Nos. 22-1245, 22-1246

IN THE

United States Court of Appeals for the First Circuit

UNITED STATES, ex rel. CHERYL LOVELL and WILLIAM MCKUSICK,

Plaintiffs-Appellants,

UNITED STATES, ex rel. GEORDIE SANBORN; STATE OF VERMONT, STATE OF CALIFORNIA, STATE OF COLORADO, STATE OF DELAWARE, STATE OF FLORIDA, STATE OF GEORGIA, STATE OF HAWAII, STATE OF ILLINOIS, STATE OF INDIANA, STATE OF IOWA, STATE OF MARYLAND, COMMONWEALTH OF MASSACHUSETTS, STATE OF MICHIGAN, STATE OF MINNESOTA, STATE OF MONTANA, STATE OF NEVADA, STATE OF NEW JERSEY, STATE OF NEW YORK, STATE OF NORTH CAROLINA, STATE OF OKLAHOMA, STATE OF RHODE ISLAND, STATE OF TEXAS, STATE OF WISCONSIN, DISTRICT OF COLUMBIA, COMMONWEALTH OF VIRGINIA, STATE OF NEW MEXICO, STATE OF TENNESSEE, STATE OF WASHINGTON, STATE OF CONNECTICUT, STATE OF LOUISIANA, ex rel. CHERYL LOVELL AND WILLIAM MCKUSICK,

Plaintiffs,

V.

ATHENAHEALTH, INC.,

Defendant-Appellee,

JOHN DOES 1-10,

Defendants.

Caption Continued on Inside Cover

Appeal from the United States District Court for the District of Massachusetts

OPENING BRIEF FOR APPELLANTS LOVELL AND MCKUSICK

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REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

This case presents a question of first impression in this Circuit regarding when attorneys' fees are recoverable under the False Claims Act, 31 U.S.C. § 3730(d), in the context of a global settlement reached between the government, the defendant, and multiple relators following a multi-year coordinated investigation. The district court's decision interpreting the Act to bar fees conflicts with Sixth Circuit precedent. It will also hinder the government's ability to leverage collaborative support from multiple relators and their counsel to investigate and resolve cases involving complex, nationwide fraud schemes.

STATEMENT OF JURISDICTION

The district court exercised subject matter jurisdiction over this False Claims Act suit under 28 U.S.C. §§ 1331 and 1345 and 31 U.S.C. § 3732. Consistent with the parties' settlement agreement, on February 5, 2021, the district court entered an order dismissing all claims other than "Relators' claims for attorneys' fees, expenses, and/or costs … and/or a share of the proceeds of the settlement agreement." JA155. Relators in both cases and the government resolved relator share issues by agreement. JA232. On March 3, 2022, the district court denied Relators-Appellants Lovell and McKusick's motion for attorneys' fees and partially granted Relator-Appellant Sanborn's fee motion, thereby resolving all remaining issues. Add.1-Add.22.[1] Appellants filed a timely notice of appeal on April 1, 2022. JA325. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. When the government intervenes in multiple qui tam actions and the relators, the government, and the defendant all agree to a global settlement that results in all relators receiving "payment from the proceeds" of the settlement, 31 U.S.C. § 3730(d)(1), can the defendant defeat a relator's claim to reasonable attorneys' fees after settlement and agreed-upon dismissal of all relators' qui tam

[1] Per Circuit Rule 28(a), the district court's decision and the settlement agreement are included in an addendum to this brief, and cited as "Add._." Other relevant documents are in the Joint Appendix and cited as "JA_."

claims with prejudice, on the ground that the first-to-file provision could have barred the relator's already-settled action?

2. When the government "proceeds with an action" which results in payment of the relator share "from the proceeds of the action or settlement of the claim," 31 U.S.C. § 3730(d)(1), as part of a global settlement that resolves all of the relator's qui tam claims, is the relator entitled to all reasonable fees incurred to prosecute the action, or only those fees related to the specific claims in which the government intervened?

STATEMENT OF THE CASE

To counteract the "resource mismatch" that occurs when "large, profitable corporations are the subject of a fraud investigation and able to devote many times the manpower and resources available to the Government," Congress encourages "a coordinated effort of both the Government and the citizenry" through the qui tam provisions of the False Claims Act. S. Rep. 99-345, at 2, 8 (1986). This "coordinated effort" often takes the form of the government working with several different whistleblower qui tam relators, each of whom "uncover[s] multiple independent parts of the same complex scheme," with "the government us[ing] the relators' collective resources to investigate the fraud." *United States ex rel. Bryant v. Cmty. Health Sys.*, 24 F.4th 1024, 1035 (6th Cir. 2022), *reh'g denied*, No. 20-5460 (Mar. 18, 2022). In such cases, the government "encourage[s] these relators to work

together on the cases and share any proceeds that might result" by negotiating an agreement among themselves to divide the statutory award available to relators. *Id.* at 1028. The result is often, as was the case here, a global settlement efficiently resolving the claims of multiple relators—and restoring millions of ill-gotten funds to government coffers—all in one fell swoop, and without costly and protracted litigation. *See id.* at 1029.

Here, for over three years, Relators-Appellants worked together with the government to uncover a nationwide fraud, entered a global settlement with the government and Defendant-Appellee AthenaHealth, and negotiated an agreement to share the proceeds. The settlement restored millions to the federal fisc and resolved all of Relators-Appellants' allegations of fraud. In return, Athena secured the dismissal of all qui tam claims with prejudice. But when it came time to pay mandatory attorneys' fees and expenses under the False Claims Act, Athena balked. For the first time in the litigation, Athena argued that the claims of Lovell and McKusick (Appellants in this appeal) were barred by the Act's "first to file" provision, even though the government had intervened in their case, Athena had waived any first-to-file defense (along with all other substantive defenses) by settling, and Lovell and McKusick had received a share of proceeds from the settlement.

The question here is whether the False Claims Act permits a defendant to

secure the benefits of a multi-relator settlement, yet then insist that only one relator is properly before the court when it comes time to pay the mandatory fees that Congress contemplated. Specifically, can a defendant agree to a comprehensive government-led settlement with multiple relators, acknowledge that all relators will share the proceeds, secure a dismissal with prejudice of all relators' claims without litigating any defenses, but avoid paying mandatory reasonable attorneys' fees to settling relators on the theory that they were not first to file?

The Sixth Circuit said no, on substantially similar facts. The district court's contrary result both misconstrued the statute (engrafting an atextual requirement) and misread this Court's precedents (overextending a narrow holding). Its opinion should be reversed.

A. Statutory Framework

The False Claims Act is "the federal government's 'primary litigative tool for combatting fraud.'" *United States v. Millennium Labs., Inc.*, 923 F.3d 240, 244 (1st Cir. 2019) (*Millennium I*) (quoting S. Rep. 99-345, at 2). The Act imposes liability on any person who "knowingly presents … a false or fraudulent claim for payment or approval," 31 U.S.C. § 3729(a)(1)(A), "to an officer, employee, or agent of the United States," *id*. § 3729(b)(2)(A)(i).

The Act authorizes two types of actions: First, the Attorney General may bring a civil action against the alleged false claimant. *Id.* § 3730(a). Second, a private

person, known as a relator, may bring a qui tam civil action "for the person and for the United States Government … in the name of the Government." *Id.* § 3730(b). "If a relator initiates the action, he must deliver a copy of the complaint and supporting evidence to the Government." *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S. Ct. 1507, 1510 (2019) (citing 31 U.S.C. § 3730(b)(2), (4)). While the government considers whether to intervene, the complaint remains sealed, for at least 60 days and often for longer at the government's request, as the government pursues an investigation. 31 U.S.C. § 3730(b)(2), (3).

If the Government chooses to "proceed with the action" by intervening, "the action shall be conducted by the Government." *Id.* § 3730(b)(4). If not, the relator may pursue the action. *Id.* § 3730(b)(4)(B). If the government intervenes, it may settle the case even over the relator's objection if "the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances." *Id.* § 3730(c)(2)(B). The relator then "receives a share of any proceeds from the action … plus attorney's fees and costs." *Cochise Consultancy*, 139 S. Ct. at 1510.

Specifically, "[i]f the Government proceeds with an action brought by a person under subsection (b), such person shall … receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim." 31 U.S.C. § 3730(d)(1). Any such payment "shall be made from the proceeds." *Id.* "Any

such person shall also receive an amount for reasonable expenses … plus reasonable attorneys' fees and costs," awarded "against the defendant." *Id*. If, on the other hand, "the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive" between 25 and 30 percent of the proceeds, plus fees and costs. *Id.* § 3730(d)(2).

"This system is designed to benefit both the relator and the Government." *State Farm Fire & Cas. Co. v. United States ex rel. Rigsby*, 137 S. Ct. 436, 440 (2016). "[E]ncourag[ing] more private enforcement suits … strengthen[s] the Government's hand in fighting false claims." *Id.* (internal quotation marks omitted; second alteration in original). The mandatory attorneys' fees provision—added in 1986 as part of a "set of reforms that were meant to 'encourage more private enforcement suits'"—aims to ameliorate "'a lack of resources on the part of Federal enforcement agencies.'" *Id.* (quoting S. Rep. No. 99-345, at 7, 23-24).

The Act also places certain "restrictions on suits by relators." *Id.* at 440. The "paragraph known as the 'public disclosure bar,' for instance," *id.*, requires dismissal of claims not brought by the government or the original source, absent government objection, "if substantially the same allegations … were publicly disclosed" in certain ways, 31 U.S.C. § 3730(e)(4). And under "the provision known as the 'first-to-file bar,'" *State Farm*, 137 S. Ct. at 440 (quoting *Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, 575 U.S. 650, 663 (2015)), a relator may not

"bring a related action based on the facts underlying [a] pending action," 31 U.S.C. § 3730(b)(5). In this Circuit, the first-to-file bar is not jurisdictional, but provides a defense akin to "'whether a qui tam plaintiff has properly stated a claim.'" *Millennium I*, 923 F.3d at 251 (quoting *United States ex rel. Heath v. AT&T, Inc.*, 791 F.3d 112, 121 (D.C. Cir. 2015)).

Taken together, the False Claims Act's incentives and restrictions "'[s]eek[] the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own.'" *United States ex rel. Ven-A-Care of the Fla. Keys, Inc. v. Baxter Healthcare Corp.*, 772 F.3d 932, 944 (1st Cir. 2014) (quoting *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 294 (2010)).

B. Qui Tam Complaints Against Athena and Global Settlement

1. In 2017, Geordie Sanborn (Relator-Appellant in No. 22-1246) filed a sealed qui tam complaint on behalf of the United States against Defendant-Appellee AthenaHealth, Inc. Add.1. Two months later, and unaware of that complaint, William McKusick and Cheryl Lovell (Relators-Appellants in this appeal) filed their qui tam complaint on behalf of the United States against Athena. Add.1; Add.6.

Athena provides electronic health record and billing software and services. Add.4. Both qui tam complaints alleged that Athena operated client referral

programs providing incentives and payments to medical providers to induce purchases of Athena's services. Add.4; Add.6. The complaints alleged that these payments violated the Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b), making them "per se false claim[s] under the [False Claims Act]," *Guilfoile v. Shields*, 913 F.3d 178, 190 (1st Cir. 2019). Relator Sanborn learned of Athena's client referral payments and incentives from his work in business development and sales for one of Athena's competitors. JA9. Relators Lovell and McKusick brought another perspective, having learned of the kickback programs because they operated a home health care service that was one of Athena's clients. JA48; JA81-JA82. Athena, for example, had asked Lovell and McKusick to participate in Athena's client lead generation program, one of the three kickback programs ultimately pursued by the government in its complaint in intervention. JA81-JA85. Lovell and McKusick thus were able to provide substantial details and supporting documentation about Athena's methods for offering and making kickbacks for purchases of its services. JA81-JA85.

In addition to the kickback claims, Relator Sanborn alleged that Athena marketed its electronic health record technology with a false guarantee of compliance with federal certification requirements for electronic health records, resulting in false claims for certain incentive payments. Add.5. For their part, Relators Lovell and McKusick brought additional claims related to Athena's billing

software systemically submitting false claims for services and the failure to return the resulting overpayments to the government. Add.6.

2. Lovell, McKusick, and their counsel participated in the government's investigation of Athena for over three years. Before and after filing the complaint, counsel for Lovell and McKusick prepared the pre-filing and mandatory disclosures to the government, *see* 31 U.S.C. § 3730(b)(2), (e)(4)(B). JA229-JA230. With counsel's preparation and assistance, Lovell and McKusick were interviewed by the government in January 2018. JA230. Counsel also prepared several supplemental disclosures of information and other documents to answer a series of particular questions from the government in the months and years thereafter. JA229-JA230.

Lovell and McKusick learned of Sanborn's qui tam complaint months after filing their complaint. JA229. With the government's encouragement, their counsel later began coordinating with counsel for Sanborn to support the government's investigation. JA166; JA229-JA230. By fall 2020—about three years after the complaints were filed—the cases had been consolidated and the government's coordinated investigation had progressed, with Relators' help, to the point that the government could reach a "handshake" settlement with Athena. JA5; JA231.

Consistent with the usual practice in multi-relator cases where the parties seek to effectuate a global settlement, and at the request of the government, Relators then negotiated between themselves regarding the allocation of the relator share. JA167;

JA231. The government commonly encourages relators to agree on such an allocation rather than litigate first-to-file status where a coordinated investigation results in a multi-relator settlement. JA210; JA230-JA231; JA263. As the record revealed, this practice is common because it avoids the delay and drain on resources that would accompany litigation of first-to-file issues, allows the government to benefit from cooperation among relators who may each possess information about different aspects of the fraud, and accounts for situations where the arguably first relator does not make as substantial a contribution to the case. JA210-JA211; JA263. Relators with experienced False Claims Act counsel routinely enter agreements allocating the relator share, whether or not their counsel represents the relator with the earliest chronological complaint, JA210, JA218, and all Relators did so here, JA231.

3. Only after Relators notified the government that they had reached an agreement on allocating the relator share did the government file a formal notice to intervene in both qui tam actions for the purpose of settling with Athena. JA231.

The government's consolidated complaint-in-intervention, relying on information gleaned from all Relators, described three programs through which Athena "paid or provided other benefits to existing and potential clients to induce them to do business with Athena." Add.6. The complaint alleged violation of the False Claims Act through these incentives and illegal kickbacks and unjust

enrichment from that wrongful conduct. Add.7.

Shortly after the government filed its complaint, all parties in both actions finalized their global settlement agreement. Athena agreed to pay the government $18.25 million in exchange for a release of claims by both the government and all Relators, except for reserved claims. Add.7; Add.25-Add.26. Relators' release of claims covered all allegations in both qui tam actions, which Relators agreed to dismiss with prejudice. Add.26; Add.31-Add.32. Relators also agreed not to object to the agreement and to confirm that the settlement was fair, adequate, and reasonable under 31 U.S.C. § 3730(c)(2)(B).

Relators reserved their claim to a share of the proceeds of the settlement agreement and to their reasonable attorneys' fees and costs in connection with any claims released by the agreement. Add.24. As to Relators' claim to the relator share, the agreement specified that the United States and Relators retained their rights under the False Claims Act "on the issue of the share percentage, if any, that Relators should receive of any proceeds of the settlement of their claims." Add.28. The agreement further provided that "It is understood by all of the Parties that Relator Sanborn and Relators Lovell and McKusick have reached their own agreement regarding their respective shares of any funds paid by the United States to Relator Sanborn." Add.28. As to Relators' claims for fees, Athena reserved the right to "contest Relators' entitlement to expenses, attorneys' fees, and costs" and to

challenge any such claims for fees. Add.25.

C. Procedural History

To implement the settlement agreement, the district court entered an order dismissing with prejudice all claims other than "Relators' claims for attorneys' fees, expenses, and/or costs … and/or a share of the proceeds of the settlement agreement." JA155. The government and Relators in both cases thereafter entered an agreement resolving all issues related to the relator share. JA167; JA232. The government paid the relator share to Relator Sanborn through his counsel, who sent the agreed allocation to Relators Lovell and McKusick through their counsel. JA167; JA232. After receipt of their share of the proceeds, Relators in both cases moved for attorneys' fees and costs.

Counsel for Lovell and McKusick worked more than 1,100 hours over more than three years assisting the government with its investigation and resolution of the claims against Athena. JA238. Lovell and McKusick argued that they were entitled to recover their reasonable fees under the mandatory fee provision specifying they "shall also receive" fees under § 3730(d)(1), because the government had "proceed[ed] with an action brought by" them "under subsection (b)" and they had received a "payment … under the first … sentence of this paragraph [(d)(1)] … from the proceeds" of the settlement. 31 U.S.C. § 3730(d)(1).

The district court denied their motion in full. The court held that § 3730(d)(1)

"limits entitlement to fees … to the first relator to file, regardless of whether the government 'proceed[ed]' in more than one action or whether the plaintiff who received the relator's share subsequently entered into a private agreement to divide it." Add.10. Even though their claims had been intervened in, settled, and dismissed with prejudice, and even though Lovell and McKusick had already received their agreed-upon and acknowledged share of the proceeds, the court then adjudicated whether the first-to-file bar applied to their complaint, 31 U.S.C. § 3730(b)(5), and held that Relator Sanborn was the first to file. Add.11-Add.13. The district court reasoned that Relators' "private agreement" did not "change the fact that … McKusick and Lovell were not the first-to-file relator," and held that awarding fees would be inconsistent with the statute and First Circuit precedent, specifically *Millennium I*, 923 F.3d at 252. The district court rejected the contrary conclusion reached by the Sixth Circuit in *Bryant*, 24 F.4th at 1039.

On Sanborn's motion, the district court determined that the government did not intervene in Sanborn's electronic health record certification claims and that Sanborn's relator share stemmed from only the kickback claims. Add.16. The court therefore denied Sanborn's motion in part. Add.17. Although acknowledging that the False Claims Act "speaks in terms of 'actions' rather than 'claims,'" Add.16, in describing the fees required "[i]f the Government proceeds with an action" that generates proceeds, 31 U.S.C. § 3730(d)(1), the court held that "both preconditions

to a fee award"—government intervention and receipt of the relator share—must be "analyzed on a claim-by-claim basis," Add.17.

Like Sanborn, Lovell and McKusick argued that the government's intervention in their "action" entitled them to fees under § 3730(d)(1) on all settled claims, including their claims related to false billing and overpayments. The district court implicitly denied these fees on the same basis as it partly denied Sanborn's motion.[2]

SUMMARY OF ARGUMENT

The False Claims Act's applicable fee-shifting provision, 31 U.S.C. § 3730(d)(1), is a straightforward directive. If the "Government proceeds with an action" brought by a qui tam relator, "such person" shall receive a share "of the proceeds of the action or settlement," paid "from the proceeds," and "[a]ny such person shall also receive" attorneys' fees. *Id.* As the Sixth Circuit held, fees are thus mandatory when two textual criteria are met: government intervention and receipt of the relator share. Both are met here. The government intervened in Lovell and McKusick's action, and they received a share "from the proceeds."

[2] Relators also argued that to the extent the court interpreted "action" to mean only the government-intervened claims (the kickback claims), they were entitled to fees on the non-intervened claims (billing and overpayments) under § 3730(d)(2), which mandates fees when the government "does not proceed with an action." *See, e.g.*, Mem. in Support of Fee Mot., Dkt. 83, at 7 n.3 (Apr. 16, 2021). Asserting that neither party had fully briefed this issue, the district court declined to reach it. Add.18.

The district court nonetheless held that Lovell and McKusick were not entitled to fees. Why? Because, in the district court's view, they would not be entitled to a share under the first-to-file bar. But first to file, like all other non-jurisdictional defenses, may be waived by settlement. And it was here. Far from contesting whether Lovell and McKusick properly brought an action or were entitled to share in the proceeds, Athena chose to enter a global settlement with them—a settlement that expressly acknowledged that all Relators had agreed to divide the relator share rather than litigate entitlement to it. Having willingly entered a multi-relator settlement spearheaded by the government, and having secured the benefits of that settlement—including dismissal of all Relators' qui tam claims with prejudice and all Relators' agreement that the settlement was fair and reasonable—Athena cannot avoid the consequences of that settlement (mandatory fees) by belatedly insisting that only one relator's action is proper.

Neither statutory text nor First Circuit precedent allows Athena to interpose the first-to-file rule as a barrier to the mandatory fees that follow Lovell and McKusick's receipt of the relator share. Under this Court's precedent, if relators contest entitlement to the relator share, then only a single relator may be awarded the share—and, by extension, fees. But, as the Sixth Circuit recognized in awarding fees to all sharing relators on materially identical facts, that narrow holding has no purchase in the context here: a global settlement where all parties acknowledged that

the relators agreed *not* to contest first to file and to share the proceeds. To expand the reach of that narrow holding to permit defendants to revive merits defenses that were waived when settling the case would only reward sandbagging and encourage second-guessing of waived merits defenses as part of ancillary fee disputes in already-settled cases, contrary to longstanding judicial norms.

The district court's atextual holding also impairs the purposes of the False Claims Act. To allow a defendant to reap the benefits of settling multiple cases and obtain releases and court-approved dismissals (with prejudice), but then reopen the can of worms by collaterally attacking the merits of the underlying litigation through fee disputes, thwarts Congress's intent in mandating relator fee awards as a key component of fraud deterrence. It makes no sense that defendants should bear less of the enforcement costs (by not paying the mandatory fees for all the work required to bring the actions) for what are often the biggest frauds, where cooperation is needed to unearth the full story.

Ultimately, atextually engrafting the first-to-file bar on eligibility for attorney fees earned in contributing to global settlements will make it much less likely that experienced relators counsel participate in comprehensive settlements like this one—where each relator brings part of the puzzle to the government's attention—without first resolving issues like first to file in the courts. This would provide all the wrong incentives, defeat the efficiencies and expedience of entering settlements,

and tax the limited government resources (judicial and executive) that the False Claims Act aims to preserve.

ARGUMENT

I. The False Claims Act Awards Fees When The Government Intervenes And Settles A Relator's Action, And The Settlement Agreement Contemplates, And The Relator Receives, A Share Of The Settlement Proceeds.

The Court reviews "issue[s] of statutory interpretation de novo." *Oliveira v. New Prime, Inc.*, 857 F.3d 7, 16 (1st Cir. 2017). "[I]nterpretation of [a] settlement agreement" is also reviewed de novo. *Vendura v. Boxer*, 845 F.3d 477, 481 (1st Cir. 2017).

A. Lovell and McKusick Meet the Two Requirements for Fees under the Plain Text of Section 3730(d)(1): Government Intervention and Receipt of the Relator Share.

As "always in matters of statutory interpretation, we start with the text." *Millennium I*, 923 F.3d at 250. The text of the mandatory fees provision, § 3730(d)(1), contains only two "facial prerequisites" to an award of fees: "the receipt of a portion of the proceeds of a successful settlement and government intervention." *Bryant*, 24 F.4th at 1024. Lovell and McKusick meet both requirements.

1. Section 3730(d)(1) provides:

> If the Government proceeds with an action brought by a person under subsection (b), such person shall … receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim …. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an

> amount for reasonable expenses … plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

Read in its entirety, the provision specifies that "any such person" who receives a share of the proceeds in a government-intervened action "shall also receive" "attorneys' fees and costs." *Id.*

The textual driver here is the penultimate sentence, which specifies that:

- "Any such person shall also receive an amount for reasonable expenses … plus reasonable attorneys' fees and costs." *Id.*

This tells us that fees are mandatory for "[a]ny such person." *Id.* But who does "such person" refer to? The "ordinary and normal reading of 'such' … is that it refers to the entire antecedent phrase." *Littlefield v. Mashpee Wampanoag Indian Tribe*, 951 F.3d 30, 37 (1st Cir. 2020). Here, the immediately preceding sentence is:

- "Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds." 31 U.S.C. § 3730(d)(1).

This informs us that "such person" is a "person under the first … sentence of this paragraph" who receives payment "from the proceeds." *Id.* Tracing "person" back to that first sentence, we learn of two requirements: (1) "the Government proceeds with an action" she brought "under subsection (b)" and (2) she "shall receive" a share of the proceeds obtained by the government in that action. *Id.*

Two additional textual clues in the mandatory fee-award sentence reinforce that fees "shall" be awarded to any relator who meets these two requirements, *i.e.*,

who receives a share of the proceeds in a government-intervened action. First, fees are automatic for "*[a]ny* such person." *Id.* (emphasis added). "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting Webster's Third New International Dictionary 97 (1976)). The "expansive word 'any' and the absence of restrictive language [leaves] 'no basis in the text for limiting' the phrase" by adding requirements that are not explicit in the statute. *See Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008) (quoting *Gonzales*, 520 U.S. at 5). Second, the word "also" in the fee-awarding sentence, stating that "any such person" who receives a share of the proceeds "shall also receive" fees, indicates that fees are always an add-on to the proceeds. *See Bryant*, 24 F.4th at 1032.

Considering "the application of § 3730(d)(1) to relators who received a share of the government proceeds of the settlement pursuant to their own sharing agreement," *Bryant*, 24 F.4th at 1031—the same question here—the Sixth Circuit parsed the same text and readily concluded that it means what it says: "'such [a] person,' who (1) commenced an action in which the government intervenes and (2) receives a share of the proceeds from the action or settlement that follows, is entitled to attorney fees." *Id.* at 1032.

This "interpretation is further confirmed by other indicia," including "legislative history." *United States v. De La Cruz*, 998 F.3d 508, 516 (1st Cir. 2021).

Congress added mandatory fee-shifting to the statute in 1986, as part of an effort to "encourage assistance from the private citizenry … [to] bolster[] the Government's fraud enforcement effort." S. Rep. 99-345, at 8. The Senate Report described the provision as awarding fees to "prevailing qui tam relators … in addition to any other percentage of award recovered," because "[u]navailability of attorneys fees inhibits and precludes many private individuals, as well as their attorneys, from bringing civil fraud suits." *Id.* at 29. This congressional intent—to ensure that fees are awarded on top of a share of the proceeds to those relators who bring suits that generate proceeds—is carried out textually: fees follow as a mandatory consequence of receipt of any share of the award (plus, under § 3730(d)(1), government intervention). No more is required.

2.a. Lovell and McKusick meet both requirements. There is no dispute that they commenced an action in which the government "proceed[ed]," because the government formally intervened and filed a complaint-in-intervention raising the kickback claims that Lovell and McKusick had alleged in their complaint. *See* Add.6-Add.7.

b. Lovell and McKusick also received a share of the proceeds from the settlement. The statute requires that "[a]ny payment to a person under the first … sentence of this paragraph shall be made from the proceeds." 31 U.S.C. § 3730(d)(1). That occurred here. A portion of "the proceeds of the action or settlement of the

claim," *id.*, was paid by the government to counsel for Sanborn, who then dispensed a portion to Sanborn and a portion to Lovell and McKusick through their counsel, JA232.

That Lovell and McKusick received their share of the proceeds in a two-step process rather than directly by a government check is immaterial. As the Sixth Circuit explained, "[n]othing in § 3730(d)(1) defines how the relator must obtain the relator's share or requires, either implicitly or explicitly, that the government directly transfer the proceeds to all the relators." *Bryant*, 24 F.4th at 1033. The statute requires only that payment of the share be made "from the proceeds." 31 U.S.C. § 3730(d)(1). And ordinary usage of the word "from" confirms that there is "no linguistic basis" to "read[] the statute to refer only to the [funds'] immediate origin." *See County of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1475 (2020) (rejecting a similarly strained reading of "from" in the Clean Water Act).[3]

To require a relator share be paid directly by the government to a relator as a prerequisite for attorneys' fees would thus impermissibly add words to the statute. A court may not "add words to the law to produce what is thought to be a desirable result," because that "is Congress's province." *EEOC v. Abercrombie & Fitch*

[3] "When John comes to the hotel, John might have come from the train station, from Baltimore, from Europe, from any two of those three places, or from all three. A sign that asks all persons who arrive from Baltimore to speak to the desk clerk includes those who took a taxi from the train station. There is nothing unnatural about such a construction." *Id.*

Stores, Inc., 575 U.S. 768, 774 (2015). And that principle applies with greater force when, as here, piling on an extra-statutory requirement thwarts Congress's purpose. *See County of Maui*, 140 S. Ct. at 1475. Disallowing fees to relators who shared in the proceeds the government recovered after successful intervention in their action undoes the very intent behind the mandatory fee provision.

c. It is enough under the statute that the source of the payment to Lovell and McKusick was the "proceeds of the action or settlement of the claim," without more. *See Bryant*, 24 F.4th at 1028-29 (holding relators who received a share of proceeds under a private sharing agreement were entitled to fees without reference to whether defendant acknowledged the sharing agreement in the global settlement).

But there is more here. The government encouraged Relators to resolve the allocation of the relator share before formalizing the settlement with Athena, intervening to formally settle the case only after Relators notified the government that they had done so. JA231. And all parties (including Athena) expressly acknowledged that Lovell and McKusick would receive a share of the proceeds. The settlement agreement specified that all three Relators reserved their rights "to claim entitlement under 31 U.S.C. § 3730(d) … to a share of the proceeds of this Agreement." Add.25. In addition, the United States and all three Relators agreed "that they each retain all of their rights … on the issue of the share percentage, if any, that *Relators*," plural, "should receive of any proceeds." Add.28 (emphasis

added). In the next sentence, all parties acknowledged that Sanborn, Lovell, and McKusick had reached "their own agreement regarding their respective shares of any funds paid by the United States to Relator Sanborn." Add.28. The parties anticipated that the funds would be dispensed first to Sanborn, but that all Relators would receive a portion of the settlement proceeds.

This is thus not a case where the parties agreed that Sanborn would receive the relator share and he "subsequently entered into a private agreement to divide it." Add.10. Rather, the settlement agreement—conditioned on all Relators' release of their claims and signed by all parties including Athena—contemplated that all Relators would receive a portion of the relator share in lieu of litigating who was first to file. The government reserved its right to challenge any Relator's entitlement to the relator share, Add.28, but rather than exercise that right, the government later entered an express agreement with all three Relators regarding the share, not Sanborn alone, JA232.

As formalized in a court-approved settlement, Lovell and McKusick received a share of the proceeds of the settlement of their claims. That, coupled with the government's intervention in their complaint, entitles them to the award of reasonable expenses, fees and costs that inexorably follows under paragraph (d)(1).

See Bryant, 24 F.4th at 1034.[4]

B. Lovell and McKusick's Fees Are Not Barred by the First-to-File Provision under Statutory Text or First Circuit Precedent.

The district court's primary reason for rejecting Lovell and McKusick's fees was that—notwithstanding their receipt of proceeds from settlement of their government-intervened action—they were not entitled to a relator share because only the first-to-file relator is *entitled* to a relator share and they were not first. Add.10-Add.11. This reasoning wrongly conflates *receipt* of the relator share—which is the requirement (along with intervention) for an award of fees under § 3730(d)(1)—with the distinct question of whether a relator is formally *entitled* to the share, had any party chosen to litigate the non-jurisdictional first-to-file merits defense, rather than settling. No one did. Athena could have declined to settle Lovell

[4] These settlement terms, moreover, distinguish the few district court cases denying fees on the ground that the relators' receipt of a share of the proceeds was not expressly acknowledged as part of the settlement agreement signed by the defendant. *See, e.g.*, *United States ex rel. Allstate Ins. Co. v. Millennium Labs., Inc.*, 464 F. Supp. 3d 449, 451-52 (D. Mass. 2020) (*Millennium II*) (settlement contemplated potential litigation over relator share, which in fact occurred, and relator entitled to share "separately entered into a private sharing agreement with some of the [other] relators"); *United States ex rel. McNeil v. Jolly*, 451 F. Supp. 3d 657, 668 (E.D. La. 2020) ("While the relators were not barred from entering into separate agreements as to the division of the shares awarded to Bergeron and McNeil, the Relators Settlement Agreement between the government and the relators did not provide for such shares to Lawson, Green, Church, or Outerbridge."); *United States v. NextCare, Inc.*, No. 3:11cv141, 2013 U.S. Dist. LEXIS 14668, at *7 (W.D.N.C. Feb. 4, 2013) ("There is no dispute that the Federal and State Settlement Agreements reference only Relator Granger as receiving a Relator's share of the settlement proceeds.").

and McKusick's action. Instead, Athena chose to participate in a multi-relator settlement, explicitly acknowledging that Lovell and McKusick would share proceeds with Sanborn. Add.28. Athena thereby secured dismissal of all Relators' qui tam complaints with prejudice without litigating any defenses (including first to file). Add.31-Add.32. The settlement disposes of any first-to-file objection to Lovell and McKusick's entitlement to receipt of proceeds. It should also have disposed of any objection to the mandatory fee award that follows automatically from receipt of such proceeds.

Nothing in the statutory text or First Circuit precedent permits Athena to voluntarily settle multiple relator actions in a global agreement; secure the benefits of that multi-relator settlement, including dismissal with prejudice of all Relators' claims; and then after receiving these benefits, claim that all but one relator action was invalidly brought to avoid the mandatory-fee consequences of its settlement.

1. Starting, as required, with the statutory text, *Oliveira*, 857 F.3d at 16, no textual criterion hinges entitlement to fees on post-settlement adjudication of compliance with the first-to-file bar for a relator who has received a share of the proceeds. Rather, "[a]ny" relator who receives a share of the proceeds "shall also receive" fees. 31 U.S.C. § 3730(d)(1).

The first-to-file bar specifies that "[w]hen a person brings an action under this subsection [(b)], no person other than the Government may intervene or bring a

related action based on the facts underlying the pending action." *Id.* § 3730(b)(5). The Supreme Court has described this provision as "requir[ing] … the dismissal of a relator's action." *State Farm*, 137 S. Ct. at 442. But the first-to-file defense is "not jurisdictional" and noncompliance is akin to failure to state a claim. *Millennium I*, 923 F.3d at 251. Like any ordinary defense, it therefore may be waived, forfeited, or settled. *See Jalbert v. U.S. Secs. & Exch. Comm'n,* 945 F.3d 587, 593 (1st Cir. 2019) ("[W]hile jurisdictional issues can be raised at any time during the case and are never waived, non-jurisdictional issues are waivable."). When, as here, a defendant chooses to settle multiple relator actions, and all relators receive their agreed-upon share of the settlement proceeds, the defendant has waived the defense. Especially so when, as here, the settlement agreement expressly contemplated that multiple relators would share the proceeds. Add.28.

Nothing in the text of § 3730(d)(1) authorizes a defendant to revive its foregone merits defenses, including first to file, as a condition precedent to the award of fees. Section 3730(d)(1) makes no express mention of first-to-file requirements, simply stating that "[i]f the Government proceeds with an action brought by a person under subsection (b), such person shall receive" a relator share, and that "[a]ny such person shall also receive" fees. This bare mention of "subsection (b)" does not require "satisfaction of the first-to-file rule … as [a] condition[] for the receipt of attorney fees." *Bryant*, 24 F.4th at 1031, 1035. As the Sixth Circuit reasoned, the

more natural reading of the reference to "subsection (b)" is that it "simply distinguishes qui tam actions by private parties from those actions that the Attorney General initiates under § 3730(a)." *Id.* at 1035. And even if the cross-reference to subsection (b) requires consideration of who was first to file in deciding if a person is *entitled* to receive the relator share, a person who in fact *receives* the share is "[a]ny such person" who "shall also receive" fees under § 3730(d)(1).

Two additional aspects of the statutory structure reinforce that the first-to-file defense should not be applied to bar fee eligibility in this global settlement context, where the parties agreed *not* to litigate entitlement to the relator share.

First, the reference to subsection (b) occurs only in paragraph (d)(1) (regarding intervened actions) and not paragraph (d)(2) (regarding non-intervened actions). *Compare* 31 U.S.C. § 3730(d)(1) ("If the Government proceeds with an action *brought by a person under subsection (b)* …."), *with id.* § 3730(d)(2) ("If the Government does not proceed with an action *under this section* …."). That disparity makes sense only if the reference to subsection (b) in (d)(1), the provision governing fees in intervened cases, is understood as clarifying that the action was brought by a "private person[]" under § 3730(b) rather than by the government under § 3730(a). Such clarification is required under the intervened-case provision because the government could be "proceed[ing]" with an action that it initiated. But there is no need to so clarify in (d)(2), the provision governing cases when the government does

not proceed; a private-person action is the only option.

But on the district court's reading, the distinction between (d)(1) and (d)(2) creates anomalous results. In cases where the government has chosen to intervene—by definition, the cases most likely to be meritorious and involve substantial relator contributions—defendants would be permitted to enter a global settlement with multiple relators that have cooperated in a comprehensive investigation, but then spring a first-to-file defense to avoid paying attorneys' fees to all but one. In non-intervened cases, defendants would have no such opening to skirt mandatory fees following a multi-action settlement. This disparate outcome—where there is less incentive to come forward in the most important cases where knowledge from multiple relators is most needed—cannot be what Congress intended. *See Kellogg Brown & Root Services, Inc.*, 575 U.S. at 663 (rejecting interpretation of the first-to-file bar that "would lead to strange results that Congress is unlikely to have wanted").

Second, § 3730(d) does specify some circumstances where a court may or must reduce or eliminate the relator share but has no such specified consequence for the first-to-file bar. That omission is meaningful, because "Congress' use of 'explicit language' in one provision 'cautions against inferring' the same limitation in another provision." *State Farm*, 137 S. Ct. at 442 (quoting *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 384 (2013)). Specifically, if a relator "planned or initiated" the underlying fraud, 31 U.S.C. § 3730(d)(3), the district court may reduce the award, and it must

eliminate the award if a relator is criminally convicted of the fraud, *id.* § 3730(d)(3). Similarly, under the second sentence of § 3730(d)(1), the court must provide a reduced award if a relator's action was "primarily" based on public disclosures.

Despite specifying these criteria for reducing or eliminating the qui tam award, subsection (d) makes no provision for reducing or eliminating the award based on the first-to-file bar. That is because if the litigation is already at the fee-award stage, the first-to-file bar has no work to do. As interpreted by the courts, the consequence of noncompliance with the first-to-file bar is dismissal. *See State Farm*, 137 S. Ct. at 442; *Millennium I*, 923 F.3d at 251. When the action is not dismissed on that basis, however—and is instead "proceed[ed] with" and settled, § 3730(d)(1)—courts should be cautious of supplying other consequences for alleged noncompliance (*e.g.*, precluding payment of attorneys' fees) that the statute does not specify. *Cf. State Farm*, 137 S. Ct. at 443 (Given other "provisions that do require, in express terms, the dismissal of a relator's action," it "is proper to infer that, had Congress intended to require dismissal for a violation of the seal requirement, it would have said so.").

2. Ultimately, when defendants face multiple relator actions with potentially overlapping claims, they have a choice. If defendants move to dismiss actions they believe are barred by first to file, they secure dismissals without prejudice, limited to the claims which overlap with earlier-filed actions. *See United States ex rel.*

Gadbois v. PharMerica Corp., 809 F.3d 1, 3 (1st Cir. 2015) ("[T]he dismissal of a section 3730(b)(5) claim ordinarily should be without prejudice, because the claim could be refiled once the first-filed action is no longer pending."). If, on the other hand, defendants choose to participate in multiple-relator settlements, then defendants, the government (if intervened), and relators can structure agreements that defendants may perceive as more valuable than litigating later-filed actions, such as dismissal with prejudice of all relators' claims, overlapping or not.

Settlement is flexible and permits parties to waive defenses or statutory requirements that they might have otherwise insisted upon. *See Jalbert*, 945 F.3d at 594 (where party claimed agency exceeded its statutory authority, it "had undeniably waived the right to assert the claim by settling"). Settlements are fully consistent with the False Claims Act and public policy favoring settlement. *See* pp. 42-48, *infra*. What the Act does *not* authorize, however, is the revival of settled defenses at the fee stage. After choosing to settle rather than litigate Lovell and McKusick's action, acknowledging that Lovell and McKusick claimed entitlement to the relator share and would receive a portion of it, nothing in the text of § 3730(d)(1) permits Athena to revive its waived non-jurisdictional first-to-file defense to avoid paying the mandatory attorneys' fees that follow automatically upon the receipt of a share of the settlement proceeds.

3. This Court's holding in *Millennium I* does not help Athena, either. That

case involves post-settlement litigation over which relator was first to file in a narrow context: when the relators dispute among themselves, post-settlement, who is *entitled* to the relator share. In that context, the Court held that "only the first-to-file relator can claim the relator's share of the settlement proceedings for each claim," because to "be entitled to the relator's share …, a relator must be a person who 'br[ings]' 'an action under … subsection [3730(b)],'" and the "first-to-file rule bars any 'person other than the Government' from 'bring[ing] a related action.'" 923 F.3d at 252 (quoting 31 U.S.C. § 3730(b)(5), (d)(1)) (alterations in original). But whether or not a relator could successfully claim *entitlement* to the relator share if the issue were litigated, attorneys' fees flow automatically from *receipt* of the share. In other words, when share entitlement is not litigated, *Millennium I*'s holding is not applicable.

Millennium I's holding thus has no bearing here, where Relators brought and settled two actions with concurrence by the government and Athena, and all Relators received a share of the proceeds according to the settlement terms. The first-to-file rule has no work to do when all qui tam claims have been settled and dismissed and there is no dispute among the relators about how to divide the proceeds.

Moreover, the *Millennium* Court did not consider, much less cast doubt on, the relators' ability to resolve share-entitlement via settlement. In fact, the Court acknowledged that the relator-share issue was presented only between some of the

relators, not all, because the relator ultimately found first to file had "reached an agreement with [a different] group" of relators. *Millennium I*, 923 F.3d at 248 n.8 (internal quotation marks omitted).[5] The other court of appeals' cases cited by the Court in support of the single-relator-entitlement rule, *see id.* at 252, likewise either did not address, or affirmatively left open, the question of how the first-to-file bar applies (if at all) when relators apportion the relator share by agreement. *See, e.g.*, *United States ex rel. LaCorte v. SmithKline Beecham Clinical Labs., Inc.*, 149 F.3d 227, 237 (3d Cir. 1998) (declining to address the application of § 3730(b)(5) to complaints filed by relators who divided relator share by agreement).

The Court should not break new ground and create a circuit split with the Sixth Circuit—the only court of appeals to address the question presented here—by extending *Millennium I* to condone defendants belatedly raising merits challenges in

[5] In a case relied on by the district court here, the district court later denied fees to one of the relators (Allstate) that had entered a sharing agreement with the relator this Court held was first to file (McGuire). *See Millennium II*, 464 F. Supp. 3d at 453. Allstate was not similarly situated to Lovell and McKusick for multiple reasons. Most importantly, the government did not intervene in its case, so its claim to fees stemmed not from § 3730(d)(1) (the provision at issue here), but from § 3730(d)(2). *See* 464. F. Supp. 3d at 451. In addition, at the time of the settlement, the first-to-file bar was considered jurisdictional; the settlement agreement did not contemplate that the relator share would be divided; and at the time of Allstate's fee petition, a different relator had already been adjudicated first to file. *See id.* at 451-53. To the extent *Millennium II* sweeps more broadly and adopts a per se rule that "only a first filer can … qualify as 'any such person' entitled to fees," *id.* at 453, that outcome does not apply to § 3730(d)(1), is inconsistent with the statutory text, and is not dictated by *Millennium I*.

ancillary proceedings after a global settlement. The Sixth Circuit considered its holding fully consistent with *Millennium I*, 24 F.4th at 1038, and rightly so; this Court, like the Sixth Circuit, has "never applied the first-to-file rule … when there was no reason to do so because the government, relators, and defendants all settled their claims together," including all issues related to the relator share, *id.* at 1037. Permitting defendants to revive settled defenses to avoid paying attorneys' fees, when they entered agreements that expressly contemplated the relator share would be divided, is inconsistent with the first-to-file bar's non-jurisdictional nature, *see Millennium I*, 923 F.3d at 251, and the purpose of the first-to-file provision.[6]

Allowing Athena to litigate the merits of Lovell and McKusick's claims in a fee proceeding (to try to wiggle out of the fee awards that automatically follow upon receipt of the relator share) would, as described below, transgress fundamental principles in our adversarial system that ancillary post-judgment proceedings do not present opportunities to re-open a case on the merits. An "attorney-fees dispute should not allow the litigants to revisit claims they settled and dismissed … years ago." *See Bryant*, 24 F.4th at 1037.

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[6] *Millennium I* is fully consistent with awarding fees to Lovell and McKusick. If the Court were to conclude, however, that *Millennium I* requires affirmance, Appellants preserve for en banc review the argument that it was wrongly decided in part.

C. Atextually Limiting Fee Awards to a Single Relator in Already Settled and Dismissed Cases, Because of a Belatedly Raised First-to-File Defense, Will Deter Anti-Fraud Efforts and Frustrate Judicially-Favored Settlements.

Limiting fee awards to a single relator following comprehensive multi-relator settlements is not only flatly inconsistent with the False Claims Act's text. It would also frustrate achievement of the Act's goals. On the other hand, awarding fees to multiple relators participating in a global settlement after a collaborative effort "when there is little risk of opportunism tracks Congress's goal of encouraging collaboration between the government and the public to uncover fraud." *Bryant*, 24 F.4th at 1036.

Multi-relator settlements provide an efficient and effective way for combatting the most complex frauds, because "Government counsel and relator counsel alike share a common interest in combining and focusing resources on the defendant rather than siphoning off resources and time to fighting about who is 'first to file'." JA228; *see also* JA263. Given the low risk of opportunistic tag-along suits in the context of government-led coordination, barring the recovery of fees for all but one first-to-file relator will gain little to nothing. But much will be lost, as multi-relator participation will be discouraged, making it harder to reach settlements in multi-relator cases and thwarting the efficient resolution of complex cases.

1. Comprehensive settlements resulting from multiple relators contributing to a single investigation serve the purposes of the False Claims Act.

The False Claims Act is a potent civil weapon in addressing fraud against taxpayers; a weapon powered by private citizen whistleblowers and their counsel. The "central purpose" of the 1986 amendments was "an expansion of opportunities and incentives for private citizens with knowledge of fraud against the government to come forward with that information." *United States ex rel. S. Prawer & Co. v. Fleet Bank*, 24 F.3d 320, 324 (1st Cir. 1994). The amendments, by mandating a guaranteed range for relator recovery and enacting a mandatory fee-shifting provision, encouraged a "coordinated effort" between private attorney generals and the government to address "sophisticated and widespread fraud." S. Rep. No. 99-245, at 2; *see also Prawer*, 24 F.3d at 326. Nowhere is such coordination "more salient than when, [as here], multiple relators each describe pertinent aspects of a broad-reaching fraud," *Bryant*, 24 F.4th at 1035, because government "resource challenges are particularly acute where the alleged fraud involves a nationwide corporate scheme," JA227. "Allowing relators to recover fees in [such] broad-reaching fraud[s] … help[s] the government by incentivizing multiple relators and their counsel to prosecute a case that the government may not be able to pursue on its own." *Bryant*, 24 F.4th at 1035. And the difficulties that the government faces in detecting and prosecuting fraud on its own are "especially true (and particularly

complicated) in the massive fraud cases," which is why they "frequently include a number of relators and their separate counsel." *Id.* (citing *United States ex rel. Doghramji v. Cmty. Health Sys., Inc.*, 666 F. App'x 410, 420 (6th Cir. 2016) (Stranch, J. concurring)).

When various whistleblowers come forward with information about distinct aspects of a complex nationwide fraud to bring qui tam actions against a single defendant, the government can "leverage the evidence, knowledge, and positions (e.g., an insider who can do consensual monitoring, relators in different parts of the country in a nationwide scheme, a current or former senior executive) of different relators as well as draw upon the resources of the multiple relators' lawyers." JA227; *see also* JA211; JA263. And evidence shows that specialized relators counsel, like counsel here, play a crucial "positive role in the system, enjoying higher litigation success rates and surfacing larger frauds compared to less experienced firms." David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 Colum. L. Rev. 1244, 1249 (2012).

The proof is in the pudding. Since passage of the 1986 amendments, whistleblowers have been awarded more than $8 billion from recoveries of more than $48 billion in settlements and judgments related to qui tam actions. *See* DOJ, Fraud Statistics, October 1, 1986 - September 30, 2021, at 3, https://tinyurl.com/39rp4kta ("DOJ Fraud Statistics"). In 2019, of the $3 billion in settlements and judgments

from civil cases involving fraud and false claims, over $2.1 billion was recovered in whistleblower-initiated qui tam actions. *See* DOJ, Justice Department Recovers over $3 Billion from False Claims Act Cases in Fiscal Year 2019 (Jan. 6, 2020), https://tinyurl.com/34pmzw67. Combatting health care fraud, as in this case, has historically been a False Claims Act enforcement priority, and 2021 was a record year, with more than $5 billion of the total $5.6 billion recovered obtained from the health care industry (not counting substantial additional amounts recovered for state Medicaid programs). *See* DOJ Fraud Statistics at 5.

Since Congress amended the False Claims Act in 1986, "many of the Government's largest [False Claims Act] settlements have come in multiple relator cases." JA227; *see also* DOJ, Fact Sheet: Significant False Claims Acts Settlements & Judgments, Fiscal Years 2009-2016, https://tinyurl.com/55ew67ry (showing how global settlements involving multiple qui tam actions have contributed to some of the government's biggest recoveries, particularly in the health care sector).

2. Statutory fee awards to relators receiving a share under multi-party settlements in intervened actions pose no risk of parasitic litigation or delayed reporting.

The district court's rule risks hindering the cooperation that makes such settlements possible, even though such a rule does nothing to further the goals of the first-to-file bar. Awarding reasonable attorney fees to counsel for relators who have helped efficiently recover millions of dollars to the fisc—after investing years of

time and resources cooperating in sharing information and facilitating government investigation of complex nationwide frauds—is fully consistent with what courts have recognized to be the "fine line" drawn by Congress in the 1986 amendments of "encouraging whistle-blowing [while] discouraging opportunistic behavior." *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 651 (D.C. Cir. 1994). Such settlements are not only extraordinarily successful in rooting out the biggest frauds; they do not reward copycats. They also do not distort the incentives for prompt reporting of fraud provided by the first-to-file rule.

Encouraging multiple relators—who cannot file qui tam actions pro se, but must proceed through counsel, *see, e.g.*, *United States ex rel. Stoner v. Santa Clara Cnty. Off. of Educ.*, 502 F.3d 1116, 1128 (9th Cir. 2007)—to cooperate with the government to investigate complex nationwide frauds does not spur the type of "parasitic" litigation that the first-to-file bar aims to prevent. Far from it. Rewarding cooperation that allows efficient recovery and comprehensive resolution of multiple claims promotes exactly the "'useful [and] proper return' to the government" intended by Congress. *Prawer*, 24 F.3d at 327-328. Here, the different Relators—who filed within months of one another and had no knowledge of one another's complaints—brought forward different aspects of Athena's illegal kickbacks. They had disparate vantage points as electronic health record services sellers competing with Athena (Sanborn) and buyers recruited by Athena to participate in the client

referral kickback scheme (Lovell and McKusick). This complementary information allowed the government to uncover the entire scope of Athena's malfeasance. And, while the benefits of encouraging such cooperation abound, several guardrails protect against opportunistic, low-value-added claims.

As an initial matter, relators have little incentive to negotiate settlements that require sharing proceeds with mere tag-along claims. Here, Relators supported the government's investigation for more than three years—with all Relators' counsel coordinating to do so for a year and half—before negotiating a sharing agreement (at the government's encouragement). Only after the relator share issue was resolved did the parties begin to collectively negotiate the global settlement terms. JA231. All Relators' counsel together also negotiated with the government about the total relator share. JA232. Parasitic tag-along relators (and their counsel) would have no bargaining power in such negotiations, and may not even be part of government-led settlement initiatives, because the government typically intervenes selectively in only those cases where relators' participation has been meaningful. *See, e.g.*, *Millennium I*, 923 F.3d at 247 (describing how government intervened in only four of several relator suits).

"[G]overnment intervention and successful settlement resulting in proceeds are [thus] prerequisites to recovering attorney fees under § 3730(d)(1), rendering the pool of possible relators significantly less than infinite." *Bryant*, 24 F.4th at 1033.

Not only do these criteria limit the number of cases, they ensure high-quality claims. Claims in which the government opts to intervene are not frivolous, having already passed a relatively high bar. Historically the United States has intervened in less than one-quarter of False Claims Act cases. JA226. Yet intervened claims account for the lion's share of recoveries (over 92%). *See* DOJ Fraud Statistics, at 3. What's more, when the defendant opts to settle, rather than fight, the probable merit of the claims is all the greater.

As a final check, only reasonable attorney fees are recoverable. Relators not only have to participate in settlement, and convince the other relators to share, they also must show that requested fees are reasonable, something a mere tag-along parasitic relator is hardly likely to be able to do. *See Bryant*, 24 F.4th at 1033.

Beyond furthering the achievement of "that golden mean" between incentivizing "whistle-blowing insiders with genuinely valuable information" and "discourag[ing] … opportunistic plaintiffs," fee awards to multiple relators who meaningfully participate in a coordinated investigation also foster another purpose this Court has recognized for the first-to-file bar: encouraging prompt reporting of fraud to the government. *See Ven-A-Care of the Fla. Keys, Inc.*, 772 F.3d at 944. The Court held in *Ven-A-Care* that the first-to-file bar provided an important incentive for knowledgeable insiders to report fraud as quickly as possible, so that they do not risk losing the relator share to relators who know less but file more

quickly. *Id.* But awarding fees to relators who have agreed to divide the relator share, at the government's urging, does not reduce the incentive to file quickly, because there is no guarantee that whichever relator filed first would agree to share (or that the government would intervene in late-coming relators' cases).

If anything, permitting relators to negotiate division of the relator share without forfeiting the right to attorneys' fees provides additional incentives to file quickly. Coordinated efforts and global settlements typically emerge where, as here, the relators filed around the same time. *See, e.g.*, *United States ex rel. Merena v. SmithKline Beecham Corp*., Nos. 93-5974 et al., 1997 U.S. Dist. LEXIS 19896, at *1-3 (E.D. Pa. July 21, 1997) (describing sharing agreement among a group of relators who filed around the same time that excluded relators who filed much later). And the possibility of a negotiated sharing agreement lessens the first-to-file bar's propensity to "discourage[] [knowledgeable relators] from coming forward with valuable information about potential fraud for fear a less knowledgeable relator already beat them to the door." *Ven-A-Care of the Fla. Keys, Inc.*, 772 F.3d at 944.

Ultimately, when the government works with multiple relators over years to conduct a comprehensive investigation, and then intervenes to coordinate a multi-relator settlement of complex frauds with the defendant's sign-on, there is "no need to protect the government from opportunism when there is no evidence of it." *Bryant*, 24 F.4th at 1039. Nor is there any need to protect other relators from "dilut[ion] [of]

th[e] potential payout," *Millennium I*, 923 F.3d at 243, because the relators themselves agreed to "fairly allocate the 'bounty' depending on each relator's contribution," *Bryant*, 24 F.4th at 1034. In such circumstances, awarding fees fosters that crucial balance between encouraging useful qui tam suits and discouraging opportunistic ones.

3. Allowing defendants to challenge fee eligibility by raising merits defenses post-settlement rewards sandbagging, deters settlements, wastes resources, and diminishes the deterrence enabled by mandatory fee awards.

While there is little downside to awarding fees as Congress contemplated, the risks of refusing to do so are significant. Denying fee awards to experienced counsel who dedicated thousands of hours, specialized skills, and substantial resources to uncovering vast frauds would only kneecap future False Claims Act recoveries. Counsel will be much less likely to bring complex fraud claims—never mind sign on to years-long collaborative endeavors—if fees are barred absent costly litigation about who was first to file. Settlements will be much harder to achieve if relators are hampered from agreeing on a division of the proceeds, and the government and the relators' resources will be unnecessarily diverted from uncovering fraud and recovering funds to sorting out who gets what. JA210-JA211; JA263. This result flatly contravenes the public policy favoring settlements and the final resolution of claims. And the government's "primary litigative tool for combatting fraud," *Millennium I*, 923 F.3d at 244, will fail to function as Congress intended.

The months-long multi-party settlement process here, led by the government following a years-long investigation, resulted in court-approved dismissal of all qui tam claims with prejudice. Leveraging scarce government resources in this way avoids litigation expenses for all, preserves scarce judicial resources, and benefits defendants by expeditiously resolving all claims. By leaving the relators to determine amongst themselves how to allocate the proceeds, the government need not devote already scarce resources to participating in first-to-file fights, or otherwise determining the division of the collectively won proceeds.

There is no reason to force first-to-file fights when the relators have successfully negotiated a division of the relator share and the government and the defendant are on board, as part of a comprehensive settlement resulting in dismissal with prejudice of all claims. The first-to-file rule has no work to do in this context. One purpose of the rule is to protect defendants from the cost and complexity of defending multiple lawsuits based on the same, or similar facts. *See Millennium I*, 923 F.3d at 244 ("Legislative history shows that this rule was meant to 'clarify in the statute that private enforcement under the civil False Claims Act is not meant to produce class actions or multiple separate suits based on identical facts and circumstances.'") (quoting S. Rep. No. 99-345, at 25). But just as the Court recognized that purpose was served by a defense that was waivable by the defendant, *id.*, it is served by a comprehensive settlement across multiple cases, which

defendants often insist on (and sought in this case). *See Bryant*, 24 F.4th at 1028 (government encouraged relators to enter a sharing agreement because it learned the defendant "would require that all seven qui tam complaints be dismissed" to settle). A global settlement coordinated by the government with the defendant's blessing, that settles and dismisses both intervened and non-intervened claims, does the same as litigating first-to-file action-by-action, but better. Not only are there no litigation costs, but the settlement disposes of all possible claims with prejudice (which a first-to-file dismissal would not), including the non-intervened claims that the relators would otherwise have the right to pursue. And if a defendant does not think a multi-relator settlement is better than litigating first to file, it need not settle.

Permitting settling defendants to defeat fees based on a post-settlement adjudication of first-to-file, on the other hand, will make the comprehensive settlements that benefit all parties much harder to achieve. In many cases, parties would first need to resolve threshold issues like first to file or the public disclosure bar, 31 U.S.C. § 3730(e)(4), delaying the government's recovery of funds beyond what is already a lengthy process, and resulting in years of costly litigation that could otherwise be avoided. *See* JA226 ("[S]uccessful cases typically take at least 3 years or more to reach an intervention decision and/or settlement."); *Millennium I*, 923 F.3d at 247 (appeal adjudicating who was first to file four years after claims were settled); *Bryant*, 24 F.4th at 1037 (first-to-file issues still being litigated seven years

after claims were settled).

Allowing such settlements to be undermined by late-breaking defenses cloaked within fee disputes also threatens the strong public policy in favor of settlements, a policy that applies with special force where "a government actor committed to the protection of the public interest has pulled the laboring oar in constructing the proposed settlement." *Jalbert*, 945 F.3d at 595 (internal quotation marks and citations omitted).

It is well settled that attorneys' fees disputes, collateral to the merits, should not be used to revisit defenses that could and should have been raised earlier. The Sixth Circuit recognized this to be true even when considering the first-to-file bar jurisdictional, *Bryant*, 24 F.3d at 1037, and the premise applies with greater force to non-jurisdictional defenses (like the first-to-file bar, *see Millennium I*, 923 F.3d at 251). Because it "is just as important that there should be a place to end as that there should be a place to begin litigation," *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938), fee disputes, which are supposed to be ancillary and ministerial in nature, should not be used to "spawn a second litigation of significant dimension." *Tex. State Tchrs. Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791 (1989). Requiring the "hypothetical relitigation" of already-settled cases "disserves conservationist ends by needlessly squandering scarce judicial resources." *Guglietti v. Sec'y of Health & Hum. Servs.*, 900 F.2d 397, 403 (1st Cir. 1990) (rejecting a proposed "case-specific method" for

determining eligibility for fee awards where the district court would have to review "each disability-termination suit to see if, in its judgment, the claimant 'was going to win anyway'")

To hold otherwise, and affirm here, would incentivize off-the-cuff resolution of intricate defenses that were effectively resolved when the parties agreed to settle and dismiss. That risks turning the ancillary fee proceeding into a full-blown merits battle, even when no party is contesting the relator share and the claims have already been dismissed. Defendants would be encouraged to use fee proceedings to smuggle in waived (and now irrelevant) merits defenses after securing their with-prejudice dismissals, with no downside risk. Athena's attempt to have its cake and eat it too should be refused.

Of course, the statutory bars have work to do when "either defendants [timely] contest relators' claims or the government contests the relators' receipt of a share." *Bryant*, 24 F.4th at 1038. "In those circumstances, courts reasonably seek assurance that relators' complaints satisfy the [False Claims Act's] prerequisites," and are not "parasitic lawsuits." *Id.* (internal citations and quotations omitted). But as the Sixth Circuit rightly recognized, the "global settlement" including the government, relators, and defendant here obviates the need for any "such assurance." *Id.*

Ultimately, a bright line rule enforcing the statutory text "encourages parties to resolve efficiently disputes about attorney fees and statutory bars on the front-end,

rather than years after settlement." *Bryant*, 24 F.4th at 1039. In other words, defendants can choose to fight or to settle, but they cannot benefit from a comprehensive settlement dismissing all claims and then continue to fight on the merits in an ancillary proceeding.

The general rule that ancillary fee proceedings should not provide an opportunity to relitigate waived merits defenses applies with special force here. Allowing recovery of the relator share (which Athena acknowledged Lovell and McKusick would receive) but disallowing reasonable attorneys' fees for the thousand-plus hours that gave rise to that recovery, would diminish the full measure of fraud detection and deterrence intended by Congress when enacting the fee-shifting provision in the first place. Fee shifting encourages compliance by requiring that the cost of prosecuting successful suits is borne "not by those who were victims but by those who have violated the regulations and caused the damage." *Hutchinson v. William C. Barry, Inc.*, 50 F. Supp. 292, 298 (D. Mass. 1943).

Precluding the mandated statutory fee recovery in multi-relator settlements, however, yields perverse incentives. Defendants in the most complex frauds, where multiple relators (and their experienced counsel and resources) are needed to help build the case in collaboration with the government, get off easier than those in more straightforward single-relator cases. It can't be right that Congress meant to so reward the most fraudulent.

At the end of the day, without assurance that relators can recover expenses and attorneys' fees for successful cases, the government may well be deprived of the skills and resources that relators and their counsel bring to unearthing and investigating the most far-reaching frauds—resources that Congress recognized and experience reveals are needed to prosecute these actions. *Cmty. Health Sys*., 666 F. App'x at 419-420 (Stranch, J., concurring). Adherence to the statute provides fair compensation and incentives for relators to cooperate in investigating the most complex frauds, promotes the public policy in favor of settlement, and ensures the deterrent effect of the full fee awards that Congress contemplated.

II. Lovell And McKusick Are Entitled To Reasonable Fees Related To All Claims Released In The Settlement Of The Intervened Action.

In addition to seeking fees and costs for work performed in support of the government's investigation and resolution of the kickback claims, Lovell and McKusick sought an award of "reasonable expenses" that were "necessarily incurred, plus reasonable attorneys' fees and costs," 31 U.S.C. §3730(d)(1), in support of the government's investigation of the billing and overpayment claims, which were also resolved in the global settlement. Add.26 (releasing "all claims … on behalf of the United States for … the allegations in the [Relators'] Civil Actions"). The district court did not expressly address this aspect of Lovell and McKusick's fee motion, but implicitly rejected fees related to work on the billing and overpayment claims on the same basis that it reduced Sanborn's fee award,

namely that the government did not intervene in those claims. *See* Add.17 ("There is little statutory basis to suggest that fees, costs and expenses must be reimbursed for the action as a whole while intervention and award of a relator's share, prerequisites to a fee award, proceed claim-by-claim.").[7]

The district court's claim-by-claim reasoning is inconsistent with the text of the False Claims Act's fee provisions. As described above, there are only two criteria for a fee award under § 3730(d)(1): (1) the government "proceed[ed] with an action" and (2) the relator received a "share of the proceeds of the action or settlement of the claim." Those requirements are met here, and there is no textual warrant for partitioning fees between intervened and non-intervened claims when the government investigated all claims, intervened in the "action," and the entire "action" was resolved by a single settlement. Fees and expenses must be "reasonable" and "necessarily incurred," but work on the billing and overpayment claims meets those requirements: Lovell and McKusick were statutorily required to disclose "substantially all material evidence and information" on those claims, *id.* § 3730(b)(2), to assist with the government's investigation, JA230, and to negotiate resolution of those claims as part of the global settlement.

[7] The first-to-file bar is undisputedly not applicable to Lovell and McKusick's billing and overpayment claims because those claims were not raised in Sanborn's complaint. *See* Add.4-Add.6; *Millennium I*, 925 F.3d at 523 (first to file is determined "claim-by-claim").

Relators also argued in the alternative in the district court that they were entitled to fees on the non-intervened claims under § 3730(d)(2), which provides fees when the government "does not proceed with an action." *See, e.g.*, Mem. in Support of Fee Mot., Dkt. 83, at 7 n.3 (Apr. 16, 2021). All Relators argued that the "prevailing party" standard common to many fee-shifting statutes, under which a court must deduct fees for discrete unsuccessful claims, *see Hensley v. Eckerhart*, 461 U.S. 424, 435-36 (1983), does not apply to the False Claims Act, which contains no express requirement that a relator be a "prevailing party" to award fees. *See* Reply in Support of Fee Mot., Dkt. 88, at 5-7 (May 28, 2021). In any event, all Relators argued, no reduction was warranted under the "prevailing party" framework because their claims were neither unsuccessful nor unrelated to the intervened claims. *Id.* at 7-8. Because Relator-Appellant Sanborn addresses the foregoing issues in detail in the consolidated appeal (No. 22-1246), Lovell and McKusick adopt by reference the arguments made in Sanborn's brief on this issue. *See* Fed. R. App. P. 28(i).

The district court declined to reach the arguments that the "prevailing party" standard does not apply to the False Claims Act on the ground that they "concern[] awards for 'actions' resolved without government intervention" under § 3730(d)(2), which the district court asserted that no party had briefed. Add.17-Add.18. Because Relators did in fact raise their entitlement to fees under § 3730(d)(2) (in the alternative), Mem. in Support of Fee Mot., Dkt. 83, at 7 n.3 (Apr. 16, 2021), they are

entitled at a minimum to a remand to establish their entitlement to fees under that provision.

CONCLUSION

The order denying attorneys' fees should be reversed.

June 27, 2022

Respectfully submitted,

s/Hyland Hunt

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that:

1. The foregoing brief is in 14-point Times New Roman proportional font and contains 12,297 words, excluding the parts exempted by Fed. R. App. P. 32(f), and thus complies with the typeface requirements of Fed. R. App. P. 32(a)(5), the typestyle requirements of Fed. R. App. P. 32(a)(6), and the type-volume of Fed. R. App. P. 32(a)(7)(B).

2. On June 27, 2022, I served the foregoing brief upon all counsel of record by filing a copy of the document with the Clerk through the Court's electronic docketing system.

s/Hyland Hunt
Hyland Hunt

June 27, 2022

ADDENDUM

District Court Order Add.1

Settlement Agreement (Exhibit A to Docket No. 83).......................................Add.23

31 U.S.C. § 3730(a)-(e)...Add.40

United States District Court
District of Massachusetts

United States of America, **Plaintiff,** **v.** **AthenaHealth, Inc., et al.,** **Defendants.**	**Civil Action No. 17-12125-NMG**

MEMORANDUM & ORDER

GORTON, J.

This dispute over attorneys' fees and costs arises from the settlement of two qui tam actions brought against defendant AthenaHealth, Inc. ("Athena" or "defendant") pursuant to the False Claims Act ("the FCA"), 37 U.S.C. § 3729 et seq. The first action was filed by relator Geordie Sanborn in October, 2017, alleging violations of the FCA and the federal anti-kickback statute ("the AKS"), 42 U.S.C. § 1320a-7b. Two months later, relators William McKusick and Cheryl Lovell filed a second qui tam action against Athena, alleging violations of the same statutes.

In January, 2021, the government intervened in some, but not all, of the relators' claims and shortly thereafter entered into an agreement with Athena to settle the action ("the Settlement Agreement") for approximately $18.25 million, a

portion of which was set aside for Sanborn as a relator's share. See 31 U.S.C. § 3730(d). Sanborn, McKusick and Lovell separately agreed to divide that share among themselves.

The Settlement Agreement reserved to relators the right to seek reasonable expenses, costs and attorneys' fees from Athena to the extent provided for by the FCA. See 31 U.S.C. § 3730(d). After unsuccessful negotiations, relators filed the pending motions for such funds which Athena opposes. For the reasons that follow, the motion of relators McKusick and Lovell (Docket No. 82) will be denied. The motion of relator Sanborn (Docket No. 77) will be allowed, in part, and denied, in part.

I. Background

A. The False Claims Act and the Anti-Kickback Statute

The FCA is among the government's "primary litigative tool[s] for combatting fraud" concerning public funds. United States v. Millennium Labs., Inc., 923 F.3d 240, 244 (1st Cir. 2019) ("Millennium I") (citing S. Rep. No. 99-3456, at 2 (1986)). It imposes civil liability upon anyone who

> knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval [or] knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim.

31 U.S.C. § 3729(a)(1)(A), (a)(1)(B). A "claim" is "any request or demand . . . . for money or property" presented to an

officer, employee or agent of the United States. 31 U.S.C. § 3729(b)(2).

The AKS imposes criminal liability on anyone who, inter alia,

> knowingly and willfully offers or pays any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person . . . . to purchase . . . . or arrange for or recommend purchasing . . . any good . . . . for which payment may be made in whole or in part under a Federal health care program[.]

42 U.S.C. § 1320a-7b(b)(2). A violation of the AKS which results in a federal health care payment is "per se [a] false claim under the FCA." United States v. Regeneron Pharms., Inc., No. 20-11217, 2020 U.S. Dist. LEXIS 227643 at *43 (D. Mass. Dec. 4, 2020) (quoting Guilfoile v. Shields, 913 F.3d 178, 190 (1st Cir. 2019)).

Private individuals can enforce the FCA as "relators" by bringing a civil qui tam action in the name of the government. Millennium I, 923 F.3d at 244. To bring a qui tam action under the FCA, a relator must file a complaint under seal, serve the government with a copy and provide it with all material evidence. Id. The government may intervene and proceed with the action or, if it does not, the relator may serve the complaint upon the defendant and litigate the action itself. Id.

B. The Qui Tam Actions

i. The Sanborn Complaint

In October, 2017, relator Sanborn sued Athena in the District of Massachusetts pursuant to the qui tam provisions of the FCA, alleging that Athena, an information technology company which specializes in the provision of healthcare services, had violated the FCA through the marketing and selling of its electronic health record ("EHR") technology. EHR technology allows health care providers to record patient information electronically and provides essential support to the modern practice of medicine.

Specifically, the relator complaint pled violations of the FCA related to 1) Athena's "client referral incentive program" and 2) the noncompliance of its EHR technology with applicable federal certification criteria.

With respect to the client referral program, the relator complaint alleged that Athena's customers were paid up to $3,000 per physician for referrals of new EHR customers. It further claimed that Athena provided other "gratuities and incentives" to induce sales of its EHR services, including tickets to sporting events, casino chips, hotel accommodations and meals. The complaint alleged that those payments and incentives violated the AKS and, because the government made payments through Medicaid and Medicare to healthcare providers who became

Athena clients because of the incentive program, also violated the FCA.

As to Athena's EHR technology, the relator complaint alleged that Athena marketed the technology with a guarantee that it would qualify its customers for incentive payments from the government pursuant to the American Recovery and Reinvestment Act of 2009, Pub. L. 111-5, 125 Stat. 115 (2009). To become eligible for incentive payments, a healthcare provider 1) had to possess certified EHR technology and 2) had to demonstrate meaningful use thereof. In 2015, the government reduced Medicare payments to healthcare providers who had not adopted certified EHR technology by 1%, followed by 2% and 3% reductions in 2016 and 2017, respectively.

The relator complaint alleged that Athena's EHR technology failed to meet applicable federal certification criteria. It further claimed that, notwithstanding the failure, Athena deployed its EHR technology and made false representations regarding its compliance with federal regulations. As a result of those purported misrepresentations, the complaint alleged that Athena customers 1) received undeserved incentive payments and 2) were not penalized for failing to adopt certified and compliant EHR technology.

ii. The McKusick and Lovell Complaint

In December, 2017, relators McKusick and Lovell, unaware of Sanborn's complaint which remained under seal, filed a qui tam complaint against Athena. They alleged that Athena violated the FCA (and similar state statutes) through 1) "systemic, uncorrected flaws" in its billing systems that resulted in the submission of false and fraudulent claims for certain services, including home care services, 2) the failure to report and return the resulting overpayments to the government and 3) violations of the AKS (and similar state statutes) arising from incentive and kickback programs substantially similar those alleged in Sanborn's complaint.

C. Complaint in Intervention and Settlement

In January, 2021, after several years of investigation, the government filed a complaint in intervention for the limited purpose of entering a settlement to recover damages from false claims submitted by Athena. The complaint stated that between January, 2014, and September, 2020, Athena maintained three programs through which it paid and provided other benefits to existing and potential clients to induce them to do business with Athena, specifically: 1) its "Concierge Event" program in which existing and potential clients were provided with expenses-paid trips to sporting and other events, 2) its "Client Lead Generation" program in which Athena paid existing clients

for referrals of new medical practices and 3) "Conversion Deals" in which Athena paid competitors who were discontinuing their EHR products to recommend that their clients transition to Athena's product. The complaint in intervention contained two counts: 1) for violation of the FCA through Athena's use of incentive programs and illegal kickbacks and 2) for unjust enrichment as a result of that wrongful conduct.

Several days later, Athena entered into the Settlement Agreement pursuant to which it paid the government approximately $18 million in exchange for releases of the claims of the government and the relators. The Settlement Agreement recited the same allegations as the complaint in intervention, albeit in an abbreviated manner. It provided that Sanborn would receive a relator's share of the $18 million recovered and noted that Sanborn, McKusick and Lovell had come to a private agreement to divide that share among themselves.

II. Motions for Attorneys' Fees and Costs

Sanborn, McKusick and Lovell have moved for payment of their attorneys' fees and costs by Athena. Athena does not oppose the motion in concept but does oppose it in amount.

It is axiomatic that

> each litigant pays his [or her] own attorneys' fees, win or lose, unless a statute or contract provides otherwise.

Volkswagen Group of America, Inc. v. Peter McNulty Law Firm, 692 F.3d 4, 13 (1st Cir. 2012) (internal punctuation omitted) (citing Hardt v. Reliance Standard Life Ins. Co., 560 U.S. 242, 253 (2010)). The FCA is one such statute and a relator who recovers damages or settlement proceeds in a FCA action is entitled to receive a relator's share as well as reasonable attorneys' fees, costs and expenses. 31 U.S.C. § 3730(d)(2). Sometimes, as happened here, the government will intervene in a qui tam action but when it does, the relator is still entitled to a percentage of "the proceeds of the action or settlement of the claim" (albeit a smaller one) as well as reasonable attorneys' fees, costs and expenses. 31 U.S.C. § 3730(d)(1).

When multiple relators have filed actions against the same defendant based upon the same underlying facts, the FCA limits entitlement to attorneys' fees and costs to the first relator to file. See United States ex rel. Allstate Ins. Co. v. Millennium Labs., Inc., 464 F. Supp. 3d 449, 453-54 (D. Mass. 2020) ("Millennium II"). The penultimate sentence of 31 U.S.C. § 3730 (d)(1) provides that

> [a]ny such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs.

31 U.S.C. § 3730(d)(1). The phrase "[a]ny such person" refers to the previous sentence of the subsection which sanctions

payment of the relator's share to "a person". Id. In Millennium I, the First Circuit Court of Appeals ("the First Circuit") held that only the first-to-file relator is "a person" entitled to a relator's share. Millennium I, 923 F.3d at 252. Accordingly, only that relator may receive an award of reasonable attorneys' fees and costs. See Millennium II, 464 F. Supp. 3d. at 453.

While a contract may also provide for attorneys' fees, the Settlement Agreement does not. Volkswagen Group of America, 692 F.3d at 13. Rather, the Settlement Agreement reserves to relators the right to seek fees, costs and expenses under the FCA. Consequently, relators are entitled to fees and costs either under 31 U.S.C. § 3730 or not at all.

To calculate reasonable attorneys' fees, courts in this Circuit generally employ the lodestar method. See, e.g., Hutchinson ex rel. Julien v. Patrick, 636 F.3d 1, 13 (1st Cir. 2011). That method begins with a calculation of total hours worked which is derived from authenticated billing records, reduced by any hours that are duplicative, unproductive or excessive. Gay Officers Action League v. Puerto Rico, 247 F.3d 288, 295-96 (1st Cir. 2001). The total hours worked is then multiplied by a reasonable hourly rate. Hutchinson, 636 F.3d at 13. After calculating the initial lodestar figure, the Court has discretion to adjust that figure upward or downward to achieve an equitable result. See Torres-Rivera v. O'Neill-

Cancel, 524 F.3d 331, 336, 340 (1st Cir. 2008), AccuSoft Corp. v. Palo, 237 F.3d 31, 61 (1st Cir. 2001) (noting that courts have the ability to "adjust or even deny a contractual award of fees if such an award would be inequitable or unreasonable") (internal citation omitted).

A. McKusick and Lovell

Athena asserts that the first-to-file rule bars McKusick and Lovell from recovering fees, costs and expenses under the FCA. McKusick and Lovell vigorously disagree and contend that they are entitled to fees, costs and expenses under 31 U.S.C. § 3730 (d)(1) because the government proceeded with their action and they received a portion of the relator's share, albeit pursuant to a private agreement with relator Sanborn.

Section 3730 does not sustain the construction which McKusick and Lovell urge. It limits entitlement to fees, costs and expenses to the first relator to file, regardless of whether the government "proceed[ed]" in more than one action or whether the plaintiff who received the relator's share subsequently entered into a private agreement to divide it. See Millennium II, 464 F. Supp. 3d at 453 (stating that "only a first filer . . . can qualify as 'any such person' entitled to fees"), see also Millennium I, 923 F.3d at 252 (holding that only the first-to-file relator can claim the relator's share).

Here, McKusick and Lovell were not the first relators to file. In Millennium I, the First Circuit held that the first-to-file rule, 31 U.S.C. 3730(b)(5), bars recovery of a relator's share (and thus an award of attorneys' fees) if the first-filed complaint contains "all the essential facts" of the fraud. Millennium I, 923 F.3d at 254, accord United States ex rel. Batiste v. SLM Corp., 659 F.3d 1204, 1209 (D.C. Cir. 2011) (holding that subsequent filers precluded from recovery where first-filed complaint alleged material elements of the fraud, equipping the government to investigate). That standard does not require "identity between the two complaints" and a later-filed claim may be barred "even if that claim incorporates somewhat different details". Millennium I, 923 F.3d at 254 (internal citations omitted).

To determine whether the first-to-file bar applies, the Court compares the relator complaints, "proceed[ing] claim-by-claim" and limiting the analysis "to the four corners of the relevant complaints". Millennium I, 923 F.3d at 253. Only one claim is relevant here: that Athena violated the AKS, and by extension the FCA, through a variety of programs that provided money and gratuities to induce use of its EHR technology. Id. (citing Rille v. Pricewaterhouse Coopers LLP, 803 F.3d 368, 373 (8th Cir. 2015) (en banc) (stating that a relator seeking recovery must demonstrate a factual overlap between its

allegations and the conduct discussed in the settlement agreement).

In his qui tam complaint, Sanborn alleged that Athena operated a "client referral incentive program" that offered cash payments or invoice credits to existing customers in order to induce referrals of potential new customers. Sanborn also claimed that Athena used gratuities such as catered meals, airfare, accommodations and tickets to sporting events to induce the purchase of its EHR technology and provided several examples of the practice. He alleged that such referral payments and gratuities violated the AKS and, consequently, the FCA.

McKusick and Lovell's complaint contained similar factual allegations. Relators claimed that Athena provided incentives in the form of invoice credit in exchange for referrals, with the amount of credit increasing with the number of practices or physicians referred. They described in detail the development of Athena's referral and marketing practices from approximately 2010 to 2017, alleging that the referral program was highly profitable and was substantially expanded over time.

It is apparent from the two qui tam complaints that the relators allege "similar frauds" and that Sanborn's first-filed complaint contained "all the essential facts" of the complaint later filed by McKusick and Lovell. Id. at 253. Sanborn's complaint provided the government with all the information

necessary to investigate the first and second fraudulent marketing and referral programs two months before McKusick and Lovell filed theirs. See id. Although Sanborn did not allege facts specifically relating to the third program, i.e. the Conversion Deals, the absence of such allegations is of little benefit to McKusick and Lovell because their complaint was likewise omissive. See id. (requiring allegations more specific than those which could have "arguably . . . . put [the government] on notice" of the particular fraud). Sanborn, not McKusick and Lovell, was the first-to-file relator and, as a result, McKusick and Lovell are not entitled to fees and costs under § 3730(d)(1). Millennium II, 464 F. Supp. 3d at 453.

The fact that McKusick and Lovell entered into a private agreement with Sanborn pursuant to which they were paid a portion of Sanborn's relator's share does not alter the conclusion. The relators' agreement cannot, and does not, change the fact that McKusick and Lovell were not the first-to-file relator and thus are excluded from § 3730(d)(1) by the first-to-file bar of subsection (b)(5). McKusick and Lovell expectantly direct the Court's attention to a recent decision in which the Sixth Circuit held that a relator who receives a portion of a relator's share pursuant to a private agreement may receive an award of attorneys' fees. United States ex rel. Bryant v. Community Health Sys., __ F.4th __, 2022, U.S. App.

LEXIS 2162 at *18-19 (6th Cir. 2022). This Court has previously held otherwise, see id. (citing Millennium II), and again concludes that recovery of attorneys' fees pursuant to a private agreement would create, in essence, a back door into fees not contemplated by the statute and inconsistent with its text, Congressional intent and First Circuit case law, see Millennium II, 464 F. Supp. 3d at 454.

B. Sanborn

Athena and Sanborn agree that Sanborn is entitled to reasonable attorneys' fees and costs as the first-to-file relator. See 31 U.S.C. § 3730(d)(1). They dispute, however, the reasonableness of the amount of claimed fees, costs and expenses, including those which pertain to the preparation of the portions of the complaint alleging EHR compliance violations. The Court first addresses the EHR compliance claim and then considers the reasonableness of the fees, costs and expenses claimed by Sanborn.

i. The EHR Compliance Claim

Athena asserts that Sanborn cannot demonstrate that the fees he seeks are reasonable because a substantial portion thereof relates to research and preparation of the EHR compliance claim in which the government did not intervene and on which it recovered nothing. Athena contends that Sanborn's

fee award must be reduced accordingly and proposes a reduction of 70%.

Sanborn balks. He stresses that Athena obtained a release of all his claims, including the EHR compliance claim, in exchange for paying a substantial sum to the government, belying the notion that the EHR compliance claim was unsuccessful. Sanborn contends more generally that the FCA does not limit entitlement to fees to those incurred for work on claims upon which the government intervened or even to those upon which the relator prevailed. Rather, Sanborn submits that the FCA provides for the issuance of fees and costs to a relator who brought an "action" in which the government intervened.

A qui tam plaintiff is entitled to an award of fees, costs and expenses for an action brought under the § 3730(d)(1) only if two related conditions have been satisfied. See Millennium II, 464 F. Supp. 3d at 453-54. First, in order for the action to come within the ambit of subsection (d)(1), the government must have "proceed[ed] with" it, i.e. intervened in the action. 31 U.S.C. § 3730(d)(1), see id. at 454. Second, the relator must have received a relator's share pursuant to the resolution of the action. 31 U.S.C. § 3730(d)(1). A relator's share issues only if the government has intervened and the action has been resolved by settlement or judgment, and only the first-to-file

relator is entitled to it. See § 3730(d)(1), Millennium I, 923 F.3d at 252.

The EHR compliance claim satisfies neither condition. Sanborn's argument that he is entitled to a fee award under § 3730(d)(1) for both claims because the government intervened and he received a relator's share with respect to one of them is at odds with the manner in which the federal courts of appeals, including the First Circuit, have interpreted § 3730. Although Sanborn correctly notes that the FCA speaks in terms of "actions" rather than "claims", the draftsmanship of the FCA has its "quirks" one of which is "that the statute is based on the model of a single-claim complaint". United States ex rel. Merena v. SmithKline Beecham Corp., 205 F.3d 97, 101 (3rd Cir. 2000) (Alito, J.). Notwithstanding the use of the word "action" in § 3730, federal courts of appeals and the United States Supreme Court consistently have understood the statute to refer to a claim rather than the action as a whole. See, e.g id., Rockwell Int'l Corp. v. United States, 549 U.S. 457 (2007).

For instance, the Third Circuit has observed that while § 3730(b)(5) proscribes the filing of subsequent "related action[s]" the first-to-file rule is applied claim-by-claim, see Merena, a conclusion with which the First Circuit is in accord, Millennium I, 923 F.3d at 253 (explaining that "essential facts" test is applied "claim-by-claim"). Similarly and of particular

relevance to the present dispute, both preconditions to a fee award have also been analyzed on a claim-by-claim basis. With respect to intervention, it is well-settled that the government may intervene only as to some claims in an action brought pursuant to § 3730(b)(1), and that is exactly what happened here. See Merena, 205 F.3d at 102 (stating that "the government often decides to take over only certain claims in a multi-claim action, and we are aware of no decision holding that this is improper"). With respect to resolution of the action, §3730(d)(1) provides that the relator's share derives from the "proceeds of the action or settlement of the claim". 31 U.S.C. §3730(d)(1), see Rille, 803 F.3d at 373. Here, Sanborn's share issued from the funds recovered pursuant to the settlement of the AKS claim.

The Court discerns no reason to treat a fee award differently. There is little statutory basis to suggest that fees, costs and expenses must be reimbursed for the action as a whole while intervention and award of a relator's share, prerequisites to a fee award, proceed claim-by-claim, and such an interpretation would require unwarranted manipulation of the statute.

Finally, to the extent Sanborn contends that he is entitled to fees and costs because the Settlement Agreement released the EHR compliance claim, that argument seems misplaced because it

concerns awards for "actions" resolved without government intervention. 31 U.S.C. § 3730(d)(2). Because neither party has briefed the issue the Court does not consider it. The Court is in any event unconvinced that a party may recover a fee award absent some showing of success. See Ruckelshaus v. Sierra Club, 463 U.S. 680 (1983) (explaining that the "consistent rule" in federal statutory fee-shifting provisions is that "a successful party need not pay its unsuccessful adversary's fees").

ii. Reasonableness of Fees and Costs

The Court applies the lodestar method to determine, in the first instance, the fees to which Sanborn is entitled, after which it may adjust that amount upward or downward in the exercise of its discretion. See Torres-Rivera 524 F.3d at 340. That task is complicated by the fact that counsel has not distinguished between time spent on the marketing claims, for which Sanborn is entitled to a fee award, and time spent on the EHR compliance claim, for which it is not. Because the Court cannot determine a principled method by which to include or exclude individual time entries, it will apply an across-the-board reduction after calculating the preliminary lodestar figure.

In that regard, the Court takes the total number of hours worked, subtracts duplicative, unproductive or excessive hours

and multiplies by a reasonable hourly rate. See Gay Officers Action League, 247 F.3d 295-96.

Sanborn proposes the following hours and rates:

Experience	Hours Expended	Hourly Rate	Total
25 years or more	5.40	$1,060	$5,724
15 to 24 years	455.30	$900	$409,770
5 to 14 years	391.50	$650	$254,475
0 to 4 years	126.25	$490	$61,862.50

Multiplying the hours expended by the respective hourly rates and adding the products yields a requested fee award of approximately $731,000. Sanborn has also claimed approximately $30,000 of paralegal fees for a total of approximately $760,000. After abandoning his request for approximately $22,000 in attorneys' fees related to travel time, Sanborn arrives at his final claim of approximately $740,000.

Athena attacks various time entries as vague, excessive and redundant, protests that legal research on unspecified topics and innumerable meetings were unnecessary and complains that the unreasonable amount of time preparing the fee petition and negotiating the relator's share require specific reductions to the award.

The Court demurs. Most of the tasks for which relator claims fees were reasonably necessary to further the prospects of the litigation. See, e.g. Equal Employment Opportunity Comm'n v. AutoZone, Inc., 934 F. Supp. 2d 342, 351, (D. Mass. 2013) (allowing for fees for conferencing when time spent doing so was "within reason"). Other tasks pertain to work for which fees are specifically available, such as preparing the fee petition. See Lund v. Affleck, 587 F.2d 75, 77 (1st Cir. 1978) (holding that time spent recovering fees pursuant to a § 1983 action was recoverable). With respect to specific entries, the claimed time and rates are not unreasonable given the characteristics and duration of the case.

The Court focuses, however, on the matter of the appropriate reduction to impose, considering that Sanborn is not entitled to a fee award for the EHR compliance claim. It is impossible to ascertain from the time entries how much time was spent on each claim but the Court notes that the EHR compliance claim was substantially more complex than the AKS claim and comprised the majority of the complaint. Furthermore, the EHR compliance and AKS claims are not substantially interconnected. See Bogan v. City of Boston, 489 F.3d 417, 428-29 (1st Cir. 2007) (explaining that fees are appropriately excluded when "different claims for relief are not interconnected, that is, when the claims rest on different facts and legal theories").

Although both claims relate to Athena's EHR technology, the AKS claim concerned its sale and marketing whereas the compliance claim was about performance. Id. Consequently, while both related to alleged violations of the FCA, the operative legal theories were distinct. Id., see United States ex rel. Zediker v. OrthoGeorgia, 407 F. Supp. 3d 1330, 1350 (noting that although "in an FCA action, almost all the claims will involve kickback or billing fraud" that fact alone does not mean that the legal theories are similar).

The Court considers the 70% reduction proposed by Athena unduly harsh. There is undoubtedly some efficiency gained by the prosecution of two claims pertaining to the same company and the same technology, even if those claims are not substantially interconnected. Moreover, Sanborn was successful in recovering a substantial sum of money for the government which Athena had acquired through violations of federal law, and a fee award is necessary to vindicate the objectives of the FCA. Therefore, the Court will reduce the fee award by 50% and award Sanborn attorneys' fees in the amount of $370,000.

Sanborn also claims costs and expenses totaling approximately $15,000. The Court concludes that he is entitled to those costs and expenses in full because they are reasonable. Furthermore, unlike the claimed fees, costs and expenses, such as data hosting, postage and travel, would not have been

substantially different had the action contained only one claim rather than two.

ORDER

For the foregoing reasons, the amended motion for attorney fees under the False Claims Act by relators Cheryl Lovell and William McKusick (Docket No. 82) is **DENIED.**

Relator Geordie Sanborn's motion for attorney fees (Docket No. 77) is **ALLOWED**, in part, and **DENIED**, in part. He is awarded $391,125.33 in fees, costs and expenses.

So ordered.

/s/ Nathaniel M. Gorton
Nathaniel M. Gorton
United States District Judge

Dated: March 3, 2022

SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is entered into among the United States of America, acting through the United States Department of Justice and on behalf of the Office of the Inspector General of the United States Department of Health and Human Services ("OIG-HHS") (collectively, the "United States"); athenahealth, Inc. ("Athena"); and Geordie Sanborn, Cheryl Lovell, and William McKusick (collectively, the "Relators") through their authorized representatives (together, "the Parties").

RECITALS

A. Athena is a medical software company based in Watertown, Massachusetts that offers electronic health record ("EHR") services, among other cloud-based products. Athena was founded in 1997 and was a publicly traded company from September 20, 2007 through February 11, 2019. Athena is currently a privately held corporation.

B. On October 27, 2017, Geordie Sanborn filed a *qui tam* action in the United States District Court for the District of Massachusetts captioned *United States ex rel. Sanborn v. Athenahealth, Inc.*, Case No. 17-CV-12125-ADB ("Sanborn Action"). On December 21, 2017, Cheryl Lovell and William McKusick filed a *qui tam* action in the same court captioned *United States ex rel. Lovell v. Athenahealth, Inc.*, Case No. 17-CV-12543-GAO ("Lovell Action") (collectively, the Sanborn Action and the Lovell Action shall be referred to as the "Civil Actions"). The Civil Actions were later administratively consolidated. The United States filed a Complaint in Intervention against Athena on January 22, 2021.

C. Under the Health Information Technology for Economic and Clinical Health Act ("HITECH Act"), the Department of Health and Human Services ("HHS") established EHR incentive programs under Medicare and Medicaid for healthcare providers (the "EHR Incentive

Programs"). With the passage of the Medicare Access and CHIP Reauthorization Act of 2015 ("MACRA"), Congress replaced the Medicare EHR Incentive Program with the Merit-based Incentive Payment System ("MIPS") for certain types of clinicians.

D. The United States contends that, between January 1, 2014 and September 22, 2020, Athena offered and provided, and agreed to provide, illegal remuneration, in cash and in kind, under three programs in order to generate sales of its EHR products, each in violation of the Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b). The United States contends that such violations of the Anti-Kickback Statute render claims false under the False Claims Act, 31 U.S.C. § 3729 *et seq.*, and the common law. In particular, the United States contends:

i. First, between June 2014 and March 2019, Athena provided existing and potential clients with all-expense-paid trips to sporting, entertainment, and recreational events, which Athena referred to as "Concierge Events." These events included, among other things, trips to the Masters golf tournament and the Kentucky Derby.

ii. Second, from January 2014 through September 2020, Athena entered into "Client Lead Generation" agreements with current clients under which it paid for referrals of potential new clients.

iii. Third, between January 2014 and October 2017, Athena entered into agreements with Health Information Technology ("HIT") companies that had decided to discontinue their HIT products. Pursuant to those agreements, which Athena referred to as "Conversion Deals," the other companies agreed to recommend that their clients transition to Athena's products. Under these arrangements, Athena paid the HIT company based on the number and value of the clients who converted to the use of Athena's products.

The United States' contentions as described in this Recital D are referred to below as the "Covered Conduct," and are described in further detail in the United States' Complaint in Intervention.

E. Athena has discontinued the three programs identified in the Covered Conduct.

F. Relators claim or reserve the right to claim entitlement under 31 U.S.C. § 3730(d) and/or its state analogs to a share of the proceeds of this Agreement and to Relators' reasonable expenses, attorneys' fees, and costs incurred in connection with any claims released herein. Athena reserves the right to contest Relators' entitlement to expenses, attorneys' fees and costs under 31 U.S.C. § 3730(d) and its state analogs incurred in connection with any claims, including any claims released herein, as well as to challenge any of Relators' claims for expenses, attorneys' fees and costs on any and all grounds, including but not limited to reasonableness and/or any other basis on which such claims may be challenged under 31 U.S.C. § 3730(d) and its state analogs.

In consideration of the mutual promises and obligations of this Settlement Agreement, the Parties agree and covenant as follows:

TERMS AND CONDITIONS

1. Athena shall pay to the United States $18,250,000, plus interest accruing at an annual rate of 0.75% per annum from September 22, 2020, and continuing until and including the day of payment (the "Settlement Amount"). Athena shall pay the Settlement Amount no later than 10 calendar days after the Effective Date of this Agreement by electronic funds transfer pursuant to written instructions to be provided by the Office of the United States Attorney for the District of Massachusetts. Of the Settlement Amount, $9,125,000 is restitution to the United States.

2. Subject to the exceptions in Paragraph 4 below (concerning excluded claims), and conditioned upon Athena's full payment of the Settlement Amount, the United States releases Athena, together with its current or past corporate parents, its direct and indirect subsidiaries, and the predecessors, successors, and assigns of any of them, from any civil or administrative monetary claim the United States has for the Covered Conduct under the False Claims Act, 31 U.S.C. §§ 3729-33; the Civil Monetary Penalties Law, 42 U.S.C. § 1320a-7a; the Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801-12; or the common law theories of payment by mistake, unjust enrichment, and fraud.

3. Subject to the exceptions in Paragraph 4 below (concerning excluded claims) and conditioned upon the full payment of the Settlement Amount, Relators, for themselves and for their heirs, successors, attorneys, agents, and assigns, release Athena, together with its current and former direct or indirect corporate parents, its current and former direct and indirect subsidiaries, divisions and affiliates, the predecessors, successors, and assigns of any of them, as well as all of its current and former officers, directors, employees, attorneys, and other agents from any and all liability, claims, allegations, demands, actions and causes of action whatsoever, known or unknown, in law or equity, that Relators have against Athena, including but not limited to any civil monetary claim that Relators have on behalf of the United States for the Covered Conduct and the allegations in the Civil Actions; except that Relators' claims for reasonable attorney's fees, expenses, and costs pursuant to 31 U.S.C. § 3730(d)(1) and/or its state analogs are not released.

4. Notwithstanding the releases given in Paragraphs 2 and 3 of this Agreement, or any other term of this Agreement, the following claims of the United States are specifically reserved and are not released:

a. Any liability arising under Title 26, U.S. Code (Internal Revenue Code);

b. Any criminal liability;

c. Except as explicitly stated in this Agreement, any administrative liability, including mandatory or permissive exclusion from Federal health care programs;

d. Any liability to the United States (or its agencies) for any conduct other than the Covered Conduct;

e. Any liability based upon obligations created by this Agreement;

f. Any liability of individuals;

g. Any liability for express or implied warranty claims or other claims for defective or deficient products or services, including quality of goods and services;

h. Any liability for failure to deliver goods or services due; and

i. Any liability for personal injury or property damage or for other consequential damages arising from the Covered Conduct.

5. Relators and their respective heirs, successors, attorneys, agents, and assigns shall not object to this Agreement but agree and confirm that this Agreement is fair, adequate, and reasonable under all the circumstances, pursuant to 31 U.S.C. § 3730(c)(2)(B). In connection with this Agreement and the Civil Actions, Relators and their respective heirs, successors, attorneys, agents, and assigns agree that neither this Agreement, any intervention by the United

States in the Civil Actions in order to dismiss the Civil Actions, nor any dismissal of the Civil Actions, shall waive or otherwise affect the ability of the United States to contend that provisions in the False Claims Act, including 31 U.S.C. §§ 3730(d)(3) and 3730(e), bar Relators from sharing in the proceeds of this Agreement. Moreover, the United States and Relators and their respective heirs, successors, attorneys, agents, and assigns agree that they each retain all of their rights pursuant to the False Claims Act on the issue of the share percentage, if any, that Relators should receive of any proceeds of the settlement of their claims. It is understood by all the Parties that Relator Sanborn and Relators Lovell and McKusick have reached their own agreement regarding their respective shares of any funds paid by the United States to Relator Sanborn.

6. Athena waives and shall not assert any defenses it may have to any criminal prosecution or administrative action relating to the Covered Conduct that may be based in whole or in part on a contention that, under the Double Jeopardy Clause in the Fifth Amendment of the Constitution, or under the Excessive Fines Clause in the Eighth Amendment of the Constitution, this Agreement bars a remedy sought in such criminal prosecution or administrative action.

7. Athena fully and finally releases the United States, and its agencies, officers, agents, employees, and servants, from any claims (including for attorneys' fees, costs, and expenses of every kind and however denominated) that Athena has asserted, could have asserted, or may assert in the future against the United States, and its agencies, officers, agents, employees, and servants related to the Covered Conduct and the United States' investigation and prosecution thereof.

8. Athena fully and finally releases the Relators and their heirs, successors, attorneys, agents, and assigns from any claims (including attorney's fees, costs, and expenses of

every kind and however denominated) that Athena has asserted, could have asserted, or may assert in the future against the Relators and their heirs, successors, attorneys, agents, and assigns, related to the Civil Actions and the Relators' investigation and prosecution thereof.

9. The Settlement Amount shall not be decreased as a result of the denial of claims for payment now being withheld from payment by any Medicare contractor (*e.g.*, Medicare Administrative Contractor, fiscal intermediary, carrier), or any state payer, related to the Covered Conduct; and Athena agrees not to resubmit to any Medicare contractor or any state payer any previously denied claims related to the Covered Conduct, agrees not to appeal any such denials of claims, and agrees to withdraw any such pending appeals.

10. Athena agrees to the following:

a. Unallowable Costs Defined: All costs (as defined in the Federal Acquisition Regulation, 48 C.F.R. § 31.205-47; and in Titles XVIII and XIX of the Social Security Act, 42 U.S.C. §§ 1395-1395lll and 1396-1396w-5; and the regulations and official program directives promulgated thereunder) incurred by or on behalf of Athena, its employees, and its agents in connection with:

(1) the matters covered by this Agreement;

(2) the United States' audit(s) and civil and any criminal investigation(s) of the matters covered by this Agreement;

(3) Athena's investigation, defense, and corrective actions undertaken in response to the United States' audit(s) and civil and any criminal investigation(s) in connection with the matters covered by this Agreement (including attorney's fees);

(4) the negotiation and performance of this Agreement; and

(5) the payment Athena makes to the United States pursuant to this Agreement

are unallowable costs for government contracting purposes and under the Medicare Program, Medicaid Program, TRICARE Program, and Federal Employees Health Benefits Program (FEHBP) (hereinafter referred to as Unallowable Costs).

b. Future Treatment of Unallowable Costs: Unallowable Costs shall be separately determined and accounted for by Athena, and Athena shall not charge such Unallowable Costs directly or indirectly to any contracts with the United States or any State Medicaid program, or seek payment for such Unallowable Costs through any cost report, cost statement, information statement, or payment request submitted by Athena or any of its subsidiaries or affiliates to the Medicare, Medicaid, TRICARE, or FEHBP Programs.

c. Treatment of Unallowable Costs Previously Submitted for Payment: Athena further agrees that within 90 days of the Effective Date of this Agreement it shall identify to applicable Medicare and TRICARE fiscal intermediaries, carriers, and/or contractors, and Medicaid and FEHBP fiscal agents, any Unallowable Costs (as defined in this Paragraph) included in payments previously sought from the United States, or any State Medicaid program, including, but not limited to, payments sought in any cost reports, cost statements, information reports, or payment requests already submitted by Athena or any of its employees or agents, and shall request, and agree, that such cost reports, cost statements, information reports, or payment requests, even if already settled, be adjusted to account for the effect of the inclusion of the unallowable costs. Athena agrees that the United States, at a minimum, shall be entitled to recoup from Athena any overpayment plus applicable interest and penalties as a result of the

inclusion of such Unallowable Costs on previously-submitted cost reports, information reports, cost statements, or requests for payment.

Any payments due after the adjustments have been made shall be paid to the United States pursuant to the direction of the Department of Justice and/or the affected agencies. The United States reserves its rights to disagree with any calculations submitted by Athena on the effect of inclusion of Unallowable Costs (as defined in this Paragraph) on Athena's cost reports, cost statements, or information reports.

d. Nothing in this Agreement shall constitute a waiver of the rights of the United States to audit, examine, or re-examine Athena's books and records to determine that no Unallowable Costs have been claimed in accordance with the provisions of this Paragraph.

11. This Agreement is intended to be for the benefit of the Parties only. The Parties do not release any claims against any other person or entity, except to the extent provided for in Paragraph 12 below (waiver for beneficiaries paragraph).

12. Athena agrees that it waives and shall not seek payment for any of the health care billings covered by this Agreement from any health care beneficiaries or their parents, sponsors, legally responsible individuals, or third party payors based upon the claims defined as Covered Conduct.

13. Upon receipt of the payment described in Paragraph 1, above, the Relators and the United States shall promptly sign and file in the Civil Actions a Stipulation of Dismissal pursuant to Rule 41(a)(1) and subject to the terms of this Agreement (the "Stipulation"). The Stipulation shall state that the allegations described in the United States' Complaint in Intervention shall be dismissed with prejudice as to the United States. Any remaining claims in the Civil Actions shall be dismissed without prejudice as to the United States. All claims shall

be dismissed with prejudice as to the Relators, except that Relators' claims for reasonable attorneys' fees, expenses, and costs pursuant to 31 U.S.C. § 3730(d)(1) and/or its state analogs shall not be dismissed until they are settled, adjudicated, or otherwise resolved, and the Court is so informed, and the Relators' claims for a share of the proceeds of this Agreement under the provisions of the False Claims Act, including 31 U.S.C. § 3730(d)(1), shall not be dismissed until they are settled, adjudicated, or otherwise resolved. The Parties agree that the United States District Court shall have continuing jurisdiction to issue orders with regard to any disputes over the amounts for expenses, attorneys' fees and costs, and Relators' share. Relators and Athena agree to meet and confer regarding the issue of Relators' attorney's fees, costs, and expenses, in an effort to settle that issue, and stipulate that any petition(s) for Relators' attorney's fees, costs, and expenses, shall not be due until 60 days after the Court enters judgment.

14. Except as otherwise provided herein, each Party shall bear its own legal and other costs incurred in connection with this matter, including the preparation and performance of this Agreement.

15. Each Party and signatory to this Agreement represents that it freely and voluntarily enters in to this Agreement without any degree of duress or compulsion.

16. This Agreement is governed by the laws of the United States. The exclusive jurisdiction and venue for any dispute relating to this Agreement is the United States District Court for the District of Massachusetts. For purposes of construing this Agreement, this Agreement shall be deemed to have been drafted by all Parties to this Agreement and shall not, therefore, be construed against any Party for that reason in any subsequent dispute.

17. This Agreement constitutes the complete agreement between the Parties. This Agreement may not be amended except by written consent of the Parties.

18. The undersigned counsel represent and warrant that they are fully authorized to execute this Agreement on behalf of the persons and entities indicated below.

19. This Agreement may be executed in counterparts, each of which constitutes an original and all of which constitute one and the same Agreement.

20. This Agreement is binding on Athena's successors, transferees, heirs, and assigns.

21. This Agreement is binding on the Relators' successors, transferees, heirs, and assigns.

22. All Parties consent to the United States' disclosure of this Agreement, and information about this Agreement, to the public.

23. This Agreement is effective on the date of signature of the last signatory to the Agreement (the "Effective Date" of this Agreement). Facsimiles and electronic transmissions of signatures shall constitute acceptable, binding signatures for purposes of this Agreement.

THE UNITED STATES OF AMERICA

DATED: 01/27/2021 BY: NICHOLAS PERROS Digitally signed by NICHOLAS PERROS Date: 2021.01.27 12:16:43 -05'00'

NICHOLAS C. PERROS
ANDREW JACO
Trial Attorneys
Commercial Litigation Branch
Civil Division
United States Department of Justice

DATED: 01/27/2021 BY: JESSICA WEBER Digitally signed by JESSICA WEBER Date: 2021.01.27 18:28:22 -05'00'

JESSICA J. WEBER
DAVID J. DERUSHA
Assistant United States Attorneys
United States Attorney's Office
District of Massachusetts

DATED: ___________ BY: ___________________________

LISA M. RE
Assistant Inspector General for Legal Affairs
Office of Counsel to the Inspector General
Office of Inspector General
United States Department of Health and Human Services

THE UNITED STATES OF AMERICA

DATED: ___________ BY: ______________________________

NICHOLAS C. PERROS
ANDREW JACO
Trial Attorneys
Commercial Litigation Branch
Civil Division
United States Department of Justice

DATED: ___________ BY: ______________________________

JESSICA J. WEBER
DAVID J. DERUSHA
Assistant United States Attorneys
United States Attorney's Office
District of Massachusetts

DATED: 01/27/2021 BY:

LISA M. RE
Assistant Inspector General for Legal Affairs
Office of Counsel to the Inspector General
Office of Inspector General
United States Department of Health and Human Services

DEFENDANT ATHENAHEALTH, INC.

DATED: 1/27/2021 BY:

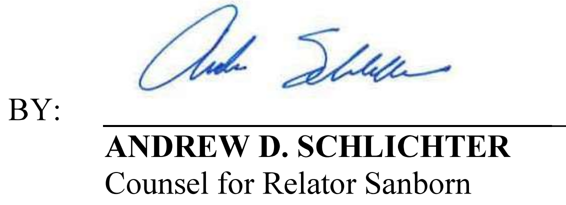
JESSICA COLLINS
Senior Vice President, General Counsel, and Secretary
athenahealth, Inc.

DATED: 1/27/2021 BY:

MARK W. PEARLSTEIN
SARAH E. WALTERS
Counsel for athenahealth, Inc.

RELATOR GEORDIE SANBORN

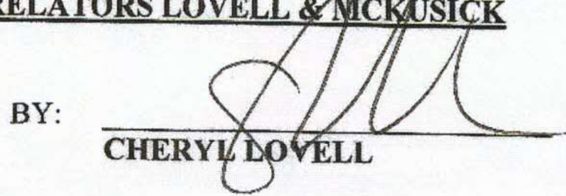
DATED: 01/26/21 BY: ______________________
GEORDIE SANBORN



DATED: 01/27/21 BY: ______________________
ANDREW D. SCHLICHTER
Counsel for Relator Sanborn

RELATORS LOVELL & MCKUSICK

DATED: 1/24/2021 BY:



CHERYL LOVELL

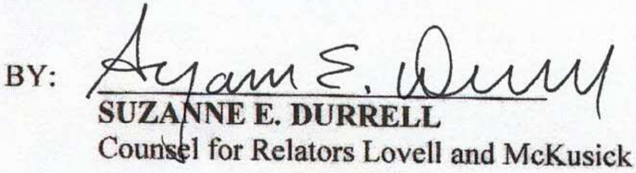
DATED: ________ BY: ____________________

WILLIAM MCKUSICK

DATED: ________ BY: ____________________

ROBERT W. LILES
Counsel for Relators Lovell and McKusick

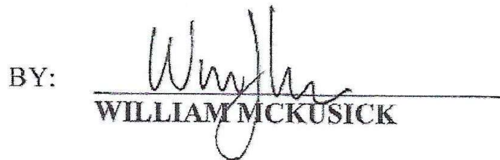
DATED: 1/27/2021 BY:

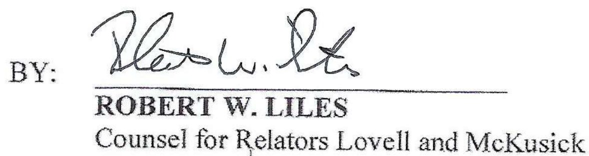


SUZANNE E. DURRELL
Counsel for Relators Lovell and McKusick

RELATORS LOVELL & MCKUSICK

DATED: ________ BY: ______________________
CHERYL LOVELL

DATED: 1/26/2021 BY: 
WILLIAM MCKUSICK

DATED: 0/27/21 BY: 
ROBERT W. LILES
Counsel for Relators Lovell and McKusick

DATED: ________ BY: ______________________
SUZANNE E. DURRELL
Counsel for Relators Lovell and McKusick

U.S. Code

Title 31.

Subtitle III. Financial Management

Chapter 37. Claims

§ 3730 – Civil actions for false claims.

(a) Responsibilities of the Attorney General.—
The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) Actions by Private Persons.—
(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.
(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.
(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.
(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—
(A) proceed with the action, in which case the action shall be conducted by the Government; or
(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) 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.

(c) Rights of the Parties to Qui Tam Actions.—
(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).
(2)
(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.
(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.
(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as—
(i) limiting the number of witnesses the person may call;
(ii) limiting the length of the testimony of such witnesses;
(iii) limiting the person's cross-examination of witnesses; or
(iv) otherwise limiting the participation by the person in the litigation.
(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.
(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.
(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) Award to Qui Tam Plaintiff.—
(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys'

fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.
(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.
(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.
(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) Certain Actions Barred.—
(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.
(2)
(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.
(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)

(A) The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed—

(i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;

(ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or

(iii) from the news media,

unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.