UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FAWN CAIN, Relator; et al.,	)	
	)	
Plaintiffs-Appellants,	)	
	)	
vs.	)	
	)	
SALISH KOOTENAI COLLEGE, INC., et al.,	)	
	)	No. 15-35001
Defendant-Appellee,	)	
	)	
and	)	
	)	
CONFEDERATED SALISH AND KOOTNEI TRIBES,	)	
	)	
Intervenor-Appellee.	)	

Appeal from the United States District Court for the District of Montana
Case No. 9:12-cv-0081-BMM

INTERVENOR-APPELLEE'S ANSWERING BRIEF

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INTRODUCTION

Intervenor-Appellee Confederated Salish and Kootenai Tribes of the Flathead Reservation ("CSKT or "Tribes") are aware that Fed. R. App. P. Circuit Rule 28-4 encourages multiple separately represented Appellees to submit a single joint brief. The Tribes' file this brief separately from Defendant-Appellee Salish Kootenai College, et. al. (SKC) because the Tribes are not a party to the merits of the underlying *qui tam* case. The Tribes sought appellate intervention (Dkt. Entry: 11-1) to address their interest in the limited issues of federal Indian law brought to this Court as a result of the district court's Fed. R. Civ. P. 54(b) Certification. *See,* ER Vol. II, Dkt. Entry: 18-3 at 282-285 (Order Granting Stipulated Motion to Modify Stay and for Rule 54(b) Certification).[1] To the greatest extent practicable, the Tribes have avoided duplicative briefing.

JURISDICTIONAL STATEMENT

The Tribes incorporate the Jurisdictional Statement submitted by SKC.

STATEMENT OF ISSUES

1. Whether a tribal entity that functions as an arm of the tribe is a "person" that may be sued under the False Claims Act by *qui tam* relators?

[1] Citations to "ER" followed by a citation are references to the Excerpts of the Record entitled "Appendix to Appellants' Brief" (Vols. I and II). Citations to "Doc.__" (district court) and "Dkt Entry:__" (Ninth Circuit) are citations to documents not included in the ER. All citations utilize the ECF pagination.

2. Whether the district court correctly found that Salish-Kootenai College functions as an arm of the Confederated Salish and Kootenai Tribes?

STATEMENT OF ADDENDUM TO BRIEF

An addendum containing the primary federal statutes discussed has been submitted with this brief.

STATEMENT OF THE CASE

A detailed recitation of the case has been provided. Dkt. Entry: 18-1 at 8-11 (Plaintiff-Appellants' Brief). The Tribes' procedural history with this case is as follows: This is a False Claims Act *qui tam* suit brought by former SKC employees, Plaintiff-Appellants Fawn Cain, Tanya Archer, and Sandi Ovitt ("Relators"). After briefing and argument on the motion to dismiss, the district court held, *inter alia*, that as an arm of the Tribes, SKC was not a "person" subject to False Claims Act *qui tam* liability under 31 U.S.C. § 3729. ER Vol. II, Dkt. Entry: 18-3 at 216-218 (Order).

The Tribes participated in the district court dismissal proceedings as amicus curiae. The Tribes filed an amicus brief (ER Vol. I, Dkt. Entry: 18-2 at 128) participated in oral argument (ER Vol. I, Dkt. Entry: 18-2 at 150) and filed a post-argument supplemental brief (Doc. 36). The Tribes' briefing and argument were focused on the federal Indian law issues raised during the dismissal phase. On

appeal, the Tribes filed a petition for intervention (Dkt. Entry: 11-1) which this Court granted. Dkt. Entry: 17 (Order).

STATEMENT OF THE FACTS

The Tribes incorporate the Statement of the Facts submitted by SKC.

SUMMARY OF THE ARGUMENT

Indian tribes are domestic sovereign nations subject to the plenary authority of Congress. Federal Indian law jurisprudence has evolved predicated upon that unique legal status, and serves as the foundation for how courts apply federal law to tribes. The Supreme Court has held that Congress did not include States, also domestic sovereigns, under the purview of the False Claims Act because the sovereign is not a "person." *See, Vermont Agency of Nat. Res. v. United States ex rel. Stevens,* 529 U.S. 765 (2000). Federal courts have followed *Stevens* and held that Congress did not intend to apply the False Claims Act against sovereign Indian tribes or their subordinate entities. Consistent with that authority, the district court applied the logic of *Stevens* and correctly held that SKC was not a "person" for purposes of the False Claims Act. Relators' suggestion that the district court should have imported a state-based Eleventh Amendment analysis regarding the application of the False Claims Act to SKC is inconsistent with federal court precedent and contrary to federal Indian law.

The district court was also correct when it held that SKC functions as an arm of the Tribes. Relators' case hinges on this Court accepting that SKC is a non-Indian entity, akin to a municipal corporation. The status of SKC has already been examined in great detail by this Court sitting *en banc*. *See, Smith v. Salish Kootenai-College*, 434 F.3d 1127 (9th Cir. 2006) (*en banc*); *cert. denied*, 547 U.S. 1209 (2006). All available documents relevant to the formation of SKC, including the state corporate charter have already received a detailed examination by the trial and appellate courts of the CSKT, the Montana District Court and the *en banc* panel. Relators' claim that SKC is a non-Indian entity has been previously adjudicated. The fact that SKC is a tribal entity is settled law and there is no need for this Court to uproot its findings in *Smith*.

Finally, resolving whether sovereign immunity was waived by SKC is unnecessary. Just as with *Stevens*, the fact that those claims are statutorily barred is enough to justify the district court's dismissal of the suit.

STANDARD OF REVIEW

The Tribes incorporate the standard of review submitted by SKC.

ARGUMENT

I. SOVEREIGNS ARE NOT "PERSONS" THAT CAN BE SUED UNDER THE FALSE CLAIMS ACT QUI TAM PROVISIONS

The False Claims Act (FCA) permits suits against "any person" who knowingly presents a false or fraudulent claim for payment or approval. 31 U.S.C.

§ 3729(a)(1). The FCA allows private individuals (called relators) to bring *qui tam* civil actions on behalf of the United States and share in the proceeds. 31 U.S.C. § 3730; *Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 768-70 (2000) ("*Stevens*"). The FCA does not define the term "person." 31 U.S.C. § 3729(b). The United States Supreme Court has held the term "person" under the FCA includes individuals, municipalities, and corporations. *Cook Cnty., Ill. v. U.S. ex rel. Chandler*, 538 U.S. 119, 125, 133-34 (2003). However, the Court has held that claims by private individuals against states cannot be brought under the FCA, as the term "person" excludes the sovereign. *Stevens*, 529 U.S. 780-81.

Stevens was a *qui tam* suit filed by a former employee of a state agency alleging the agency had violated the FCA by providing false grant claims to the United States. In deciding whether such claims could be brought against a state agency, the Court examined the history and intent of the FCA and its amendments. *Stevens*, 520 U.S. 774-785. The Court ultimately concluded that the FCA was only intended to allow suit against natural persons and no congressional amendment has broadened that limitation, reaffirming the Court's "longstanding interpretive presumption that 'person' does not include the sovereign." *Id.* at 780. While states are domestic sovereigns, the Court noted "they are sovereigns nonetheless, and both comity and respect for our federal system demand that something more than

mere use of the word 'person' demonstrate the federal intent to authorize unconsented private suit against them." *Id.* at 780 (n. 9); *see also, Wilson v. Omaha Indian Tribe,* 442 U.S. 653, 667 (1979) (statutes employing the phrase "person" ordinarily exclude the sovereign) (citing *United States v. Cooper Corp.*, 312 U.S. 600 (1941)); *accord* 1 U.S.C. § 1 (omitting sovereigns from the term "person" when used in acts of Congress).

The logic of *Stevens* has been applied to FCA claims against Indian tribes. The only published decision on point is *United States v. Menominee Tribal Enterprises,* 601 F. Supp.2d 1061 (E.D. Wisc. 2009). *Menominee* compared the Supreme Court's FCA holdings in *Stevens* (sovereigns not persons under FCA) and *Chandler* (municipal corporations are persons under FCA) concluding "much of the dispute in the present case boils down to which of these two recent Supreme Court cases more accurately sets forth the proper considerations applicable to Indian tribes." *Menominee*, 601 F. Supp.2d at 1066. The court held that *Stevens* controlled, reasoning that just as Congress "must do something more" to indicate that a sovereign state may be sued, there must be "affirmative evidence that Congress intended to allow Indian tribes to be sued under the FCA…". *Id.* at 1068. Other courts in this Circuit have come to the same conclusion. *Kendall v. Chief Leschi School, Inc.*, 2008 WL 4104021 at *1(W.D. Wash. 2008)(FCA cannot be applied to incorporated school district that functioned as an arm of the sovereign

tribe); *United States ex. rel. Howard. Shoshone-Paiute Tribes*, 2012 WL 2327676 at *5-7 (D. Nev. June 19, 2012) (citing *Stevens* and *Menominee* to hold that *qui tam* FCA claim cannot be brought against sovereign tribe). This Court recently upheld that district court's application of *Stevens*' "longstanding interpretive presumption that 'person,' as defined in a statute does not include the sovereign." *United States ex. rel. Howard v. Shoshone-Paiute Tribes*, 2015 WL 3652509 at *6 (9th Cir. June 15, 2015) (Memorandum Opinion) ("the same historical evidence and features of the FCA's statutory scheme that failed to rebut the presumption for the states in *Stevens*, here similarly fail to rebut the presumption for sovereign Indian tribes"). The district court's decision here remains entirely consistent with the line of authority cited above, and correctly held that Indian tribes are not "persons" within the meaning of the FCA.

It is important to note that there is no dispute from Relators that the FCA does not apply to the sovereign tribes. Rather, Relators' argue that the district court committed reversible error by virtue of SKC's corporate identity. However, Relators' contention that the district court should have looked to the Supreme Court's decision in *Chandler* as the controlling law with regard to SKC ignores previous precedent and the principles of federal Indian law. Indian tribes carry an inherent sovereignty that does not subject them to suit any more than a state. Moreover, unlike states, the CSKT (and tribes generally) have no subordinate

governmental bodies analogous to counties or municipalities. Drawing on Indian tribes' unique history and the role that tribal business and educational arms play in the economic and cultural health of Indian Country, courts have held that tribal entities are not subject to the FCA. *See, e.g. Kendall v. Chief Leschi School, Inc.*, at *1. Again, resolving how the divergent precedent of *Stevens* and *Chandler* applied to a tribal entity was exactly the issue addressed in *Menominee. United States v. Menominee Tribal Enterprises*, 601 F. Supp. 2d at 1066-69. In that court's view "the ultimate question is whether Indian tribes have more in common with states or with municipalities." *Id.* at 1067. Comparing local governmental entities that have always been subject to suit with the sovereign status held by Indian tribes, the *Menominee* court concluded that like states, Congress was required to clearly express its intention that Indian tribes could be sued under the FCA, something Congress had not done. *Id.* at 1068.

Such a conclusion comports with fundamental federal Indian law, and "the proposition that tribes retain their historical sovereignty to the extent that it is not inconsistent with the overriding interests of the federal government." *Howard* at *6 (D. Nev. 2012). Should there be any question over FCA coverage to tribal entities, "courts have long interpreted ambiguities within a statute to protect American Indian rights." *Id., quoting, United States v. Nice*, 241 U.S. 591, 599 (1916) ("According to a familiar rule, legislation affecting the Indians is to be

construed in their interest, and a purpose to make a radical departure is not lightly to be inferred"); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980) ("Ambiguities in federal law have been construed generously in order to comport with…traditional notions of sovereignty and with the federal policy of encouraging tribal independence").

The reasoning above also counsels against this Court taking up Relators' invitation to import an Eleventh Amendment-based "directly or functionally liable" arm of the state analysis. Dkt. Entry: at. 21-22. Indian tribes have a relationship with the federal government grounded upon an inherent sovereignty that pre-dates the Eleventh Amendment. An entire body of federal Indian law exists to deal with the judicial application of federal law to tribes, and this Court has utilized that precedent to determine when a subordinate tribal entity carries a sufficient tribal status in a given circumstance. *See, e.g. Smith v. Salish Kootenai College,* 434 F.3d at 1133-35. Given this Court's existing federal Indian law precedent, the district court had no need to resort to an arm of the state analysis when determining the extent of FCA coverage. The district court committed no reversible error when it found SKC was a tribal entity for the purposes of the FCA.

The district court correctly held that SKC was not a "person" subject to Relators' *qui tam* suit under the FCA. The Tribes respectfully request that this Court affirm the district court on this issue.

II. SKC IS AN ARM OF THE TRIBES

Given that *qui tam* FCA claims cannot be brought against sovereigns, (discussed above) Relators' case hinges on this Court finding that SKC is not an arm of the Tribes. For the reasons stated below, the district court correctly held that SKC is a tribal entity and functions as an arm of the Tribes for the purposes of the FCA.

A. This Court has Determined that SKC is an Arm of the Tribes.

The district court correctly relied on this Court's *en banc* decision in *Smith v. Salish Kootenai College* to hold that SKC is an arm of the Tribes for the purposes of the FCA.

The issue in *Smith* was whether the CSKT Tribal Court had jurisdiction over tort claims brought by a non-member against SKC. The *en banc* panel concluded that SKC was an arm of the Tribes, and therefore the case belonged in the CSKT Tribal Court. *Smith v. Salish-Kootenai College,* 434 F.3d at 1136-41. The *en banc* panel held that exclusive tribal court jurisdiction was proper under both *Williams v. Lee,* 358 U.S. 217 (1959) (holding suit could not be brought in state court for reservation-based claim against an Indian defendant) as well as the first exception of *Montana v. United States*, 450 U.S. 544 (1981) (finding tribal court jurisdiction

over non-members who enter consensual relationships with the tribe or its members).[2] *Id.*

The *en banc* panel in *Smith* recognized that "Tribes may govern themselves through entities other than formal tribal leadership" and although not every tribal enterprise may be considered a tribal entity "we have previously recognized that there are entities that are sufficiently identified with the tribe that they may be considered to be 'tribal.'" *Smith v. Salish-Kootenai College,* 434 F.3d at 1133. The *en banc* panel was aware that "[w]hether an entity is a tribal entity depends on the context in which the question is addressed." *Id.* (*citing, Dille v. Council of Energy Res. Tribes,* 801 F.2d 373, 376 (10th Cir. 1986) ("the definition of an Indian tribe changes depending upon the purpose of the regulation or statutory provision under consideration"). After examining a plethora of federal Indian law cases from this Circuit and others, the *en banc* panel found that SKC was clearly an arm of the Tribes. *Smith v. Salish-Kootenai College,* 434 F.3d at 1135. Relators argue *Smith* should not control here because the context of the suit is distinguishable and the

[2] In fact the *en banc* panel felt that SKC had such a tie to the Tribes that the CSKT Tribal Court may also have jurisdiction under the second *Montana* exception (tribal court jurisdiction proper in cases where it would have a direct effect on the political integrity, or health and welfare of the tribe) but deferred the question. *See, Smith v. Salish-Kootenai College,* 434 F.3d at 1136 ("Denying jurisdiction to the tribal court would have a direct effect on the welfare and economic security of the tribe insofar as it would seriously limit the tribe's ability to regulate the conduct of its own members through tort law. But…we need not decide whether the second [*Montana* exception] also applies").

record before the *en banc* court regarding SKC's status was incomplete. Dkt. Entry: 18-1 at 22-25. Relators completely miss the mark for two reasons.

First, there is no statutory or policy reason for the Court to define SKC any differently under the FCA than it did in *Smith.* There is no statutory definition of what constitutes a tribal entity for the purposes of the FCA. At any rate, Congress has not expressed a clear intention that the FCA even applies to tribes. (See Section I, above). Absent any clear statutory language to the contrary, the district court had no reason to depart from the detailed analysis of SKC that *Smith* provides. The district court correctly found SKC to be an arm of the Tribes for the purposes of the FCA.

Secondly, the *Smith* decision was hardly the product of an incomplete record. The *en banc* panel analyzed the issue at length, recognizing that the status of SKC was examined by both the CSKT Tribal Court and the Court of Appeals, and then the District Court of Montana. The *en banc* panel referenced a Montana Supreme Court case that recognized a prior federal district court finding that SKC was "a tribal government agency." *Smith v. Salish Kootenai College,* 434 F.3d at 1134 (citing *Bartell v. Am. Home Assurance Co.,* 310 Mont. 276, 49 P.3d 623, 624 (2002)). The *en banc* panel also had the benefit of the CSKT Court of Appeals' detailed review of SKC's formation. *Smith v. Salish-Kootenai College,* 4 Am. Tribal Law 90 (Feb 17, 2003) ("To treat SKC as a nonmember for purposes of

jurisdiction would be to deny both the fundamental nature and identity of the college and the complexity of federal Indian law).

Relators' counter that the corporate identity of SKC and the character of the land that SKC occupies reveal that their *qui tam* FCA claims against SKC are not against a tribal entity, but rather a non-Indian Montana corporation. Dkt. Entry: 18-1 at 15-17, 24-25. Relators urge the Court to allow full discovery into the SKC corporate documents so they can prove their case is against a non-Indian entity. However, as a cursory reading of the *Smith* briefing makes clear, both the CSKT and State Corporate charters were before the *en banc* court, along with the SKC By-Laws and an Affidavit from then SKC President Joe McDonald.[3] The *en banc* panel referenced some of those documents in its opinion. *Smith v. Salish-Kootenai College,* 434 F.3d at 1134. Furthermore, the mere existence of a Montana corporate charter does not make SKC a non-Indian corporate entity.[4] Relators' arguments echo what the *en banc* panel has already heard and rejected:

[3] Pacer cannot produce the record from *Smith v. Salish-Kootenai College,* however the briefs are available on Westlaw either under a WL number or at the bottom of the *en banc* decision published at 434 F.3d 1127. For an unknown reason the CSKT Court of Appeals' brief is not available on Westlaw.

[4] The issue of dual tribal-state incorporation under Montana corporate law has already been addressed by the Montana Supreme Court. *See, Flat Center Farms, Inc. v. State Department of Revenue,* 310 Mont. 206, 49 P.3d 578 (2002) (subsequent state incorporation of reservation-based tribal business entity previously incorporated under tribal law did not divest the entity of its tribal status, thus entity was not subject to state corporate taxes); *see also, Koke v. Little Shell*

> It should not be overlooked that Smith sued SKC the Montana Corporation; the corporation that was chartered by the State of Montana and incorporated by seven individuals, not the tribe. It is also significant that the record is void of any evidence of whether the land on which SKC is headquartered is or is not alienated fee land. Under the district court's erroneous analysis, these are critical factors they [sic] cannot be simply presumed.

Reply Brief of Plaintiff-Appellant Smith, 2003 WL 22724264 (9th Cir 2003) at *7.

The tribal status of SKC is settled law in this Circuit. There is no reason for the Court here to overturn a determination made by an *en banc* panel sitting with the benefit of a complete record. Every argument made regarding the corporate identity of SKC has been previously heard and decided. The district court correctly followed *Smith* when it held that SKC was an arm of the Tribes.

B. Resolving Whether SKC Waived Sovereign Immunity is Unnecessary.

While the district court correctly interpreted and applied the doctrine of sovereign immunity, the Tribes submit that this Court could affirm the district court without having to resolve whether SKC properly invoked the Tribes' sovereign immunity. The Supreme Court took this approach in *Stevens*, beginning and ending with the statutory question. *Stevens*, 529 U.S. at 779. "We nonetheless have routinely addressed *before* the question whether the Eleventh Amendment

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Tribe of Chippewa Indians of Montana, Inc., 315 Mont. 510, 68 P.3d 814 (2003) (when deciding issues involving state incorporated Indian entity courts must look beyond corporate charter to the tribal nature of the entity).

forbids a particular statutory cause of action to be asserted against States, the question whether the statute itself *permits* the cause of action it creates to be asserted against States (which it can do only by clearly expressing such an intent)." *Id.* (citations omitted, emphasis in original). It is the status as a sovereign itself that serves as the statutory bar to a *qui tam* FCA claim, not the existence of an immunity defense.

The same path was followed in *Menominee.* Deferring on the sovereign immunity defense raised by the tribal corporation, the district court explained "the Supreme Court found it preferable to reach the question of statutory interpretation first." *United States v. Menominee,* 601 F. Supp.2d at 1066 (n. 1) ("*Stevens* construed the term 'person,' and in doing so it did not limit its analysis to the sovereign immunity issue…"). Taking this course would allow this Court to affirm the district court without having to decide the sovereign immunity issues presented here. Moreover, the Court would not have to break new ground as a statutory-based affirmation would remain consistent with the *Stevens* and *Menominee* decisions.

CONCLUSION

False Claims Act *qui tam* liability only extends to "persons" under 31 U.S.C. § 3729(a). The district court correctly held that as an arm of the Confederated Salish and Kootenai Tribes, SKC was not such a "person." The Tribes respectfully

request that the district court's dismissal of Relators' *qui tam* FCA claims be affirmed.

STATEMENT OF RELATED CASES

The Confederated Salish and Kootenai Tribes are not aware of any pending cases related to this appeal.

Respectfully submitted this 19th day of August, 2015.

Confederated Salish and Kootenai Tribes

By: /s/ John T. Harrison
John T. Harrison
Attorney for the Confederated Salish and Kootenai Tribes

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,727 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). It has been prepared in a proportionately spaced typeface using Microsoft Office Word 2010, in 14-point font size in Times New Roman type style.

Dated: August 19, 2015

By: /s/ John T. Harrison
John T. Harrison
Attorney for the Confederated Salish and Kootenai Tribes

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 19, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I further certify that I mailed a true and correct copy of the foregoing by U.S. Mail, postage prepaid to the following:

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/s/ John T. Harrison
John T. Harrison
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ADDENDUM

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1 U.S.C. § 1. Words Denoting Number, Gender, and So Forth.

In determining the meaning of any Act of Congress, unless the context indicates otherwise—

words importing the singular include and apply to several persons, parties, or things;

words importing the plural include the singular;

words importing the masculine gender include the feminine as well;

words used in the present tense include the future as well as the present;

the words “insane” and “insane person” shall include every idiot, insane person, and person non compos mentis;

the words “person” and “whoever” include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals;

“officer” includes any person authorized by law to perform the duties of the office;

“signature” or “subscription” includes a mark when the person making the same intended it as such;

“oath” includes affirmation, and “sworn” includes affirmed;

“writing” includes printing and typewriting and reproductions of visual symbols by photographing, multigraphing, mimeographing, manifolding, or otherwise.

31 U.S.C. §3729. False Claims Act.

(a) Liability for certain acts.—

(1) In general.--Subject to paragraph (2), any person who--

(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

(C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);

(D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;

(E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or

(G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104-410), plus 3 times the amount of damages which the Government sustains because of the act of that person.

(2) Reduced damages.--If the court finds that—

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation,

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of that person.

(3) Costs of civil actions.--A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Definitions.--For purposes of this section—

(1) the terms “knowing” and “knowingly” –

(A) mean that a person, with respect to information—

(i) has actual knowledge of the information;

(ii) acts in deliberate ignorance of the truth or falsity of the information; or

(iii) acts in reckless disregard of the truth or falsity of the information; and

(B) require no proof of specific intent to defraud;

(2) the term “claim”—

(A) means any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that—

(i) is presented to an officer, employee, or agent of the United States; or

(ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest, and if the United States Government--

(I) provides or has provided any portion of the money or property requested or demanded; or

(II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded; and

(B) does not include requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or as an income subsidy with no restrictions on that individual's use of the money or property;

(3) the term "obligation" means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment; and

(4) the term "material" means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

(c) Exemption from disclosure.--Any information furnished pursuant to subsection (a)(2) shall be exempt from disclosure under section 552 of title 5.

(d) Exclusion.--This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

31 U.S.C. § 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.[1] 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.

(f) Government not liable for certain expenses.--The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) Fees and expenses to prevailing defendant.--In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Relief from retaliatory actions.—

(1) In general.--Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or

associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.

(2) Relief.--Relief under paragraph (1) shall include reinstatement with the same seniority status that employee, contractor, or agent would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An action under this subsection may be brought in the appropriate district court of the United States for the relief provided in this subsection.

(3) Limitation on bringing civil action.--A civil action under this subsection may not be brought more than 3 years after the date when the retaliation occurred.