2021 WL 1017401 (C.A.6) (Appellate Brief)
United States Court of Appeals, Sixth Circuit.

UNITED STATES OF AMERICA, ex rel. Kathleen A. Bryant, Plaintiff - Appellant,

v.

COMMUNITY HEALTH SYSTEMS, INC.; Heritage Medical Center, Defendants - Appellees.

No. 20-5460.
March 15, 2021.

On Appeal from the United States District Court for the Middle District of Tennessee, Case No. 3:14-cv-02195

Brief of Appellees Community Health Systems, Inc., et al.

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*I CORPORATE DISCLOSURE STATEMENT

Appellee Community Health Systems, Inc. ("CHSI") is a publicly held corporation. CHSI does not have a corporate parent, and no publicly held corporation currently owns 10% or more of its stock. Heritage Medical Center is a privately held company in which CHSI previously had an indirect ownership interest. No publicly held corporation currently owns 10% or more of its stock.

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*1 STATEMENT IN SUPPORT OF ORAL ARGUMENT

This is one of four related cases pending before this Court concerning whether private False Claims Act plaintiffs, known as relators, are entitled to have defendants pay their attorney's fees, even though the relators failed to satisfy several of the statutory prerequisites to bring suit and the Government did not award the relators a share of its recovery. Because these cases involve interrelated and important issues concerning the False Claims Act and its attorney's fee provision, 31 U.S.C. § 3730(d), Defendants-Appellees suggest that oral argument may aid the Court.

A motions panel of this Court previously denied the parties' joint motion to consolidate this case with the three related cases, but deferred any "decision regarding argument and the structure thereof . . . to the merits panel." No. 20-5460, RE 17-2 at 3. Defendants-Appellees respectfully suggest that the four cases be consolidated for purposes of argument and that the relators in all cases present their argument (through one or more counsel) first, and that Defendants-Appellees then be afforded an equal amount of time to respond.

*2 STATEMENT OF THE ISSUES

Relator-Appellant Kathleen Bryant filed the fourth of seven related False Claims Act ("FCA") cases that Community Health Systems, Inc. ("CHSI") and its affiliates (together "CHS" or "Defendants") settled with the Government. One of the lawsuits that preceded Bryant's had prompted the Government to commence a nationwide investigation; that earlier lawsuit made allegations about all CHSI-affiliated hospitals that subsumed Bryant's later allegations about one CHSI-affiliated hospital. After the parties settled the seven FCA cases, the Government did not award Bryant any share of its recovery (known as a relator's share). Bryant now seeks attorney's fees.

This appeal raises the following questions:
(1) Does the FCA require defendants to pay the attorney's fees of a relator, even if the relator was not awarded a relator's share, 31 U.S.C. § 3730(d)(1)?

(2) Does the FCA require defendants to pay the attorney's fees of a relator, even if the relator's case is barred by the Act's first-to-file bar, 31 U.S.C. § 3730(b)(5)?

*3 STATEMENT OF THE CASE

The False Claims Act allows private persons, known as relators, to bring claims on behalf of the United States. 31 U.S.C. § 3730(b). Successful relators may receive a portion of the Government's recovery--known as a relator's share--and they may "also receive" an award for their attorney's fees, to be paid by the defendant. 31 U.S.C. § 3730(d).

This case is the fourth of seven related FCA cases that CHS settled with different relators and the Government in a July 29, 2014 Settlement Agreement. Not long after filing her lawsuit, Bryant learned that there was already an ongoing government

investigation that had been initiated as a result of an earlier filed qui tam lawsuit against CHS. And upon settlement, the Government did not award Bryant any share of its recovery, known as the relator's share, 31 U.S.C. § 3730(d)(1) & (d)(2).

Bryant nonetheless now argues that the False Claims Act requires CHS to pay her attorney's fees. For two independent reasons, it does not: First, because Bryant did not obtain a relator's share, she is not a "such person" who "shall also receive" attorney's fees under the False Claims Act's fee provision. 31 U.S.C. § 3730(d)(1). And, second, the first-to-file bar, 31 U.S.C § 3730(b)(5), bars her from obtaining any recovery, including for attorney's fees.

*4 A. The False Claims Act

Defendants adopt the description of the statutory scheme from their brief in *United States ex rel. Doghramji v. Community Health Systems, Inc.*, Nos. 20-5462 & 20-5469 (6th Cir.) ("CHS *Doghramji* Br."). *See* CHS *Doghramji* Br. 4-7.

B. The Seven False Claims Act Lawsuits Here

During the relevant period here, Community Health Systems, Inc. was affiliated with more than one hundred hospitals across twenty-nine states. [1] Doghramji Complaint, *Doghramji* RE 1, PageID#20 (¶ 18). [2] It is headquartered in Franklin, Tennessee. *Id*. Heritage Medical Center ("Heritage") was, during the period relevant for this lawsuit, a CHSI-affiliated hospital located in Shelbyville, Tennessee. Complaint, RE 1, PageID#3.

In January 2009, a relator filed under seal the first of seven qui tam lawsuits that Defendants eventually settled in 2014. *U.S. ex rel. Reuille v. Cmty. Health Sys. Prof'l Servs. Corp., et al.*, No. 1:09-cv-00007 (N.D. Ind.) (filed Jan. 7, 2009) (complaint at *Doghramji* RE 115-3). It was followed a few months later by a second ***5** qui tam action. *U.S. ex rel. Cook-Reska v. CHS, et al.*, No. 4:09-cv-01565 (S.D. Tex.) (filed May 22, 2009) (complaint at *Doghramji* RE 115-4). Each of these two lawsuits named only a single hospital defendant (in addition to parent corporate entities) and alleged misconduct only at that hospital. Neither mentioned any conduct specific to the Emergency Department or even used the words "Emergency Department" or "emergency room." [3]

Emergency room physician Dr. Scott Plantz filed the third lawsuit on February 11, 2010. *U.S. ex rel. Plantz v. CHS, et al.*, No. 1:10-cv-0959 (N.D. Ill.) (filed February 11, 2010) (complaint at *Doghramji* RE 115-5). He alleged that 119 CHSI-affiliated hospitals and other defendants had each engaged in a "massive," corporate-directed ED fraud. Plantz alleged that CHSI and its affiliates had set minimum benchmarks for the percentage of patients that had to be admitted through each hospital's ED. Plantz Complaint, *Doghramji* RE 115-5, PageID ## 1561-1562 (¶¶ 202-10), 1572-1575 (¶¶ 246-56). CHSI-affiliated hospitals allegedly then met these benchmarks through a series of improper tactics, including "mandate[s] that the ED physicians should not use a 23-hour observation of a patient" but instead "simply admit the patient to the hospital." *Id*. at PageID ## 1572-1573 (¶ 247). ***6** (Observation is a different patient billing status than admission. Though the care received by patients in admission and observation status is usually identical, Medicare reimburses at higher rates for admissions. *See id*.). Plantz described the alleged scheme in detail--using the word Emergency Department or "ED" 103 times--and supported his allegations with documents from CHSI's affiliates that otherwise would have been unavailable to the Government. *Id*. at PageID ### 1610-1612. Heritage Medical Center was among the 119 defendants that Plantz named. *See id*. at PageID#1555 (¶ 171).

Six months later, on July 29, 2010, Bryant filed her lawsuit against Heritage Medical Center and Community Health Systems, Inc. Complaint, RE 1. She, like Plantz, alleged that "CHS ha[d] instructed Heritage and all other CHS facilities to increase the number of full hospital admissions through the ER." *Id*. at PageID#11 (¶ 37). In particular, Bryant alleged that CHS's national offices had "instructed" Heritage and other hospitals "to place all patients entering the hospital in 'full inpatient admit status,' " and not observation status. *Id*. Most of her complaint described instances of alleged misconduct at Heritage. But she also alleged that the "FCA violations she observed at Heritage Medical Center resulted from corporate directives," *Id*. at PageID #### 3-4 (¶ 10), and that "the billing fraud was being committed at all hospitals owned by Defendant CHS." *Id*. at PageID#16 (¶ 51).

Not long after Bryant filed her case, the Government informed her of several ***7** earlier filed qui tam cases. 6/27/2017 Hearing Transcript, *Doghramji* RE 273, PageID#6619. Soon after, Bryant entered into an agreement with Reuille's, Cook-Reska's, and Plantz's counsel where all of the relators expressly recognized the risks that the first-to-file and "other bars" posed to their cases, and agreed to pool any relator's share that any one of them received. APP.002-003 (¶ 11); APP.039 (Kreindler Dep. at 30:3-9). Bryant was to receive 7% of any potential recovery, with larger shares to be allocated to the earlier filing relators (for whom the first-to-file bar posed less of a risk). APP.003 (¶ 13).

Later in 2010 and early 2011, three more lawsuits were filed by qui tam relators alleging that CHS was engaged in improper conduct to "increase ER admissions." *U.S. ex rel. Carnithan v. CHS, et al.*, No. 3:11-cv-00312 (S.D. Ill.) (filed April 14, 2011); *U.S. ex rel. Mason v. CHS, et al.*, No. 3:12-cv-817 (W.D.N.C.) (complaint amended to add claims against CHS on April 18, 2011); *U.S. ex rel. Doghramji*, No. 3:11-cv-00442 (M.D. Tenn.) (filed May 10, 2011). Like Plantz, these relators alleged that CHS's national office "directed each CHS Affiliate Hospital[] to admit all Medicare beneficiaries presenting for emergency medical services as hospital inpatients regardless of whether such admissions were reasonable and necessary for their diagnosis or treatment." Carnithan Amended Complaint, *Doghramji* RE 115-7, PageID#1758 (¶ 370).

The Government "began coordinating [a] national investigation after Plantz ***8** filed his complaint." 4/1/2020 Memorandum Opinion, RE 103, PageID#1284. CHS cooperated with the Government's investigation, and produced documents and information to the Government from 2011 until 2014. CHS had no contact with the Relators' counsel whatsoever during the investigation. The Company dealt exclusively with the Justice Department in connection with the investigation and the negotiations to resolve the FCA claims against CHS. Because all the relators' lawsuits had been filed under seal, CHS did not learn of the relators' (or their counsels') identities until the Government revealed them after the parties had largely agreed on the terms of a settlement. [4]

C. Settlement, Transfer And Consolidation

Defendants adopt the description of the settlement, transfer and consolidation of these cases from their *Doghramji* brief. *See* CHS *Doghramji* Br. 13-16.

D. Prior Proceedings In This Court And The Court Below

Defendants adopt the description of the prior proceedings in this Court and the court below from their *Doghramji* brief. *See* CHS *Doghramji* Br. 16-18.

***9** E. The Rulings Under Review Here

Judge Aspen ruled that none of the relators currently before this Court are entitled to attorney's fees under the False Claims Act. 4/1/2020 Memorandum Opinion, RE 103.

Judge Aspen disagreed with CHS's argument that a relator must receive a relator's share from the Government to be entitled to attorney's fees. *Id*. at PageID ## 1279-1280. But he ruled that Plantz was the first relator to allege "a nationwide fraudulent scheme" of "Emergency Department fraud," and therefore that Plantz was the only relator eligible to recover attorney's fees for work on that claim. *Id*. at PageID#1281. As Judge Aspen noted, "[t]he Government began coordinating the national investigation after Plantz filed his complaint." *Id*. at PageID#1284. Thus, Plantz's complaint "not only theoretically, but actually did" provide the Government sufficient notice of the fraud. *Id*.

The two relators who had filed complaints before Plantz--that is, Reuille and Cook-Reska--"did not allege the scheme that was ultimately the source of the settlement in these cases." *Id.*; *see id*. at PageID#1283. The *Doghramji* Relators and Bryant,

by contrast, filed their complaints well after Plantz had filed his. Plantz's complaint "include[d] all of the purportedly unique contributions of these relators." *Id*. at PageID#1282.

Judge Aspen found that "Bryant's allegations were encompassed within the ***10** broad national Emergency Department settlement [and] she did not provide any unique information in her complaint beyond the extant scheme alleged in Plantz's complaint." *Id*. at PageID#1284. Judge Aspen further found that "Bryant identifies no particular component of the fraudulent scheme outside of the ambit of Plantz's complaint." *Id*. Even if Bryant's complaint added additional detail, Plantz's complaint had already provided the Government "enough information to discover [all] related frauds." *Id*. at PageID#1281. Thus, Judge Aspen held, Bryant's request for attorney's fees was "barred by the first-to-file rule." *Id*. at PageID#1284.

Bryant appealed. Notice of Appeal, RE 104.

***11 SUMMARY OF THE ARGUMENT**

"[T]he fee applicant bears the burden of establishing entitlement to an award [.]" *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). Bryant cannot carry that burden for two independent reasons: *First*, she did not receive a relator's share, so the False Claims Act's fee provision does not entitle her to "also receive" attorney's fees. 31 U.S.C. § 3730(d)(1). And, *second*, her fee request is barred by the False Claims Act's first-to-file bar. *Id*. § 3730(b)(5).

I. Bryant concedes that receipt of a relator's share is a precondition to an award of fees. *See, e.g.*, Bryant Br. 20, 28. She argues instead that she did receive a relator's share because of her private agreement with other relators that funneled a portion of their recovery to her. *See id*. at 27-28.

But "[t]he fact that [a relator] may have received a share of the proceeds through a separate private agreement with [another relator] does not change" the fact that a relator did not receive a relator's share under the statute. *U.S. ex rel. Saidiani v. NextCare, Inc.*, No. 3:11-cv-141, 2013 WL 431828, at *3 (W.D.N.C. Feb. 4, 2013). Every court to have considered the issue prior to this case has concluded that the FCA does not permit such ready circumvention of its requirements by private agreement. "To hold otherwise would be inconsistent with the clear congressional intent in crafting limiting provisions in § 3730" and "would incentivize tag-along suits brought by relators seeking a large recovery." *U.S. ex rel. Allstate Ins. Co. v.* ***12** *Millennium Labs., Inc.*, 464 F. Supp. 3d 449, 454 (D. Mass. 2020).

The Government awarded the relator's share to Plantz and Cook-Reska. Bryant failed to receive a relator's share, and therefore under the FCA she is not entitled to attorney's fees.

II. The FCA's first-to-file bar, 31 U.S.C. § 3730(b)(5), prevents "successive plaintiffs from bringing related actions based on the same underlying facts." *Walburn v. Lockheed Martin Corp.*, 431 F.3d 966, 971 (6th Cir. 2005).

Bryant argues that it is too late for CHS to raise the first-to-file bar following intervention or settlement. But the "exception-free" first-to-file bar contains neither a post-intervention or a post-settlement exception. *Id*. at 973 (quoting *U.S. ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1187 (9th Cir. 2001)). Nor does any rule waive defenses upon "settlement."

Indeed, courts routinely apply the first-to-file bar after a settlement to bar relators from recovering under Section 3730(d). *E.g.*, *United States v. Millenium Labs., Inc.*, 923 F.3d 240, 251 (1st Cir. 2019); *U.S. ex rel. Felten v. William Beaumont Hosps.*, No. 2:10-cv-13440, 2019 WL 9094425, *5 (E.D. Mich. June 7, 2019). Further, this Court has permitted post-settlement challenges to attorney's fees based on the public disclosure bar, and there is no reason the rule should be any different for the first-to-file bar. *U.S. ex rel. Taxpayers Against Fraud v. Gen. Elec. Co.*, 41 F.3d 1032, 1044 (6th Cir. 1994). Bryant's policy-based arguments for a ***13** post-settlement exception to the first-to-file bar should be addressed to Congress, not the courts, and lack merit in any event.

This Court should also reject Bryant's fallback invitation to overturn the District Court's finding that she was not the first to file. Judge Aspen correctly found that "Bryant's allegations were encompassed within the broad national Emergency Department settlement [and] she did not provide any unique information in her complaint beyond the extant scheme alleged in Plantz's complaint." RE 103, PageID#1284. The case law supports that determination, and holds that the first-to-file bar applies "where the first complaint allege[s] a broad fraudulent scheme orchestrated by a national or parent company, and the second complaint merely add[s] additional facts or widen[s] the circle of victims." *U.S. ex rel. Heath v. AT&T, Inc.*, 791 F.3d 112, 122 (D.C. Cir. 2015). Bryant may have "incorporate[d] somewhat different details" in her complaint, but she alleged "essentially the same . . . scheme" as Plantz. *U.S. ex rel. Poteet v. Medtronic, Inc.*, 552 F.3d 503, 514, 516 (6th Cir. 2009).

*14 STANDARD OF REVIEW

This Court reviews interpretations of the False Claims Act and other legal issues underlying an attorney's fee award de novo. *U.S. ex rel. Summers v. LHC Grp., Inc.*, 623 F.3d 287, 291 (6th Cir. 2010). If the district court applies the correct legal standard, however, its determination as to a party's eligibility for a fee award is reviewed only for clear error. *Sierra Club v. Hamilton Cty. Bd. of Cty. Comm'rs*, 504 F.3d 634, 642 (6th Cir. 2007).

ARGUMENT

I. BRYANT IS NOT ENTITLED TO ATTORNEY'S FEES BECAUSE SHE DID NOT RECEIVE A RELATOR'S SHARE

Bryant is not entitled to "also receive" attorney's fee for work on the claim of nationwide ED fraud because she did not receive the relator's share for that claim. 31 U.S.C. § 3730(d)(1). Before this case, six courts have considered whether the False Claims Act requires a relator to have received a relator's share to "also receive" attorney's fees. 31 U.S.C. § 3730(d)(1). Each has held that receipt of a relator's share is a precondition to a fee award. [5] The unanimous conclusion of these courts ***15** is supported by both the False Claims Act's text and the American Rule background against which it was enacted. CHS adopts and incorporates by reference pages 25-37 of its *Doghramji* brief, in which it sets forth this argument in full.

1. Unlike the other relators, Bryant appears to concede that receipt of a relator's share is a precondition to an award of fees. She states that the FCA mandates the award of fees "when the Government . . . obtains a recovery *for which the relator receives a share*." Bryant Br. 20 (emphasis added). And several pages later: "[T]he False Claims Act's statutory framework, procedure and plain language require the award of a relator's reasonable attorneys' fees . . . *where the relator receives a share of the proceeds of the action*." *Id*. at 28 (emphasis added).

Rather than dispute the legal proposition that a relator's share is required, Bryant argues that the district court made a "factual finding[]" that "each relator received a share." *Id*. at 27-28. It did no such thing. The facts were-- and remain--undisputed: The Government awarded Plantz and Cook-Reska a relator's share for their respective claims. *See* Plantz Share Agreement, *Doghramji* RE 115-15; Cook-Reska Share Agreement, *Doghramji* RE, 115-16; APP.026. [6]

The district court, instead, reached a *legal* ruling that "there is no requirement ***16** that a relator receive the statutory share in order to receive her attorney's fees," 4/1/2020 Memorandum Opinion, RE 103, PageID #1279, (before, of course, it went on to deny Bryant fees on first-to-file grounds, *see id*. at PageID ## 1280-1282, 1283-1284). The district court's legal ruling is reviewed de novo, not for clear error as Bryant argues. *See* Bryant Br. 27-28.

And, as even Bryant appears to concede, the district court's legal ruling was wrong. As discussed above and at greater length in related briefs, *see* CHS *Doghramji* Br. 25-37, only relators who receive a relator's share "shall also receive" fees. 31 U.S.C. § 3730(d)(1).

2. Bryant instead maintains that she and all the other relators received a relator's share qualifying her for fee shifting because they had entered into a private agreement to share the proceeds of the Government's award.

Every court to have considered a similar argument has concluded that it was wrong. *See U.S. ex rel. Allstate Ins. Co. v. Millennium Labs., Inc.*, 464 F. Supp. 3d 449, 454 (D. Mass. 2020); *McNeil v. Jolly*, 451 F. Supp. 3d 657, 668 (E.D. La. 2020); *U.S. ex rel. Saidiani v. NextCare, Inc.*, No. 3:11-cv-141, 2013 WL 431828, at *3 (W.D.N.C. Feb. 4, 2013). Receiving money from a private agreement does not constitute a relator's share warranting fee shifting under § 3730(d)(1). [7]

***17** As those cases explain, "[t]he fact that [a relator] may have received a share of the proceeds through a separate private agreement with [another relator] does not change" the fact that a relator did not receive a relator's share under the statute. *NextCare*, 2013 WL 431828, at *3. "To hold otherwise would be inconsistent with the clear congressional intent in crafting limiting provisions in § 3730" and "would incentivize tag-along suits brought by relators seeking a large recovery." *Allstate*, 464 F. Supp. 3d at 454. It would also allow the circumvention of the first-to-file and other bars: If receipt of a private sharing payment were enough, even relators who were dismissed early on in a case would be entitled to fees, provided they (at some point, and maybe even after the fact) struck a deal with another relator to spread at least one cent of the successful relator's recovery around. Congress surely did not intend to permit such infinite expansion of the pool of relators entitled to attorney's fees.

As Bryant's counsel put it, Bryant received funds only after they were "funneled through somebody else's bank account." APP.040 (Kreindler Dep. at 61:23-25). Such back-channel funneling, pursuant to private deals struck among ***18** relators, does not suffice to evade the limitations on fee shifting that Congress legislated. The Government awarded its relator's share to Plantz and Cook-Reska. Bryant did not receive a relator's share payment pursuant to Section 3730(d), and consequently she is not entitled to an award of fees under Section 3730(d) either.

3. Despite conceding that an award of a relator's share is a precondition to an award of fees, Bryant dedicates much of her brief to arguing that fee shifting is "mandatory." Bryant Br. 25; *see id*. at 22-26. That's true as far as it goes, but misses the point. The False Claims Act, no doubt, provides that plaintiffs who meet the statutory prerequisites for a fee award "shall" receive one. 31 U.S.C. § 3730(d)(1); *cf., e.g.*, 42 U.S.C. § 1988(b) (providing that "the court, in its discretion, *may* allow the prevailing party . . . a reasonable attorney's fee" (emphasis added)). But the question here is *whether* Bryant met the statutory prerequisites for a fee award; it has nothing to do with the district court's discretion to deny a fee award to an otherwise eligible party. And Bryant did not meet the statutory prerequisites because she was not a "such person" who received a relator's share. 31 U.S.C. § 3730(d)(1). [8]

Bryant could have challenged the Government's decision not to award her a relator's share, as relators often do. [9] Or, she could have insisted that the Government ***19** specify the relator's share allocation in the Settlement Agreement, as the Government often does. [10] In fact, "the False Claims Act provides a specific mechanism for relators to challenge the [purported] adequacy of a settlement agreement." *U.S. ex rel. Merena v. SmithKline Beecham Corp.*, 205 F.3d 97, 99 (3d Cir. 2000); *see* 31 U.S.C. § 3730(c)(2)(B). But Bryant signed the Settlement Agreement, and agreed that it was "fair, adequate, and reasonable," RE 38, PageID#186, even though it subjected her to the risk of not receiving a relator's share. And because Bryant did not, in fact, receive a relator's share, she is not a "such person" who is entitled to "also receive" attorney's fees. 31 U.S.C. § 3730(d)(1).

II. BRYANT IS NOT ENTITLED TO ATTORNEY'S FEES BECAUSE HER CASE DOES NOT SATISFY THE FIRST-TO-FILE BAR

Bryant filed her lawsuit six months after Plantz had already filed a lawsuit alleging that all CHSI-affiliated hospitals, including Heritage, engaged in a scheme of corporate-directed Emergency Department fraud. For that reason, as the district court found, the first-to-file bar is an independent reason that Bryant is not entitled ***20** to recover attorney's fees.

The FCA's first-to-file bar, 31 U.S.C. § 3730(b)(5), prevents "successive plaintiffs from bringing related actions based on the same underlying facts," *Walburn v. Lockheed Martin Corp.*, 431 F.3d 966, 971 (6th Cir. 2005). The first-to-file bar is an

"exception-free," *id*. at 973 (quoting *U.S. ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1187 (9th Cir. 2001)), and "jurisdictional limit on the courts' power to hear" subsequently filed cases, *U.S. ex rel. Poteet v. Medtronic, Inc.*, 552 F.3d 503, 516 (6th Cir. 2009).

Congress intended the first-to-file bar to serve several related purposes: (1) it "stops repetitive claims," *Walburn*, 431 F.3d at 970-71; (2) it provides "incentives to relators to promptly alert the government to the essential facts of a fraudulent scheme," *U.S. ex rel. Wilson v. Bristol-Myers Squibb, Inc.*, 750 F.3d 111, 117 (1st Cir. 2014) (quotation and alteration marks omitted); and (3) it limits recoveries to "true whistleblower[s]" who give the Government notice of the alleged fraud, *U.S. ex rel. Taxpayers Against Fraud v. Gen. Elec. Co.*, 41 F.3d 1032, 1035 (6th Cir. 1994). After all, "[o]nce the government is put on notice of its potential fraud claim, the purpose behind allowing qui tam litigation is satisfied," *Poteet*, 552 F.3d at 516, and "there is little point in rewarding a second toot," *U.S. ex rel. Duxbury v. Ortho Biotech Prods., L.P.*, 579 F.3d 13, 24 (1st Cir. 2009).

Bryant offers two reasons the first-to-file bar supposedly does not bar her fee ***21** requests: First, she says it is too late for the bar to apply, and, second, she says she *was* first to file. Neither is persuasive.

1. Bryant offers several theories for why it is now too late for CHS to raise the first-to-file bar. But, notably, she does not once address the district court's holding that on any "fair reading," the False Claims Act's attorney's fees provision includes "the first-to-file limitation in subsection (b)(5)." 4/1/2020 Memorandum Opinion, RE 103, PageID#1280; *see also* CHS *Doghramji* Br. 42-43 (citing *United States ex rel. Greenwald v. Kool Smiles Dentistry, PC*, No. 3:10-cv-1100, 2018 WL 4356744, at *2 (D. Conn. Sept. 12, 2018), and other cases explaining how the FCA's fee provision bar "incorporates" the first-to-file bar). In fact, Bryant offers no textual argument *at all* as to why a court should ignore the first-to-file bar in awarding attorney's fees. The Court might end its analysis there. In any event, none of Bryant's extratextual theories have any merit.

a. Bryant's first argument is that once the Government intervenes, "[t]here is nothing in the language or statutory scheme that would allow Defendants . . . to interfere in the Government's action." Bryant Br. 29. That is wrong for any number of reasons. Chief among them, there *is* something in the statute: the first-to-file bar, 31 U.S.C. § 3730(b)(5). The "exception-free" first-to-file bar, *Walburn*, 431 F.3d at 973, contains no exception for cases in which the Government has intervened.

Thus, as relators in one of the other cases concede, "[t]he United States' ***22** decision to intervene did not deprive CHS[] of th[e] right" to raise the first-to-file bar. Doghramji Br. 33 (citing *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 477 (2007)). Moreover, as then-Judge Alito once put it, "[i]t is hard to see why Congress might have wanted the fortuity of government intervention to make such a difference." *U.S. ex rel. Merena v. SmithKline Beecham Corp.*, 205 F.3d 97, 105 (3d Cir. 2000). It did not, or else it would have said so in the statute. [11] *See also* CHS *Doghramji* Br. 37-44.

b. Next, Bryant falls back from intervention to argue that the "time limitation for raising" the first-to-file bar expires upon "settlement." Bryant Br. 34. She cites no authority for this proposition either. There is none. Just as there is no postintervention exception to the "exception-free" first-to-file bar (*Walburn*, 431 F.3d at 973), there is no post-settlement exception either.

Nor is there any reason that there might be such an exception: No rule waives defenses upon "settlement." A defendant can forfeit certain defenses by failing to state them in a responsive pleading, *see* Fed. R. Civ. P. 8(c)(1), 12(h)(1), but CHS ***23** was not even served with process in these cases, and never filed a responsive pleading. [12] No rule waives defenses upon "settlement."

Nor is "settlement" (much less an out-of-court settlement like the one here) even an event under the rules of procedure. From the point of view of the Federal Rules of Civil Procedure, all that happened here was that the Government and Relators voluntarily dismissed their cases pursuant to Federal Rule 41(a)(1), before they had even served CHS with process or CHS had entered an appearance. *See* RE 38, PageID ## 191-192 (¶ 15). Bryant does not explain how her pre-service, voluntary dismissal could possibly have waived CHS's defenses to her fee claim. It could not.

And even if some defenses might somehow be waived by a plaintiffs' voluntary dismissal, the first-to-file bar is a "jurisdictional limitation," *Walburn*, 431 F.3d at 970; *Poteet*, 552 F.3d at 516, which "can never be waived or forfeited," *Vander Boegh v. EnergySolutions, Inc.*, 772 F.3d 1056, 1064 (6th Cir. 2014). [13]

***24** Bryant's post-settlement exception also cannot be squared with the case law. Several courts have considered post-settlement first-to-file challenges to attorney's fees and concluded that "only a first filer . . . [is] entitled to fees," even after a settlement. *United States ex rel. Allstate Ins. Co. v. Millennium Labs., Inc.*, 464 F. Supp. 3d 449, 453 (D. Mass. 2020). [14] Bryant addresses only one of those cases, and says that it was "incorrectly decided" and "misapplied the first-to-file provision." Bryant Br. 31-32 (discussing *William Beaumont*, 2019 WL 9094425). She does not say why.

Nor does she address the reasoning of the other courts, which have explained that "Congress could not have intended for a plaintiff, who is not the first filer and, therefore, not entitled to the relator's share, to be guaranteed recovery of attorneys' fees," *Allstate*, 464 F. Supp. 3d at 454, and that the False Claims Act attorney's fee provision should be read as "incorporat[ing]" the first-to-file bar, *Greenwald*, 2018 WL 4356744, at *2.

Bryant's discussion of *United States ex rel. Chiba v. Guntersville Breathables, Inc.*, 421 F. Supp. 3d 1241 (N.D. Ala. 2019), does not help her either. That case did ***25** not even involve the first-to-file bar. There, one group of relators filed one case, in which the U.S. intervened and settled; then "[t]he U.S. accorded Relators a share of the proceeds garnered by the settlement, thus entitling Relators to attorneys' fees." *Id*. at 1255. To be sure, the district court held that the relators would be entitled to fees after a settlement, even if the FCA's government action and public disclosure bars might otherwise apply. *See id*. at 1254-55 (discussing 31 U.S.C. § 3730(e)(3), (e)(4)). But *Chiba* awarded the relator's attorney's fees *because* "the United States [had] accorded Relators a share of the proceeds," and thus it was too late to dispute whether the relators were "prevailing parties." *Chiba*, 421 F. Supp. 3d at 1254. Here, Bryant did not receive a relator's share.

If, as Bryant suggests, *Chiba* held that the public disclosure bar does not apply post-settlement to an attorney's fees request, it would be directly contrary to Sixth Circuit law. In *United States ex rel. Taxpayers Against Fraud v. General Electric Co.*, 41 F.3d 1032 (6th Cir. 1994), this Court, citing the public disclosure bar, directed the district court to determine whether one of the relators in that case "had standing to act as a co-plaintiff." *Id*. at 1044. "If [it] had no standing, then the statutory fee award must be reduced by the amount of the award attributable to [its] legal fees." *Id. Taxpayers Against Fraud* was a settled case. *See id*. at 1036. [15]

***26** Similarly, in *U.S. ex rel. Bledsoe v. Cmty. Health Sys., Inc. (Bledsoe II)*, 501 F.3d 493 (6th Cir. 2007), this Court has held, in a settled case, that "[a]bsent a valid complaint which affords a relator the possibility of ultimately recovering damages, there is no compelling reason for allowing a relator to recover for information provided to the government." *Id*. at 522. *Bledsoe* concerned a Rule 9(b) challenge, not a first-to-file challenge. But its rationale applies here: If Rule 9(b) pleading challenges to a relator's entitlement can be raised after settlement, then there is no reason that statutory first-to-file challenges cannot be as well.

In any event, courts routinely consider first-to-file challenges to relator's share awards after settlement. [16] But Section 3730(d)(1) governs both relator's share and attorney's fees. There is no possible reading of it on which entitlement to a relator's share is subject to a post-settlement first-to-file challenge, but entitlement to attorney's fees is not. Or, in other words, Bryant's argument that settlement ***27** extinguishes all first-to-file issues cannot be right, unless all the cases adjudicating post-settlement first-to-file issues in relator's share cases are wrong.

Bryant attempts to distinguish some (but not all) of the "post-intervention and post-settlement" cases on the ground that they "only involve[d] disputes between relators." Bryant Br. 30. That's irrelevant: Nothing in 31 U.S.C. § 3730(b)(5) says relators can raise first-to-file challenges after settlement, but that defendants cannot. [17]

It's also wrong: There are several cases in which courts denied attorney's fees based on *defendants'* first-to-file objections. See cases cited at note 14, *supra*. Bryant says nothing at all about them (other than to declare one of them "incorrect[]"). *See* p. 24, *supra*. In fact, in one of the very cases Bryant cites, the *Government*, not a relator, challenged a relator's entitlement to recover after a settlement. *See Rille v. PricewaterhouseCoopers LLP*, 803 F.3d 368, 371 (8th Cir. 2015) (en banc); Bryant Br. 30. And in *Taxpayers Against Fraud*, this Court considered *a defendant's* post-settlement objection to paying attorney's fees. *See* ***28** *Taxpayers Against Fraud*, 41 F.3d at 1044. Although *Rille* concerned whether the relators had filed the claim at all and *Taxpayers Against Fraud* concerned the public disclosure bar, it is impossible to see why the Government and defendants can raise such post-settlement challenges to a relator's recovery under Section 3730(d)(1), but cannot raise first-to-file challenges.

Nor does Bryant's discussion of the Settlement Agreement add anything. *See* Bryant Br. 39-40. Bryant does not challenge Judge Aspen's finding that CHS is "not precluded under the terms of the Settlement Agreement from asserting statutory bars to Relators' attorneys' fees." 10/3/2019 Memorandum Opinion, RE 98, PageID#859. She just argues that the Settlement Agreement "could not" preserve such defenses because that would be "contrary to the plain language and statutory scheme." Bryant Br. 39. That is just a re-run of her argument that first-to-file challenges cannot be raised after settlement, ever. And, again, Bryant never says what "plain language" in the statute (*id*.) supposedly creates a post-settlement exception to the "exception-free" first-to-file bar or how her reading can be squared with the numerous cases that permit challenges after settlement to a relator's entitlement to recover. *Walburn*, 431 F.3d at 973.

c. Bryant therefore "fall[s] back to the last line of defense for all failing statutory interpretation arguments: naked policy appeals." *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1753 (2020). She argues that "policy considerations" support an ***29** attorney's fee award to relators who were not first to file. Bryant Br. 35; *see id*. at 35-38. Her specific policy concern is that, if late-filing relators like her are subject to the first-to-file bar, then supposedly "no attorneys would ever expend resources to assist the Government i[n] any case involv[ing] more than one *qui tam* suit." *Id*. at 37-38.

"Gone here is any pretense of statutory interpretation[.]" *Bostock*, 140 S.Ct. at 1753. But courts, of course, cannot "award attorneys' fees whenever [they] deem the public policy furthered by a particular statute important enough to warrant the award." *Alyeska Pipeline Servs. Co. v. Wilderness Soc'y*, 421 U.S. 240, 263 (1975). Nor can "congressional utilization of the private-attorney-general concept . . . be construed as a grant of [such] authority to the Judiciary." *Id*. "The place to make new legislation, or address unwanted consequences of old legislation, lies in Congress." *Bostock*, 140 S. Ct. at 1753.

In any event, Bryant's policy argument is plainly wrong, even on its own terms. The first-filed relator will still have plenty of incentive "to assist the Government," Bryant Br. 37, if late filers are not entitled to attorney's fees. Moreover, late filers may still obtain compensation through private sharing agreements and contingency fees, like Bryant and her counsel did here. *See* APP.037 (Kreindler Dep. at 17:4-8).

Bryant's interpretation, by contrast, would encourage "repetitive claims," ***30** *Walburn*, 431 F.3d at 971, and require defendants to pay the attorney's fees of purely "parasitic" relators who "provide[] little if any public service," *Merena*, 205 F.3d at 105. These are the very policy consequences that Congress wanted to avoid. *See Walburn*, 431 F.3d at 970-71. In other words, "Congress could not have intended for a plaintiff, who is not the first filer . . . to be guaranteed recovery of attorneys' fees." *Allstate*, 464 F. Supp. 3d at 454.

Further, Bryant's policy concern that the Government might have been left "at the mercy" of CHS without her counsel's "valuable" assistance is difficult to credit. Bryant Br. 38. She says that the Government had "urged" her counsel to participate in the investigation and that she incurred attorney's fees "on behalf of and at the direction of the Government," *id*. at 10, 43, but here is how counsel for the Government put it when questioned by Relators' counsel:
Q. Now, did the government ask for some relators' counsel in some of the cases to assist in the litigation?

A. I think the government accepted the willingness of relators' counsel to assist in the litigation.

...

Q. Okay. Now, did the government coordinate much of the work done by the relators' counsel?

A. At some point the government tried to add some coordination to it, yes.

6/27/2017 Hearing Transcript, *Doghramji* RE 273, PageID ## 6536-6538.

2. Bryant eventually retreats to her alternate theory: She asks this Court to ***31** "overturn the District Court's clearly erroneous findings of facts and hold that [she] was the first-to-file." Bryant. Br. 21. But the district court did not err, and certainly did not commit a clear error, in finding that Plantz was the first to file.

To decide whether the first-to-file bar applies, "a court must compare the relator's complaint with the allegedly first-filed complaint." *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." *Id*. (quotation and alteration marks omitted).

"The later complaint need not rest on precisely the same facts as a previous claim[.]" *Id*. (quotation marks omitted). "Rather, so long as a subsequent complaint raises the same or a related claim based in a significant measure on the core fact or general conduct relied upon in the first *qui tam* action, § 3730(b)(5)'s first-to-file bar applies." *Id.*; *see U.S. ex rel. Shea v. Cellco P'ship*, 748 F.3d 338, 341 (D.C. Cir. 2014), *vacated on other grounds*, 135 S. Ct. 2376 (2015) ("[L]ater actions are barred where the first would have sufficed to equip the government to investigate the fraud alleged in the later action." (quotation and alteration marks omitted)).

That test is easily applied here. Bryant alleged that CHSI-affiliated hospitals engaged in corporate-wide practices to overbill the government through improper ED admissions. *See* Complaint, RE 1, PageID ## 1 (¶ 1), 5-6 (¶ 20), 9-10 (¶ 31), 13-15 (¶¶ 44-48). So did Plantz. Plantz Complaint, *Doghramji* RE 115-5, ***32** PageID ## 558-62, 1577-1579. Bryant alleged that CHS directed hospitals to "bill for services that should have been performed on an outpatient or observation basis as if they were more expensive inpatient services." RE 1, PageID ## 1-2 (¶ 2). So did Plantz. *Doghramji* RE 115-5, PageID ## 1561 (¶ 204), 1573 (¶ 249). Bryant alleged that CHSI-affiliated hospitals "alter[ed] physician diagnoses to increase falsely the severity of the patient's condition." RE 1, PageID ## 1-2 (¶ 2). So did Plantz. *Doghramji* RE 115-5, PageID#1576-1577 (¶¶ 259, 260).

Reading the writing on the wall, Bryant does not argue that she was the first to file the claim of nationwide ED fraud. Instead, she argues that she was first to file the claim of "fraud occurring at . . . Heritage Medical Center." Bryant Br. 44. But, as the district court properly found, those Heritage-specific "allegations were encompassed within the broad national Emergency Department" claim that Plantz had already alleged. 4/1/2020 Memorandum Opinion, RE 103, PageID#1284. Bryant "did not provide any unique information in her complaint beyond the extant scheme alleged in Plantz's complaint, other than reiterating that a named defendant in the initial complaint had, in fact, done as specified." *Id*.

That finding was correct, and certainly not "clearly erroneous." Bryant Br. 21. The first-to-file bar applies "where the first complaint allege[s] a broad fraudulent scheme orchestrated by a national or parent company, and the second complaint merely add[s] additional facts or widen[s] the circle of victims." *U.S. ex* ***33** *rel. Heath v. AT&T, Inc.*, 791 F.3d 112, 122 (D.C. Cir. 2015); *U.S. ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204, 1209 (D.C. Cir. 2011); *U.S. ex rel. Carter v. Halliburton Co.*, 710 F.3d 171, 182 (4th Cir. 2013), *aff'd in part, rev'd in part on other grounds*, *Kellogg Brown & Root Servs., Inc. v. U.S. ex rel. Carter*, 575 U.S. 650 (2015).

"[A]dding details and geographic locations" does not escape the bar. *U.S. ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 373 (5th Cir. 2009). That is true even if "the defendants involved are slightly different," *Poteet*, 552 F.3d at 514,

which here they were not. *See* Plantz Complaint, *Doghramji* RE 115-5, PageID#1555 (naming Heritage as a defendant). Thus, Bryant's complaint may have "incorporate[d] somewhat different details," but it alleged "essentially the same . . . scheme" as Plantz's. *Poteet*, 552 F.3d at 514, 516. Bryant's complaint is therefore barred by the first-to-file bar.

Rule 9(b) and *Walburn v. Lockheed Martin Corp.*, 431 F.3d 966 (6th Cir. 2005), do not help Bryant escape this conclusion. *See* Bryant Br. 45-46. In *Walburn*, an earlier-filed complaint's allegations were "so fatally broad as to run afoul of the heightened pleading requirements for fraud under Federal Rule of Civil Procedure 9(b)." *Walburn*, 431 F.3d at 972. The complaint failed to plead "*any* allegedly fraudulent claim submitted to the government" and thus was "legally infirm from its inception." *Id*. (emphasis added). Such a broad and infirm complaint "can hardly be said to have given the government notice of the essential facts of a fraudulent ***34** scheme, and therefore would not enable the government to uncover related frauds." *Id*. at 973. It therefore did not trigger the first-to-file bar as to a later-filed, legally firm complaint. *Id*.

Here, by contrast, there is no doubt that Plantz *did* plead a legally valid claim; indeed, even Bryant appears to implicitly acknowledge that Plantz filed a nationwide claim of fraud. *See, e.g.*, Bryant Br. 21 (arguing only that Bryant was "first-filed for Heritage Medical Center"). But "the greater fraud often includes the lesser," *Heath*, 791 F.3d at 122, and it does here: Bryant's allegations as to Heritage "did nothing more than allege that a[] subsidiary perpetuated the same fraud" that Plantz had already alleged all subsidiaries perpetrated, *id*. In such circumstances, the later-filed complaint alleges "essentially the same . . . scheme," *Poteet*, 552 F.3d at 514, and the first-to-file bar applies. *See id.*; *Heath*, 791 F.3d at 122.

***35 CONCLUSION**

For the reasons set forth above, this Court should affirm the judgment below.

Respectfully submitted,

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Appendix not available.

Footnotes

1 Community Health Systems, Inc. is a holding company traded on the New York Stock Exchange. Community Health Systems, Inc. has no employees and no operations other than those associated with being a publicly traded company. All operations related to its affiliated hospitals are conducted by separate and distinct affiliated legal entities.

2 The court below consolidated this case for a time with other related qui tam cases. We cite documents filed on the docket of one of the consolidated cases, No. 3:11-cv-442 (M.D. Tenn.), as "*Doghramji* RE."

3 The Emergency Department ("ED") and emergency room ("ER") are synonyms that refer to the department of a hospital responsible for patients in need of immediate, unscheduled care. *See* MedicineNet, "Emergency Department," https://perma.cc/N79K-LX75.

4 Reuille's case was, however, unsealed on December 27, 2010, when the Government declined to intervene. *See* No. 1:09-cv-00007 (N.D. Ind.), RE 17, 18. The Government later informed the Court that the Tenet lawsuit and other qui tam lawsuits had caused it to "reconsider[]" its decision on intervention. No. 1:09-cv-00007, RE 30 at 3-4. Reuille's case remained stayed until the 2014 settlement. No. 1:09-cv-00007, RE 33, 42, 44, 48, 51, 55.

5 *See U.S. ex rel. Allstate Ins. Co. v. Millennium Labs., Inc.*, 464 F. Supp. 3d 449, 453 (D. Mass. 2020); *U.S. ex rel. McNeil v. Jolly*, 451 F. Supp. 3d 657, 668 (E.D. La. 2020); *U.S. ex rel. Chiba v. Guntersville Breathables, Inc.*, 421 F. Supp. 3d 1241, 1249 (N.D. Ala. 2019); *U.S. ex rel. Greenwald v. Kool Smiles Dentistry, PC*, No. 3:10-cv-1100, 2018 WL 4356744, at *2 (D. Conn. Sept. 12, 2018); *U.S. ex rel. Saidiani v. NextCare, Inc.*, No. 3:11-cv-141, 2013 WL 431828, at *2 (W.D.N.C. Feb. 4, 2013); *Miller v. Holzmann*, 575 F. Supp. 2d 2, 6 (D.D.C. 2008).

6 Bryant's counsel had, in fact, objected to the Government's decision to allocate the relator's share to a subset of the relators rather than all of them. *See* APP.040 (Kreindler Dep. at 58:18-25, 61:14-23). But, as one of his colleagues predicted, "I strongly suspect we'll hear [the Government is] going to allocate []because they have to." APP.041 (Kreindler Dep. at 63:5-12).

7 Bryant suggests that a district court has once awarded attorneys' fees to a relator who "received her relator's share of the proceeds through [a] sharing agreement." Bryant Br. 32. The case she cites, however, does not say a word about which relator was awarded the relator's share. *See U.S. ex rel. Felten v. William Beaumont Hosps.*, No. 2:10-cv-13440, 2019 WL 9094425 (E.D. Mich. June 7, 2019). Instead, it held that "[b]ecause . . . the government explicitly intervened on and settled a claim based on [the relator's] allegations, [the relator] is entitled to attorneys' fees." *Id.* at *5. If anything, that suggests the relator did receive a relator's share.

8 She also failed to meet them, as explained below (*see* Section II, *infra*), because she was not first to file.

9 *See, e.g.*, *United States v. Millenium Labs., Inc.*, 923 F.3d 240, 251 (1st Cir. 2019) (example of such post-settlement challenge); *Taxpayers Against Fraud*, 41 F.3d at 1039-40 (same); *United States v. Najjar*, 120 F. Supp. 3d 1322 (M.D. Fla. 2015) (same); *U.S. ex rel. Barajas v. United States*, 258 F.3d 1004, 1012-13 (9th Cir. 2001) (same); *see also* Settlement Agreement, RE 38, PageID#184 (reserving relators' rights to make such a challenge).

10 *See, e.g.*, *McNeil*, 451 F. Supp. 3d at 668 (settlement agreement specified which relators would be awarded relator's share); *Greenwald*, 2018 WL 4356744 at *2 (same).

11 In any event, CHS is not "interfer[ing] in the Government's action," Bryant Br. 29; it is objecting to the *relators'* request for attorney's fees. If that challenge is successful, the "action originally brought by a private person, which the Attorney General has joined, becomes an action brought by the Attorney General." *Rockwell*, 549 U.S. at 478. And relators are not entitled to a relator's share or attorney's fees in actions brought by the Attorney General. *See* 31 U.S.C. § 3730(d)(1) (providing for a relator's share and attorney's fees only in "action[s] brought by a person under subsection (b)").

12 Even then, only affirmative defenses and certain other enumerated defenses are waived by failure to include them in a responsive pleading. *See* Fed. R. Civ. P. 8(c)(1), 12(h)(1). The first-to-file bar is neither.

13 Bryant argues that *Kellogg, Brown & Root, et al. v. U.S. ex rel. Carter*, 135 S. Ct. 1970 (2015) requires abandoning this court's prior rulings (*Walburn*, 431 F.3d at 970; *Poteet*, 552 F.3d at 516) that the first-to-file bar is "jurisdictional." But a panel of this Court may depart from circuit precedent only when an intervening Supreme Court decision "requires" or "mandates" that it do so. *Caswell v. City of Detroit Hous. Comm'n*, 418 F.3d 615, 618 n.1 (6th Cir. 2005); *United States v. Moody*, 206 F.3d 609, 615 (6th Cir. 2000). *Kellogg*, which does not say a word about jurisdiction, does not. *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006) (such "drive-by jurisdictional rulings . . . should be accorded no precedential effect" (quotation marks omitted)).

14 *See Allstate*, 464 F. Supp. 3d at 453; *U.S. ex rel. Felten v. William Beaumont Hosps.*, No. 2:10-cv-13440, 2019 WL 9094425, *4 (E.D. Mich. June 7, 2019); *Greenwald*, 2018 WL 4356744, at *2-3.

15 Further, *Chiba's* ruling was based on the dubious premise that "the government action and public disclosure bars serve no purpose" after settlement, because the defendant's underlying FCA liability is then resolved. 421 F. Supp. 3d at 1253. Whatever that premise's merits as to the other bars, it has none as to the first-to-file bar: Awarding a relator's share and attorney's fees to late filing relators would *encourage*, not prevent, "opportunistic plaintiffs from bringing parasitic lawsuits." *Poteet*, 552 F.3d at 516. Moreover, unlike the bars in § 3730(e), the FCA's attorney's fee provision "incorporates" the first-to-file bar. *Greenwald*, 2018 WL 4356744, at *2; *Allstate*, 464 F. Supp. 3d at 454.

16 *See, e.g.*, *United States v. Millenium Labs., Inc.*, 923 F.3d 240, 251 (1st Cir. 2019); *U.S. ex rel. Dhillon v. Endo Pharm.*, 617 F. App'x 208, 212 (3d Cir. 2015) (per curiam); *United States ex rel. Ferrara v. Novo Nordisk, Inc.*, No. CV 11-1596 (RBW), 2019 WL 4305503, at *11 (D.D.C. Sept. 11, 2019).

17 Bryant tries to rationalize her proposed rule that post-settlement challenges are only for relators by arguing that "[r]elators do not have at their disposal a mechanism to challenge another relator's right to recover . . . until after settlement." Bryant Br. 34. But neither do defendants who have not been served with process. And it is doubtful, to say the least, that Congress expected the Government and defendants to stall settlement for months, even years, so that late-filing relators could serve defendants with process and then be challenged with first-to-file motions. *See* CHS *Doghramji* Br. 46.

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