Nos. 22-1245, 22-1246

In the United States Court of Appeals
For the First Circuit

UNITED STATES OF AMERICA, EX REL.,
Lovell & Mckusick, et al., Relators-Appellants
v.

AthenaHealth, Inc., et al., Defendant-Appellee

On Appeal from the United States District Court
For the District of Massachusetts
Hon. Nathaniel M. Gorton, Nos. 17-cv-12125; 17-cv-12543

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

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CORPORATE DISCLOSURE STATEMENT

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

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

I. STATEMENT OF INTEREST

A. Taxpayers Against Fraud Education Fund

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

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

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

B. Importance of the Litigation

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

As it did in civil rights and environmental enforcement statutes that require fee shifting, Congress provided for fee shifting under the FCA to make it feasible for private individuals to pursue cases in the public interest. Congress understood that in order to capitalize on the incentives in the FCA for citizens to report fraud, it also needed to encourage private attorneys to invest time and resources to pursue meritorious cases on behalf of those individuals. This is particularly important in complex cases, like the *qui tam* actions before the Court, that require years of investment by private counsel working alongside the Government, so that funds are returned to the U.S. Treasury and future frauds are deterred. Here, the

Relators' multi-year concerted effort led to the recovery of more than $18 million for the United States.

At issue in this appeal is the District Court's order: (1) denying an award of attorneys' fees, costs, and expenses to counsel for Relators Lovell and Mckusick, and (2) reducing by 50% an award of attorneys' fees, costs, and expenses to counsel for Relator Sanborn. The District Court held that: (1) the FCA authorizes only "first to file" relators to recover attorneys' fees, and (2) a relator is not entitled to reasonable attorneys' fees and expenses for work on a non-intervened claim, even if it is part of a successful global settlement among the Government, relator, and the defendant through which the defendant obtains a release of all claims. Addendum to Brief of Appellants Lovell and McKusick ("Add.") at 2.

TAFEF submits this *amicus* brief to explain the critically important public policies underlying the FCA's mandatory fee-shifting provisions and to provide an explanation of how the District Court's decision is at odds with the text and purpose of the statute, which provides for an award of attorneys' fees to successful *qui tam* relators. Where, as here, a defendant agrees to settle all intervened *qui tam* actions and the settlement requires all of the relators to release all of their claims, payment of reasonable fees and necessary expenses incurred by all the relators and

their counsel is mandatory under 31 U.S.C. § 3730(d)(1).[2] Once a Defendant has settled the merits of the case, it has no basis for raising defenses it might have pursued if it had not settled the case. In addition, the evaluation of the amount of fees turns on what was reasonable and necessary to achieve the successful result of all settled claims. The District Court's order should be reversed.

II. ARGUMENT

A. The False Claims Act's Fee-Shifting Provision Is a Core Component of the Act's Design to Encourage Whistleblowers to Pursue Meritorious Cases

Enactment of a mandatory fee-shifting mechanism was an integral part of Congress's plan in amending the FCA in 1986 to incentivize whistleblowers to report fraud against the Government and to encourage private investment in fraud enforcement. Mindful that fraud permeated federal programs, the Senate Judiciary Committee took note of "serious roadblocks to obtaining information . . . [and] weaknesses in both investigative and litigative tools" and the need for legislative improvements to correct those weaknesses. S. REP. NO. 99-345, at 5269 (1986). The Committee observed that "perhaps the most serious problem plaguing effective enforcement is a lack of resources on the part of Federal enforcement agencies." *Id.* at 5272. Lacking sufficient resources, "federal auditors,

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

investigators, and attorneys are forced to make 'screening' decisions" about what cases they are able to pursue. *Id.* The Committee observed that allegations that could develop into very significant cases had been left unaddressed due to a judgment that devoting scarce resources may not be efficient. *Id.* As this Court would later observe, the status quo was particularly ill-suited to address the "sophisticated and widespread fraud depleting the national fisc." *United States ex rel. S. Prawer & Co. v. Fleet Bank*, 24 F.3d 320, 326 (1st Cir. 1994).

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

To counter this asymmetry, Congress concluded that encouraging assistance from private counsel in FCA cases could "make a significant impact on bolstering the Government's fraud enforcement effort" and that in other areas of enforcement such as antitrust and securities violations, the number of private enforcement actions far exceeds those brought by the Government. *Id.* To that end, Congress amended the FCA's *qui tam* mechanism to encourage more private enforcement and to expand the role of relators in *qui tam* litigation. *Id.* at 5288-89. The 1986 amendments authorized *qui tam* relators to continue as parties after intervention in

part to act as a check that the Government does not neglect evidence or drop the case without legitimate cause. *Id.* at 5290-91. Recognizing the "risks and sacrifices" of the private relator, Congress also mandated a guaranteed range for share recovery. *Id.* at 5292-93. Even when a person brought suit based on public information, a relator share, albeit lower, had to be awarded. *Id.* at 5293.

One of the most significant changes Congress made to the FCA was to require defendants to reimburse successful *qui tam* relators for their reasonable attorneys' fees and expenses. *Id.* at 5294. The Senate Report notes that, prior to the 1986 amendments, the FCA did not provide a specific authorization for attorneys' fees. *Id.* Congress sought to rectify that gap, cognizant that the "[u]navailability of attorneys fees inhibits and precludes many private individuals, as well as their attorneys, from bringing civil fraud suits." *Id*.

In enacting the fee-shifting mechanism, Congress legislated against the background of hundreds of other fee-shifting statutes designed to incentivize counsel to invest resources to pursue cases in the public interest. *See generally* John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567 (1993) (describing fee shifting statutes). Under these fee-shifting statutes, the Supreme Court has observed that the role of "private attorney[s] general . . . [is to] vindicate[e] a policy that Congress considered of the highest priority," and "emphasized the

crucial connection between liability for violation of federal law and liability for attorney's fees under federal fee-shifting statutes." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 137 (2005) (citations omitted).

These rationales apply with full force to the FCA. Indeed, without a guarantee of fair compensation, "relators will not come forward (risking, in many cases, their livelihoods), and private attorneys will not undertake the extensive work and expense necessary to represent relators," and it is for that reason that "even if the Government takes over the action, the relator is entitled to a share of 'the proceeds of the action or settlement of the claim' and his or her attorney is entitled to 'reasonable attorneys' fees and costs.'" *United States ex rel. Doghramji v. Cmty. Health Sys.*, 666 F. App'x 410, 411 (6th Cir. 2016). Likewise, if relators and their counsel are deterred because of the lack of assurance that they can recover expenses and attorneys' fees for successful cases, the Government may be deprived of the amplified resources needed to prosecute these actions.

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

Guaranteeing compensation for relators and their counsel through recovery of a relator share and attorneys' fees has "encourage[d] [the] working partnership" between the Government and *qui tam* relators envisioned by the sponsors of the 1986 Amendments. *See* 132 Cong Rec. H9382-03, at 29322 (Oct. 7, 1986)

(Statement of Rep. Berman) ("The public will be well served by having more legal resources brought to bear against those who defraud the Government."). While the relator share provision incentivizes relators to contribute to the Government's investigation and recovery by basing the percentage of recovery on the substantial assistance provided the Government, *see United States ex rel. Shea v. Verizon Commc'ns, Inc.*, 844 F. Supp. 2d 78, 82 (D.D.C. 2012), the fee-shifting provision ensures that relators' counsel have the incentive to invest their resources. The guarantee of compensation of reasonable fees and expenses for prevailing relators enables relators and their counsel to afford to invest the millions of dollars in attorney time and expenditures required to assist the Government in investigations and for litigation and expert costs. *See, e.g.*, *Motion for Attorney Fees, Costs, and Expenses, United States ex rel. Lacey v. Visiting Nurse Serv. of New York*, No. 14-cv-05739 (S.D.N.Y. Jan. 15, 2021) (Dkt. 212) (relator's counsel seeking to recover over $11 million invested in fees and costs in health care fraud case); *United States ex rel. Higgins v. Healthsouth Corp.*, No. 14-cv-2769, 2020 WL 1529563 (M.D. Fla., Mar. 31, 2020) (relator's counsel awarded over $1 million in fees and costs in health care fraud case); *United States ex rel. Luke v. Healthsouth Corp.*, No. 13-cv-01319, 2020 WL 1169393 (D. Nev. Mar. 11, 2020) (same); *see also United States ex rel. Nichols v. Computer Scis. Corp.*, No. 12-cv-1750, 2020 WL 6559194

(S.D.N.Y. Nov. 8, 2020) (holding relator's counsel entitled to recovery of fees and expenses spent on assisting Government with investigation as well as litigation).

Fee shifting thus helps to address the substantial asymmetries in resources between large corporate defendants and the Government. Considering that the largest FCA recoveries have been achieved through settlement with or judgment against many large and well-funded entities, including GlaxoSmithKline, Merck, Johnson & Johnson, Bank of America, Northrop Grumman, Quest Laboratories, Verizon, and in this case, AthenaHealth, without the potential for recovery of attorneys' fees, private counsel would not have an incentive to pursue these cases. Guaranteeing fee recovery helps sustain private counsel who must often wait through many years of investigation and litigation before any recovery, thereby diminishing the value of the contingent recovery alone.

Fee shifting also encourages private counsel to take on representation of relators in smaller dollar cases where, although the contingent fee recovery may be small, the public interest in prosecution may be high, especially if the fraud implicates public health and safety. *See, e.g.*, *Yates v. Pinellas Hematology & Oncology*, *P.A.*, 21 F.4th 1288, 1314-15 (11th Cir. 2021) ("Fraud harms the United States in ways untethered to the value of any ultimate payment. For instance, we have explained that when the United States is defrauded, 'the government has been

damaged to the extent that such corruption causes a diminution of the public's confidence in the government'").

The expansion of incentives for relators and their counsel to bring *qui tam* actions has been credited with a dramatic increase in recoveries of federal funds. Since the 1986 amendments, FCA recoveries and enforcement actions have soared, attributable in large part to the success of the *qui tam* provisions at revealing concealed information about fraud and funding litigation to pursue stolen dollars. More than $70 billion has been restored to the U.S. Treasury since 1986. *See Justice Department's False Claims Act Settlements and Judgments Exceed $5.6 Billion in Fiscal Year 2021*, U.S. DEP'T JUST. (Feb. 1, 2022), https://www.justice.gov/opa/pr/justice-department-s-false-claims-act-settlements-and-judgments-exceed-56-billion-fiscal-year. In fiscal year 2021 alone, of the $5.6 billion in settlements and judgments from civil cases involving fraud and false claims, $1.6 billion was recovered in whistleblower-initiated *qui tam* actions. *Id.* Health care fraud enforcement, as in this case, has been particularly dependent on the investment of private counsel in *qui tam* whistleblower suits. *See Doghramji*, 666 F. App'x at 419 (Stranch, J., concurring) (reviewing crucial role of FCA *qui tam* provisions in recovering federal funds lost through healthcare fraud).

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

Additional policy concerns underlie Congress' decision to mandate attorneys' fees for successful actions. The FCA is premised in part on the theory that in order to prevent and deter fraud, the cost of engaging in fraud must exceed the benefit. *See* S. REP. NO. 99-345, at 5268 (1986) ("The sad truth is that crime against the Government often *does* pay.") (citation omitted). To remedy and deter fraud, the FCA provides for three times actual damages and penalties that may be awarded even when damages are not established. *Id.* at 5273.

By requiring that persons who are found liable for engaging in fraud pay more than actual damages, the FCA ensures that they internalize the true cost of their fraudulent conduct, which includes the cost of enforcement. *Cf. Hutchinson v. William C. Barry, Inc.*, 50 F. Supp. 292, 298 (D. Mass. 1943) ("The fear of this liability for double damages and attorney's fees [under the Fair Labor Standards Act] not only aids compliance, but promotes the settlement of controversies at the conference table or in the administrative office rather than the courts."). Fee shifting encourages compliance by requiring that the cost of prosecuting successful suits is borne "not by those who were victims but by those who have violated the regulations and caused the damage." *Id.* Numerous studies have documented the significant deterrent value of *qui tam* suits. *See, e.g.*, D. Howard I. McCarthy, *Deterrence Effects of Antifraud and Abuse Enforcement in Health Care*, 75 J.

HEALTH ECON. 102405 (2021) (calculating $19 billion in deterrence from $1.9 billion in recoveries); Claire Sylvia & Emily Stabile, *Rethinking Compliance: The Role of Whistleblowers*, 84 U. CIN. L. REV. 451, 462-70 (2016) (discussing and summarizing evidence of the deterrent effect of whistleblower suits).

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

The policy underlying the fee-shifting provision is no less important when multiple relators file overlapping cases. A single whistleblower who knows only a portion of a fraud may not provide the Government with sufficient information to alert the Government to a widespread fraud. But multiple whistleblowers providing insights into a broader picture may be essential to show the Government the extent of a complex fraud. And the Government may benefit, as it did here, from enlisting the assistance of multiple relators and their counsel to investigate and pursue the complex fraud. If only the relator and her counsel in the first intervened case has the incentive to provide those resources because later-filing attorneys will not be compensated for their time and investments, it is the Government that may be deprived of valuable information and resources. As the Sixth Circuit recently explained, the necessity of a "coordinated effort" envisioned by Congress between "the Government and the citizenry" to combat fraud is "[n]owhere . . . more salient than when multiple relators each describe pertinent

aspects of a broad-reaching fraud." *United States ex rel. Bryant v. Cmty. Health Sys.*, 24 F.4th 1024, 1035 (6th Cir. 2022) (citation omitted).

The United States' decision to intervene in and consolidate two *qui tam* actions here served the Government's interests in pursuing allegations of health care fraud and resulted in a significant recovery of over $18 million returned to the Treasury. Intervention in multiple, consolidated *qui tam* actions is becoming increasingly common as a way for the United States to optimize resources by enlisting the support of multiple relators and their private counsel in fraud enforcement efforts. Recoveries in the billions have been made as a result of Government intervention and settlement of multiple, related actions where each relator brings information and resources to assist the Government, and attorneys' fees have been paid to multiple relators' counsel in these settlements. *See, e.g.*, *For-Profit Education Company to Pay $13 Million to Resolve Several Cases Alleging Submission of False Claims for Federal Student Aid*, U.S. DEP'T OF JUST. (June 24, 2015), https://www.justice.gov/opa/pr/profit-education-company- pay-13-million-resolve-several-cases-alleging-submission-false; *Universal Health Services, Inc. and Related Entities to Pay $122 Million to Settle False Claims Act Allegations Relating to Medically Unnecessary Inpatient Behavioral Health Services and Illegal Kickbacks*, U.S. DEP'T JUST. (July 10, 2020), https://www.justice.gov/opa/pr/universal-health-services-inc-and-related-entities-

pay-122-million-settle-false-claims-act; *Justice Department Obtains $1.4 Billion from Reckitt Benckiser Group in Largest Recovery in a Case Concerning an Opioid Drug in United States History*, U.S. DEP'T JUST. (July 11, 2019), https://www.justice.gov/opa/pr/justice-department-obtains-14-billion-reckitt-benckiser-group-largest-recovery-case. The Government's decision to intervene in multiple, related actions, consolidate these actions, and create a team of lawyers to assist Government lawyers is a critically important enforcement tool and is consistent with the statutory scheme enacted by Congress in the 1986 amendments.

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

otherwise unnecessary" hours from a fee award. *See, e.g.*, *Aldinger v. Segler*, 157 F. App'x 317, 318 (1st Cir. 2005) (quoting *United States v. Metropolitan Dist. Comm'n*, 847 F.2d 12, 16 (1st Cir. 1988)).

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

The plain text of the FCA implements Congress's vision for mandatory attorneys' fees for successful relators. Subsection 3730(d)(1) of the FCA provides that if the Government "proceeds with" an action brought by a person under subsection (b), "such person" shall receive a relator share award, subject to certain restrictions, and "such person shall also" receive an award of expenses necessarily incurred and reasonable attorneys' fees and costs. *United States ex rel. Rost v. Pfizer, Inc.*, 507 F.3d 720, 727 (1st Cir. 2007) ("[T]he Act *requires* defendants to pay attorneys' fees for a successful qui tam plaintiff.") (emphasis added). In identifying whether a relator qualifies as "such person" who may recover a share and fees, costs, and expenses under (d)(1), three criteria must be met: (1) the relator must have brought a civil action under subsection (b); (2) the Government must have intervened; and (3) the action must have been successful, whether through settlement or judgment. 31 U.S.C. § 3730(d)(1).

Upon settlement or judgment, subsection (d)(1) provides that "such person" in the intervened case shall receive a relator share of between 15-25% of the

proceeds of the action "depending upon the extent to which the person substantially contributed to the prosecution of the action." *Id.* "[S]uch person shall also receive" reasonable attorneys' fees and costs and reasonable expenses necessarily incurred. *Id.* These amounts "shall be awarded against the defendant." *Id.* As the Sixth Circuit recently held, a plain reading of the text provides that once relators meet the three criteria, relators, including multiple relators in whose cases the Government has intervened as part of a global settlement, are entitled to reasonable attorneys' fees and costs. *Bryant*, 24 F.4th at 1024.

Both sets of Relators in this case met each of these criteria. Both sets of Relators brought civil actions under subsection (b). The Government intervened in the consolidated action and pursued claims alleged in both sets of Relators' complaints. And the case was successful through settlement: the Defendant agreed to pay more than $18 million in a global settlement in exchange for a release of *all* claims alleged against it by *both* sets of Relators. In addition, both Relators received a portion of the proceeds from the settlement. Accordingly, the Relators met the statutory requirements and therefore each Relator "shall . . . receive" reasonable attorneys' fees and expenses.

The district court rejected the Sixth Circuit's plain reading of the statute, citing its own prior decision in in *United States ex rel. Allstate Insurance Co v. Millennium Laboratories, Inc*., 464 F. Supp. 3d 449 (D. Mass. 2020) (*Millennium*

II). But *Millennium II* did not analyze the statutory text of section (d)(1). In *Millennium II*, the district court concluded that this Court had held in *United States ex rel. McGuire v. Millennium Labs*, 923 F.3d 240 (1st Cir. 2019) (*Millennium I*) that only one relator is entitled to fees, but *Millennium I* did not involve attorneys' fees. Rather, this Court addressed whether a relator, in whose case the Government *did not* intervene, was entitled to a share of the Government's settlement with the defendant and other relators in whose cases the Government *did* intervene. Moreover, as the district court in *Millennium II* recognized, the relator there would not have been eligible for fees because the Government did not proceed with its action. *Millennium II*, 464 F. Supp. 3d at 454. Thus, neither *Millennium I* nor *Millennium II* is inconsistent with *Bryant*.

1. The "First-to-File" Rule is not Relevant to the Award of Fees Under Subsection (d)(1)

The District Court declined to award fees to Relators Lovell and Mckusick under subsection (d)(1) on the grounds that the filing of their *qui tam* action violated the "first-to-file" rule set forth in subsection (b)(5). The District Court reasoned that any subsequent complaint that alleged "all the essential facts" of the fraud was barred from being brought, citing this Court's decision in *Millennium I*. Based on this analysis, the District Court held that relators who had filed successive, related actions were not "persons" entitled to a relator's share under subsection (b), and, therefore, did not meet one of the requirements under (d)(1)

for an award of expenses and fees. But nothing in *Millennium I* supports the proposition that after settling a case a defendant can raise defenses that it failed to raise before electing to settle. If the defendant wished to challenge the relators' claims, "it should have done so, rather than settling the case and dismissing the claims." *Bryant*, 24 F.4th at 1037. The District Court erroneously grafted the first-to-file rule onto subsection (d)(1)'s criteria for the award of fees and expenses, which nowhere refers to the satisfaction of the first-to-file provision as a condition for the receipt of attorneys' fees. Subsection (d)(1)'s "reference to 'subsection b' simply distinguishes *qui tam* actions by private parties from those actions that the Attorney General initiates under § 3730(a)," and "does not incorporate any of subsection (b)'s procedures, including the first-to-file rule." *Id.* at 1035.

This absence of a condition must not be read as a mere accident of drafting. *See Bais Yaakov of Spring Valley v. ACT, Inc.*, 12 F.4th 81, 87 (1st Cir. 2021) (noting "the general principle of statutory construction that courts presume Congress has acted intentionally and purposely when it includes particular language in one section of a statue but omits it in another section of the same Act") (citations omitted and alterations adopted). To the contrary, Congress knew how to put conditions on an award of share and fees in subsection (d)(1) and, instead, set forth specific criteria with no reference to other restrictions. The Eighth Circuit considered a similar question concerning the triggering of a share award in *United*

States ex rel. Rille v. Accenture, 707 F.3d 1011 (8th Cir. 2013). In *Rille*, the United States sought to deny the relator a share of a recovery based on an argument, advanced after settlement of the action, that the relator's complaint did not satisfy Federal Rule of Civil Procedure 9(b). The Court of Appeals rejected the argument that 9(b) plays a role in adjudicating relator share under subsection (d)(1), noting that section 3730(d) "comes into play at the conclusion of a case, after the action has already proceeded to a judgment or a settlement. If the government is allowed to contend at the conclusion of a case that a relator's initial allegations were insufficient, even though the government implicitly acknowledged the legal sufficiency of the pleadings by choosing to intervene, the relator no longer has the opportunity to cure the deficiency." *Id.* at 1017-18.

While this Court need look no further than the plain text of the statute to conclude that the defendant may not raise a first-to-file defense after settlement of the case, concerns underlying enactment of the first-to-file provision are also not present in this case. As this Court has explained, the first-to-file rule is designed to "preven[t] opportunistic suits" that "siphon off the first-filed suit's proceeds" and accordingly "weake[n] the incentive to dig out the facts and launch the initial action." *Millennium I*, 923 F.3d at 252. By contrast, where, as here, the Government intervenes in multiple, related actions and draws on resources of experienced *qui tam* counsel representing multiple relators to advance prosecution

of the consolidated action, there is no concern of parasitic or "opportunistic suits." To the contrary, the contributions of multiple relators and their counsel—each of whom devoted significant time and resources assisting the Government in developing its case against the defendants—enhanced rigorous enforcement as contemplated by the Act. *See Bryant*, 24 F.4th at 1035 ("If multiple relators uncover multiple independent parts of the same complex scheme and the government uses the relators' collective resources to investigate the fraud, it would be unfair to allow solely the first relator's attorney to recover all the attorney fees because that relator discovered one part of the fraud first.").

In contrast, *Millennium I* involved a paradigmatic example of the situation the first-to-file rule was designed to address. This Court's application of the first-to-file rule to block a relator whose allegations the government did not intervene in and which did not overlap with the settled cases, fulfilled the statute's goal of precluding "opportunistic" and "follow-on" suits from "siphon[ing]" off the suit's proceeds. *Millennium I*, 923 F.3d at 252. Here, both Relators' complaints provided the Government crucial information about Defendant's fraud, allegations from both Relators overlapped with the Government's complaint-in-intervention, and both Relators' and their counsel worked in lockstep with the Government in the investigation and, ultimately, the settlement of this case. *Millennium I's* concerns about the "follow-on" filer are simply not present.

2. The FCA Provides for an Award of All Reasonable Fees and Necessary Expenses Incurred in Achieving a Successful Result

The District Court also held that Relator Sanborn was precluded from receiving a fee award for work on the claim that the Defendant's electronic health record ("EHR") technology's noncompliance with certain federal certification criteria violated the FCA. The District Court reasoned that because the Government did not intervene in this part of Sanborn's complaint, Sanborn does not qualify for a fee award for work on that claim under subsection(d)(1) because: (1) the Government did not "proceed" with the claim, and (2) Sanborn's relator share issued from funds recovered pursuant to settlement of a separate claim.

The District Court's holding conflicts with the plain text and purpose of the FCA's mandatory fee-shifting provision. As explained, *supra*, subsection (d)(1) establishes three criteria for determining whether a relator qualifies as "such person" who may recover a fee award under (d)(1): (1) the Relator must have brought a civil action under subsection (b); (2) the Government must have intervened in the action; and (3) the person must have received a share of the "proceeds of the action or settlement of the claim." Any such person is entitled to reasonable attorneys' fees and necessary expenses. Those criteria were met in this case. The statute does not include a limitation that fees and expenses may be awarded only for claims that were the basis of a settlement calculation.

That subsection (d)(1) provides that the relator's share derives from the "proceeds of the action or settlement of the claim," does not, as the District Court suggests, require a different interpretation. While the Government intervened in some but not all of the claims alleged in both sets of Relators' complaints, the global settlement agreement negotiated between the Government, the Relators, and the Defendant provided the Defendant a release from *all* claims in exchange for the payment of proceeds of more than $18 million. Contrary to the District Court's holding, the proceeds of the action from which the relator's share derived resulted from the settlement of *all* claims, including those not intervened in by the Government.

In dissecting the case into distinct claims in which the Government intervened, the district court drew on cases addressing the first-to-file bar, and asserted that it "saw no reason to treat a fee award differently." Add. at 17. However, the plain text of the statute provides the reason and, contrary to the district court's expressed concern, it does not "require unwarranted manipulation of the statute" but rather is entirely consistent with both the statute's language and purpose. Furthermore, *Rille v. PricewaterhouseCoopers*, 803 F.3d 368 (8th Cir. 2015), cited by the District Court, does not compel a different reading of the statute. In that case, the relator sought a share of a claim the Government brought on its own, and that was not alleged by any Relator.

The text of the statute reflects Congress's broad purpose in incentivizing relators to bring forward information about fraud against the Government. FCA cases often involve complex and interwoven schemes. That parties resolve cases by assigning a settlement amount to a particular claim does not reflect the work necessary to expose the scheme that resulted in the successful resolution of the case. The parties will often, in negotiating a settlement agreement, use one or more claims as the focal point for calculating a settlement amount. But that practical approach does not mean that other claims that were not dismissed on the merits were somehow unsuccessful. If that were the rule, it would be much harder for the parties to settle cases because relators would need to ensure that funds were specifically assigned to each released claim. Where, as here, all claims are released, Defendants should not be permitted to second guess the strategy relators used to achieve a successful result by after-the-fact dissection of the basis of the settlement amount.

To hold otherwise would provide *defendants* in cases like this with the very windfall courts so assiduously seek to avoid in fee litigation. If defendants obtain releases of all claims (including non-intervened claims) against them as part of a global settlement, they avoid the risk associated with litigating the non-intervened claims and losing, while forfeiting the potential reward of successfully litigating those claims and avoiding paying attorneys' fees entirely. Under the District

Court's decision, by contrast, defendants will have the best of both worlds: they avoid both downside litigation risk and the statutorily mandated payment of fees associated with settlement.

The District Court's rationale also does not comport with the principles behind Congress's decision to implement mandatory fee shifting under the FCA. In particular, the decision conflicts with Congress's desire to incentivize private counsel to take on complex litigation that can last years as well as smaller dollar cases where contingent fee recovery may be small but the public interest in prosecution may be high. As former Chief Judge Young of the District of Massachusetts explained:

> It would fly in the face of the "private attorney general" motivation behind the False Claims Act to parse out complaints and attorney billing records to such a point where any hours researching claims found somehow "unsuccessful" or "unrelated" to the final settlement in a case that was never litigated in open court would be deducted from the total hours claimed in a fee application under section 3730(d)(1). Such a rule would provide a disincentive to an attorney to bring any borderline claims at all, for fear that their work would not be reimbursed, and would greatly impact the scope and efficacy of complaints brought under the False Claims Act.

United States ex rel. Averback v. Pastor Med. Assoc. P.C., 224 F. Supp. 2d 342, 350 n.7 (D. Mass. 2002).

In this case, all of the claims were settled and thus, all were successful. But even if some of the claims had not been part of the settlement, awarding reasonable attorneys' fees for time spent on such claims would have been appropriate. The

Supreme Court established that in evaluating the lodestar for an award of fees, where an unsuccessful claim is related to a successful claim, a court must consider the reasonableness of the total time spent in relation to the results achieved. *See Hensley v. Eckerhart*, 461 U.S. 424, 434-35 (1983). The lodestar should only be reduced if the value of the related time was excessive in light of the results achieved. This is so because "'[m]uch of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis.'" *Bogan v. City of Boston*, 489 F.3d 417, 428 (1st Cir. 2007) (citation omitted). In FCA cases, relators often bring to the Government a variety of related allegations and theories, the investigation of which may contribute in various ways to the results achieved, even if the settlement or damages are tied to a particular claim and not others. *See, e.g.*, *United States ex rel. Nichols v. Computer Scis. Corp.*, 499 F. Supp. 3d 32 (S.D.N.Y. 2020), *United States ex rel. Int'l Bhd of Elec. Workers Local Union No. 98 v. Farfield Co.*, 2020 WL 1821028, at *11 (E.D. Pa. 2020) ("In applying the *Hensley* analysis, we are mindful of the Court's caution it is 'the result is what matters' and 'a mathematical approach comparing the total number of issues in the case with those actually prevailed upon . . . provides little aid in determining what is a reasonable fee in light of all the relevant factors."), *aff'd,* 5 F.4th 315 (3rd Cir. 2021); *Barfield v. New York City Health & Hosps. Corp.*, 537 F.3d 132, 152 (2d Cir. 2008) ("the Court must be 'mindful of

the Supreme Court's observation that 'the most critical factor' in a district court's determination of what constitutes reasonable attorney's fees in a given case is the degree of success obtained by the plaintiff'"). The Court's assessment of "degree of success" must not be "limited to inquiring whether a plaintiff prevailed on individual claims," but rather must account for both "the quantity and quality of relief obtained, as compared to what the plaintiff sought to achieve as evidenced in her complaint." *Barfield*, 537 F.3d at 152 (citations and quotation marks omitted).

Here, the district court viewed the anti-kickback claims and EHR claims as based on different facts and different legal theories, noting that the operative theories are distinct and citing a case observing that in an FCA action "almost all the claims will involve kickback or billing fraud" and "that fact alone does not mean the legal theories are similar." Add. at 21 (citation omitted). But the alleged kickbacks were for the purpose of inducing the use of the EHR system that did not comply with meaningful use requirements. The conduct was therefore all a related part of the scheme to obtain Government funds for a system that the Government would not pay for if it had been aware of its shortcomings or that kickbacks were being paid. Kickbacks like those alleged here are often an integral part of accomplishing a fraud scheme and are not unrelated merely because the legal elements of the theory are not identical to other theories involved in a fraud scheme. *See, e.g., United States ex rel. Booker v. Pfizer, Inc.,* 9 F. Supp. 3d 34, 40

(D. Mass. 2014) (relator successfully alleged that the defendant engaged in a kickback scheme involving drugs that it marketed for off-label use), *United States ex rel. Witkin v. Medtronic, Inc.,* 189 F. Supp. 3d 259, 265-66 (D. Mass. 2016) (same); *United States. ex rel. Westmoreland v. Amgen, Inc.,* 738 F. Supp. 2d 267, 270-71 (D. Mass. 2010) (relator successfully alleged that the defendant paid kickbacks to physicians to prescribe medically unnecessary drugs). Relators' counsel investigating a fraud scheme must necessarily pursue the potential legal theories that capture it, and will be discouraged from doing so if after the fact they will not be compensated for their efforts because the parties assigned the dollar value to one of the released claims.

III. CONCLUSION

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

and reasonable attorneys' fees and costs incurred to achieve the successful result in this case.

Dated: July 5, 2022

Respectfully submitted,

/s/Paul J. Lukas

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CERTIFICATE OF COMPLIANCE

I certify that this document complies with the type-volume limit of Fed R. App. P. 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and 1st Cir. R. 32(b)(1), this document contains 6,500 words.

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(6) because this brief employs proportionally spaced 14-point Times New Roman font.

Dated: July 5, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of July, 2022, I caused a copy of the foregoing brief to be filed electronically with the Court's ECF system, and that all counsel will be served by the ECF system.

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