WHEN THE HUNTER BECOMES THE HUNTED: COUNTERCLAIMS AGAINST QUI TAM RELATORS AND OTHER CONTRACTUAL OBSTACLES

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This paper examines contractual issues that relators may encounter in *qui tam* cases under the False Claims Act (FCA). The strong public policy interest in encouraging whistleblowers to report fraud to the government has numerous implications for relators to consider when signing employment or separation agreements, and when moving forward with *qui tam* claims after those agreements have already been signed. When a relator reaches a settlement with her employer, the timing of the agreement may largely determine whether a court will enforce the release of liability. Further, a relator may agree to a variety of terms in her employment or separation agreement that a defendant may seek to invoke in order to lodge various forms of breach-of-contract counterclaims against the relator in the *qui tam* action.

I. RELEASE OF *QUI TAM* CLAIMS

A. Pre-filing Release Depends on the Government's Knowledge of the Fraud

A separation agreement at the end of employment, or a settlement agreement to resolve disputed legal claims, typically contains a general release provision, releasing any and all legal claims against the company. While such provisions are generally enforceable with respect to the release of most civil claims, a court may determine that it is not enforceable as to the release of *qui tam* claims.

The Ninth Circuit Court of Appeals became the first Circuit Court to evaluate this issue, in U.S. ex rel. Green v. Northrop Corp., 59 F. 3d 953 (9th Cir. 1995). There, the court adopted the general rule that a contract purporting to release *qui tam* claims is unenforceable on public policy grounds if the relator signed the contract before she filed a FCA *qui tam* claim. The court reasoned that enforcing the release would frustrate the government's interest in encouraging private citizens to disclose fraud.[2] A few years later, in U.S. ex rel. Hall v. Teledyne Wah Chang Albany, 104 F.3d 230 (9th Cir. 1997), the Ninth Circuit carved out an exception, finding that public policy did not favor invalidating the release where the relator had sufficiently reported the fraud to the government before signing the release. In that case, the relator had reported the fraud in question to the Nuclear Regulatory Commission, which investigated and dismissed the complaint. The relator signed a broad release of his legal claims and later filed a *qui tam* action based on the fraud he had previously reported. The court found that because he signed the release after disclosing everything to the government, the government's interest in being fully informed of the fraud had already been satisfied, so there was no public policy reason to invalidate the release.[3]

Under the Ninth Circuit analysis in Hall and Green, the key factor is whether the government had sufficient notice of the fraud, such that the public interest in encouraging disclosure of fraud did not outweigh the interest in enforcing private agreements. Interestingly, one district court in the Ninth Circuit further clarified that the government's awareness of facts from which it could *infer* fraud is insufficient to overcome the public policy interest in

[2] Id. at 962.

[3] Id. at 231-33.

encouraging disclosure. The court reasoned that even if the underlying facts were publicly available, the government might not connect the discrete facts to infer fraud. In that case, the public policy interest in encouraging formal disclosure of fraud would remain.[4]

Other Circuit Courts of Appeals to address the issue of FCA releases before *qui tam* filing have adopted or otherwise approved of the Ninth Circuit's reasoning. In U.S. ex rel. Ritchie v. Lockheed Martin Corp., 558 F.3d 1161, 1169-70 (10th Cir. 2009), the Tenth Circuit adopted the Hall and Green framework. In that case, the court held the release of the *qui tam* claims enforceable because the government had sufficient notice of the allegations of fraud based on the employer's prior disclosure of the relator's same allegations to the government and the government investigation of those allegations. The Fourth Circuit followed suit when, citing Ritchie, it enforced a release of claims provision where the relator had reported fraud to the government and the government had initiated a criminal investigation, before the relator signed the release.[5]

In U.S. ex rel. Ladas v. Exelis, Inc., 824 F.3d 16 (2d Cir. 2016), the Second Circuit applied the Hall and Green framework, but concluded that the release was unenforceable because the government did not have sufficient knowledge of the relator's fraud allegations. The employer had disclosed in a white paper that it discovered an inconsequential change in its subcontractor's product. However, the paper described the change in a materially misleading way and stated that the product still complied with the terms of the contract. Because the fraud allegations centered on the product's noncompliance with the contract, the court found that the employer's disclosure was insufficient to give the government notice of the fraud.[6] In both Ritchie and Ladas, the relator claimed that the employer's own disclosures were "whitewashed", and the relator then provided additional valuable information to the government. Importantly, the Tenth Circuit enforced the release against the relator in Ritchie where the government had closed its investigation before the relator signed the release.[7] In Ladas, however, the Second Circuit did not enforce the release against the relator where the disclosure was so misleading that it did not reasonably provide the government notice that there was anything to investigate.[8]

In one outlier case, the Eighth Circuit discussed the framework laid out in Green but distinguished its outcome as inapplicable to the bankruptcy context. There, the court considered

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[4] U.S. ex. rel Calilung v. Ormat Indus., Ltd, 2016 WL 1298119, at *10-11 (D. Nev. Apr. 1, 2016).

[5] U.S. ex rel. Radcliffe v. Purdue Pharma L.P., 600 F.3d 319, 331 (4th Cir. 2010) (applying the Hall and Green framework without explicitly adopting it).

[6] Id. at 20-23.

[7] 558 F.3d at 1169-70.

[8] 824 F.3d at 23 ("While a company's disclaimers accompanying its disclosure of fraud allegations may not negate government knowledge when the government then proceeds to investigate the allegations, we decline to impute to the government knowledge based solely on documents saying that nothing is wrong – and especially on documents that so state based on half-truths and affirmative misrepresentations.").

whether it could enforce a release ratified by the relators and their bankruptcy trustee. It found that the public policy interest in encouraging disclosure of fraud did not apply in the bankruptcy context because bankruptcy already has inherent disincentives to relators settling their FCA claims for monetary gain.[9]

B. Post-filing Releases Require the Government's Consent

The Hall and Green frameworks specifically apply only to releases that the relator signed before filing a *qui tam* action. When a relator signs a release *after* filing the *qui tam* action, § 3730(b) of the FCA requires the consent of the Attorney General to release the defendant of liability.[10] Courts of Appeals have uniformly interpreted this section to render the release unenforceable when the government intervened in the *qui tam* action and did not consent to the release.[11] In cases where the relator filed a *qui tam* action and the government did not intervene, however, the Ninth Circuit has allowed the relator to unilaterally dismiss the claims,[12] while other Courts of Appeals to address the issue have required the government to consent before the relator can dismiss the claims.[13]

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[9] U.S. ex rel. Gebert v. Transp. Admin. Servs., 260 F.3d 909, 917 (8th Cir. 2001).

[10] 31 U.S.C. § 3730.

[11] E.g. U.S. ex rel. Longhi v. United States, 575 F.3d 458, 474 (5th Cir.2009); Hoyte v. Am. Nat. Red Cross, 518 F.3d 61, 64 (D.C. Cir. 2008); United States v. Health Possibilities, P.S.C., 207 F.3d 335, 339 (6th Cir. 2000); Ridenour v. Kaiser-Hill Co., 397 F.3d 925, 933 (10th Cir. 2005); Searcy v. Philips Elecs. N. Am. Corp., 117 F.3d 154, 160 (5th Cir. 1997); U.S. ex rel. Killingsworth v. Northrop Corp., 25 F.3d 715, 722 (9th Cir. 1994); see U.S. ex rel. Radcliffe v. Purdue Pharma L.P., 600 F.3d 319, 328 (4th Cir. 2010) (distinguishing the release at issue – signed before filing – from releases signed after filing the *qui tam* action).

[12] Killingsworth, 25 F.3d at 722 (9th Cir. 1994) (allowing the relator to dismiss the claims after the time for the government to intervene has expired).

[13] Hoyte, 518 F.3d at 64 (D.C. Cir. 2008) ("[A] motion to dismiss by the relator requires the consent of both the Government and the court even where the Government has declined to intervene."; Health Possibilities, P.S.C., 207 F.3d at 339 (6th Cir. 2000) (rejecting the proposition that the relator could dismiss any *qui tam* claims without the government's consent when the government declined to intervene); Searcy,117 F.3d at 160 (5th Cir. 1997) (holding that the government can veto a relator's settlement without first intervening). Cf. Ridenour v. Kaiser-Hill Co., 397 F.3d 925, 933 (10th Cir. 2005) (holding that the government could file a motion to dismiss the relator's claims without first intervening in the case).

II. COUNTERCLAIMS AGAINST A *QUI TAM* RELATOR

A. Breach of Confidentiality and Breach of Fiduciary Duty

FCA defendants sometimes assert counterclaims against the relator for breach of contract or breach of fiduciary duty, based on the relator's disclosure of confidential company information to the government. These are often based on provisions in employment or separation agreements that require that the employee keep confidential and not disclose the company's confidential information. A breach of fiduciary duty claim can also be asserted as a non-contractual, common law obligation of an executive to the company, particularly if the employee is still employed by the company.

Courts usually follow one of two approaches when dealing with such counterclaims: (1) dismissing the counterclaims on public policy grounds, or (2) permitting only those counterclaims that are "independent" of the FCA claim. Courts following the first approach have held that the FCA states an overriding public policy in favor of private citizens providing the government with evidence of fraud.[14] These courts effectively bar any counterclaim against a relator out of concern that any counterclaim would have a chilling effect which would deter disclosure of fraud to the government.

Courts following the second approach permit counterclaims under some limited circumstances. These courts generally rely on a distinction between "independent" counterclaims and counterclaims for indemnification or contribution, classically articulated by the D.C. district court in U.S. ex rel. Miller v. Bill Harbert Int'l Const., 505 F. Supp. 2d 20 (D.D.C. 2007).[15] Courts categorically prohibit counterclaims that are merely disguised attempts to seek indemnification (paying for all costs sustained by the defendant as a result of an FCA violation) or contribution (paying for a portion of the costs sustained) from the relator.[16] As

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[14] See U.S. ex rel. Head v. Kane Co., 668 F. Supp. 2d 146, 152 (D.D.C. 2009) (dismissing as against public policy employer's breach of contract claim against relator for the relator's failure to return emails which he provided to the government as part of his *qui tam* claim); U.S. ex rel. Grandeau v. Cancer Treatment Centers of America, 350 F. Supp.2d 765, 773 (N.D. Ill. 2004) (holding that the relator did not breach his confidentiality agreement with the employer because disclosure to the government in *qui tam* actions was allowed under any circumstances); X Corp. v. Doe, 805 F. Supp. 1298, 1310 n.24 (E.D. Va. 1992), aff'd without op. sub nom. Under Seal v. Under Seal, 17 F.3d 1435 (4th Cir. 1994) (noting that a confidentiality agreement would be void as against public policy if, when enforced, it would prevent "disclosure of evidence of a fraud on the government").

[15] Id. at 26 (barring defendant's counterclaim for breach of fiduciary duty for relator's failure to report FCA violations to the company, because counterclaim sought indemnification and contribution from relator). Miller is often cited by other courts applying the distinction between "independent" counterclaims that may be permissible, and counterclaims for indemnification or contribution which are not permissible.

[16] Mortgages, Inc. v. U.S. Dist. Court for Dist. of Nev. (Las Vegas), 934 F.2d 209, 214 (9th Cir. 1991) (FCA and federal common law prohibit state law counterclaims which have effect of indemnification or contribution); Miller, 505 F. Supp. 2d at 26 ("The unavailability of contribution and indemnification for a defendant under the False Claims Act now seems beyond peradventure.")

articulated by the Miller court, such counterclaims "create the perverse result of making a truthful relator pay to offset the liability of a wrongdoing FCA defendant," and thus are barred by public policy.[17] Courts might, however, permit counterclaims which are truly "independent" of the FCA claim, meaning that the counterclaim seeks remedies for damages wholly independent of potential FCA liability, such as damages sustained when competitors gain access to confidential company information or relators engage in misconduct unrelated to whistleblowing.[18] As illustrated by the cases below, this allegation of an "independent" counterclaim can be especially viable if the relator takes confidential company documents not reasonably related to the planned *qui tam* report to the government.

Several courts, including the Ninth Circuit Court of Appeals, have allowed the employer's counterclaims to proceed as "independent" counterclaims where the relator's retention of documents was not "reasonable," i.e., the relator took documents and disclosed information beyond the extent necessary to pursue the FCA claim. Thus, the relator would have a valid defense as to the retention and disclosure of any documents related to the FCA claim, but no defense as to unrelated documents.[19] U.S. ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.,

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(collecting cases); Wildhirt, 2013 WL 5304092, at *5 (quoting Miller); Siebert v. Gene Sec. Network, Inc, 2013 WL 5645309, at *5-6 (N.D. Cal. Oct. 16, 2013) (dismissing breach of fiduciary duty counterclaim for failure to prevent the company from committing fraud because it effectively sought contribution from relator); U.S. ex rel. Battiata v. Puchalski, 906 F. Supp. 2d 451, 455-61 (D.S.C. 2012) (dismissing breach of fiduciary duty counterclaim without prejudice for failure to plead damages independent of FCA liability).

[17] Miller, 505 F. Supp. 2d at 29.

[18] See id.; U.S. ex rel. Wildhirt v. AARS Forever, Inc., 2013 WL 5304092, at *6 (N.D. Ill. Sept. 19, 2013) (permitting counterclaims for breach of contract where relator took documents unrelated to FCA claim before relator ever intended to blow the whistle); U.S. ex rel. Notorfransesco v. Surgical Monitoring Assoc., Inc., 2014 WL 7008561, at *2 (E.D. Pa. Dec. 12, 2014) (allowing breach of contract counterclaims where confidential information shared by relator in *qui tam* complaint provided competitive advantage to other companies).

[19] See U.S. ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1062 (9th Cir. 2011) (finding merit in public policy exception, but holding it did not bar breach of contract counterclaim where relator took such massive amounts of Company documents that relator could not "justify why removal of the documents was reasonably necessary to pursue an FCA claim"); U.S. ex rel. Cieszynski Lifewatch Servs., Inc., 2016 WL 2771798, at *3-5 (N.D. Ill. May 13, 2016) (dismissing counterclaim where defendant failed to show that relator took more documents than necessary to support FCA claim or that relator disclosed information to third parties other than the government); U.S. ex rel. Ruscher v. Omnicare, Inc., 2015 WL 4389589, at *5 (S.D. Tex. July 15, 2015) (allowing employer to pursue breach of contract claim as to relator's retention of documents unrelated to the FCA claim); Walsh v. Amerisource Bergen Corp., 2014 WL 2738215, at *4-7 (E.D. Pa. June 17, 2014) (following Cafasso and allowing defendant's counterclaim to proceed until plaintiff showed that all documents retained were relevant to FCA claim); Siebert, 2013 WL 5645309, at *8 (N.D. Cal. Oct. 16, 2013) (relator signed separation agreement representing he had returned all Company property and would keep information confidential; public policy prevented employer from enforcing confidentiality agreement with regard to only those confidential documents retained by relator which were relevant to the FCA *qui tam* claim);

637 F.3d 1047 (9th Cir. 2011) represents the biggest warning to date to potential relators about "what not to do" in exiting a company with the intention of filing a *qui tam* claim. In Cafasso, after learning that her job was about to be terminated, the plaintiff copied almost eleven gigabytes of data (tens of thousands of pages of documents) from company computers in anticipation of bringing a *qui tam* suit.[20] When the company realized this soon afterwards, it sued Cafasso, and Cafasso promptly filed a *qui tam*. With respect to the company's counterclaims for Cafasso's alleged misappropriation of documents, the Ninth Circuit Court of Appeals commented:

> Although we see some merit in the public policy exception that Cafasso proposes, we need not decide whether to adopt it here. Even were we to adopt such an exception, it would not cover Cafasso's conduct given her vast and indiscriminate appropriation of GDC4S files. Cafasso copied nearly eleven gigabytes of data – tens of thousands of pages. She decided which GDC4S documents to copy by browsing through folders related to technology and technology development, and, she testified, "if I saw something that I thought actually could apply and should be investigated, *I just grabbed the whole folder*" (emphasis added). Further, she scanned only file names and "did not look at any individual documents at all." Swept up in this unselective taking of documents were attorney-client privileged communications, trade secrets belonging to GDC4S and other contractors, internal research and development information, sensitive government information, and at least one patent application that the Patent Office had placed under a secrecy order.[21]

Unhelpfully, Cafasso then engaged in what the court described as "numerous discovery abuses" during the litigation, including refusing to identify which of the thousands of documents she had taken supported her claims; seeking discovery into over 100 inventions that she had not mentioned in her complaint, which the court prohibited; appearing to abandon her *qui tam* claims in response to interrogatories; and then attempting to file a 733-page amended complaint, which the court denied. Ultimately, the court dismissed Cafasso's *qui tam* claims and refused to grant her leave to re-file them, granted summary judgment in favor of the company with respect to Cafasso's misappropriation of company files, and ordered Cafasso to pay attorneys' fees to the company.[22]

Wildhirt, 2013 WL 5304092, at *6 (following Cafasso and allowing counterclaims because of "extremely broad scope of documents and communications" relators retained and disclosed).

[20] 637 F.3d at 1062.

[21] Id.

[22] Importantly, however, the district court awarded the defendant $300,000 in fees, a fraction of the fees expended and sought by the defendant. Furthermore, the court also refused the defendant's request to impose millions of dollars in sanctions as a result of the unsuccessful *qui tam* and Cafasso's litigation abuses. U.S. ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc., 2009 WL 3723087, at *9 (D. Ariz. Nov. 4, 2009).

While some may read Cafasso as a huge landmine for relators, it perhaps should instead be read as a case with very bad facts. Overall, it is consistent with the holdings from other cases that the documents taken or disclosed by relators must be reasonably related to their *qui* tam claims. It also highlights that relators' taking and retention of documents must be selective rather than indiscriminate if they want to be protected by the public policy exception against such counterclaims.

One district court allowed a FCA defendant to proceed with counterclaims on the basis that the alleged counterclaim was "independent", without discussing whether the relator's actions in disclosing confidential information to the government was reasonable. In U.S. ex rel. Notorfransesco v. Surgical Monitoring Assoc., Inc., 2014 WL 7008561 (E.D. Pa. Dec. 12, 2014), the defendant claimed that in filing her *qui tam* complaint, the relator placed in the public record (after the case became unsealed) confidential company information, including "patient records, invoices, billing records, and customer billing rates," which would allow other companies a competitive advantage. The court rejected the relator's public policy defense, holding that any damages the defendant sustained due to competitors' access to confidential, commercially valuable company information was wholly independent of the company's FCA liability. However, the court did not grant the defendant's request for injunctive relief, holding that it would be improper to prevent the relator from disclosing confidential materials reasonably necessary to pursue her FCA claim.[23]

Notorfransesco appears to be somewhat of an outlier, as no other case we have found holds that relators may be liable for business damages sustained by publicizing confidential company documents relevant to an FCA claim as part of a FCA *qui tam* filing. Moreover, Notorfransesco's holding has an internal tension, denying the FCA defendant injunctive relief to prevent the disclosure of the documents on public policy grounds, but allowing the defendant to recover any independent damages that might flow from the disclosure. There is the risk, of course, that other courts could follow Notorfansesco's logic in the future.

In light of Notorfransesco, a relator could take steps to mitigate any potential liability for publicizing commercially valuable company information. Importantly, the damages at issue in Notorfransesco did not occur until the seal on the FCA complaint was lifted, making the complaint and attached documents publicly available. As a result, a relator could take precautions by, for instance, excluding from her complaint any unnecessary documents or information that contain commercially valuable information or, to the extent possible, requesting the Department of Justice or the court to redact commercially valuable information or otherwise keep commercially valuable documents out of the public record.

B. Failure to Disclose Suspected Violations of Law to the Company

In a few cases, FCA defendants have asserted counterclaims against the relator for breach of contract or breach of fiduciary duty for a relator's failure to disclose suspected violations of law to the company. This may be based on a contractual provision in an employment agreement,

[23] Id. at *3-5.

separation agreement, or perhaps even a company handbook or policy manual signed or otherwise agreed to by the employee, that obligates the employee to report all suspected fraud or other violations to the company. Courts analyze these cases under the same framework discussed above. Below we discuss these cases in a little more detail.

In U.S. ex rel. Vainer v. DaVita, Inc., 2013 WL 1342431 (N.D. Ga. Feb. 13, 2013), the relators were medical directors for several dialysis clinics. The relators' employment contract with DaVita required the relators to submit monthly invoices to the company certifying that they had complied with all provisions of the contract. The employment contract contained a provision requiring the relators to notify the company of any suspected violation of law. In response to the relators' FCA *qui tam* complaint, the company brought breach of contract counterclaims seeking damages caused by relators' failure to disclose the violations of law, and their false certifications of compliance with that contractual obligation. The court dismissed these counterclaims, holding that they amounted to claims for indemnification or contribution that would deter relators from disclosing fraud to the government. The court reasoned that, in order for the company to succeed on its counterclaims, it would need to show that the fraud alleged in the FCA complaint had actually occurred, thus making the counterclaims wholly dependent on the company's own FCA liability – thus demonstrating it as a claim for indemnification or contribution. Relatedly, the court stated that any damages the company might show from the relators' breach of contract "would essentially be some damage caused by the act of being a relator," thus undermining the FCA public policy of encouraging private citizens to report fraud to the government.[24]

The defendant asserted a similar breach of fiduciary duty counterclaim in U.S. ex rel. Nehls v. Omnicare, Inc., 2013 WL 3819671 (N.D. Ill. July 23, 2013), based on the relator's failure to report the company's fraud internally, thus causing the company to sustain considerable litigation costs in defending the FCA suit. The relator was an officer of the corporation and, as a member of the Compliance Committee, had signed a Code of Ethics agreement requiring her to ensure compliance with applicable laws. The court dismissed the counterclaim for multiple reasons, including: 1) the fact that the relator could have internally disclosed the fraud while still bringing the *qui tam* action undermined the company's argument that relator's breach of fiduciary duty caused its litigation expenses; and 2) regardless of the causation problem, the counterclaim was dependent on the defendant's FCA liability and effectively a claim for contribution from the relator, and was thus barred by the FCA.[25] The court provided a helpful formulation to distinguish independent and dependent counterclaims: a counterclaim is independent when "there is a clear distinction between the facts supporting the counterclaim and the facts supporting the defendant's FCA liability."[26] Because the breach of fiduciary duty claim required the defendant to show that there was in fact fraud that the relator did not disclose, there was no such clear distinction, and the claim was barred.

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[24] Id. at *1-5.

[25] Id. at *18-21 (citing, *inter alia*, Miller).

[26] Id. at *21.

In U.S. ex rel. Grandeau v. Cancer Treatment Centers of America, 350 F. Supp.2d 765 (N.D. Ill. 2004), the court addressed a case in which there was such a clear distinction: the relator had received and responded to a government subpoena related to his *qui tam* claim while still employed by the defendant, but did not disclose the existence of the subpoena to the defendant. The defendant asserted a breach of fiduciary duty claim based on the relator's duty to disclose the existence of the subpoena, rather than on the substance of the fraud the relator had failed to report. The court declined to dismiss this counterclaim, finding it sufficiently distinct from the underlying allegations of the *qui tam*, although it did limit the possible damages recoverable by the company. The company argued that it would have fired the relator for failing to disclose the subpoena, so it sought to recover the relator's salary, in addition to its litigation expenses in investigating and defending the FCA claim. The court held that neither of these types of damages was recoverable: the relator's failure to disclose the subpoena did not cause the company to sustain litigation expenses, and the company paid the relator's salary as consideration for the relator's work, such that any recovery of the relator's salary would unjustly enrich the company. However, the company had pled that its damages were "not limited to" these claims. As a result, the court did not dismiss the claim to allow the company to prove other damages it may have sustained due to the relator's failure to disclose.[27]

In Siebert v. Gene Security Network, Inc., 2013 WL 5645309 (N.D. Cal. Oct. 16, 2013), the relator formerly served as a high-level executive officer for the defendant. As part of his employment, he signed a confidentiality agreement and, on the termination of his employment, additionally signed a separation agreement containing the following representations: he had returned all company property to the defendant, he would continue to abide by the confidentiality agreement, and he released all claims he had against the defendant. The defendant filed counterclaims against the relator for a breach of fiduciary duty by failing to disclose violations of law, for a breach of the confidentiality agreements contained in the relator's employment contract and separation agreement, and for fraudulently inducing the company to sign the separation agreement when he allegedly had no intent to honor its provisions. Following the reasoning in Vanier and Nehls, the Siebert court dismissed the breach of fiduciary duty counterclaim because the claim would require the defendant to prove the existence of the fraud underlying the relator's FCA claim, and was thus dependent on the defendant's FCA liability.[28]

However, the court denied in part the relator's motion to dismiss the fraudulent inducement and breach of contract counterclaims. Regarding the confidentiality provisions of the separation agreement, the court held that the defendant would not be able to pursue the counterclaims to the extent that the documents retained by the relator were "adequately related" to the FCA complaint. However, the court allowed the counterclaim to proceed to discovery to allow the defendant the opportunity to prove that some of the documents were not adequately

[27] Id. at 772-73. Ultimately, the relator's attorneys withdrew from the case due to the relator's failure to pay a large bill for fees or costs, and the court ultimately dismissed the relator's case for lack of prosecution. It's unclear what became of the counterclaims, but it does not appear that the defendant pursued them after dismissal of the underlying *qui tam* case.

[28] Id. at *2, 4-6.

related to the FCA complaint, thus rendering the counterclaim independent, and therefore actionable.[29]

Vanier, Nehls, and Seibert all suggest that a defendant would be unlikely to succeed on a breach of contract or breach of fiduciary duty counterclaim premised on the relator's failure to disclose violations of law to the company. Nevertheless, a relator could undermine any such breach of fiduciary duty counterclaim by affirmatively disclosing all legal and compliance issues to the company, including the underlying basis of his upcoming *qui tam*. However, that approach could also have significant drawbacks, such as revealing the basis of his *qui tam* to the company before it has been investigated by the government, or raising undesired red flags about the relator very early on.

C. Disparagement of the Company

Separation agreements typically contain, and employment agreement occasionally contain, a non-disparagement provision, prohibiting the employee from making any negative statements about the company. In a few cases, defendants have asserted breach-of-contract counterclaims for the relator's disparaging statements about the company. In such cases, the same analysis described above should apply: the counterclaims may be viable if they involve conduct that is independent from the FCA claims.

In U.S. ex rel. Head v. Kane Co., 668 F. Supp. 2d 146 (D.D.C. 2009), the D.C. District Court denied a motion to dismiss the defendant's counterclaim that the relator breached his separation agreement when he made disparaging or critical statements about the company. In the employee's separation agreement, both the relator and the defendant agreed not to "make any oral or written statement or take any other action which disparages or criticizes the other party."[30] In holding that the breach of contract claim based on disparagement could proceed, the court noted that the relator had made statements about the company to third parties – not to the government – after he filed his *qui tam* suit. In addition, the court found that he made the statements "completely apart from this proceeding." The court found that other counterclaims for defamation, libel, and slander, also could proceed because truth is a defense for each claim. As a result, it reasoned, the counterclaims could would only succeed on the merits if the defendant was *not* liable under the FCA, and therefore if the counterclaim was not dependent on a the defendant's own liability for fraud.[31]

In Burch ex rel. U.S. v. Piqua Eng'g, Inc., 145 F.R.D. 452 (S.D. Ohio 1992), the defendant asserted a series of counterclaims for defamation, breach of duty of loyalty, breach of fiduciary

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[29] Id. at *8. A review of the docket shows that the counterclaim proceeded to trial, where the jury ruled in favor of the relator. While the parties did engage in substantial summary judgment motion practice, for unknown reasons the relator did not move for summary judgment on the counterclaim.

[30] Id. at 149.

[31] Id. at 153.

duty, and breach of duty of fair dealing, all stemming from the relators' statements about the company to the media. The District Court for the Southern District of Ohio denied the relator's motion to dismiss out of the view that the counterclaim were compulsory counterclaims to the relators' personal claims for employment discrimination. The defendant did not allege that the relators had participated in the fraud and the counterclaims based on the relators' disparaging statements were independent of the FCA claims.[32]

The cases involving disparagement counterclaims demonstrate that a relator should be cautious about making statements to third parties and statements not necessary to pursing the *qui tam* action, such as statements to the media. Alternatively, if the relator wishes to make statements to the media and other third parties, she should avoid agreeing to a non-disparagement clause in her separation agreement.

[32] Id. at 456-57.