17-2191-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

John A. Wood,

Plaintiff-Appellee,

Allergan, Inc.,

Defendant-Appellant.

ON INTERLOCUTORY APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (FURMAN, J.), No. 10 CIV. 5645 (JMF)

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

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Federal Rule of Appellate Procedure 26.1, Taxpayers Against Fraud Education Fund ("TAFEF") 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.

TO THE HONORABLE UNITED STATES COURT OF APPEALS:

Pursuant to Fed. R. App. P. 29, Taxpayers Against Fraud Education Fund respectfully submits this brief as *Amicus Curiae* in support of Appellee John Wood. A Motion for Leave to File has been filed contemporaneously herewith, and this brief is subject to the Court's ruling on that Motion. TAFEF supports Appellee for the reasons set forth below.

I. STATEMENT OF INTEREST

Taxpayers Against Fraud Education Fund 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"), regularly participates in litigation as *amicus curiae*, and has provided testimony to Congress about ways to improve the FCA. TAFEF is supported by whistleblowers and their counsel, by membership dues and fees, and by private donations. TAFEF is the 501(c)(3) arm of Taxpayers Against Fraud, which was founded in 1986. TAFEF has a strong interest in ensuring proper interpretation and application of the FCA.

TAFEF files this brief on appeal on the proper interpretation of the first-to-file rule and its interaction with Rule 15, Fed. R. Civ. P. TAFEF leaves any other

disputed issues to the parties.

II. ARGUMENT

The Supreme Court most recently addressed the False Claims Act's "first-to-file rule," 31 U.S.C. § 3730(b)(5), in *Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter*, 575 U.S. ___, 135 S. Ct. 1970 (2015). That decision struck down a line of cases that had artificially elongated an earlier-filed case's effect to preclude any later-filed case based on the same facts—even after the earlier-filed case had been dismissed. *Id.* at 1978. Specifically, the Supreme Court held in *Carter* that "an earlier suit bars a later suit while the earlier suit remains undecided but ceases to bar that suit once it is dismissed." *Id.*

The district court in *Carter* had dismissed the case with prejudice. The Supreme Court affirmed reversal of that decision, but did not mandate, as Appellant argues, that a later-filed case must always be dismissed. Rather, it merely affirmed reversal of the result in the case at bar. *United States ex rel. Boise v. Cephalon, Inc.*, 2016 U.S. Dist. LEXIS 12331, at *9-10 (E.D. Pa. Feb. 2, 2016) ("[*Carter*] did not mandate a procedural outcome for second-filed suits whose first-filed counterparts have been dismissed"). The Supreme Court's prasing—"ceases to bar *that suit*"—suggests that nothing impedes prosecution of the later-filed suit once the first-filed suit is dismissed. 135 S. Ct. at 1978 (emphasis added).

The Supreme Court observed that interpreting the first-to-file rule to require

dismissal with prejudice would contravene False Claims Act ("FCA" or "Act") policy. Justice Alito rhetorically asked for a unanimous Court: "Why would Congress want the abandonment of an earlier suit to bar a later potentially successful suit that might result in a large recovery for the Government?"[1] 135 S. Ct. at 1979. The Court judged it "unlikely" that Congress would have intended such "strange results." *Id.*

That insight should guide the Court's decision in this case: Why would Congress want an earlier, defective suit to force whistleblowers—whom it has incentivized to shoulder significant risk, to come forward with their valuable information, and to litigate declined cases—to dismiss and refile years later, potentially losing to the Act's statute of limitations some or all of the claims they have brought on behalf of the Government, through no fault of their own?

Prior to *Carter*, defendants argued that a first-filed suit barred any later suit based on the same facts. Here, Appellant argues that the same result is compelled by the confluence of the first-to-file rule and the Act's statute of limitations. This result is at odds with the text and history of the Act, and the policy that motivated its passage by Congress.

It is perfectly appropriate—indeed, required—to commit to the discretion of

[1] The earlier-filed suit in *Carter* had been dismissed for lack of prosecution. The earlier-filed suits in this case had similarly been dismissed for failure to serve the defendant—*i.e.*, not on the merits.

district judges under Rule 15, Fed. R. Civ. P., the decision whether to allow relators to amend and supplement later-filed complaints to allege that earlier-filed complaints are no longer "pending" and therefore "cease to bar" the later-filed suit. Doing so comports with the Act's text and history, and the policy underlying it. The harsh rule Appellant proposes should be rejected and the District Court's decision should be upheld.

A. The History and Policy of the FCA and the 1986 Amendments Support Allowing a First-to-File Flaw to Be Cured Through Supplementation under Rule 15

The FCA remains the "Government's primary litigative tool for combatting fraud." S. Rep. 99-345 at 2, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5266 (Jul. 28, 1986). The Government recovered over $4.7 billion under the Act in fiscal year 2016 alone, of which $2.9 billion came from relator-initiated suits. U.S. Dep't of Justice, Press release, Justice Department Recovers Over $4.7 Billion From False Claims At Cases in Fiscal Year 2016, *available at* https://www.justice.gov /opa/pr/justice-department-recovers-over-47-billion-false-claims-act-cases-fiscal-year-2016. The Act "is remedial in nature and thus [courts] construe its provisions broadly to effectuate its purpose." *United States ex rel. Rigsby v. State Farm Fire & Cas. Co.*, 794 F.3d 457, 468 (5th Cir. 2015).

The Act's first-to-file rule has little legislative history and Congress's intent in enacting the provision is "not entirely clear." Claire Sylvia, THE FALSE CLAIMS

ACT: FRAUD AGAINST THE GOVERNMENT at 816-17 (2d ed. 2010); *United States ex rel. Campbell v. Redding Med. Ctr.*, 421 F.3d 817, 823 (9th Cir. 2005). However, its inclusion as part of the 1986 amendments—which strengthened the relator, or *qui tam*, provisions of the Act to spur greater private enforcement—counsels that it should not be construed to discourage the filing of *qui tam* cases or to weaken their effectiveness. S. Rep. No. 99-345, at 23-24 ("the Committee's overall intent in amending the *qui tam* section of the False Claims Act is to encourage more private enforcement suits"); *Campbell*, 421 F.3d at 823-24 (a purpose of the amendments was to remove "overly restrictive court interpretations of the *qui tam* statute").

When it amended the Act in 1986, Congress was concerned that government lawyers were outmatched and outnumbered. One of the Act's primary sponsors said:

> If the government can pass a law that will increase the resources available to confront fraud against the government without paying for it with taxpayers' money, we are all better off. This is precisely what this law is intended to do: deputize ready and able people who have knowledge of fraud against the government to play an active and constructive role through their counsel to bring to justice those contractors who overcharge the government.

132 Cong. Rec. H9388 (daily ed. Oct. 7, 1986) (statement of Rep. Berman).

The first-to-file rule furthers the FCA's purpose of encouraging relators with valuable knowledge to bring cases promptly by protecting the interest of the first to file. *Campbell*, 421 F.3d at 823-24. However, once a first-filed case is dismissed,

that relator's interest is no longer protected. *Carter*, 135 S. Ct. at 1978. Nothing in the legislative history suggests that the rule was meant to protect or indemnify defendants, or prevent a later-filed relator from recovering on behalf of the United States once an earlier-filed claim has been dismissed. The rule should be construed in a manner consistent with the Act's broad purpose, and should not be used to undermine relators or discourage them from coming forward.

Relators must file their complaints under seal. 31 U.S.C. § 3730(b)(2). They cannot know, prior to filing, whether related cases are pending, because those cases may still be sealed. In fact, they may not learn of related cases for years. The District Court recognized this fact, and the rule it adopted is in accord with the Act's remedial purpose. It commits to the discretion of the district judge, who is in the best position to make the determination, whether supplementation to cure a first-to-file defect is available "on just terms." Rule 15(d), Fed. R. Civ. P. (*See infra*, Section C, for a discussion of Rule 15(d)). Where earlier-filed cases have been abandoned or defendants have not been served, as in the present case, or where the earlier-filed complaint lacked sufficient detail to put the Government on the trail of fraud, supplementation should be available to show that the first-to-file rule no longer applies.

The absolute rule Appellant advocates flies in the face of FCA policy and is unworkable. Appellant and its *amici* rely heavily on an unpublished D.C. Circuit

opinion to argue that commending the supplementation decision to the district court would result in "anomalous outcomes," while Appellant's rule would lead to "predictability." Appellant Brief at 26-28, relying on *United States ex rel. Shea v. Cellco P'ship*, 2017 U.S. App. LEXIS 13346 (D.C. Cir. July 25, 2017). In that decision, the court begins by stating the obvious: that a later-filed relator's ability to proceed after an earlier-filed action is dismissed "could depend on the pure happenstance of whether the district court reached her case while the first-filed suit remained pending." *Id.* at *13.

The court then outlines a hypothetical in which Relators A, B, and C file identical cases in sequential order. The court dismisses B's case on first-to-file grounds, because the court reaches it first and A is still pending. By the time the court reaches C, it has dismissed A, and C is allowed to amend and continue. The court uses this example to claim that Relator C "would receive a windfall," and speculated that "Congress presumably would not have intended a relator's fate to depend on chance considerations such as the extent of a particular court's backlog and the timeliness of a particular court's entry of a dismissal." *Id.* at *13-14.

This specious reasoning should not guide the Court. Relators' claims are always subject to the "pure happenstance" and "chance considerations" of crowded dockets and earlier-filed, potentially-sealed cases. As discussed *infra*, *Shea's* example does not take into account the years-long seal periods accommodating the

Government's investigation, or that relators may not dismiss their cases without Government permission. 31 U.S.C. § 3730(b)(1). The simplicity of *Shea's* hypothetical so vastly understates the complex reality of FCA investigations and prosecutions that it obfuscates, rather than clarifies, the issues at stake.

However, it perhaps-unintentionally highlights how allowing supplementation to cure a first-to-file defect fulfills the Act's fundamental purpose. As *Carter* perceived: in *Shea's* hypothetical, the first-to-file bar does not prevent Relator C from pursuing a recovery on the Government's behalf—a benefit the Government would not otherwise receive. This assuredly was Congress's intent: to enable relators to be force-multipliers in the pursuit of fraud against the Government and to return stolen funds to public coffers.

Appellant laments the potential for infinite numbers of "me too" actions being filed as a result of allowing amendment to cure a first-to-file defect. However, such results cease to be a threat when the FCA is viewed as a whole and evaluated in accordance with the Federal Rules of Civil Procedure ("Rules"). In the event that a first-to-file defect in a later-filed complaint could be cured by amendment, the subsequent suit may be barred by a variety of other doctrines, including *res judicata* and collateral estoppel; the FCA's statute of limitations; the FCA's public disclosure provision; and the statute's prohibition against *qui tam* suits whenever the Government has already brought its own civil action or

administrative proceeding to remedy the fraud. *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 936 (2009) (recognizing that "the Government is bound by the judgment" in *qui tam* suits); *United States ex rel. Chovanec v. Apria Healthcare Grp. Inc.*, 606 F.3d 361, 365 (7th Cir. 2010) (acknowledging that "the doctrines of claim and issue preclusion" might "block[] anyone (including the United States) from filing additional suits dealing with" the fraud scheme alleged in two earlier-filed *qui tam* suits); *United States ex rel. Poteet v. Medtronic, Inc.*, 552 F.3d 503, 517-18 (6th Cir. 2009) ("[I]f the first-filed *qui tam* action has been dismissed on its merits or on some other grounds not related to its viability as a federal action, it can still preclude a later-filed, but possibly more meritorious, *qui tam* complaint under the first-to-file rule").

Rather than incentivize "me too" relators to file suit with the expectation that they will be able to amend their complaints after a first-filed complaint is dismissed, Appellant's formulation of the first-to-file rule would perversely incentivize those who commit fraud to immunize themselves by causing a sham *qui tam* complaint to be filed that fails to satisfy the requirements of Rule 9(b), is otherwise deficient, or is not prosecuted by the sham relator. *See infra*, at 13-14 (discussing such sham complaints). Though dismissed, the sham filing would cause genuine relators to lose some or all of their claims, by forcing them to dismiss and refile. This would prevent legitimate, nonparasitic relators from

pursuing claims on behalf of the Government when the Government lacks the resources, ability, or will to pursue those claims—which is the fundamental purpose of the *qui tam* law.

Appellant's concern about "me too" relators is also undermined by the Act's seal provision. When relators file an FCA action, they venture into a constantly shifting landscape. As the District Court understood, they do not know whether other similar actions are pending against the same defendant, because all cases are filed under seal. *United States ex rel. Wood v. Allergan, Inc.*, 2017 U.S. Dist. LEXIS 50103, at *33 (S.D.N.Y. Mar. 31, 2017) (*Wood I*); 31 U.S.C. § 3730(b)(2). A case typically remains under seal for years while the Government completes its investigation. Once unsealed, it is not unusual for a complaint to go through several amendments, with defendants filing motions to dismiss each iteration of the complaint—proceedings that further delay resolution of even defective cases.

A sham or defective case may thus be filed first, but might not be resolved or even come to light until long after the Government has declined to intervene in a later-filed, but meritorious, suit. A later-filing relator may elect to pursue declined litigation for many years, in line with the law's incentives, shouldering significant personal burdens and expending substantial resources, without ever knowing of the existence of a first-filed case. Forcing such a later-filed relator to refile her claims because an earlier-filed, but dismissed, action comes to light would discourage

potential relators and could dissuade them from shouldering the substantial risks they must undertake in coming forward with information about fraud against the Government.

Under Appellant's proposed rule, the relator in this situation would be surprised to learn that she has no claim at all because the first-filed case, though abandoned, blocks her case. This is not speculation; it happened in *Carter*, where the parties and the district court learned about the earlier-filed action only "shortly before trial." 135 S. Ct. at 1974.

Appellant suggests that relators may simply dismiss their allegations and refile once a first-filed case is dismissed. Appellant Brief at 27-28. As noted above, however, relators cannot dismiss without the Government's permission, which may be withheld or delayed for a variety of reasons. *United States ex rel. Michaels v. Agape Senior Cmty., Inc.*, 848 F.3d 330, 336-38 (4th Cir. 2017). Dismissing sealed cases in the midst of a government investigation, even if allowed, could cause untold administrative difficulties and harm to the investigation.

Further, relators risk many of their allegations being dismissed pursuant to the FCA's statute of limitations if they are required to dismiss and refile their claims. While the Government mentions in its brief that equitable tolling may be available to those relators whose claims, through no fault of their own, run up

against the statute of limitations in cases that are dismissed pursuant to the first-to-file bar, those relators should not be forced to rely on such uncertainties when the Rules allow a relator to cure a first-to-file defect through amendment. U.S. Brief at 17-18. Just as relators cannot control when and how their cases are handled during the seal period—or even when and how they are dismissed thereafter—they also cannot control the length of seals in other actions, including earlier-filed ones. It is an impossible system to game.

Appellant argues that its rule would lead to predictability, Brief at 27-28, but it would more likely result in a circus of voluntary dismissals and re-filings whenever any potentially-related action is dismissed. To address *Shea's* example: suppose that, after a few years of investigation, the first-filed case (A) is unsealed and dismissed for lack of prosecution. B is unsealed, while C remains sealed. Meanwhile, a new relator (D) files suit.

Under Appellant's proposed rule, B should immediately dismiss and refile to avoid the first-to-file rule on any claims not lost to the statute of limitations.[2] But it would be barred anew, this time by D (which is still sealed and unknown to B, C, and the courts). Relator C, meanwhile, might not be able to take advantage of the rule because the Government may not consent to dismissal while it investigates.

[2] Relator B would, of course, have to secure permission from the Department of Justice, which may or may not be withheld.

Even if C could refile, it would still be barred by D. The only "winner" is D, the last filer.[3]

Is this what Congress intended? This chaos would serve neither the Department of Justice nor the dockets of the federal courts, but is avoidable under Rule 15. Upon A's dismissal, B would supplement her complaint to plead that fact, and B could continue to litigate. C and D would be barred. As this example illustrates, Appellant's inflexible rule does not simplify or streamline matters. Allowing the possibility of supplementation on "just terms" most closely hews to Congress's purpose, as recognized in *Carter*, 135 S. Ct. at 1978-79.

The United States suggests that it could intervene in a later-filed case to prevent this result, U.S. Brief at 18, but neither relators nor the treasury should be put to such fortuity. The Act was amended specifically to allow relators to complement the efforts of overworked and overwhelmed government lawyers. They should not have to rely on government intervention for rescue—which occurs in under 25% of cases—when relief is available under the Rules.

Courts have recognized that interpreting the first-to-file rule in the dogmatic fashion Appellant advocates is not compatible with the Act's purpose. For

[3] Nor is the last-filer the only, or even primary, beneficiary in this example: the statute of limitations may well bar claims in D's case, which could have been pursued by B or C. Because the Government's complaint in intervention can only relate back to the filing date of the relator's complaint, 31 U.S.C. § 3731(c), the Government may also be barred from pursuing these claims.

example, in *Campbell* the first-filed relator's action was barred by the public disclosure rule. The Government moved to dismiss the second-filed relator's action under the first-to-file rule, the court granted the motion, and the Government settled with the defendant. The Ninth Circuit reversed, holding that "to create an absolute bar would permit opportunistic plaintiffs with no inside information to displace actual insiders with knowledge of the fraud . . . ." 421 F.3d 817. "This cannot be what Congress intended." *Id.*

Courts have also acknowledged that nominally first-filed cases may not bar later-filed cases where they fail to put the Government on the trail of fraud. *E.g.*, *United States ex rel. Banigan v. Organon U.S.A. Inc.*, 2012 U.S. Dist. LEXIS 76130, at *35 (D. Mass. June 1, 2012) ("While the FCA's first-to-file bar precludes a *qui tam* suit where a prior action gave the government sufficient notice of the essential elements of fraud, the policy underlying the provision counsels that the bar should not apply if the government would uncover such fraud (if at all) only by exhausting its investigative resources"); *United States ex rel. Heineman-Guta v. Guidant Corp.*, 874 F. Supp. 2d 35, 40 n.12 (D. Mass. 2012) ("The court can imagine . . . the possibility of a first-filed complaint that is so spurious or vacuous as to provide no real notice of fraud to the government, and therefore not serve to bar later-filed complaints of genuine substance").

A later-filed relator may carry the torch when earlier-filed relators' suits are

dismissed for reasons that, as in the cases above and the case at bar, do not address the merits of the action. Appellant's rule would needlessly bar these actions and prevent recovery on behalf of the United States.

In *Carter*, the Court concluded: "The False Claims Act's *qui tam* provisions present many interpretive challenges, and it is beyond our ability in this case to make them operate together smoothly like a finely tuned machine." 135 S. Ct. at 909. The Act's provisions do not always operate in perfect unison. However, given the Act's broad, remedial purpose, they should not be applied in a crabbed fashion to prevent recovery to the United States and discourage whistleblowers from coming forward and pursuing declined claims. This is especially true where the Rules supply a familiar mechanism that provides a pathway for resolution that is committed to the broad discretion of the trial judge, who is in the best position to make the call.

B. Non-Compliance with the First-To-File Rule Does Not Compel Dismissal

1. The Rule's Text Does Not Mandate a Remedy

The first-to-file rule provides: "When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5). As is apparent, the text does not prescribe a remedy for a non-compliant complaint and it certainly does not mandate the harsh remedy of dismissal.

Congress knows how to direct a remedy when desired. The public disclosure rule, for example, instructs: "The court shall dismiss an action" that violates the rule. 31 U.S.C. § 3730(e)(4)(A). "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Kucana v. Holder*, 558 U.S. 233, 249, 130 S. Ct. 827, 175 (2010) (brackets omitted). Automatic dismissal upon finding a first-to-file defect is thus not compelled by the statute.

The Supreme Court recently made precisely this point in *State Farm Fire & Cas. Co. v. United States ex rel. Rigsby*, 580 U.S. ___, 137 S. Ct. 436, 442–43 (2016). Appellant cites this same decision, arguing that *Rigsby* "stated that the False Claims Act 'require[s], in express terms, the dismissal of a relator's action' that is brought in violation of the first-to-file bar." Appellant Brief at 1. But this sentence refers to an earlier part of the opinion, where the Court includes the first-to-file rule among several "restrictions on suits by relators," but then distinguishes the "express" condition stated in the public disclosure rule.[4] The errant reference

[4] The full text reads:

> The FCA places a number of restrictions on suits by relators. For example, under the provision known as the "first-to-file bar," a relator may not "'bring a related action based on the facts underlying [a] pending action.'" [Citation omitted.] *Other FCA provisions* require compliance with statutory requirements as express conditions on the

in *dicta* later in the opinion does not bear the weight Appellant heaps on it.

This is particularly so because *Rigsby* stands for precisely the opposite proposition: "In the absence of congressional guidance regarding a remedy, '[a]lthough the duty is mandatory, the sanction for breach is not loss of all later powers to act.'" *Id.* at 442, *quoting United States v. Montalvo-Murillo*, 495 U.S. 711, 718 (1990). Dismissal is not compelled where "the statute says nothing . . . about the remedy for a violation of [a] rule." *Id.*

Rather, where dismissal is not the prescribed remedy for non-compliance, it is within the discretion of the district court to craft an appropriate remedy. *Id.* at 444. Notably, while a seal violation such as the one at issue in *Rigsby* cannot be "cured" by pleading additional facts, a first-to-file defect can be.

2. The First-to-File Rule's Non-Jurisdictional Nature Undercuts the Authorities on Which Appellant Relies

Most of the authority upon which Appellant and its *amici* rely assumes that the first-to-file rule is jurisdictional. The court below acknowledged this problem and properly distinguished those cases:

> relators' ability to bring suit. The paragraph known as the "public disclosure bar," for instance, [jurisdictionally bars such suits]."

Rigsby, 137 S. Ct. at 440 (emphasis added).

> Significantly, most of the courts to hold that a first-to-file rule violation cannot be cured have rested heavily, if not primarily, on their view that the rule is jurisdictional in nature and the "hornbook" principle that "jurisdiction . . . depends upon the state of things at the time of the action brought" . . . . That hornbook principle does not apply to non-jurisdictional rules, even those that explicitly call for looking at the circumstances as of the time of filing.

Wood I at *34-35.

At the time, this Court had not determined whether the first-to-file rule is jurisdictional, but the District Court predicted that it would hold the rule non-jurisdictional. *Id.* at *31-35. A few days later, this Court confirmed that prediction. *United States ex rel. Hayes v. Allstate Ins. Co.*, 853 F.3d 80 (2d Cir. 2017). The Court based its decision on the text of the rule and Supreme Court precedent reining in "profligate use of the term jurisdiction." *Id.* at 85-86 (internal quotation marks omitted). It thus joined the D.C. Circuit "in holding that the FCA's first-to-file rule 'bears only on whether a *qui tam* plaintiff has properly stated a claim.'" *Id.* at 86, quoting *United States ex rel. Heath v. AT&T, Inc.*, 791 F.3d 112, 120–21 (D.C. Cir. 2015).

Because the cases upon which Appellant and its *amici* rely are based on a misconception that has been rejected by this Court, those authorities and their assumptions should likewise be rejected. Specifically, the assumptions that the first-to-file rule must be applied at the time of filing and that any defect marks the case forever and cannot be cured—*see, e.g.*, *United States ex rel. Carter v.*

Halliburton Co., 866 F.3d 199, 206 (4th Cir. 2017)—lose their force.[5]

There is no argument, after *Carter*, that a later-filed action cannot be refiled immediately. Running afoul of the first-to-file rule does not permanently mark a suit as defective. Any defect is capable of being "cured" the moment an earlier-filed suit is no longer pending, unlike a suit dismissed under the public disclosure rule, which cannot be "cured" because a public disclosure cannot be undone. Instead, the compliance with the first-to-file rule is simply a procedural requirement and alleged non-compliance is evaluated under Rule 12(b)(6).

C. Rule 15, Fed. R. Civ. P., Allows Supplementation "On Just Terms" to Plead the Dismissal of an Earlier-Filed Action

Because the first-to-file rule is not jurisdictional and dismissal is not compelled by the statute, Rule 15(d), Fed. R. Civ. P., provides a pathway for pleading "any transaction, occurrence, or event that happened after the date of the pleading to be supplemented."[6]

Appellant argues that, unlike the rest of the federal rules, Rule 15 does not

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[5] As the district court pointed out, even jurisdictional defects may be cured. *Wood I* at *35 n.13.

[6] While leave should technically be granted to supplement under Rule 15(d), in situations like the one presently before the Court, the difference is "more theoretical than real." *In re Asbestos Prods. Liab. Litig. (No. VI)*, 611 Fed. Appx. 86, 89 (3d Cir. 2015) (noting the distinction, but finding it "largely one of semantics" because the standards set forth in each "are the same"); *ConnectU v. Zuckerberg*, 522 F.3d 82, 90 (1st Cir. 2008) (same).

apply to FCA actions challenged under the first-to-file rule. However, in *United States ex rel. Gadbois v. PharMerica. Corp.*, 809 F.3d 1 (1st Cir. 2015), *cert. denied*, 136 S. Ct. 2517 (2016), the First Circuit explained that courts generally allow supplementation under Rule 15(d) to cure even defects in subject matter jurisdiction and that the Supreme Court had signaled its approval of this practice. *Id.* at 5 (citing *Mathews v. Diaz*, 426 U.S. 67, 75 (1976), in which a plaintiff who had not satisfied a "nonwaivable condition of jurisdiction" before filing suit was allowed to do so through a supplemental pleading).[7] Based on this and other authorities, the court explained that the defendant's "attempt to elongate the reach" of the time-of-filing rule was improper, because it originated in and applies most readily to diversity cases and "is inapposite in the federal question context." *Id.*, *citing Zuckerberg*, 522 F.3d at 92; *see also Boise*, 2016 U.S. Dist. LEXIS 12331, at *11. The court ultimately left the decision whether to grant leave to supplement to the district court in the first instance.

There is nothing in the FCA's history or text to suggest that any part of the Rules do not apply to FCA cases. Rather, numerous cases hold that Rule 9(b), as a pleading rule applying to fraud cases, applies equally to actions under the FCA,

[7] Because *Gadbois* resolved the appeal under Rule 15, the court did not reach the relator's argument that the first-to-file rule is non-jurisdictional. 809 F.3d. at 4 n.2. That it is not jurisdictional in this Circuit only strengthens the case for allowing supplementation under Rule 15.

despite Congress's clear intention that the FCA should be applied broadly to reach any fraud upon the United States. *See, e.g.*, *United States ex rel. Chorches v. Am. Med. Response, Inc.*, 865 F.3d 71, 81 (2d Cir. 2017) ("*Qui tam* complaints filed under the FCA, because they are claims of fraud, are subject to Rule 9(b)").

Even where departures from the rules are necessary, because of the special circumstances under which relators file FCA cases, the Rules are nevertheless given the full effect possible. For example, Rule 4 requires service of the complaint on the defendant within 90 days of filing. The statute's sealing provisions make service impossible until the court unseals the action. Thereafter, however, the rule applies and the complaint must be served within 90 days. The Rules and the statute thus work hand in glove.

The same is true of supplementation under Rule 15(d). According to the Advisory Committee Notes accompanying the 1963 amendments, Rule 15(d) was crafted to give courts broad discretion in allowing a supplemental pleading. The Committee noted that some courts had taken a "rigid and formalistic view that where the original complaint fails to state a claim upon which relief can be granted, leave to serve a supplemental complaint must be denied." This left plaintiffs sometimes "needlessly remitted to the difficulties of commencing a new action even though events occurring after the commencement of the original action have made clear the right to relief."

The Committee noted that under the amended Rule 15(d), "the court has discretion to permit a supplemental pleading despite the fact that the original pleading is defective," and commended to the trial judge evaluation of the particular circumstances of the case to determine whether the filing should be allowed. Fed. R. Civ. P. 15(d) Advisory Committee's Notes to 1963 amendment. *See also* 3-15 Moore's Federal Practice - Civil § 15.30 (2017) ("A plaintiff may therefore be granted leave to file a supplemental complaint despite the failure of the original complaint to state a claim for relief").

Rule 15(d) thus permits a supplemental pleading to correct a defective complaint and circumvents "the needless formality and expense of instituting a new action when events occurring after the original filing indicated a right to relief." 6A Wright et al., Federal Practice and Procedure § 1504, at 258-59. That, of course, is exactly what the district court has already done in this case.

Rule 15 can only play the same role in FCA cases that it does in other civil litigation, which would allow the first-to-file provision to serve its purpose—*i.e.*, to encourage relators with legitimate claims to file promptly and to ensure that a later-filing relator with meritorious claims is not prevented from recovering amounts fraudulently stolen from the taxpayers, no matter how long the administration of justice takes.

III. CONCLUSION

For the foregoing reasons, this Court should reject the atextual requirements Appellant attempts to read into the first-to-file rule, and affirm the well-reasoned decision of the District Court.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FRAP 29(c)(5)

The undersigned, counsel for Taxpayers Against Fraud Education Fund, *Amicus Curiae*, hereby certifies pursuant to Federal Rule of Appellate Procedure 29 that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than Taxpayers Against Fraud Education Fund, *Amicus Curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

Dated: November 7, 2017 /s/ Jennifer M. Verkamp

CERTIFICATE OF COMPLIANCE WITH FRAP 29(d) AND FRAP 32(a)

The undersigned, counsel for Taxpayers Against Fraud Education Fund, *Amicus Curiae*, hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 5,109 words as reported by the word count function of Microsoft Word, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). 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.

Dated: November 7, 2017 /s/ Jennifer M. Verkamp

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of November, 2017, I caused a corrected copy of the foregoing brief to be filed electronically with the Court's CM/ECF system, and that all counsel will be served by the CM/ECF system.

/s/ Jennifer M. Verkamp