at the pleading stage to satisfy the 'particularity' requirement of Rule 9(b) in the context of a claim under the FCA").

- The Government recognizes the conflict. According to the United States, "the overall body of appellate precedent creates substantial uncertainty" regarding the application of Rule 9(b) in FCA cases and "[t]hat uncertainty hinders the ability of *qui tam* relators to perform the role that Congress intended them to play in the detection and remediation of fraud against the United States." *See* U.S. *Amicus* Br., *Ortho Biotech Prods., L.P. v. United States ex rel. Duxbury*, No. 09-654 (May 19, 2010) at 16, *cert. denied*, 561 U.S. 1005 (2010).[5]

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[5] *See also* U.S. *Amicus* Br., *United States ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, No. 12-1349 (Feb. 25, 2014) at 10, *cert. denied*, 134 S. Ct. 1759 (2014) ("U.S. *Nathan* Brief") (stating that the "lower courts have reached inconsistent conclusions" about Rule 9(b) pleading requirements in FCA

The conflict should be resolved to avoid the abuses that disadvantage FCA defendants. For example, the circuit conflict encourages relators to forum shop and file marginal cases in circuits where the Rule 9(b) standards have been "relaxed." A future relator contemplating suit may choose to file in the District of Columbia in order to avoid the case law of the Fourth, Sixth, Eighth, and Eleventh Circuits and the requirement in these circuits that the relator plead, at a minimum, "representative false claims" in order to state a violation of the FCA. Pet. at 9-14.

Resolving the circuit conflict would reinforce important Rule 9(b) objectives: to eliminate speculative, unsupported fraud accusations, which harm the reputations of defendants and result in undue burdens, including significant expenditures of time and money to defend against baseless claims. This means, at a minimum, that a complaint must plead a false claim in order to state a violation of the FCA. Speculative and uninformed assertions that false claims may have been submitted to the United States do not satisfy the plain language (or intent) of Rule 9(b) and do not further the purposes of the FCA.

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cases and that, "[i]f that disagreement persists . . . this Court's review to clarify the applicable pleading standard may ultimately be warranted in an appropriate case"); *cf.* John T. Boese, *Civil False Claims and* Qui Tam *Actions* § 5.04[B] at 5-112.6 (Wolters Kluwer, 4th ed. 2015-2 Supplement) ("As these decisions reflect, a clear circuit split has developed over whether Rule 9(b) requires FCA complaints to allege the details of false claims that actually were submitted.").

ARGUMENT

I. THE COURT SHOULD RESOLVE THE CIRCUIT SPLIT

The Petition sets forth the split in the circuits regarding whether Rule 9(b) requires an FCA complaint to plead particular facts about a fraudulent or false claim to the Government. Pet. at 9-19. The Court should resolve this clear conflict for a number of reasons.

A. The Circuit Split Encourages Forum Shopping

An FCA case may be brought "in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant, can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred." 31 U.S.C. § 3732(a). This generous venue provision means that, in a typical FCA case against a manufacturer supplying products to the Government, venue can be had in myriad district courts across the nation, in multiple circuits. Because there is no requirement that the challenged acts have any nexus to the forum, the venue possibilities are expansive and the opportunity for forum shopping among the circuits is heightened.

This case illustrates the potential for abuse. The Complaint does not identify any false claim generated or transmitted by Petitioners in the District of Columbia (indeed, it does not allege the particulars of any false claim); nor does the Complaint allege that Defendants conspired in the

District of Columbia to submit a false claim. Yet venue was proper in the district court of the District of Columbia — just like it would have been in every other district court in the United States — because "one defendant," AT&T, Inc. ("AT&T"), transacts business in the District of Columbia (as it does throughout the United States).

The FCA's sweeping venue provision, coupled with nationwide service of process,[6] encourages forum shopping where, as here, the circuits are divided on a threshold question of FCA law. Why would a *qui tam* relator lacking facts about any false claim — or concerned about the prospect of dismissal because of marginal, weak, or tenuous allegations of false claims — file suit in the Fourth, Sixth, Eighth, or Eleventh Circuits, given that these circuits have held that the "*sine qua non*" of an FCA violation is a false claim, which must be pleaded with particularity under Rule 9(b)?[7]

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[6] *See* 31 U.S.C. § 3732(a) ("A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States."). This nationwide service of process provision means that, in determining personal jurisdiction, the court undertakes a "national contacts" analysis as opposed to a forum-specific contacts inquiry. *See* Boese, *supra* § 5.06[E] at 5-147 (2012-1 Supplement) ("When the nationwide service of process and nationwide venue are combined, they can easily require individuals and corporations to defend False Claims Act cases far from their homes and far from where the corporations or individuals have ever conducted business.").

[7] That transfer of venue may be available — in theory — under 28 U.S.C. § 1404 does little to alleviate this concern,

The Court should address and resolve this disparity. The efficient administration of justice is not served when relators can escape pleading requirements by picking and choosing the most favorable forum. Nor is it fair that defendants must litigate in a forum selected not for its convenience but for its relator-friendly law. The need to invest judicial and other resources should be dictated by the requirements of the FCA and Federal Rules of Civil Procedure, not the location of the suit.

B. The Court Should Clarify The Rule 9(b) Pleading Standard To Deter And Limit Speculative, Insubstantial *Qui Tam* Suits

The prospect of large FCA bounties has led to increased *qui tam* filings, many of which most charitably can be characterized as opportunistic. *Qui tam* filings have increased significantly over just the past few years. *Supra* at 2.[8] This marked

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given the historic deference afforded to a plaintiff's selection of a forum. Nor is it fair or efficient to address forum shopping through motions practice, as opposed to having this Court resolve the underlying problem: inconsistent law.

[8] Moreover, the Department of Justice's recent emphasis on individual liability in fraud cases likely will increase the number of FCA defendants, including in *qui tam* suits, augmenting the litigation burdens on businesses whose principals, officers, and senior staff become FCA targets and seek indemnification from their employers as they mount their own defenses. *See* Sally Quillian Yates, United States Deputy Attorney General, Memorandum, "Individual Accountability for Corporate Wrongdoing" (Sept. 9, 2015), *available at* http://www.justice.gov/dag/file/769036/download (colloquially referred to as the "Yates Memorandum").

growth in *qui tam* FCA filings implies ever more speculative, insubstantial cases. The magnet of windfall recoveries, coupled with the first-to-file bar on subsequent actions,[9] attracts and incentivizes relators to rush to the courthouse to plead broad FCA claims based on hunches, guesswork, and speculation. Many relators hope that their allegations will trigger further investigation by the Department of Justice to uncover evidence that might support the relator's generalized claims or, absent Government intervention, that the claims will survive a motion to dismiss and that a settlement will be offered to stave off the prospect of protracted and costly discovery and reputational harm.

This relator hope is rational and justified. The Government does not exercise its discretion to dismiss suits that lack merit, even when its own investigation fails to corroborate the allegations.[10] This Government inaction provides relators with unwarranted leverage to extract a settlement even in the most speculative of cases.[11] The sources of

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[9] *See* 31 U.S.C. § 3730(b)(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.").

[10] *See, e.g.,* U.S. *Nathan* Brief at 18 (Government did not intervene to dismiss *qui tam* action even though the complaint's allegations were "implausible").

[11] *See, e.g.*, Vicki W. Girard, "Punishing Pharmaceutical Companies for Unlawful Promotion of Approved Drugs: Why the False Claims Act is the Wrong Rx," 12 J. Health Care L. &

this leverage are the FCA's onerous penalties and treble damages provisions,[12] the prospect of broad discovery under the Federal Rules of Civil Procedure, and the potentially drastic collateral consequences of FCA allegations and liability, which can include suspension and debarment by the Government (a result that would put many government contractors out of business).[13]

Pol'y 119, 136-37 (2009) ("The threat of exclusion from Medicare, Medicaid, and all other health care programs . . . has been characterized as a corporate 'death sentence' for pharmaceutical companies. Indeed, the risk of losing millions of customers covered under these programs explains many companies' willingness to settle rather than litigate issues") (footnotes omitted); John T. Boese & Beth C. McClain, *Why* Thompson *Is Wrong: Misuse of the False Claims Act to Enforce the Anti-Kickback Act*, 51 Ala. L. Rev. 1, 18 (1999) (FCA's treble damages and penalty structure "places great pressure on defendants to settle even meritless suits"); *accord* Robert Salcido, "DOJ Must Reevaluate Use of False Claims Act in Medicare Disputes," Wash. Legal Found., *Legal Backgrounder* at 4 (Jan. 7, 2000), *available at* http://cdn.akingump.com /images/content/9/9/v2/994/448.pdf (noting the "dirty little secret" of FCA litigation that "given the civil penalty provision and the costs and risks associated with litigation, the rational move for [FCA defendants] . . . is to settle the action even if the [plaintiff's] likelihood of success is incredibly small").

[12] 31 U.S.C. § 3729(a)(1); 28 C.F.R. § 85.3(a)(9).

[13] *See* Federal Acquisition Regulation ("FAR") 9.406-2(a) (providing for debarment based on a civil judgment demonstrating fraud or a lack of honesty and integrity in business); FAR 9.406-2(b)(1)(vi)(B) (providing for debarment based on a knowing failure to disclose evidence of an FCA violation).

This case is illustrative. The Complaint seeks "hundreds of millions of dollars" in damages (apparently without accounting for statutory trebling or civil penalties). When substantial damages and statutory penalties are at issue, reputations are at stake, and discovery will be burdensome and expensive, the settlement of even meritless cases can be rationalized as a necessary business decision.

Rule 9(b) provides an important procedural safeguard against the proliferation of baseless claims and the attendant reputational harm.[14] The rule permits well-pleaded claims of fraud to move forward while checking those "parasitic" FCA cases based on hunch, speculation, and guesswork. *See*

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[14] *See, e.g.*, *United States ex rel. Joshi v. St. Luke's Hosp., Inc.*, 441 F.3d 552, 559, 561 (8th Cir. 2006) (Rule 9(b) prevents "baseless allegations . . . to extract settlements," a concern that especially applies to FCA actions because "a *qui tam* plaintiff, who has suffered no injury in fact, may be particularly likely to file suit as a pretext to uncover unknown wrongs."); *United States ex rel. Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1313 n.24 (11th Cir. 2002) (Rule 9(b) protects defendants from frivolous suits and "spurious charges of immoral and fraudulent behavior.") (citation and internal quotation omitted); *Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001) (Rule 9(b) prohibits plaintiffs "from unilaterally imposing upon the court, the parties and society enormous social and economic costs absent some factual basis.") (citation and internal quotation omitted); *see also* Barney J. Finberg, *Construction and Application of Provision of Rule 9(b), Federal Rules of Civil Procedure, that Circumstances Constituting Fraud or Mistake Be Stated with Particularity*, 27 A.L.R. Fed. 407 (updated 2015), § 5 (collecting cases for proposition that Rule 9(b) protects against baseless cases).

False Claims Act Implementation: Hearing Before Subcomm. on Admin. Law and Gov't Relations of House Comm. on Judiciary, 101st Cong., 2d Sess. 3 (1990) (FCA seeks "to resolve the tension between . . . encouraging people to come forward with information and . . . preventing parasitic lawsuits") (statement of Sen. Grassley).

Rule 9(b)'s deterrent effect on the filing of baseless claims benefits the Government as well. For example, uniform enforcement of Rule 9(b) in FCA cases — such that pleadings must specify the alleged false claims — will discourage the filing of speculative *qui tam* complaints, freeing up Government resources to investigate and pursue actions based on particularized fraud allegations.[15] In addition, in at least some cases, the Government itself pays (albeit indirectly) for the cost of defending against insubstantial *qui tam* litigation because a contractor's costs in successfully defending against a *qui tam* action may be recouped under the Federal Acquisition Regulation. *See* 48 C.F.R. § 31.205-47(b) & (e) (allowing successful contractors to recover up to 80% of legal costs in certain instances).

In short, the enforcement of Rule 9(b) pleading standards provides much-needed protections to the business community and the Government. For these safeguards to work, Rule 9(b) must be applied as

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[15] The Department of Justice must investigate the allegations in every *qui tam* complaint. 31 U.S.C. § 3730(a) ("The Attorney General diligently shall investigate a violation under section 3729.").

written: a complaint "*must* state with *particularity* the circumstances constituting fraud." Fed. R. Civ. P. 9(b) (emphasis added).

C. The Court Needs To Clarify The Rule 9(b) Pleading Standard To Check The Discovery Overreach Of Relators

Rule 9(b) also serves the important purpose of checking overreach in *qui tam* complaints. For good reason, relators seek to avoid pleading particularized allegations regarding the alleged false claims and otherwise seek to plead broad allegations of a purportedly widespread scheme as opposed to specific facts. This pleading style opens the door to broad discovery concerning the alleged scheme, including every document "relating to" any "express" or "implicit" claim to the Government. In circular fashion, vague, non-particular fraud claims tend to lead to broad discovery requests that relators then justify by reference to the broad allegations in their complaints.

Because Rule 9(b) limits the issues in the case to those that are well pleaded, the rule serves as a procedural bulwark against unsubstantiated allegations and discovery fishing expeditions. *See, e.g.*, *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 191 (5th Cir. 2009) ("Rule 9(b) also prevents nuisance suits and the filing of baseless claims as a pretext to gain access to a 'fishing expedition.' A complaint that includes both particular details of a scheme to present fraudulent bills to the Government and allegations making it likely bills were actually submitted limits any

'fishing' to a small pond that is either stocked or dead.").[16]

This Court's review is needed to check and limit abusive complaints. Without this Court's guidance, relators will have every incentive to plead speculation, not facts, to help themselves to discovery that is burdensome and costly, not only for defendants, but also for the judiciary and the Government, for the reasons discussed above, *supra* at 14, and because, as the party in interest, the Government, even in a non-intervened case, may be subject to burdensome discovery requests from the defendant and/or the relator. *See, e.g., Williams v. C. Martin Co. Inc.*, No. 07-6592, 2014 WL 3095161 (E.D. La. July 7, 2014) (compelling FEMA to submit to Fed. R. Civ. P. 30(b)(6) deposition in non-intervened FCA case, to address 26,000 pages produced by FEMA in discovery).

D. Rule 9(b) Pleading Issues In FCA Cases Are Litigated Repeatedly In The Lower Courts

The Court also should resolve the circuit conflict because the Rule 9(b) pleading standard is one of the most frequently litigated issues in FCA cases. The

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[16] Rule 9(b)'s particularity requirement also permits courts to determine if the first-to-file or public disclosure bars require dismissal, further checking pleading overreach. *See United States ex rel. Kinney v. Stoltz*, 327 F.3d 671, 675 (8th Cir. 2003) (affirming dismissal of FCA complaint because, notwithstanding the Rule 9(b) pleading requirement, the relator failed to plead facts supporting the assertion that he was an original source of the fraud allegations).

issue matters greatly to the business community. Our review indicates that, of the 600 decisions squarely addressing the FCA and available on Westlaw for the five-year period of 2010-2014,[17] 229 decisions, or close to 40%, addressed Rule 9(b).[18] Petitioners separately have identified 110 cases in which the question presented was determinative. Pet. App. 38a-47a.

The myriad courts analyzing the question presented should do so by applying one uniform standard decided by this Court, not materially differing standards set by the circuits.

II. THE DECISION BELOW NEGATES THE RULE 9(b) PLEADING REQUIREMENT IN FCA CASES

Finally, the Court should grant the Petition because the decision below, if allowed to stand, would negate important aspects of Rule 9(b).

Some background is helpful. According to the Complaint ("Compl."), the relator operates his own

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[17] To ensure that we considered only those cases squarely addressing the FCA over this five-year period, we searched for the phrase "False Claims Act" appearing in the synopsis or digest of the opinion. The cases include unreported decisions.

[18] This percentage likely understates the frequency of Rule 9(b) decisions given that not all decisions are available on Westlaw; moreover, the 600 cases include all FCA cases, not merely those addressing pleading requirements. Of the pleading stage cases, a higher percentage would address Rule 9(b).

firm, "The Telephone Company," which "performs for-hire audits of the telecommunications records and bills of school districts and businesses." Compl. ¶ 5. The Complaint alleges that the relator "became aware of the fraudulent acts and practices" — AT&T's alleged scheme to bill schools above the "Lowest Corresponding Price" (LCP) rate — through his "audits." *Id.* Yet, the Complaint does not allege that the relator audited any AT&T invoice or claim to the Government. The relator pleads no facts about any express or implied false claim submitted by AT&T or its subsidiaries to the Government. The Complaint nowhere alleges that the relator has any personal knowledge of the supposed improper billing scheme.[19]

The Complaint's allegations of fraud rest upon innuendo and supposition, not facts. The relator speculates that AT&T and its subsidiaries "must have" submitted false claims to the Government because, according to the Complaint, "AT&T did nothing to institutionalize LCP compliance," even after it committed to do so as part of a consent decree with the FCC. Compl. ¶¶ 61 & 64-70.[20] In

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[19] This speculation is not surprising given the Complaint's admission that the relator never worked at AT&T and is a resident of Wisconsin, Compl. ¶ 5, far removed from AT&T's headquarters in Dallas, Texas, where the supposed scheme allegedly took place.

[20] According to the Complaint, AT&T entered into a consent decree with the FCC in 2004, relating to "fraudulent E-Rate billing for services provided by AT&T to the New London, Connecticut, Public School District." Compl. ¶ 64; *id.* ¶¶ 65-70.

support of this allegation, the Complaint cites to and attaches one AT&T training manual and one set of PowerPoint slides from a conference. The Complaint alleges that these two documents omit mention of the LCP requirement. *Id.* ¶ 70. From this fact, the relator surmises — and pleads in his Complaint — that AT&T and its subsidiaries must have concocted a scheme to overbill the Government.

No other pleaded facts (as opposed to speculative conclusions in the Complaint) support the fraud charge.[21] The Complaint does not identify or describe even one claim by AT&T that failed to satisfy the LCP requirement. The Complaint does not allege that the relator or his firm audited any AT&T-issued invoice. In short, the Complaint contends that fraud "must have been" afoot because one AT&T training manual and one set of PowerPoint slides do not reference the LCP requirement.[22]

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[21] The Complaint alleges that the Detroit Public Schools conducted an audit of AT&T's billings in "early 2010" and concluded that "AT&T was not offering or billing its services at LCP." Compl. ¶ 103. But nothing in the Complaint suggests that AT&T fraudulently submitted these bills to the Federal Government. And there are no pleaded facts (as opposed to conclusions) from which to determine that AT&T knew that any claim was false.

[22] Any inference drawn from this "omission" is countered by express language in the same training manual stating that AT&T will comply with all federal requirements and that "[a]ll statements made to the Government must be scrupulously accurate and truthful, including, proposal information, pricing data, and invoices." Compl., Ex. 3 at 3, 50 (Dkt. 1-3 at 4, 51).

This allegation does not satisfy the Rule 9(b) pleading requirements. Indeed, this allegation arguably does not satisfy the pleading requirements under Federal Rule of Civil Procedure 8(a). Not one pleaded fact suggests that AT&T intentionally omitted the LCP requirement from the two documents in order to further some fraudulent scheme.[23] In addition, that one training manual and one set of PowerPoint slides do not reference LCP compliance does not establish that AT&T, in fact, did not comply with the LCP requirement. And, the Complaint fails to allege even one false claim to the Government — the *sine qua non* of an FCA violation.

Yet, adopting a relaxed Rule 9(b) standard, the D.C. Circuit reasoned that the Complaint satisfied Rule 9(b) because it "put AT&T on fair notice of the fraud of which it is accused: That, even in the wake of a consent decree pertaining to pervasive E-Rate problems, AT&T persisted in knowingly or recklessly failing to comply with the [LCP] requirement . . . ." Pet. App. at 21a. The court also determined that the Complaint satisfied any "time, place, and manner" pleading requirement because (a) it alleges a fraudulent scheme occurring from 1997 to 2009, (b) at AT&T's headquarters, (c) in which AT&T

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[23] The LCP requirement may have been omitted for any number of reasons unrelated to fraud. *Cf. Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556-57 (2007) (complaint failed to plead conspiracy based on allegation of parallel conduct because "[w]ithout more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality").

"deliberately failed" to train its employees about the LCP requirement. *Id.* at 20a.

But the goal of Rule 9(b) is not merely to put defendants on notice of the alleged fraud — which Rule 8 requires independent of Rule 9(b). Rule 9(b) serves other purposes, including protecting against baseless claims, to narrow the issues, and to protect against reputational harm to the defendant. *Supra* at 10-16.

Rule 9(b) achieves these goals by requiring the complaint to "state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b). Legal conclusions, adverbs, and adjectives do not state with particularity the circumstances constituting the fraud. Pleaded facts are required. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009) ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.").

Those pleaded facts "must" identify the allegedly false claims submitted to the Government. The failure to identify a false claim is a failure to meet Rule 9(b)'s requirements. *See, e.g., United States ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304, 308 (5th Cir. 1999) ("Because such statements or claims are among the circumstances constituting fraud in a False Claims Act suit, these must be pled with particularity under Rule 9(b).")[24];

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[24] Abrogated on other grounds by *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928 (2009).

see also, e.g., *United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011) ("It seems to be a fairly obvious notion that a False Claims Act suit ought to require a false claim.") (citation and internal quotation marks omitted); *id.* at 1057 (affirming dismissal of FCA complaint where complaint alleged only scheme, not specific false claims) ("This type of allegation, which identifies a general sort of fraudulent conduct but specifies no particular circumstances of any discrete fraudulent statement, is precisely what Rule 9(b) aims to preclude.") (citation omitted).

The decision below conflicts not only with other circuit precedent but with the plain language of Rule 9(b).

CONCLUSION

For the foregoing reasons, and those in the Petition, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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