Nos. 09-16181, 09-16607, 09-17710
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA *ex rel.* MARY ANGELA CAFASSO,

Plaintiff-Counter Defendant-Appellant,

v.

GENERAL DYNAMICS C4 SYSTEMS, INC.,
Defendant-Appellee

Defendant-Counter Claimant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Taxpayers Against Fraud Education Fund states that it is a corporation organized under § 501(c)(3) of the Internal Revenue Code. It has no parent corporation and no stock owned by a publicly owned company. 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.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Taxpayers Against Fraud Education Fund is a nonprofit public interest organization dedicated to combating fraud against the federal Government through the promotion of the *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3729, *et seq*. It has a profound interest in ensuring that the Act is appropriately utilized. The issues here involve the correct application of Federal Rule of Civil Procedure 9(b) to False Claims Act *qui tam* suits and the enforceability of employment confidentiality agreements when such agreements prevent employees from sharing information with Government officials in an attempt to expose fraud on the public fisc. The decisions below gravely undermine the efficacy of the Act in policing fraud on the federal Government, because (1) the district court's application of Federal Rule of Civil Procedure 9(b) erroneously requires evidentiary proof of actual claims at the pleading stage of litigation, and will therefore improperly prevent sufficiently-pled, meritorious False Claims Act *qui tam* suits from going forward; and (2) the district court's improper enforcement of a private confidentiality agreement against a *qui tam* relator who reported fraud to the Government is inconsistent with recognized public policy, will preclude *qui tam* relators from satisfying the district court's pleading requirements, and will improperly provide defendants who have violated the FCA with a means to shield themselves from potential liability.

I. ARGUMENT

A. The District Court Erred In Its Application Of Rule 9(b).

The False Claims Act is an anti-fraud statute, subject to the pleading requirements of Federal Rule of Civil Procedure 9(b), which states that "the circumstances constituting fraud . . . shall be stated with particularity." *See Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001). Notably, Rule 9(b) does not require that all of the elements of fraud claims be pled with particularity. *See Vess v. Ciba-Geigy Corp.*, 317 F.3d 1097, 1104 (9th Cir. 2003). In the context of False Claims Act litigation, the circumstances constituting fraud vary significantly from case to case, as fraudfeasors are constantly developing new ways to defraud the federal Government. Consequently, the application of Rule 9(b) to False Claims Act complaints must also vary depending on the nature of the violations alleged in a particular case.

Moreover, the different sections of the Act impose liability for different types of fraudulent conduct, including, *inter alia*: presenting false claims to the Government or causing another to do so, *see* section 3729(a)(1); making or using false statements or false records that are material to false claims or causing another to do so, *see id.* at (a)(2); conspiring to defraud the Government to get a false claim paid, *see id.* at (a)(3); concealing or improperly avoiding or decreasing an obligation to remit money or property to the Government, *see id.* at (a)(7); as

well as a few others, s*ee* 31 U.S.C. §§ 3729(a)(1) through (a)(7).[1] Each of these liability provisions requires different elements, and as the Fifth Circuit has stated, a False Claims Act plaintiff can fulfill Rule 9(b)'s requirements "without including all the details of any single court-articulated standard – it depends on the elements of the claim at hand." *U.S. ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 188 (5th Cir. 2009).

For example, liability under section 3729(a)(1) includes the element that a false claim was actually presented to the Government for payment or approval. However, section (a)(1) is the only liability provision of the False Claims Act that includes this presentment requirement. *See Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123, 2129-2130 (2008). By contrast, violations of section (a)(7) require no proof of presentment of a false claim. *See U.S. ex rel. Bourseau v. RIB Med. Mgmt. Servs., Inc.*, 531 F.3d 1159, 1169 (9th Cir. 2008). Section (a)(7) claims, generally known as "reverse false claims," concern situations in which Government money or property is wrongfully retained and false statements or records are made or used in order to improperly conceal,

[1] These sections were recently amended as part of the Fraud Enforcement and Recovery Act of 2009, and as a result of the amendments, the sections have been re-codified at 31 U.S.C. §§ 3729(a)(1)(A) through (a)(1)(G), respectively. Since this litigation commenced well before the amendments and re-codification took effect, and since the parties and the district court have consistently cited the pre-amendment sections of the statute, this *amicus curiae* brief will also cite to those pre-amendment sections.

avoid, or decrease the obligation to return that money or property to the Government. Thus, a cause of action under section (a)(7) never turns on whether or not a false claim was presented to the Government, while a cause of action under section (a)(1) always does. It follows then, that what is necessary to plead the "circumstances constituting fraud" will differ, based on which section of the False Claims Act is alleged to have been violated.

Here, the Relator asserted claims under both sections (a)(1) and (a)(7), as well as sections (a)(2), (a)(3), and (a)(4). Although the district court seemingly acknowledged the differences between the False Claims Act's various liability provisions,[2] it failed to recognize how those differences affect what is required in order to satisfy Rule 9(b). Instead, the district court simply issued a blanket dismissal of all of the Relator's claims, stating that the Relator's complaint "does not state a claim under any subpart of 31 U.S.C. 3729(a) because detailed allegations of fraudulent schemes cannot substitute for a *qui tam* plaintiff's obligation to identify a false claim." District Court's Order of August 11, 2008, at Docket # 219, p. 11, 12 (emphasis added). This ruling was in error and provides grounds for vacating the district court's Order and remanding the matter.

[2] The district court recognized this fact, as it cited *Bourseau* when discussing the elements of section (a)(1) claims. *See* District Court's Order of May 21, 2009, at Docket # 352, p. 14.

In addition, the district court deemed all of the Relator's allegations deficient because the Relator "never alleges that the government paid a false or fraudulent claim." *Id.* at 11. Again, the district court's fundamental understanding of liability under the False Claims Act is flawed. The False Claims Act imposes liability for the defendant's conduct (*e.g.* presenting false claims, making false statements, conspiring to defraud the Government, etc.), and does not focus on the Government's conduct in paying or not paying the claim. It is well-settled that False Claims Act liability will still attach even if the Government does not suffer actual damages by paying false or fraudulent claims. *See, e.g., Bly-Magee*, 236 F.3d at 1017 ("[A] qui tam plaintiff need not prove that the federal government will suffer monetary harm to state a claim under the FCA."). Therefore, to the extent that the district court dismissed the Relator's claims for failure to allege that the Government paid false claims, that dismissal must be reversed.

Contrary to the district court's holding, the Ninth Circuit has never held that Rule 9(b) requires plaintiffs alleging fraud to plead the details of specific transactions.[3] In *U.S. ex rel. Lee v. SmithKline Beecham Inc.*, the Court held that "Rule 9(b) may not require Lee to allege, in detail, all facts supporting each and

[3] Although this Court has not been presented with many opportunities to opine on the proper application of Rule 9(b) to complaints under the FCA, the Court recently heard argument on the issue in *United States ex rel. Frazier v. IASIS Healthcare Corp.*, Nos. 08-16243 and 08-16305.

every instance of false testing over a multi-year period." 245 F.3d 1048, 1051 (9th Cir. 2001) (citing *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997)). Rather, a relator's complaint is sufficient as long as it is adequate to "give [the] defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *Id.* at 1051-52 (citing *Neubronner v. Milken*, 6 F.3d 666, 671 (9th Cir. 1993)).

Several district courts within the Circuit have applied these principles in subsequent False Claims Act cases. *See e.g.*, *Strom ex rel. U.S. v. Scios, Inc.*, No. C 05-3004 CRB, 2009 WL 5062323 at *9 (N.D. Cal. Dec. 23, 2009) (holding that "given the purposes of Rule 9(b), the specifics of all claims are unnecessary at the pleading stage."); *U.S. ex rel. Manion v. St. Luke's Regional Medical Center, Ltd.*, No. CV 06-498-S-EJL, 2008 WL 906022, at *3 (D. Idaho March 31, 2008) (stating that "Rule 9(b) may not require a plaintiff to allege, in detail, all facts supporting each and every instance of fraud that occurred over a multi-year period."). Unlike the district court decision in this case, these decisions are consistent with the Court's previous holdings regarding the application of Rule 9(b) to cases involving fraud allegations.

For example, in *Cooper v. Pickett*, the Court held that a "skeletal analysis" satisfied Rule 9(b)'s requirements, stating:

> It is not fatal to the complaint that it does not describe in detail a single specific transaction. . . . We hold that the complaint meets the particularity requirement of Rule 9(b). Overall, the complaint 'identifies the circumstances of the alleged fraud so that defendants can prepare an adequate answer.'. . .If the [plaintiffs] cannot prove any specific instances . . . they will not prevail on that claim at summary judgment or trial. Because '[w]e do not test the evidence at this stage,' the complaint should go forward.

137 F.3d 616, 627 (9th Cir. 1997) (quoting *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1550 (9th Cir. 1994)(*en banc*)). Indeed, the Ninth Circuit has never required, as a matter of course, that plaintiffs alleging fraud identify or detail specific claims or transactions, and there is no reason for the Court now to depart from its long-standing position on this issue. The district court's rationale for dismissing the Relator's complaint is in direct contravention of this Court's prior rulings, and the Order dismissing the Relator's complaint should be vacated.

Several circuit courts that have recently addressed the issue agree that complaints in False Claims Act cases – whether filed by the United States or by *qui tam* relators – can satisfy Rule 9(b)'s pleading requirements if they provide a sufficient factual basis to identify the main aspects of the alleged fraud scheme and, if presentment of false claims is an element of the cause of action, supply an adequate basis for the court to make a reasonable inference that false claims were in fact submitted to the Government. While some circuit courts have applied a

more stringent standard to complaints alleging violations of section (a)(1) (which includes presentment of a false claim as an element),[4] several other circuit courts have held that even section (a)(1) claims do not require plaintiffs to identify specific false claims at the pleading stage.

For instance, in *Grubbs*, the Fifth Circuit reversed a district court's dismissal with prejudice of a *qui tam* complaint that alleged violations of sections (a)(1), (2) and (3) of the False Claims Act. The circuit court held that each of these causes of action had been pled with the requisite particularity. With respect to claims under section (a)(1), the court held that "to plead with particularity the circumstances constituting fraud for a False Claims Act § 3729(a)(1) claim, a relator's complaint, if it cannot allege the details of an actually submitted false claim, may nevertheless survive by alleging particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted." *Grubbs*, 565 F.3d at 190.[5] Further, the court stated that "a plaintiff does not necessarily need the exact dollar amounts, billing numbers, or dates to prove to a preponderance that fraudulent bills were actually submitted. To require these details at pleading is one small step shy of requiring

[4] *See e.g., United States ex rel. Snapp, Inc. v. Ford Motor Co.*, 532 F.3d 496 (6th Cir. 2008); *United States ex rel. Roop v. Hypoguard USA, Inc.*, 559 F.3d 818 (8th Cir. 2009); *Lacy v. New Horizons Inc.*, 348 Fed. Appx. 421 (10th Cir. 2009).
[5] *See also, U.S. ex rel. Clausen v. Laboratory Corp. of Am., Inc.*, 290 F.3d 1301, 1311 (11th Cir. 2002).

production of actual documentation with the complaint, a level of proof not demanded to win at trial and significantly more than any federal pleading rule contemplates." *Id.* (emphasis added).

Similarly, in *United States ex rel. Lusby v. Rolls-Royce Corp.*, the Seventh Circuit held that a relator's claim under section (a)(1) satisfied Rule 9(b)'s pleading requirements, even though the relator did not identify a specific request for payment from the defendant to the Government. 570 F.3d 849, 854 (7th Cir. 2009). In denying the defendant's motion to dismiss the relator's complaint on Rule 9(b) grounds, the court declared: "We don't think it essential for a relator to produce the invoices (and accompanying representations) at the outset of the suit." *Id.* at 854. The court continued: "To say that fraud has been *pleaded* with particularity is not to say that it has been *proved* (nor is proof part of the pleading requirement)." *Id.* at 855 (emphasis in original).[6]

Moreover, in *United States ex rel. Duxbury v. Ortho Biotech Products.*, the First Circuit held that Rule 9(b) does not necessarily require plaintiffs in False Claims Act cases to identify specific false claims. Instead, the court held that plaintiffs "could satisfy Rule 9(b) by providing 'factual or statistical

[6] When the court later evaluated the relator's claims under section (a)(7), it properly focused on whether the relator had adequately pled the circumstances constituting the fraud, not on whether the relator alleged that a false claim had been presented to, or paid by, the Government (which, as noted above, is not an element of an (a)(7) claim). *Id.*

evidence to strengthen the inference of fraud beyond possibility' without necessarily providing details as to each false claim." 579 F.3d 13, 29 (1st Cir. 2009).

These circuit court opinions are consistent with the Ninth Circuit's position, as stated in *Cooper v. Pickett*, *supra*, that Rule 9(b) is a *pleading* standard, and was never intended as a mechanism to "test the evidence" prior to the taking of discovery. 137 F.3d 627. Furthermore, the United States – the real party in interest in all False Claims Act cases – has taken the same position with respect to pleading fraud under the False Claims Act. Indeed, the United States Solicitor General, in a brief to the United States Supreme Court, stated that "[i]n the view of the United States, it is possible for a relator (or the Government) in a FCA action to describe the alleged fraudulent scheme with sufficient specificity to satisfy Rule 9(b)'s particularity requirement even without identifying specific false claims. That is particularly so in light of the flexibility provided by Rule 11(b)(3), which allows pleadings based on evidence reasonably anticipated after further investigation or discovery." Brief for the United States at 28 n.12, *Rockwell Int'l Corp. v. United States*, No. 05-1272 (Sup. Ct. Nov. 20, 2006) (internal citations omitted), attached hereto as Exhibit A; *see also* Brief of the United States as Amicus Curiae at 7-8, *United States ex rel. Frazier v. IASIS Healthcare Corp.*, Nos. 08-16243, 08-16305 (9th Cir. Oct. 30, 2008), attached hereto as Exhibit B

(rejecting a "categorical approach that a relator must identify specific false claims submitted to the Government in every context").

The district court's wholesale dismissal of the Relator's complaint was in error for failure to distinguish among her allegations under multiple sections of the False Claims Act, and for erroneously applying Rule 9(b) to require evidentiary proof at the pleading stage. This Court should vacate the district court's August 11, 2008 Order and remand the matter.

B. Public Policy Considerations Outweigh Enforcement of Confidentiality Agreements that Shield Defendants from FCA Liability

The False Claims Act remains "the government's primary litigative tool for the recovery of losses sustained as the result of fraud against the government." *Avco Corp. v. U.S. Dep't of Justice*, 884 F.2d 621, 622, (D.C. Cir. 1989). Moreover, the statute "seeks not only to provide the Government's law enforcers with more effective tools, but to encourage any individual knowing of Government fraud to bring that information forward." S. Rep. No. 345, 99th Cong., 2d Sess. (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5267. Congress recognized long ago that in order for the False Claims Act to serve as an effective tool, relators must be incentivized to expose schemes that defraud the Government. As a result, Congress has repeatedly amended the False Claims Act, in an effort to encourage relators to come forward.

For instance, as part of the 1986 amendments to the False Claims Act, Congress eliminated purely discretionary awards to relators, and instead established a system whereby most relators are guaranteed at least a 15% share of the Government's recovery. 31 U.S.C. § 3730(d)(1) and (2). In addition, the 1986 amendments created a new right of action for employees who are retaliated against for engaging in lawful conduct in furtherance of False Claims Act proceedings. 31 U.S.C. § 3730(h). By enacting the 1986 amendments, Congress illustrated the importance of encouraging relators to bring more *qui tam* suits, thereby exposing more fraud against, and recovering more funds for, the Government.

More recently, Congress amended the statute again, further strengthening the protections afforded to those who are retaliated against for exposing fraud against the Government. The legislative history of the 2009 False Claims Act amendments includes remarks from Representative Howard L. Berman, one of the principal architects of federal False Claim Act legislation. Congressman Berman reiterated the importance of protecting and encouraging *qui tam* plaintiffs, noting that, prior to the enactment of the 2009 amendments, the House Judiciary Committee held a hearing at which a board member of Taxpayers Against Fraud and former Department of Justice attorney testified that

> *Qui tam* plaintiffs are key to the Government's efforts to fight fraud. . . . [A]s inside witnesses, they produce evidence that can be absolutely critical to establishing liability. Fraudulent activity

> by its very nature is concealed. . . . Without the help of insiders who brought the Government documents and other hard evidence of the fraud, it would have been extremely difficult for the Government to develop sufficient evidence to establish liability in many successful FCA cases.

Representative Berman (CA), "Fraud Enforcement And Recovery Act of 2009," *Congressional Record* 155: 82 (June 3, 2009) p. E1295, E1297, attached hereto as Exhibit C.

Permitting employers who may have committed fraud to hide behind confidentiality agreements, and the threat of lawsuits under such agreements, directly undermines Congress' purpose to encourage insiders to report False Claims Act violations. Those who are alleged to have violated the False Claims Act should not be allowed to use confidentiality agreements as a means to silence the employees and insiders who are most likely to uncover and report those violations to the Government. Relators should not have to choose between subjecting themselves to personal liability and assisting the Government in investigating potential violations of the False Claims Act. This Court has long recognized that public policy considerations underlying the False Claims Act outweigh an employer's private interest in avoiding liability under the Act. In *United States ex rel. Green v. Northrup*, the Court refused to enforce an agreement that purported to release an employer from all future claims that might be brought by an employee – including *qui tam* claims under the False Claims Act. The Court

held that the agreement violated public policy, since it was entered into without the Government's knowledge or consent and before the employee could file a *qui tam* action and notify the Government of the employer's alleged fraud. The Court stated that

> If the prevailing legal rule were that prefiling releases entered into without the government's consent or knowledge were enforceable, then it stands to reason that [the relator] never would have filed his *qui tam* complaint in the first place. . . . [B]oth the structure of the [False Claims] Act and the legislative history reveal that it is the *filing* of more private suits that Congress sought to encourage, both to increase enforcement and deterrence as well as to spur the government to undertake its own investigations.

59 F.3d 953, 966 (9th Cir. 1995).

This Court's holding in *Green* makes clear that release agreements that conflict with the Government's policy of incentivizing relators to file *qui tam* suits will not be enforced. The same rationale applies to confidentiality agreements: if interpreted to impose liability for providing evidence of fraud to the Government, such agreements would strip relators of the ability to provide the Government with the best evidence of fraud, thereby chilling the filing of *qui tam*

suits, or, in the event such a suit is filed, hindering the Government's ability to investigate the relator's claims.[7]

The concept that confidentiality concerns must give way where allegations of fraud or other unlawful conduct are at issue is not novel. For example, the Health Insurance Portability and Accountability Act (HIPAA), which provides extensive protections for private patient information, explicitly permits whistleblowers who have a good faith belief that unlawful conduct has occurred to disclose otherwise protected information to appropriate Government agencies that enforce health care law, as well as to attorneys retained by those whistleblowers. *See* 45 C.F.R. § 164.502(j)(1)(i) and (ii). This provision is analogous to the False Claims Act's anti-retaliation provision, which also protects whistleblowers who disclose information to the Government based on a reasonable, good faith belief that unlawful conduct has occurred. *See Moore v. Cal. Inst. Of Tech. Jet Propulsion Lab.*, 275 F.3d 838, 845-46 (9th Cir. 2002).

Certainly, confidentiality agreements have a legitimate purpose in prohibiting employees and other insiders from misappropriating an employer's confidential, proprietary or trade secret information. But that legitimate purpose is

[7] This affront to congressional intent is even more egregious when viewed in the context of the district court's erroneous and unduly burdensome interpretation of Rule 9(b), which would prevent many suits from proceeding for lack of the precise information likely to be covered by such confidentiality agreements.

not implicated when *qui tam* relators disclose otherwise confidential information to the Government and to their attorneys[8] for the purpose of exposing potential False Claims Act violations. In such circumstances, the relators are not seeking any competitive advantage – they are merely providing factual support for their allegations.[9]

When an insider discloses an employer's confidential documents to the Government for the purpose of exposing fraud against the public fisc, that insider should not subsequently be subjected to civil liability for doing so. Simply stated, public policy considerations strongly favor allowing whistleblowers to disclose confidential documents and information for the purpose of exposing fraud against the Government – even if a confidentiality agreement ostensibly applies. The U.S. District Court for the Northern District of Illinois recognized this fact

[8] *Qui tam* relators are compelled to disclose information supporting their FCA claims to their attorneys, as they are generally not allowed to proceed as *pro se* litigants, representing the interests of the United States. *See Stoner v. Santa Clara County Office of Educ.*, 502 F.3d 1116, 1126-28 (9th Cir. 2007).

[9] In fact, employers who allege breach of contract claims against *qui tam* relators based on the terms of confidentiality agreements would likely be hard-pressed to prove any damages arising from those purported breaches. While the district court in this case observed that the confidentiality agreement at issue provided that a breach of its terms would "irreparably harm the [Appellee's] business," the court's ultimate conclusion that "there is no question GDC4S has been damaged" was primarily based, not upon any actual damages resulting from the Relator's disclosure of confidential information, but rather upon the expenses GDC4S incurred in litigating its breach of contract claim. District Court's Order of May 21, 2009, at Docket # 352, p. 21.

when it dismissed an employer's breach of contract claim against an employee who delivered confidential documents to the Government without informing the employer. The district court stated: "Relator and the government argue that the confidentiality agreement cannot trump the FCA's strong policy of protecting whistleblowers who report fraud against the government. Their position is correct. . . . Relator could have disclosed the documents to the government under any circumstances, without breaching the confidentiality agreement." *U.S. ex rel. Grandeaux v. Cancer Treatment Centers of America*, 350 F. Supp. 2d 765, 773 (N.D. Ill. 2004) (emphasis supplied). Likewise, the U.S. District Court for the District of Nevada held that confidentiality agreements might not be enforceable in the following three situations: "(1) if the interests in the agreement's enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement, (2) if the agreement is being used by one party within the context of litigation to suppress an adverse party's access to evidence, and (3) if the employee is disclosing an illegal or wrongful act for a purely public purpose, such as whistleblowing." *Saini v. International Game Tech.*, 434 F. Supp. 2d 913, 923 (D. Nev. 2006). Furthermore, the U.S. District Court for the District of Columbia provided the following insight:

> If the [plaintiff company's] strategy were accepted, those seeking to bury their unlawful or potentially unlawful acts from consumers, from other members of the public, and from law enforcement

> or regulatory authorities could achieve that objective by a simple yet ingenious strategy: all that would need to be done would be to delay or confuse any charges of health hazard, fraud, corruption, overcharge, nuclear or chemical contamination, bribery, or other misdeeds, by focusing instead on inconvenient documentary evidence and labeling it as the product of theft, violation of proprietary information, interference with contracts, and the like. The result would be that even the most severe public health and safety dangers would be subordinated in litigation and in the public mind to the malefactors' tort or contract claims, real or fictitious. The law does not support such a strategy or inversion of values. There is a constitutional right to inform the government of violations of federal laws – a right which under Article VI supersedes local tort or contract rights and protects the "informer" from retaliation.

Maddox v. Williams, 855 F. Supp. 406, 415 (D.D.C. 1994) (footnotes and internal citations omitted).[10] We urge the Court to adopt a similar view and to vacate the district court's May 21, 2009 Order granting the Defendant-Appellee's motion for summary judgment on its breach of contract claim.

CONCLUSION

For the foregoing reasons, the district court's August 11, 2008 and May 21, 2009 Orders, which, respectively, dismissed the Relator's complaint and granted summary judgment on the breach of contract claim, should be vacated.

[10] The court further observed that "Congress has even implemented that [constitutional] right, albeit in limited factual context, by enactment of the Qui Tam provisions of the False Claims Act." *See id.* at n. 32.

Furthermore, the Court should make clear that confidentiality agreements will not be enforced to the extent that such agreements impede whistleblowers' ability to report fraud to the Government.

Dated: May 17, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4,559 words as reported by the word count function of Microsoft Word, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman font, 14-point type for both text and footnotes.

May 17, 2010

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing BRIEF AMICUS CURIAE OF TAXPAYERS AGAINST FRAUD EDUCATION FUND IN SUPPORT OF APPELLANT SEEKING REVERSAL with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 17, 2010. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

May 17, 2010

s/ Lani Anne Remick
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