No. 16-16070

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, ex rel. MARY KAYE WELCH,

Plaintiff-Appellee,

v.

MY LEFT FOOT CHILDREN'S THERAPY, LLC, et al.,

Defendants-Appellants.

APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA
HON. MIRANDA M. DU, DISTRICT JUDGE
CASE NO. 2:14-CV-01786-MMD-GWF

BRIEF OF *AMICUS CURIAE* TAXPAYERS AGAINST FRAUD EDUCATION FUND IN SUPPORT OF APPELLEE AND IN SUPPORT OF AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amicus Curiae* Taxpayers Against Fraud Education Fund ("TAFEF") makes the following disclosures:

1. TAFEF is not a publicly held corporation or other publicly held entity.

2. TAFEF does not have any parent corporations.

3. No publicly held corporation or other publicly held entity owns 10% or more of any TAFEF stock, as TAFEF is a non-profit organization.

Dated: January 20, 2017

/s/ Matthew J. Piers
Matthew J. Piers

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TO THE HONORABLE UNITED STATES COURT OF APPEALS:

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, the Taxpayers Against Fraud Education Fund respectfully submits this brief as *Amicus Curiae* in support of Appellee. A Motion for Leave to File this brief was previously filed on December 12, 2016. The Taxpayers Against Fraud Education Fund supports Appellee for the reasons set forth below.

STATEMENT OF INTEREST

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. TAFEF is committed to preserving effective anti-fraud legislation at the federal and state levels. The organization has worked to publicize the *qui tam* provisions of the False Claims Act ("FCA"), has participated in litigation 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, and by membership dues and foundation grants. TAFEF

is the 501(c)(3) arm of Taxpayers Against Fraud, which was founded in 1986.[1]

As argued by the Appellee and by the United States and the State of Nevada as *Amicus Curiae*, the weight of authority demonstrates that the relator's FCA *qui tam* claim in this case falls outside the scope of the private arbitration agreement that she entered into with her employer. TAFEF submits this brief to address the policy reasons and practical implications why private arbitration agreements should not be permitted to encompass FCA *qui tam* claims.

ARGUMENT

I. Requiring Employees to Arbitrate *Qui Tam* Claims Pursuant to Private Employment Agreements Will Undermine the Purpose of the False Claims Act to Enlist Private Individuals in Uncovering and Combating Fraud.

Requiring employees to arbitrate FCA *qui tam* claims pursuant to private employment contracts will deter relators from reporting fraud

[1] Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, TAFEF represents that no party's counsel has authored this brief in whole or in part, no party or party's counsel has contributed money that was intended to fund preparing or submitting the brief; and no person other than *Amicus Curiae*, its members, or its counsel has contributed money that was intended to fund preparing or submitting the brief.

and severely undermine the purpose of the FCA, which is to enlist private individuals with information about fraud to bring that information to the Government's attention and to add to the Government's resources in combatting fraud. *See* S. REP. NO. 99-345, at 5267 (1986) ("In the face of sophisticated and widespread fraud, the Committee believes only a coordinated effort of both the Government and the citizenry will decrease [fraud against the Government].") Most *qui tam* relators are employees who discover the fraudulent practices alleged in the course of their employment. Although non-employees are not precluded from bringing *qui tam* claims under the FCA, insiders with access to the company's inner workings, policies and procedures are generally in the best position to expose fraud, which by its very nature may only be visible to insiders.

In recent years, employers' use of arbitration agreements has been steadily rising, with corporations routinely seeking to keep employment disputes private. *See Advocacy: Forced Arbitration,* National Employment Lawyers Association, https://www.nela.org/index.cfm?pg=mandarbitration (last visited Jan. 19, 2017) ("In 2010, 27 percent of U.S. employers reported that they

required forced arbitration of employment disputes—covering over 36 million employees, or one-third of the non-union workforce. This percentage is likely higher today and continues to grow . . . ."). If employees who sign these broad employment arbitration agreements are precluded from litigating their *qui tam* claims in a court of law, the number of employees who will become relators and apprise the Government of fraud is likely to be severely diminished because mandatory arbitration tends to suppress claim filing generally and because of the unique factors that motivate individuals to file whistleblower claims under the FCA.

A. Mandatory Arbitration Suppresses Claims Filing Generally.

Requiring employees to arbitrate their *qui tam* claims does not merely dictate the forum in which the claims will be decided; it suppresses the number of such claims filed in the first place. Contrary to Appellants' argument that requiring arbitration of such claims will have little impact because *qui tam* relators can "effectively vindicate their statutory cause of action (and the Government's corresponding substantive interests) in the arbitral forum," Opening Br. at 13, empirical evidence indicates that mandatory arbitration provisions

suppress the filing of claims. *See Forced Arbitration Undermines Enforcement of Federal Laws by Suppressing Consumers' and Employees' Ability to Bring Claims* (Dec. 17, 2013) (Cong. testimony to the S. Judiciary Comm. of Jean R. Sternlight), *available at* http://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1000&context=congtestimony (discussing indication that "miniscule numbers" of claims are filed in arbitration). Specifically, when subject to mandatory arbitration clauses, "*almost no consumers or employees actually bring claims in arbitration*. Thus, rather than providing greater access to justice the main function of arbitration clauses is to protect companies from claims brought in any venue." *Id.* at 3 (emphasis in original).

Mandatory arbitration suppresses claims, in part, because the process favors defendants, which are typically the party that pays the arbitrator's fees and hires the arbitrator for future arbitration. To that end, arbitration poses an inherent conflict of interest—one that particularly favors repeat defendants whose future business arbitrators wish to secure. Arbitration also severely limits parties' ordinary rights with respect to discovery, *see infra* section III, which especially disadvantages plaintiff employees because employers have custody and

control of most documents and witnesses that plaintiffs needs to wage a successful case. In light of these lopsided realities, the hallmark of mandatory arbitration in the employment context is an "absolute lack of justice received by employees who never file a claim because they correctly perceive that the playing field is irrevocably tilted against them . . . ." Richard A. Bales, *Normative Consideration of Employment Arbitration at Gilmer's Quinceañera*, 81 TUL. L. REV. 331, 390 (2006).

B. *Qui Tam* Relators in Particular Are Unlikely to Risk Blowing the Whistle if it is Unlikely to be Heard.

In the context of FCA actions, requiring employees to privately arbitrate their *qui tam* claims will undoubtedly decrease the likelihood of relators stepping forward with knowledge of and information regarding fraud because they will not be able to satisfy the goal of public accountability. A key change that the 1986 amendments made to the False Claims Act was to ensure the whistleblower a role by remaining a party to the case if the Government proceeds with it, or by being allowed to proceed in court without the Government. Congress had identified that one of the main impediments to whistleblowers reporting fraud was their concern that nothing would happen. S. REP. NO. 99-345, at 5271 (recounting Committee testimony that

whistleblowers require "some assurance their disclosures will lead to results"). Providing a more significant role for whistleblowers was intended to help address that concern and help encourage whistleblowers to come forward. *Id.* at 5290 (observing that the provision allowing the relator to proceed without the Government was intended to address that "in many cases, individuals knowing of fraud are unwilling to make disclosures in light of potential personal and financial risk as well as a lack of confidence in the Government's ability to remedy the problem").

In TAFEF's extensive experience, relators are often motivated to file an FCA complaint in court because such an action results in the public being informed of the fraud and the defendants being forced to publicly answer for their fraudulent conduct. That result cannot be achieved in arbitration, which is conducted in secret. *See infra* section II. Furthermore, relators face many risks in coming forward to report fraud, including humiliation, stress, stigma, isolation, being excluded from their relevant employment industry, and, significantly, retaliation. When FCA cases are adjudicated in court, relators can seek protection in a public forum, from a judge, in the face of retaliatory conduct.

Without such judicial safeguards, employees have even less incentive to step forward with critical information.

Ultimately, if employment arbitration agreements are held to validly preclude employee-relators from litigating their *qui tam* claims in court, employers will increasingly mandate that their employees sign such agreements. As it is, employers have "little to lose and much to gain by insisting on the arbitration" of employment claims because, amongst other things, it is faster, cheaper, and "shielded from public view." Minna J. Kotkin, *Secrecy in Context: The Shadowy Life of Civil Rights Litigation*, 81 CHI.-KENT L. REV. 571, 576 (2006). If this approach is permitted to extend to *qui tam* claims, corporate defendants will effectively "blunt the Government's primary weapon in the fight against fraud, and tip the scales in defendants' favor." Mathew Andrews, *Whistling in Silence: The Implications of Arbitration on Qui Tam Claims Under the False Claims Act*, 15 PEPP. DISP. RESOL. L.J. 203, 207 (2015).

II. Private Arbitration of *Qui Tam* Claims Is Directly at Odds With the False Claims Act's Purpose of Protecting the Public.

The central purpose of the False Claims Act is to protect the public Treasury and, as such, the public at large. This Court has

recognized that "*qui tam* actions exist only to vindicate the public interest." *United States v. Northrop Corp.*, 59 F.3d 953, 968 (9th Cir. 1995). *See also United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1217, n.8 (9th Cir. 1996) ("The FCA deputizes private individuals to act to protect the interests of the United States."). As a result, FCA claims should be adjudicated in the public eye, not in an arbitration, which is "a private process." Christopher R. Drahozal, *Confidentiality in Consumer and Employment Arbitration*, 7 Y.B. ON ARB. & MEDIATION 28, 30 (2015). Fraud against the Government undermines federal programs, depletes public resources, and in some cases, poses risks to human life and national security. S. REP. NO. 99-345, at 5268. Private arbitration of such claims is incompatible with the vindication of these rights because of the lack of accountability of arbitrators and the confidential nature of the process.

A. Cases Involving Fraud Against the Taxpayers Should Not be Resolved by Private Arbitrators, Who Are Largely Immune From Review.

Although courts frequently enforce arbitration agreements in deference to private parties' freedom of contract, the judicial policy favoring freedom of contract is necessarily diminished where, as here,

the rights at issue are the Government's rights and where enforcement directly affects the interests of the public. The Government is not a party to the employment agreements and has not assented to its claims being arbitrated.

Privatizing the resolution of *qui tam* claims places arbitrators, who are not publicly accountable, in charge of determining the scope of regulatory and contractual obligations involving public funds, without public disclosure of either the disputes themselves or the outcomes. This empowers the arbitrators to make potentially significant changes in substantive legal obligations without public knowledge or scrutiny, in a setting that makes it virtually impossible to obtain a second layer of review.

B. Allegations of Fraud Against the Government Should Not be Adjudicated in Secret.

In contrast to a court of law, where hearings and trials are open to the public, non-parties to an arbitration typically are not permitted to attend arbitration hearings. Drahozal, 7 Y.B. ON ARB. & MEDIATION at 40. Moreover, it is hard to even learn about the existence of arbitration proceedings. "Unlike the public courthouse, no set location for an arbitral proceeding exists. No open docket notifies the public or the

media of the filing of an arbitration claim or the existence of the dispute." Laurie Kratky Doré, *Public Courts Versus Private Justice: It's Time to Let Some Sun Shine in on Alternative Dispute Resolution*, 81 CHI.-KENT L. REV. 463, 484 (2006). Nor can the public obtain information about the case. *See id.* at 484-85 ("Parties cannot share, and the public cannot access, evidence, testimony, briefs, motions, and other information disclosed" and "[a]bsent party agreement, the [arbitral] forum makes no transcript of the proceedings."). And the arbitrator is generally "not required to provide any written findings of fact, conclusions of law, or explanation of the grounds for the award. The award itself, which may consist solely of a concise, unsupported disposition, is generally not publicly filed . . . ." *Id.* at 485.

Further shrouding the process in secrecy, arbitration agreements frequently include confidentiality provisions. *See* Kotkin, 81 CHI.-KENT L. REV. at 577. The extent of confidentiality involved in the arbitration process may vary with the specific employment agreement at issue, but both "the arbitration process and its outcomes remain private" under a typical agreement. Doré, 81 CHI.-KENT L. REV. at 484. If FCA claims are resolved in confidential arbitral proceedings, the public suffers

because, among other things, arbitration diminishes both public education and the deterrence of potential future violators. Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 427, 432, 437-38 (1999) (explaining, in the context of employment discrimination claims, that only public adjudication can give "concrete meaning and expression to the public values embodied in a statute" and that "[a]rbitration effectively forfeits the enforcement mechanisms of spill-over deterrence and stigmatization").

In sum, forcing *qui tam* actions to be arbitrated will shroud the adjudication and resolution of FCA claims in secrecy, to the detriment of the public, which the FCA is intended to protect. *See id.* at 487 ("[A]rbitration confidentiality perpetuates public ignorance of continuing hazards, systemic problems, or public needs."). It threatens a virtually silent reworking of the relationship between the Government and parties with whom it contracts, subject to only the most superficial review and without public disclosure, shielded from judicial and electoral processes.

III. Arbitrating *Qui Tam* Claims Creates Practical and Procedural Hurdles Not Contemplated by Congress and Would Undermine the FCA's Carefully Calibrated Scheme.

The procedural provisions of the FCA were carefully crafted to balance a number of interests, including encouraging private individuals to file claims and protecting the Government's interests in its investigations. Including FCA claims within the scope of mandatory arbitration clauses that employees have signed risks undermining the balance that Congress struck.

As an initial matter, the False Claims Act requires relators to file *qui tam* claims under seal and to serve the "complaint and written disclosure of substantially all material evidence and information the person possesses . . . on the Government pursuant to Rule 4(d)(4) [now Rule 4(i)] of the Federal Rules of Civil Procedure." 31 U.S.C. § 3730(b)(2). That procedure is "simply inapplicable to an arbitration proceeding." Charles A. Sullivan, *Whose Claim Is It Anyway? Arbitrating Relators' FCA Claims*, 9 J. HEALTH & LIFE SCI. L. 4, 7 (2015). As such, from the very outset, arbitrating a *qui tam* claim is impractical because there is no legal mechanism for a relator to initiate

a *qui tam* claim in an arbitral forum. The procedural impediments only mount from there.

"[E]ven when the DOJ opts not to intervene, the FCA provides it certain rights that do not fit within the framework of arbitration." *Id.* For instance, the FCA requires both the Attorney General and the court to approve the dismissal of any action. 31 U.S.C. § 3730(b)(1). It also permits the Government to intervene at any time after initially declining upon a showing of good cause. *Id.* § 3730(c)(3). The Government's right to intervene after previously declining applies even for purposes of appeal in *qui tam* actions. *See United States v. Texas Instruments Corp.*, 25 F.3d 725, 727 (9th Cir. 1994). Yet, incongruously, "[a]n arbitration award is virtually final because . . . [the Federal Arbitration Act] limits the grounds for setting aside the arbitral award to egregious errors." Moohr, 56 WASH. & LEE L. REV. at 402-03 (citing 9 U.S.C. § 10 (setting forth grounds for vacating arbitration decisions)). Notably, also, the FCA requires a *court* to determine the percentage of any recovery the relator will receive when the Government does not intervene. 31 U.S.C. § 3730(d)(2) ("If the Government does not proceed with an action under this section, the person bringing the action or

settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages.").

Given the prevalence of confidentiality provisions in arbitration agreements, mandatory arbitration of FCA claims may also disturb the essential collaboration between the relator and the Government that occurs in intervened cases. For instance, confidentiality requirements are likely to prevent relators from coordinating with the Government to prepare and produce materials like factual and legal research and Government position papers. Andrews, 15 Pepp. Disp. Resol. L.J. at 245-46 (adding that if the Government went to trial, relators would be precluded from acting as co-litigants in the case).

Yet another impracticality of arbitrating FCA actions is the fact that discovery is generally limited in scope in the arbitral forum. Doré, 81 Chi.-Kent L. Rev. at 484. Discovery occurs only "at the agreement of the parties or the discretion of the arbitrator." *Id.* at 484, n. 117 (citing *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 164 & n.5 (5th Cir. 2004)). In this case, for instance, the parties' arbitration agreement states that they are only entitled to discovery "as the arbitrator considers necessary . . . consistent with the expedited nature

of arbitration." My Left Foot Children's Therapy Mutual Binding Arbitration Agreement at 5, No. 14-cv-01786-MMD-GWF (D. Nev. 2015), ECF. No. 20-1. *See also* American Arbitration Association, Employment Arbitration Rules and Mediation Procedures, Rule 9, available at https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004362&revision=latestreleased (last visited Jan. 19, 2017) (using same language quoted from the instant arbitration agreement to confer authority on arbitrator to order discovery). This narrowing of the broad scope of discovery permitted in a court of law is incongruous with the often complicated nature of cases involving fraud against the Government, which typically entail extensive discovery.

Significantly, parties to an arbitration also have no way to enforce certain third-party subpoenas for purposes of a hearing, and they may not be able to issue third-party subpoenas at all for purposes of discovery. Several federal courts of appeal have held that the Federal Arbitration Act does not give arbitrators any authority to order third-parties to appear to testify or produce documents for purposes of pre-hearing discovery. *See Life Receivables Trust v. Syndicate 102 at*

Lloyd's of London, 549 F.3d 210, 216-17 (2d Cir. 2008); *Hay Grp., Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 410 (3d Cir. 2004); *COMSAT Corp. v. Nat'l Sci. Found.*, 190 F.3d 269, 275–76 (4th Cir. 1999). The holdings of the Second, Third and Fourth Circuits are supported by the plain language of the Federal Arbitration Act, which only authorizes arbitrators to subpoena witnesses to appear at hearings "before them" and to bring documents with them to those hearings. 9 U.S.C. § 7.

This Court has not addressed whether arbitrators have pre-hearing subpoena power over non-parties under the FAA. However, even when arbitrators do have the authority to issue subpoenas, questions can arise about how to enforce subpoenas given the interplay between Rule 45 of the Federal Rules of Civil Procedure, and the unique context of arbitration. *See* Danielle C. Beasley*, Recurring Concerns in Arbitration Proceedings: Examining the Contours of Arbitral Subpoenas Issued to Nonparty Witnesses*, 87 U. DET. MERCY L. REV. 315 (2010). Inability to obtain third party testimony could easily prove detrimental to the pursuit of an FCA case.

It also bears noting that forcing *qui tam* claims into arbitration will, over time, frustrate the development of precedent and uniform law

pertaining to the False Claims Act. In marked contrast to judges, arbitrators do not have authority to develop law that will be applicable to other parties. Moohr, 56 WASH. & LEE L. REV. at 435. Arbitrators decisions are "final and limited to the purpose of resolving the immediate dispute." *Id.* at 436 (contrasting the litigation system in which courts' creation of and reliance upon precedent promotes uniformity and efficiency). If *qui tam* claims are held to be arbitrable, similar FCA cases will be subject to different arbitration standards, with a resulting lack of clarity and certainty to future relators. With time, this level of uncertainty will significantly frustrate the incentive for relators to disclose fraud in the first place, undermining the very purpose of the FCA.

In sum, forcing *qui tam* claims into an arbitral forum will prevent the effective enforcement of the False Claims Act. The strong policy reasons for finding that private employment arbitration agreements do not encompass *qui tam* claims are supported by the language in both the False Claims Act and the arbitration agreement in this case. This Court should rule that Welch's *qui tam* claim is beyond the scope of her arbitration agreement.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: January 20, 2017

Respectfully Submitted,

/s/ Matthew J. Piers

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,535 words according to the word-count function of Microsoft Word 2016, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I certify that this brief 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 this brief has been prepared in a proportionally spaced typeface, using Microsoft 2016, 14-point Century Schoolbook.

Dated: January 20, 2017

/s/ Matthew J. Piers
Matthew J. Piers

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing 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 January 20, 2017.

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.

Dated: January 20, 2017

/s/ Matthew J. Piers
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