No. 09-1202, 09-1244

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES ex rel. MARK RADCLIFFE,
Plaintiff-Appellant/Cross-Appellee,

v.

PURDUE PHARMA L.P.; PURDUE PHARMA, INC.
Defendants-Appellees/Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING AFFIRMANCE

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INTEREST OF THE UNITED STATES

The United States respectfully submits this *amicus curiae* brief to address an issue raised by the cross-appellants as an alternative ground for affirming the district court's judgment: whether the release executed by the relator and the defendant bars the relator's *qui tam* action under the False Claims Act (FCA). That issue implicates the enforcement prerogatives of the United States under the FCA, which is

the government's primary tool to combat fraud and recover losses as a result of fraud in federal programs. At the Tenth Circuit's invitation, the government submitted a brief addressing this issue in *United States* ex rel. *Ritchie* v. *Lockheed Martin Corp.*, 558 F.3d 1161 (10th Cir. 2009), and the government has a strong interest in addressing the same question in this appeal.

STATEMENT

This case involves a *qui tam* action under the False Claims Act filed by relator Mark Radcliffe against the defendants, Purdue Pharma, L.P. and Purdue Pharma, Inc., alleging that the defendants fraudulently marketed a new drug to boost sales, thus causing the government to overpay for prescription medications through Medicaid and other programs. Though it dismissed the case on other grounds, the district court ruled that a release executed by Radcliffe and Purdue Pharma that would otherwise bar this *qui tam* action is unenforceable because it is contrary to the policies of the FCA.

While the United States agrees with the district court that prefiling releases of FCA *qui tam* actions are generally unenforceable, and contrary to a central purpose of the FCA – encouraging the

disclosure of allegations of fraud to the government – the district court nonetheless should have enforced the release in this case. Enforcing the release here does not undermine that purpose because the relator's allegations of fraud were disclosed to the government independent of the filing of the *qui tam* action itself. The Court therefore may properly affirm the district court's judgment on the alternative ground that the release executed by the relator bars his *qui tam* action.

A. Background

Radcliffe is a former sales representative at Purdue Pharma. Purdue Pharma manufactures OxyContin, a pain medication. *United States* ex rel. *Radcliffe v. Purdue Pharma L.P.*, 582 F. Supp. 2d 766, 768, 774 (2008). Radcliffe's lawsuit stems from his allegation that Purdue Pharma misrepresented the relative potency of OxyContin, inducing physicians to prescribe it under false pretenses. *Id.* at 769. Those fraudulently induced prescriptions, Radcliffe contends, were in turn presented to the government for reimbursement under Medicaid and other government programs, and therefore constituted false claims prohibited by the FCA. *Id.*

After learning that Purdue Pharma's representations concerning OxyContin's potency might be misleading, Radcliffe considered bringing a *qui tam* lawsuit. Using an alias and attempting to conceal his identity, Radcliffe in January and February 2005 threatened Purdue Pharma with a *qui tam* suit and offered to settle his claims. *Id.* at 774. Purdue Pharma's attorneys suspected that Radcliffe was behind those threats. Purdue Pharma Br. 9 n.4.

Several months later, as part of a general restructuring of its sales force, Purdue Pharma offered Radcliffe a severance package, which he accepted. 582 F. Supp. 2d at 774. On August 1, 2005, Radcliffe executed a general release as part of that package. *Id.* That agreement included a general release "from any and all liability" to Purdue Pharma "for actions or causes of action . . . which" Radcliffe "ever had, may now have or hereafter can, shall or may have." *Id.* at 774 n.5.

The next day, the government subpoenaed Radcliffe to testify as part of a comprehensive independent investigation of Purdue Pharma's manufacturing, marketing, and distribution of OxyContin. *Id.* at 775, 776. That investigation, which had been ongoing since 2002, touched on

the dispute over the relative potency of OxyContin that formed the basis of the claims in Radcliffe's *qui tam* complaint. *Id.* at 775.

B. Proceedings Below

Radcliffe filed this *qui tam* action on September 27, 2005. *Id.* At the United States' request, the district court stayed this case for approximately a year and a half to permit the pending criminal investigation of Purdue Pharma's OxyContin practices to go forward. *Id.* at 776. After the district court lifted the stay, the government declined to intervene in the action. *Id.*

When the complaint was unsealed, Purdue Pharma moved to dismiss on three grounds: first, that the suit was based on a public disclosure; second, that the suit was barred by the release the relator executed as a part of his severance agreement; and finally, that the relator had not pleaded fraud with sufficient particularity under Federal Rule of Civil Procedure 9(b). Radcliffe Br. 2. The district court denied the motion on the first two grounds but dismissed the case with leave to amend, finding that the relator had not pleaded fraud adequately. 582 F. Supp. 2d at 784. Radcliffe filed an amended complaint, which Purdue Pharma again moved to dismiss pursuant to

Rule 9(b). This time, the district court dismissed the complaint with prejudice.

Radcliffe filed a timely appeal. Purdue Pharma then cross-appealed the district court's decision to deny its motion to dismiss.

SUMMARY OF ARGUMENT

As a general rule, prefiling releases of False Claims Act *qui tam* actions are not enforceable. Enforcing such agreements without qualification would undermine a core purpose of the FCA, which is to induce relators to bring allegations of fraud to the attention of the government, instead of sweeping them under the rug as part of a settlement agreement. To alleviate that problem, FCA releases should be enforced if, but only if, the relator's allegations of fraud are disclosed to the government independent of the filing of the *qui tam* action itself. That rule protects the government's enforcement prerogatives, encourages defendants to bring allegations of fraud to the government's attention, and is consistent with the federal policy favoring settlements.

The district court misapplied this rule when it refused to enforce the release here. Contrary to the district court's view, the policies of the FCA do not require the government to investigate fully an allegation of

fraud before a relator may settle the claim with a defendant. Once allegations of fraud are disclosed to the government, nothing in the FCA requires every such allegation to result in a full-dress investigation, let alone litigation, which would make little sense given the expense and inconvenience associated with those endeavors.

ARGUMENT

I. A Prefiling Release Of A *Qui Tam* Action Is Enforceable Only If The Government Has Knowledge Of The Relator's Allegations Of Fraud Independent Of The Filing Of The *Qui Tam* Action.

A. Releases Of *Qui Tam* Actions Are Presumptively Unenforceable.

The FCA does not explicitly address whether a release of a *qui tam* action executed before the filing of that action is enforceable. The statute does provide that after a *qui tam* action is filed the relator and the defendant may not settle (or at least may not voluntarily dismiss) an FCA *qui tam* action without the government's consent. *See* 31 U.S.C. § 3730(b)(1); *Ridenour v. Kaiser-Hill Co.*, 397 F.3d 925, 931 n.8 (10th Cir. 2005); *United States v. Health Possibilities, P.S.C.*, 207 F.3d 335, 339 (6th Cir. 2000); *Searcy v. Philips Elecs. N. Am. Corp.*, 117 F.3d 154,

155 (5th Cir. 1997). But no comparable provision addresses whether a prefiling release is enforceable.

Absent a specific provision addressing whether a release of a federal cause of action is enforceable, "[t]he question whether the policies underlying that statute may in some circumstances render the waiver unenforceable is a question of federal law." *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987). More specifically, it is a question of "[f]ederal common law," which "may supplant state law . . . when 'a significant conflict exists between [a] federal policy or interest and the operation of state law, or the application of state law would frustrate specific objectives of federal legislation.'" *United States* ex rel. *Ritchie v. Lockheed Martin Corp.*, 558 F.3d 1161, 1168 (10th Cir. 2009) (quoting *Boyle* v. *United Technologies Corp.*, 487 U.S. 500, 507 (1988)). Thus, to determine whether a prefiling FCA *qui tam* release is enforceable, a court should apply a federal common law rule, asking whether enforcing the release comports with the purposes of the FCA. *See id.* at 1168-69; *United States* ex rel. *Green v. Northrop Corp.*, 59 F.3d 953, 960-61 (9th Cir. 1995).

The purposes of the FCA support enforcing a prefiling *qui tam* release only if the relator's allegation's of fraud were disclosed to the government independent of the filing of the *qui tam* action itself. The FCA's core purpose is to enlist relators to help the government to "encourage any individual knowing of Government fraud to bring that information forward." S. Rep. 99-345, at 2 (1986). It contemplates that relators will do so by providing the government with notice of their allegations and an opportunity to proceed against the potential defendant. One of the relator's obligations upon filing a *qui tam* action, for example, is to serve on the government a "copy of the complaint and written disclosure of substantially all material evidence and information the person possesses" related to the relator's claims. 31 U.S.C. § 3730(b)(2). Similarly, a relator can be an "original source" of information underlying an FCA action – and thus eligible to bring a *qui tam* action arising out of publicly disclosed fraud allegations – only if he has "voluntarily provided" to the government "the information" on which his *qui tam* lawsuit is based. *Id.* § 3730(e)(4)(B). Those provisions make clear that a central purpose of the FCA is to ensure that relators'

allegations of fraud come to the government's attention and enable the government to determine whether to take enforcement action itself.

This basic purpose would be frustrated if relators and potential defendants could release *qui tam* claims without disclosing allegations of fraud to the government. *See Green*, 59 F.3d at 965-66. That unqualified rule would encourage defendants to buy the silence of relators by offering settlement payments in amounts less than what the defendant would be required to pay the government in any *qui tam* action (or in any independent government lawsuit). *See id.*; *see also United States* ex rel. *Gebert v. Transp. Admin. Servs.*, 260 F.3d 909, 916 (8th Cir. 2001). Such settlements, if categorically enforced, would deter subsequent *qui tam* actions by relators, and the resulting disclosure of relators' allegations of fraud to the government, permitting defendants to evade independent government scrutiny of those allegations. That result would be inconsistent with the FCA, which contemplates that the government will have an independent opportunity to enforce the FCA and related antifraud provisions – through criminal or civil action – when a relator comes forward with allegations of fraud.

B. Purdue Pharma's Approach Conflicts With The Purposes Of The FCA.

Purdue Pharma agrees with the government that the *Rumery* federal common law rule governs whether a prefiling release is enforceable, but contends that such releases are unenforceable only on exceedingly narrow grounds. Purdue Pharma Br. 34-50. That approach misconceives the nature and purpose of FCA *qui tam* actions.

A principal theme of Purdue Pharma's brief is that prefiling FCA *qui tam* settlements should be enforceable because *qui tam* actions are no different in principle from a host of other federal private causes of action that may be settled before filing, such as civil rights, antitrust, securities fraud, and similar claims. *E.g.*, Purdue Pharma Br. 38. But *qui tam* actions possess a public character that differs in kind from those statutes. Most fundamentally, a *qui tam* relator asserts a fraud cause of action that belongs to the government, not merely a cause of action personal to himself. When a relator prevails, the government is entitled to the bulk of the recovery; indeed, a relator has standing to bring such an action at all only because a *qui tam* action is considered a partial assignment to a relator of a government cause of action. *See*

Vermont Agency of Nat'l Res. v. United States ex rel. *Stevens*, 529 U.S. 765, 773 (2000).

Moreover, an FCA *qui tam* action is more than merely a mechanism whereby relators sue to vindicate public interests while the government sits passively on the sidelines. It contemplates, instead, that relators will work as enforcement partners with the government, not merely by suing, but also by informing the government of the underlying allegations of fraud, and otherwise assisting the government with, and even participating in, the action. *See, e.g.*, *id.* at 771-73. Because unqualified enforcement of prefiling *qui tam* releases would interfere with the FCA's remedial scheme, a rule that such releases are presumptively unenforceable is entirely appropriate.

II. The Release In This Case Is Enforceable Because The Government Independently Learned Of The Relator's Allegations of Fraud.

The government, however, agrees with Purdue Pharma that the release the relator executed in this case is enforceable. FCA *qui tam* releases should be enforceable if the government has knowledge of the relator's allegations of fraud independent of the filing of the *qui tam* action itself, and the government had such knowledge in this case.

1. This government-knowledge exception to the general rule that *qui tam* releases are not enforceable comports with the purposes of the FCA. If the government knows of a relator's allegations of fraud, the public interest in disclosing allegations of fraud through filing a *qui tam* action has been vindicated. Such government knowledge also reduces the perverse incentive a *qui tam* defendant would otherwise have to buy the silence of relators, because that defendant faces the real threat of an independent government action (or a *qui tam* action by another relator). The defendant faces that threat because a relator's settlement agreement does not preclude the government from bringing a separate enforcement action based on the relator's allegations. *See Ritchie*, 558 F.3d at 1170 n.8; *Green*, 59 F.3d at 967; *United States* ex rel. *Hall* v. *Teledyne Wah Chang Albany*, 104 F.3d 230, 233 (9th Cir. 1997). This exception to the general principle that such releases are not enforceable would encourage defendants to disclose allegations of fraud to the government – and more generally, to cooperate with government fraud investigations – to ensure that their settlement agreements are enforced. *See Ritchie*, 558 F.3d at 1170-71 & n.9.

That exception is further supported by the interest not only in supplementing government enforcement of the FCA, but also in promoting the orderly and efficient private resolution of FCA cases. *See Ritchie*, 558 F.3d at 1170; *Gebert*, 260 F.3d at 916-17. Another purpose of an FCA *qui tam* action is to encourage relators to bring claims on behalf of the government where the government may lack the resources to bring the claim itself. *See*, *e.g.*, *Ritchie*, 558 F.3d at 1168. Assuming the government is otherwise aware of the fraud, *qui tam* settlements advance that purpose because they provide relators, and threaten *qui tam* defendants, with the prospect of monetary recovery without the need to engage in expensive and inconvenient litigation. Moreover, enforcing *qui tam* settlement agreements that do not conflict with the FCA's policies avoids the gratuitous displacement of state contract law, which should occur "only where . . . a 'significant conflict' exists between an identifiable 'federal policy or interest and the [operation] of state law.'" *Boyle*, 487 U.S. at 507 (quoting *Wallis* v. *Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966)).

The Ninth and Tenth Circuits have adopted this framework to determine whether FCA releases are enforceable. Most recently, the

Tenth Circuit – in an opinion issued after the district court issued its decision on the release in this case – held that FCA *qui tam* releases are generally unenforceable, except where "the allegations of fraud have been disclosed to the government," and enforced an FCA *qui tam* release on those grounds. *Ritchie*, 558 F.3d at 1170.

The Ninth Circuit has adopted the same framework to analyze this issue. In *Green*, for example, it refused to enforce an FCA *qui tam* release, but only because "the government only learned of the allegations of fraud . . . *because of the filing of the qui tam complaint*." 59 F.3d at 966 (emphasis in original). Two years later, in *Hall*, the Ninth Circuit confirmed that the general rule of unenforceability under *Green* does not apply if the government independently obtains knowledge of the relator's allegations of fraud. 104 F.3d at 233. The rule adopted by the Ninth and Tenth Circuits is fundamentally sound, and this Court should follow it here.

Under that rule, the release executed by the relator in this case is enforceable. There is no dispute that, when the *qui tam* complaint in this case was filed, the government had for years been comprehensively investigating Purdue Pharma's OxyContin marketing practices – the

same basic conduct that formed the basis of the relator's *qui tam* complaint. In other words, as the district court concluded, "the government did learn the substance of Radcliffe's allegations independently." 582 F. Supp. 2d at 782. The district court should have enforced the release on the basis of those facts alone.

2. Instead of ending the analysis there, however, the district court concluded that the release was unenforceable "because the government had not fully investigated the substance of Radcliffe's allegations." 582 F. Supp. 2d at 783; *see also id.* at 780 & n.11. That reasoning overlooks the purpose of requiring disclosure of allegations of fraud to the government, which is not to ensure that the government exhaustively investigates and prosecutes every allegation of fraud, but rather that it has an adequate *opportunity* to do so. Nothing in the FCA requires the government to investigate fully every allegation of fraud that is brought to its attention. On the contrary, the FCA leaves it to the discretion of the United States to decide whether, and under what circumstances, to initiate or participate in an FCA action. *See* 31 U.S.C. § 3730(b)(2). Moreover, giving conclusive weight to whether the government's investigation was "complete" as a condition of enforcing an FCA release

could lead to an inappropriate, time-consuming, and amorphous inquiry into the government's internal investigative deliberations and processes. The proper focus of the inquiry is whether the allegations of fraud were sufficiently disclosed to the government, not on whether the government's investigation was complete.

This approach is supported by the *Ritchie* and *Hall* decisions. *Hall* held that a *qui tam* release was enforceable because the government "was aware" and "had already investigated" the relator's allegations; it did not ask whether the government's investigation was *complete*. 104 F.3d at 233. The same is true of *Ritchie*, which enforced a release because the parties had disclosed the relator's allegations of fraud to the government, thus giving the United States "ample *opportunity* to uncover and prosecute any fraud that had taken place." 558 F.3d at 1170 (emphasis added). Neither of those decisions probed the government's internal processes to determine whether the government's investigation was complete, and for good reason.

The district court also stated that "[e]nforcing a release in this situation would deprive the public of a potential relator to enforce the FCA and recover monies for the government treasury." 582 F. Supp. 2d

at 783. But as explained, even a relator who settles an FCA *qui tam* action is “enforcing” the FCA, because the threat of paying such settlements deters fraud no less than paying FCA judgments does. And even when an FCA relator settles with a potential defendant, the government or another relator is still free to bring an FCA suit and recover funds for the government.

CONCLUSION

For the foregoing reasons, the Court may properly affirm the district court’s judgment on the alternative ground that the release the relator executed with Purdue Pharma bars this action.

Respectfully submitted,

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JULY 2009

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), I certify that the attached *amicus curiae* brief is proportionally spaced in 14-point Century font and contains 3,286 words according to the count supplied by Corel WordPerfect 12.

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