CASE NO. 09-1129

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA *ex rel*. YOASH GOHIL, *Plaintiff-Appellant*,

v.

AVENTIS PHARMACEUTICALS INC, et al., *Defendants-Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT,
ESATERN DISTRICT OF PENNSYLVANIA
Case no. 02-CV-2964
HONORABLE PETRESE B. TUCKER

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

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Taxpayers Against Fraud Education Fund states that it is a corporation organized under § 501(c)(3) of the Internal Revenue Code. It has no parent corporation and no stock owned by a publicly owned company. TAFEF represents no parties in this matter and has no pecuniary interest in its outcome. However, TAFEF has an institutional interest in the effectiveness and correct interpretation of the federal False Claims Act.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Taxpayers Against Fraud Education Fund is a nonprofit public interest organization dedicated to combating fraud against the Federal Government through the promotion of the *qui tam* provisions of the False Claims Act. It has a profound interest in ensuring that the Act is appropriately utilized. The decision below gravely undermines the efficacy of the Act in policing fraud on the federal government, because it undermines the private-public partnership that is essential to *qui tam* suits under the False Claims Act.

I. STATEMENT OF THE ISSUE

Whether the district court erred in ordering the relator to produce, to the defendants, unredacted documents that reveal the relator's communications with the government during a four-and-one-half-year period during which the relator's *qui tam* complaint was under seal while the government investigated the relator's allegations of fraud against the defendants.

II. ARGUMENT

A. THE DISTRICT COURT ERRED BY FAILING TO RECOGNIZE THAT THE DOCUMENTS AT ISSUE ARE PROTECTED FROM DISCLOSURE BY THE COMMON INTEREST PRIVILEGE

1. The Government is the Real Party in Interest in All *Qui Tam* False Claims Act Cases

The False Claims Act was first enacted by Congress in 1863 as a means to combat rampant procurement fraud during the Civil War. *See* Act of Mar. 2, 1863, ch. 67, 12 Stat. 696, *reenacted by* Rev. Stat. §§ 3490-3494, 5438 (1878); *see also United States v. Neifert-White Co.,* 390 U.S. 228, 232 (1968); S. Rep. No. 345, 99th Cong., 2d Sess. (1986), at 8*, reprinted in* 1986 U.S.C.C.A.N. 5266, 5273. The Act creates a unique private-public partnership between individuals and the Government, designed to expose and punish fraud against the Government. Congress has twice amended the

Act, once in 1943 and again in 1986. Each time the Act was amended, the intertwined roles of the Government and private persons were further defined and refined. In its current form, the False Claims Act provides that an action may be commenced in one of two ways. First, the Attorney General may bring a civil action. *See* 31 U.S.C. § 3730(a). Second, "a person," called a relator, may bring a civil action. *See* 31 U.S.C. § 3730(b)(1). This private action is called a "*qui tam*" suit.[1] By statute, when a relator files a *qui tam* action under the False Claims Act, the suit is both "for the person and for the United States Government," and "shall be brought in the name of the Government." *Id.*

Whenever a relator files a *qui tam* suit, he or she is required to file a complaint under seal, and to serve on the Government "[a] copy of the complaint and written disclosure of substantially all material evidence and information the person possesses." 31 U.S.C. § 3730(b)(2). Thus, at the time the complaint is filed, only the relator and the Government are aware of its existence – certainly, the defendant is not aware that a *qui tam* suit has been filed. The "written disclosure" referenced in the statute, often called a disclosure statement, provides the Government with the facts and legal

[1] "*Qui tam*" is short for "*qui tam pro domino rege quam pro se ipso in hac parte sequitur,*" which means he who sues for himself as well as for the king. *See Vermont Agency of Natural Res. v. United States ex rel. Stevens,* 529 U.S. 765, 786, n.1 (2000).

theories on which the relator's complaint is based, so that the Government can conduct an investigation of the relator's allegations before making an election whether to proceed with the case.

If the United States elects to proceed, it has primary responsibility for the conduct of the litigation. *See* 31 U.S.C. § 3730(b)(4)(A). If the Government declines to proceed with the case, the relator is allowed to conduct the action on his/her own. *See* 31 U.S.C. § 3730(c)(3). However, even if the Government declines to intervene in the case, the Act permits the Government to still maintain some control over the litigation, and even allows the Government to intervene at a later date upon a showing of good cause. *Id.* In addition, at its request, the Government may be served with the copies of all pleadings and deposition transcripts for the purpose of monitoring the case. *Id.* Moreover, regardless of whether or not the Government intervenes in the relator's suit, the Government may seek restrictions on discovery by the relator upon a showing that the relator's actions would interfere with the Government's investigation or prosecution of a matter arising out of the same facts. 31 U.S.C. § 3730(c) (4). Furthermore, every circuit court that has faced the issue has held that relators may not file *qui tam* suits *pro se*, due to the fact that False Claims Act cases purport an injury to the Government, and thus, the claims belong to the

Government, and not the relator. *See e.g. U.S. ex rel. Mergent Svcs. V. Flaherty*, 540 F.3d 89, 92-94 (2d. Cir. 2008); *Timson v. Sampson*, 518 F.3d 870, 873 (11th Cir. 2008); *U.S. ex rel. Stoner v. Santa Clara County Office of Educ.*, 502 F.3d 1116, 1126-1127 (9th Cir. 2007); *U.S. ex rel. Brooks v. Lockheed Martin Corp.*, 237 Fed. Appx. 802, 803 (4th Cir. 2007); *U.S. ex rel. Lu v. Ou*, 368 F.3d 773, 775 (7th Cir. 2004). Thus, from the outset of every *qui tam* case, the False Claims Act establishes and protects the Government's role as the real party in interest, and the Government's status as the real party in provides the proper framework within which the Government's communications with the relator and his or her counsel must be viewed. The district court seemingly failed to acknowledge the Government's role in the present case, and the reasons why candid communications between the Government, and the relator who acts on the Government's behalf, must be protected from disclosure.

2. The Documents are Protected from Disclosure to the Defendants by the Common Interest Privilege

This Court has held that, in order for communications between multiple parties to be protected from disclosure by the common interest privilege,[2] "the party asserting the privilege must show that (1) the

[2] The "common interest privilege" is often referred to as the "community of interest privilege," the "joint defense privilege," and the "joint prosecutorial

communications were made in the course of a joint defense [or prosecution] effort, (2) the statements were designed to further the effort, and (3) the privilege has not been waived." *In the Matter of Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 126 (3d. Cir. 1986). Each of these factors is invariably satisfied when a relator files a *qui tam* action under the False Claims Act and begins discussing his or her fraud allegations with the Government. First, the relator's disclosure statement and subsequent communications with the Government are made in the course of the joint effort to prosecute the Government's claims. Second, unless proven otherwise, the relator's communications with the Government are in furtherance of that effort. And finally, the relator is only required to serve the disclosure statement on the Government. Therefore, unless the relator discloses the content of his or her communications with the Government to a third party, the information exchanged between the relator and the Government should be protected from disclosure.[3]

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privilege," and those terms are used interchangeably throughout this brief. However, we recognize the distinction the Court made between the common interest privilege and the "co-client/joint-client privilege" and will not rely on cases discussing that privilege. *See In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 362-363 (3d. Cir. 2007).

[3] Notably, in cases where the relator discloses the content of the disclosure statement to persons outside the Government, courts have found a waiver of the privilege. *See U.S. ex rel. Schweizer v. Oce*, 577 F. Supp. 2d 169, 173 (D.D.C. 2008)(waiver found where the relator filed the disclosure statement

The common interest privilege between the relator and the Government applies regardless of whether the Government has intervened in the relator's suit or not. *See U.S. ex rel. Purcell v. MWI Corp.*, 209 F.R.D. 21, 26-27 (D.D.C. 2002) (holding that "in FCA cases in which the government intervenes, a joint-prosecutorial privilege exists between the government and the relator"); *U.S. ex rel. Burroughs v. DeNardi Corp.*, 167 F.R.D. 680, 686, n.3 (S.D. Cal. 1996)(rejecting the "defendants' arguments that the joint prosecution privilege applies only when the government chooses to intervene"). It protects, from disclosure to outsiders, communications between the relator and the Government, just as the attorney-client privilege does. *See In re Teleglobe Commc'ns Corp.*, 493 F.3d at 364 ("the community-of-interest privilege allows attorneys representing different clients with similar legal interests to share information without having to disclose it to others"); *U.S. v. Doe*, 429 F.3d 450, 453 (3d. Cir. 2005)(stating that "[t]he common interest privilege allows for two clients to discuss their affairs with a lawyer, protected by the attorney-client privilege, so long as they have an 'identical (or nearly identical) legal interest as opposed to a merely similar interest"); *In the Matter of Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d at 126 ("The joint defense

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with the court). Logically, when such disclosures have not been made, there has been no waiver.

privilege protects communications between an individual and an attorney for another when the communications are 'part of an on-going and joint effort to set up a common defense strategy.'")(internal citation omitted).

Surprisingly, the U.S. District Court for the Eastern District of Pennsylvania – the trial court in this case – ordered the relator to produce, to the defendants, unredacted documents revealing the communications between the relator and the Government, notwithstanding that court's repeated recognition of the protections afforded to parties by the common interest privilege. *See Miron v. BDO Seidman, LLP*, No. Civ.A. 04-968, 2004 WL 3741931, at *1, 2 (E.D. Pa. 2004) ("The common interest doctrine is an exception to the general rule that the attorney-client privilege is waived upon disclosure of privileged information to a third party. Where parties with 'shared interest in actual or potential litigation against a common adversary' share privileged information pursuant to this shared goal, the common interest doctrine preserves the attorney-client privilege with respect to that information."); *Woll v. Valiant Ins. Co.*, No. Civ.A. 99-0465, 2003 WL 23281280, at *1, 3 (E.D. Pa. 2003) ("The common interest doctrine provides that when one attorney acts for two clients who have a common interest, there is no attorney-client privilege as between the two clients, but that they jointly hold the privilege against anyone else.") (internal citations

omitted). This order was issued in error, and the Court should reverse the district court's ruling.

B. THE DISTRICT COURT ERRED BY FAILING TO RECOGNIZE THAT THE DOCUMENTS AT ISSUE ARE PROTECTED FROM DISCLOSURE BY THE WORK PRODUCT DOCTRINE

In the event that the Court does not agree that the documents at issue deserve the full protection of the attorney-client privilege, given the common interest privilege shared by the relator and the Government, there can be no question that the relator's disclosure statement and subsequent documents reflecting the relator's communications with the Government are protected by work product doctrine, which protects "documents and tangible things ... prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative ..." Federal Rule of Civil Procedure 26(b)(3); *see also In re: Cendant Corp. Secs. Litig.*, 343 F.3d 658, 662 (3d. Cir. 2003). By statute, all disclosure statements are necessarily "prepared in anticipation of litigation," as they are drafted and served on the Government with a copy of the relator's complaint, for the purpose of assisting the Government in deciding whether to intervene in the relator's suit. *See* 31 U.S.C. § 3730(b)(2); *see also U.S. ex rel. Hunt v. Merck-Medco Managed Care, LLC, et al.*, No. 00-CV-737, 2004 WL 868271, at *1, 2 (E.D. Pa. Apr.

21, 2004) (declaring that “there is no question that the Disclosure Statements were prepared ‘in anticipation of litigation’ insofar as they were drafted by Relators’ attorneys *after* the drafting of Relators’ complaints and, as previously explained, they were submitted to the government pursuant to the False Claims Act for the purpose of allowing the government to determine whether it should intervene in the case”) (emphasis in original); *U.S. ex rel. O’Keefe v. McDonnell Douglas Corp.*, 918 F. Supp. 1338, 1346 (E.D. Mo. 1996)(holding that disclosure statements are work product because “[t]he plain language of the FCA requires the relator to produce the document ‘in anticipation of litigation’”). The same rationale applies to other documents that reflect subsequent communications between the relator and the Government.

As this Court has observed, once a document has been deemed work product, it then becomes necessary to determine whether it is “opinion work product,” deserving nearly absolute immunity from disclosure, or “factual work product,” entitled to a level of protection that can be overcome upon a showing of substantial need for the information and an inability to obtain the information from another source without undue hardship. Federal Rule of Civil Procedure 26(b)(3); *see also In re: Cendant Corp. Secs. Litig.*, 343 F.3d at 663. The district court properly recognized that the documents at

issue are protected by the work product doctrine, but seemed to give short shrift to the level of protection those documents deserve, as it ordered the relator to produce all documents reflecting the relator's communications with the Government during the time the Government was investigating the relator's allegations against the defendants. The district court's order is an extraordinary departure from most other decisions on this issue. Not only did the district court determine that the defendants had a substantial need for all the information contained in those documents and no other means to obtain that information without undue hardship, but the district court also found, without explanation, that absolutely nothing in the relator's documents constitutes opinion work product.

The district court's order, issued without explication, is in error, as it runs afoul of the generally-accepted view that a relator's disclosure statement and the documents reflecting the relator's other communications with the Government almost certainly constitute opinion work product, as they reflect the mental impressions and litigation strategies of the attorneys who prepared them. As one district court opined, "it would be difficult for the court to see how the [disclosure statement and other, similar] documents could be characterized as anything other than 'opinion-work product,' specifically protected from disclosure to opposing counsel, because the

disclosure would potentially reveal plaintiff's counsel's mental impressions, opinions and theories about the case." *U.S. ex rel. Burroughs*, 167 F.R.D. at 684. As the district court provided no explanation for its holding that the documents at issue are not entitled to protection as opinion work product, the district court's order compelling the relator to produce all work product documents to the defendants was in error and should be reversed.

C. PUBLIC POLICY CONSIDERATIONS STRONGLY WEIGH AGAINST DISCLOSURE OF THE DOCUMENTS AT ISSU TO THE DEFENDANTS

Counsel representing relators prepare disclosure statements and engage in communications with the Government during the Government's investigatory period in anticipation of joint litigation of the relator's action by the Government and the relator's counsel. If this process is to be both effective and efficient, relators must feel confident that they can be comprehensive and thorough in their communications with the Government, without fear that those communications will be disclosed to defendants.

The policy considerations behind the False Claims Act weigh in favor of treating relators' disclosure statements and associated documents as opinion work product, virtually immune from disclosure to adverse parties. In 1986, Congress recognized that the False Claims Act serves as the "Government's primary litigative tool for combating fraud," and sought to

strengthen the Act by incentivizing relators to report fraud against the Government. S. Rep. No. 345, 99th Cong., 2d Sess. (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5267. As part of that effort, Congress made many significant changes to the Act. For instance, Congress eliminated purely discretionary awards to relators, and instead established a system whereby most relators are guaranteed at least a 15% share of the Government's recovery. 31 U.S.C.A. § 3730(d)(1) and (2). In addition, the 1986 amendments created a new right of action for employees who are retaliated against for engaging in lawful conduct in furtherance of False Claims Act proceedings. 31 U.S.C.A. § 3730(h). By enacting the 1986 amendments, Congress realized its goal of encouraging relators to bring more *qui tam* suits, thereby exposing more fraud against, and recovering more funds for, the Government. Congress could have further amended the Act to include a requirement that, once a *qui tam* case is unsealed, relators must serve on defendants their disclosure statements and/or other communications with the Government. However, Congress chose to not include such a requirement, and has not sought to include such a requirement during the past twenty years since the 1986 amendments were passed. Rather, Congress's only explicit directive requires this information to be shared with the Government.

The district court's order, however, which compels the relator to produce unredacted documents to the defendants that reflect all of the relator's communications with the Government, undermines the policies that drove Congress to enact the 1986 amendments to the False Claims Act. If upheld, the district court's order will only discourage future relators from bringing allegations of fraud to the Government's attention. Even those relators who still choose to come forward will almost certainly be affected by the district court's order, as they will undoubtedly be less than fully candid with the Government, for fear that their communications will not be protected from disclosure to defendants. Clarity and certainty are necessary here, lest relators be chilled in their communications with the Government.

We agree with the assessment of the U.S. District Court for the Central District of California, and urge the Court to adopt a similar reasoning. The California district court observed:

> If the purpose of the disclosure requirement – to place in the hands of the government information from which it can promptly and efficiently make a sound determination about whether to intervene – is to be promoted, it is necessary that relators' [sic] be able to predict with a high level of confidence *ex ante* whether material contained in disclosure statements will have to be turned over to defendants. An *ex post* test, the outcome of which cannot be predicted with a high level of confidence *ex ante*, is undesirable because if there is uncertainty about the matter, then relators' [sic] may skimp on the contents of disclosure statements, thereby lessening their value as a screening tool for the government.

> Therefore, leaving open the question whether disclosure statements – or particular sentences contained therein – must be turned over to a qui tam defendant will tend to defeat the goals of section 3730(b)(2). Accordingly, the statutory purpose of the disclosure requirement is best promoted by a bright-line rule precluding discovery of all portions of disclosure statements or drafts thereof.

U.S. ex rel. Bagley v. TRW Inc., 212 F.R.D. 554, 557-558 (C.D. Cal. 2003).

The Court should reverse the district court's order, as it demonstrates an extraordinary departure from congressional intent and disregards the policy considerations that encourage relators to be open and candid in their communications with the Government.

CONCLUSION

For the foregoing reasons, the district court's order should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accord with Fed. R. App. P. 32(a)(7)(C), the undersigned certifies that this brief complies with the type-volume limitation set forth in the Rule. Excluding the portions exempted by Rule 32(a)(7)(B)(iii), the brief contains 3160 words as reported by the word count function of Microsoft Word. The brief was prepared in Microsoft Word in Times New Roman font, 14-point type for both text and footnotes.

In accord with 3d Cir. L.A.R. 31.1 (2008), the undersigned certifies that the text of the electronic version of this brief is identical to the text in the paper copies of this brief. In addition, the undersigned certifies that the Symantec Antivirus program was used to scan the electronic version of this brief for any viruses, and none were detected.

April 1, 2009

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I hereby certify that copies of this brief were served by first-class mail, postage prepaid this 1st day of April, 2009, upon:

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This brief was electronically filed with the clerk on April 1, 2009, in accordance with the procedures of L.A.R. Misc. 113. In addition, on April 1, 2009, this brief was filed with the clerk, pursuant to Fed. R. App. P. 25(a)(2)(B), by first-class United States Mail.

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