No. _____

In The
Supreme Court of the United States

VICTAULIC COMPANY,

Petitioner,

v.

UNITED STATES EX REL. CUSTOMS FRAUD INVESTIGATIONS, LLC,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Federal Rule of Civil Procedure 9(b) requires a party pleading fraud to "state with particularity the circumstances constituting fraud...." The False Claims Act imposes liability for civil penalties and treble damages upon any person who knowingly and improperly avoids or decreases an "obligation" to pay the United States Government, where "obligation" means "an established duty, whether or not fixed...." 31 U.S.C. § 3729(a)(1)(G), (b)(3). The questions presented are:

1. Whether a *qui tam* relator's complaint under the False Claims Act satisfies Rule 9(b) by alleging nothing more than the opportunity for fraud, as held by the Third Circuit, or whether Rule 9(b) instead requires allegations of actual false claims, as held by the Fourth, Sixth, Eighth, and Eleventh Circuits, or allegations of particular details of a scheme paired with reliable indicia of a false claim, as held by the First, Fifth, Seventh, Ninth, Tenth, and District of Columbia Circuits.

2. Whether an "obligation" under the False Claims Act includes contingent duties that arise only after the exercise of discretion by Government actors, so that an alleged failure to pay contingent marking duties is actionable as a knowing and improper avoidance of an obligation to pay the Government.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 DISCLOSURE STATEMENT

Petitioner Victaulic Company was defendant in the district court and appellee in the court of appeals.

Victaulic Company is a private corporation organized under the laws of New Jersey. Victaulic Company does not have a parent corporation, and no publicly held corporation owns 10% or more of Victaulic Company's stock.

Respondent Customs Fraud Investigations, LLC, a *qui tam* relator, was plaintiff in the district court and appellant in the court of appeals.

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Victaulic Company respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Third Circuit's opinion (1a-63a) is reported at 839 F.3d 242. The relevant orders and opinions of the district court (66a-150a) are unreported.

JURISDICTION

The Third Circuit's judgment was entered on October 5, 2016. (64a-65a.) A timely petition for rehearing was denied on February 22, 2017. (151a-152a.) This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

Relevant provisions of the False Claims Act ("FCA"), 31 U.S.C. § 3729 *et seq.*; the Tariff Act of 1930, 19 U.S.C. § 1202 *et seq.*; and the Federal Rules of Civil Procedure are set forth in the Appendix. (153a-170a.)

INTRODUCTION

The decision below presents two important issues of law with wide-ranging implications for nearly every business in the United States. First, the decision exacerbates an acknowledged and deep conflict among the courts of appeals and substantially dilutes what a *qui tam* relator must allege to satisfy the particularity requirement of Rule 9(b). Second, the decision dramatically expands the FCA to impose liability for contingent "reverse false claims" in direct conflict with both every other court of appeals that has addressed the

issue and the plain language of the FCA. This Court should grant certiorari to resolve both of these important issues.

1. Rule 9(b) requires a party pleading fraud to "state with particularity the circumstances constituting fraud...." In 2014, when nine courts of appeals were almost equally divided regarding the particularity test to be applied, the Government acknowledged that certiorari "may ultimately be warranted in an appropriate case." Brief for the United States as *Amicus Curiae* at 10, *United States ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, No. 12-1349 (U.S. Feb. 2014) ("U.S. *Nathan* Br."). Since then, the circuit split has only deepened.

Eleven courts of appeals have now adopted conflicting tests to evaluate the sufficiency of a *qui tam* relator's complaint. The Fourth, Sixth, Eighth, and Eleventh Circuits have adopted a strict standard requiring allegations of actual false claims, i.e., "representative samples" with details such as the time, place, and content of the acts and the identity of the actors. The First, Fifth, Seventh, Ninth, Tenth, and District of Columbia Circuits have adopted a more relaxed standard requiring allegations of "particular details" of a scheme to submit false claims paired with "reliable indicia" that false claims were actually submitted. The Third Circuit's decision below worsens the conflict by introducing an even more lenient standard requiring nothing more than the opportunity for fraud—effectively eliminating Rule 9(b)'s particularity requirement.

This case presents the appropriate vehicle to address the conflict because it includes none of the

procedural limitations of prior cases and because the pleading issues are starkly presented. Only the Third Circuit's more relaxed new standard allows this case to proceed—and even then the relator alleged "just enough." (31a.) Furthermore, the rise of professional relators bringing *qui tam* actions with no inside information to offer, as in this case, demonstrates the increasingly urgent need for this Court to articulate the proper particularity standard for the lower courts to apply.

Despite the purported uniformity of the Federal Rules, both businesses and *qui tam* relators were already subject to widely divergent (often case-determinative) pleading standards from one court to the next. By eviscerating the most basic requirement of Rule 9(b), the Third Circuit's decision amplifies that already deafening problem and invites rampant forum shopping by *qui tam* relators who now need only identify an opportunity for fraud. This issue is of exceptional importance to every business that engages in transactions with the Government and every legitimate whistleblower attempting to remedy fraud perpetrated on the Government. Certiorari is necessary to resolve this worsening conflict.

2. The FCA imposes liability for "reverse false claims" upon any person who knowingly and improperly avoids or decreases an "obligation" to pay the Government, where "obligation" means "an established duty, whether or not fixed...." 31 U.S.C. § 3729(a)(1)(G), (b)(3). The Third Circuit's decision below ignores this plain language and creates FCA liability based on an alleged failure to pay *contingent* duties that would arise—if at all—only after the

exercise of discretion by Government actors. I.e., the Third Circuit permits FCA liability for the failure to pay a duty, even when that duty may never have been imposed.

Other courts of appeals have consistently and correctly concluded that a mere potential duty does not create an obligation to pay the Government. The Third Circuit's novel and unsupported statutory interpretation not only dramatically expands the scope of FCA liability, but also creates a circuit split on the issue. This Court should grant certiorari to resolve this conflict and to address the Third Circuit's new and novel interpretation of the FCA, which will have significant consequences for most American businesses.

STATEMENT

I. STATUTORY AND REGULATORY BACKGROUND

A. The FCA

The FCA was enacted in 1863 to combat "widely publicized abuses by unscrupulous private contractors" during the Civil War. John T. Boese, *Civil False Claims and Qui Tam Actions* at 1-8 (4th ed. 2011) ("Boese"). Despite its lengthy history, the FCA "was not widely utilized until far-reaching amendments introduced in 1986 made it the weapon of first choice in combating fraud in virtually every program involving federal funds." *Id.* at 1-5.

1. Actions by Qui Tam Relators

During the Civil War era, the Government's ability to enforce existing laws was limited. *Id.* at 1-8. To address this issue, Congress included a *qui tam* provision in the FCA—then known as the

"Informer's Act"—to permit private persons, i.e., *qui tam* relators, to bring actions on behalf of the Government. *See id.* at 1-8 to 1-9; 31 U.S.C. § 3730.

These *qui tam* provisions saw little use in the first century of the FCA. *See* Boese at 1-12 to 1-19. However, Congress believed that "[d]etecting fraud is usually very difficult without the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity." S. Rep. No. 99-345, at 4 (1986). Therefore, the 1986 amendments to the FCA included "sweeping" changes "to encourage more private enforcement suits...." *Id.* at 1-24 to 1-25. Specifically, the 1986 amendments guaranteed a relator's right to participate even when the Government intervenes; increased the relator's percentage of any recovery; and prohibited employers from retaliating against whistleblowers. *See id.* at 1-25; Robert Salcido, *The 2009 False Claims Act Amendments: Congress' Efforts to Both Expand and Narrow the Scope of the False Claims Act*, 39 Pub. Cont. L.J. 741, 755 (2010) ("Salcido").

In the 30 years since the enactment of the 1986 amendments, *qui tam* relators have filed more than 11,000 actions under the FCA. *See* U.S. Dep't of Justice, *Fraud Statistics* (Dec. 13, 2016), https://www.justice.gov/opa/press-release/file/918361/download. Those *qui tam* actions have resulted in settlements and judgments totaling nearly $37.7 billion, more than $6.3 billion of which was ultimately awarded to relators. *See id.*

2. Reverse False Claims

In 1986, Congress expanded the FCA to impose liability on any person who "knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay...the Government...." 31 U.S.C. § 3729(a)(7) (1986). Congress' stated purpose for creating "reverse false claims" liability was to provide a remedy "where parties created false records or statements to minimize their obligation to pay funds or provide services under their contracts with the Government." Salcido, 39 Pub. Cont. L.J. at 746.

In 2009, Congress expanded reverse false claims to impose liability on any person who "knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay...the Government...." 31 U.S.C. § 3729(a)(1)(G). This amendment "eliminated the need for a person to have made an affirmative act—a false statement or record—in order to conceal, avoid, or decrease the obligation...." Boese at 1-84.1. Congress also defined the word "obligation" as "an established duty, whether or not fixed...." 31 U.S.C. § 3729(b)(3). Therefore, the FCA now imposes liability (and treble damages and penalties) upon any person who knowingly and improperly avoids or decreases an established duty, whether or not fixed, to pay the Government.

B. The Tariff Act of 1930

During the rapid expansion of American industry following World War I, economists argued that tariffs would raise wages and promote the nation's economic development. *See* Daniel K. Tarullo, *Law*

and Politics in Twentieth Century Tariff History, 34 UCLA L. Rev. 285, 290-91 (1986). In accordance with that view, Congress passed the Tariff Act of 1930 "to encourage the industries of the United States, [and] to protect American labor...." Tariff Act of 1930, Pub. L. No. 71-361, 46 Stat. 590 ("Tariff Act"). In addition to raising tariff rates on more than 20,000 imported goods, the Tariff Act required that imported goods be marked with their country of origin (§ 304(a)) and provided for the assessment of marking duties if goods were not properly marked at the time of importation and not subsequently exported under customs supervision (§ 304(b)).

Today, the Tariff Act allows U.S. Customs and Border Protection ("Customs") to assess marking duties against importers if unmarked goods enter into commerce, are later detected, and are not subsequently marked, exported, or destroyed under Customs' supervision prior to finality of "liquidation." *See* 19 U.S.C. § 1304(i); 19 C.F.R. § 134.2. "Liquidation" is defined as "the final computation or ascertainment of duties" and generally occurs no more than one year after importation. 19 C.F.R. § 159.1; *see* 19 U.S.C. §§ 1500, 1504(a)(1); 19 C.F.R. §§ 159.9(c), 159.11(a). If unmarked goods are discovered after liquidation has occurred, Customs may seek monetary penalties through an enforcement action but may not assess marking duties. *See* 19 U.S.C. §§ 1304(i), 1592; 19 C.F.R. §§ 134.2, 134.51, 134.54, 159.46(b).

II. PROCEEDINGS BELOW

A. The District Court's Decisions

The jurisdiction of the district court was invoked under the FCA, 31 U.S.C. § 3732(a), and under the general jurisdiction of the district courts for civil actions arising under federal law, 28 U.S.C. § 1331.

1. Motion to Dismiss the Complaint

Petitioner Victaulic Company ("Victaulic") is a leading producer of iron and steel pipe couplings and fittings both domestically and abroad. Respondent Customs Fraud Investigations, LLC ("CFI") "conducts confidential research and analysis related to potential customs fraud" and then files *qui tam* actions against importers with which CFI has no relationship and about which CFI has no firsthand knowledge.

CFI filed a complaint against Victaulic asserting a single cause of action under the reverse false claims provision of the FCA. CFI's complaint alleged that Victaulic had engaged in a 10-year scheme to defraud the Government by failing to include country of origin markings on approximately 83 million pounds of pipe fittings imported from China and Poland. CFI further alleged that Victaulic had falsified Customs entry forms by failing to disclose that it owed 10 percent marking duties on the allegedly unmarked imports. (CFI later admitted that Victaulic neither misrepresents the origin of its imported products to Customs nor falsifies Customs entry forms with regard to country of origin.)

After the Government declined to intervene and the complaint was unsealed, Victaulic moved to

dismiss the complaint under Rule 12(b)(6).[1] Following extensive briefing and a lengthy hearing, the district court dismissed the complaint with prejudice. (112a.) The court held that the complaint was "virtually devoid of non-conclusory factual allegations" and failed to state a claim. (147a.) Even considering additional facts alleged by CFI in its briefing and at oral argument, the court concluded that "CFI ha[d] not 'nudged' its claims 'across the line from conceivable to plausible.'" (148a.)

2. Motion for Leave to Amend the Complaint

After the complaint was dismissed with prejudice, CFI filed a motion to alter or amend the judgment and for leave to file an amended complaint. CFI's proposed amended complaint described a "product study" of "the secondary market for Victaulic pipe fittings" in which CFI reviewed photographs in 221 postings on the online auction website eBay. Each of the postings was purported to be for Victaulic pipe fittings, though none was posted by Victaulic. Regardless of the number or quality of photographs in each posting, CFI alleged that it "was able to determine with 95% confidence whether a marking was present or not" and concluded that "the overwhelming majority" of postings showed unmarked products. This was the sole basis upon which CFI—as a complete outsider—made its allegations against Victaulic.

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[1] Victaulic also moved to dismiss the complaint under Rule 12(b)(1). The district court denied that aspect of Victaulic's motion, and that ruling was not challenged on appeal.

The district court denied CFI's motion. (66a.) Having already considered the additional facts provided by CFI, the court held that CFI had unduly delayed seeking what was "essentially CFI's second effort at amendment." (84a.) The court also held that amendment would be futile because the proposed amended complaint failed to satisfy Rule 9(b) and because an alleged failure to pay marking duties does not constitute a violation of the FCA.

In evaluating the proposed amended complaint under Rule 9(b), the district court applied a standard requiring "particular details" of a scheme paired with "reliable indicia" of a false claim, which requires more than "a mere opportunity for fraud." (100a.) The court held that "CFI's product study [wa]s insufficiently reliable to support its conclusion that Victaulic failed to mark foreign products because it use[d] unreliable methods." (102a.) "CFI's conclusions rest[ed] on the assumption that it was able to discern from photographs on the internet whether a given product was marked." (*Id.*) However:

> CFI's own allegations illustrate[d] the limits of its products study. When CFI selected a sample of nine products to purchase...one of the products purchased was not even marked as a Victaulic product and had to be excluded from the study....Furthermore, upon purchasing items for sale, CFI realized that "approximately half of the Victaulic pipe fittings CFI purchased were, in fact, marked as made in the

> U.S.A., although they appeared from the eBay listings to be unmarked."

(103a.) CFI's allegations of fraud, particularly as a stranger to Victaulic with no inside information, were therefore insufficient to satisfy the requirements of Rule 9(b).

The district court also held that "the same conduct that gives rise to the obligation to pay marking duties cannot also be said to avoid, conceal, or decrease those duties so as to give rise to a reverse false claim...." (99a.) Therefore, an alleged failure to pay marking duties could not give rise to liability as a reverse false claim. The court declined to consider whether a failure to pay contingent duties gives rise to a claim under the FCA but observed that "an obligation to pay marking [duties] arises only if unmarked or improperly marked goods are entered into the country and are not subsequently remarked, exported, or destroyed." (88a.)

B. The Court of Appeals' Decision

A split panel of the court of appeals reversed the district court's decision denying leave to file an amended complaint, holding that the proposed amended complaint satisfied Rule 9(b), and a unanimous panel held that an alleged failure to pay contingent marking duties is actionable as a reverse false claim.

1. Finding the Mere Opportunity for Fraud Satisfies Rule 9(b)

The panel majority devoted little more than a single page of its opinion to its evaluation of the

proposed amended complaint under Rule 9(b). The majority concluded that "nothing more is required to give Victaulic adequate notice of the claims raised against it" than an allegation that the photographs reviewed by CFI showed fewer markings than might be expected, paired with the "opportunity for fraud." (30a-31a.) Acknowledging that "[t]here is little evidence to show that CFI's unusual procedure of reviewing eBay listings is an accurate proxy for the universe of Victaulic's products available for sale in the United States," the majority stated, "[w]e, too, are skeptical." (29a.) Nevertheless, applying its new, minimal standard, the majority concluded that "CFI has done just enough to allow this matter to proceed...." (31a.)

The dissent disagreed, finding that the proposed amended complaint failed to satisfy even the plausibility requirement of Rule 8(a), let alone the particularity requirement of Rule 9(b):

> Whereas Rule 9(b) requires that fraud be alleged with particularity, CFI gives us ten years of raw import data and insists there is evidence of fraud in there, somewhere, while completely failing to identify which shipments, during which time periods, at which ports were illegal. The mere suggestion of fraud, which is all CFI has alleged, is not enough to state a plausible claim or to satisfy the heightened pleading standards of Rule 9(b).

(34a.) Because the dissent concluded that CFI's allegations were nothing more than "a data dump camouflaged as a set of particularized allegations"

that did not satisfy the "sharper teeth" of Rule 9(b), the dissent would have affirmed the district court's finding of futility under Rule 9(b). (60a-62a.)

2. Finding an Alleged Failure to Pay Contingent Marking Duties Is Actionable as a Reverse False Claim

When evaluating whether the failure to pay contingent marking duties is actionable as a reverse false claim, the court of appeals focused on the legislative history associated with the definition of "obligation." In particular, the court relied upon "the Senate Report highlighting the definition's express inclusion of 'contingent, non-fixed obligations'...." (20a.) That language, however, was never enacted. *See* 31 U.S.C. § 3729(b)(3).

Turning to a consideration of marking duties under the Tariff Act, the court concluded that if unmarked or improperly marked goods "escape detection and are released into the United States, the ten percent ad valorem duty is deemed to 'have accrued at the time of importation' and is due and owing, without exception." (22a.) Only the marking duties statute was cited to support this conclusion; the court cited no other statute or implementing regulation.

Based upon this cursory, faulty review of the FCA and the Tariff Act, the court of appeals held that "[t]he statutory text, legislative history, and policy rationale underlying the regulatory scheme all lead to one conclusion: reverse false claims liability may attach as a result of avoiding marking duties." (25a.)

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to resolve the significant issues presented in this case.

This case highlights a deep and worsening divide among the courts of appeals regarding an important and recurring issue: the appropriate standard to determine whether a *qui tam* relator's complaint under the FCA satisfies the particularity requirement of Rule 9(b). Almost every court of appeals has now taken a side in this conflict, and the Third Circuit's decision below has created a new, third, even more minimalist approach to evaluating the particularity requirement. The Government has previously advised this Court that this is an important issue warranting review in an appropriate case. This is such a case.

Also at issue in this case is a novel and troublesome interpretation of the word "obligation" as defined in the FCA. The Third Circuit's interpretation, which conflicts with every other court of appeals that has addressed the issue, expands the scope of liability for "reverse false claims" to include a failure to pay monies that might become due for any potential regulatory violation. This new interpretation subjects nearly every business operating in the United States—under any regulatory scheme—to the possibility of suit under the FCA and could lead to billions of dollars' worth of baseless claims.

I. THIS COURT SHOULD RESOLVE THE DEEP DIVIDE AMONG THE COURTS OF APPEALS REGARDING THE APPLICATION OF RULE 9(B) IN FCA CASES TO PROVIDE A UNIFORM STANDARD FOR THE HUNDREDS OF FCA CASES FILED EACH YEAR

In alleging claims of fraud, "a party must state with particularity the circumstances constituting fraud...." Fed. R. Civ. P. 9(b). There is no dispute that complaints alleging violations of the FCA are subject to the particularity requirement of Rule 9(b). *See Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 404 (2011). Indeed, "every regional circuit has held that a relator must meet the requirements of Rule 9(b) when bringing complaints on behalf of the government." *In re BP Lubricants USA Inc.*, 637 F.3d 1307, 1310 (Fed. Cir. 2011) (collecting cases). However, when it comes to the important and recurring issue of how to *apply* the particularity requirement of Rule 9(b), the courts of appeals are deeply divided.

A. Nearly Every One of the Courts of Appeals Has Taken a Side in this Dispute, Subjecting Litigants to Widely Divergent Standards

As recently as three years ago, the Government acknowledged that "lower courts have reached inconsistent conclusions about the precise manner in which a *qui tam* relator may satisfy the requirements of Rule 9(b)." U.S. *Nathan* Br. at 10. At that time, nine courts of appeals had taken a side in this conflict, applying one of two standards.

The Government further advised: "If that disagreement [among the lower courts] persists, however, this Court's review to clarify the applicable pleading standard may ultimately be warranted in an appropriate case." *Id.* The disagreement not only has persisted, but also has worsened. Since the Government made those statements, two more courts of appeals have taken a side. Additionally, the Third Circuit, which had already adopted one of the two existing standards, has now created a third standard in its decision below. This worsening conflict warrants this Court's review, particularly as relators who are complete outsiders with no firsthand knowledge—like CFI here—now seek to bring cases under the FCA.

1. The "Actual False Claims" Standard Applied by the Fourth, Sixth, Eighth, and Eleventh Circuits

The Fourth, Sixth, Eighth, and Eleventh Circuits apply a strict standard when evaluating whether a *qui tam* relator's complaint satisfies Rule 9(b). Specifically, these courts require that a relator provide allegations of actual false claims—i.e., "representative samples" of the alleged fraud—with details such as the time, place, and content of the acts and the identity of the actors. *See, e.g.*, *United States ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, 707 F.3d 451, 455-58 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 1759 (2014); *United States ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 501 F.3d 493, 502-09 (6th Cir. 2007); *United States ex rel. Joshi v. St. Luke's Hosp., Inc.*, 441 F.3d 552, 559-61 (8th Cir. 2006), *cert. denied*, 127 S. Ct. 189; *United States ex rel. Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301,

1308-14 (11th Cir. 2002), *cert. denied*, 123 S. Ct. 870 (2003).

This "actual false claims" approach results from the view that the submission of a claim is "the *sine qua non* of a [FCA] violation." *Clausen*, 290 F.3d at 1311. Requiring strict adherence to the particularity standard satisfies the "multiple purposes of Rule 9(b), namely, of providing notice to a defendant of its alleged misconduct, of preventing frivolous suits, of 'eliminat[ing] fraud actions in which all the facts are learned after discovery,' and of 'protect[ing] defendants from harm to their goodwill and reputation'...." *Nathan*, 707 F.3d at 456.

> When Rule 9(b) applies to a complaint, a plaintiff is not expected to actually *prove* his allegations, and [courts] defer to the properly pleaded allegations of the complaint. But [courts] cannot be left wondering whether a plaintiff has offered mere conjecture or a specifically pleaded allegation on an essential element of the lawsuit.

Clausen, 290 F.3d at 1313.

The courts of appeals applying the "actual false claims" standard also observe that "[t]he [FCA] is intended to encourage individuals who are either close observers or involved in the fraudulent activity to come forward, and is not intended to create windfalls for people with secondhand knowledge of the wrongdoing." *United States ex rel. Kinney v. Stoltz*, 327 F.3d 671, 674 (8th Cir. 2003). The fact that a complete outsider may have difficulty learning the details of the alleged scheme, or may lack

independent access to relevant records, is irrelevant; "neither the Federal Rules nor the [FCA] offer any special leniency under [such] circumstances to justify [a relator] failing to allege with the required specificity the circumstances of the fraudulent conduct he asserts in his action." *Clausen*, 290 F.3d at 1314; *see Nathan*, 707 F.3d at 458 ("pleading requirements do not permit a relator to bring an action without pleading facts that support all the elements of a claim").

The Second Circuit has not yet "wade[d] into the circuit split" regarding the appropriate Rule 9(b) standard, but a case involving this issue is pending. *United States ex rel. Polansky v. Pfizer, Inc.*, 822 F.3d 613, 619 (2d Cir. 2016); *see Fabula ex rel. United States v. Am. Med. Response, Inc.*, Case No. 15-3930 (2d Cir.) (oral argument Dec. 27, 2017). While it is impossible to predict what the Second Circuit may hold, its precedents indicate that it is more likely to join the Fourth, Sixth, Eighth, and Eleventh Circuits in adopting the strict "actual false claims" standard. *See, e.g.*, *United States ex rel. Ladas v. Exelis, Inc.*, 824 F.3d 16, 26 (2d Cir. 2016) ("'We recognize and rigorously enforce the[] salutary purposes of Rule 9(b).'").[2]

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[2] District courts in the Second Circuit have also indicated that they favor the strict standard. *See, e.g.*, *United States ex rel. Corporate Compliance Assocs. v. N.Y. Soc'y for the Relief of the Ruptured & Crippled, Maintaining the Hosp. for Special Surgery*, No. 07-292, 2014 WL 3905742, at *11-16 (S.D.N.Y. Aug. 7, 2014) (collecting cases).

2. The "Particular Details" and "Reliable Indicia" Standard Applied by the First, Fifth, Seventh, Ninth, Tenth, and District of Columbia Circuits

The First, Fifth, Seventh, Ninth, Tenth, and District of Columbia Circuits have applied a more "lenient" or "relaxed" standard when evaluating whether a *qui tam* relator's complaint satisfies Rule 9(b). Specifically, these courts require a relator to provide allegations describing "particular details" of a scheme to submit false claims paired with "reliable indicia" leading to a strong inference that false claims were actually submitted. *See, e.g.*, *United States ex rel. Heath v. AT&T, Inc.*, 791 F.3d 112, 125-27 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 2505 (2016); *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 998-99 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 801; *United States ex rel. Lemmon v. Envirocare of Utah, Inc.*, 614 F.3d 1163, 1171-73 (10th Cir. 2010); *United States ex rel. Duxbury v. Ortho Biotech Prods., L.P.*, 579 F.3d 13, 29-32 (1st Cir. 2009), *cert. denied*, 130 S. Ct. 3454 (2010); *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 185-92 (5th Cir. 2009); *United States ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849, 853-55 (7th Cir. 2009).

Nothing in the text of Rule 9(b) or the FCA warrants a deviation from the strict requirements of particularity. *See generally* Fed. R. Civ. P. 9(b); 31 U.S.C. § 3729. However, the courts of appeals that have adopted the relaxed standard reason that Rule 9(b) is "context specific and flexible and must remain so to achieve the remedial purpose of the [FCA]." *Grubbs*, 565 F.3d at 190. The stated goal of these courts is to "effectuate[] Rule 9(b) without stymieing

legitimate efforts to expose fraud." *Id.* Therefore, if a relator "cannot allege the details of an actually submitted false claim, [the relator] may nevertheless survive by alleging particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted." *Id.*

"Particular details" nevertheless remain the touchstone even under this relaxed standard. A *qui tam* relator's complaint does not satisfy Rule 9(b) unless it provides sufficient detail to allow "pointed and efficient" discovery "tailored by the district court to the case at hand." *Id.* at 191; *see Ebeid*, 616 F.3d at 999 (sufficient detail so defendant "can defend against the charge and not just deny that [the defendant has] done anything wrong"); *Lusby*, 570 F.3d at 854-55 (must "show, in detail, the nature of the charge, so that vague and unsubstantiated accusations of fraud do not lead to costly discovery and public obloquy").

There is one point of agreement among the courts applying the strict standard and the courts applying the relaxed standard. None of the courts of appeals offers any particular solicitude for outsiders; "[t]o jettison the particularity requirement simply because it would facilitate a claim by an outsider is hardly grounds for overriding the general rule, especially because the FCA is geared primarily to encourage insiders to disclose information necessary to prevent fraud on the government." *Ebeid*, 616 F.3d at 999; *see also Clausen*, 290 F.3d at 1314.

3. *The New "Opportunity for Fraud" Standard and the Third Circuit's Internal Conflict*

In 2014, the Third Circuit acknowledged that "the various Circuits disagree as to what a plaintiff...must show at the pleading stage to satisfy the 'particularity' requirement of Rule 9(b) in the context of a claim under the FCA." *Foglia v. Renal Ventures Mgmt., LLC*, 754 F.3d 153, 155 (3d Cir. 2014). After surveying the existing landscape, the Third Circuit chose to adopt the "more nuanced reading of the heightened pleading requirements of Rule 9(b), holding that it is sufficient for a plaintiff to allege 'particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted.'" *Id.* at 155-57. However, even under this standard, "[d]escribing a mere opportunity for fraud [would] not suffice" to satisfy Rule 9(b). *Id.* at 158. The Third Circuit reaffirmed this standard two years later, holding that a *qui tam* relator must "support its allegations 'with all of the essential factual background that would accompany the first paragraph of any newspaper story—that is, the who, what, when, where and how of the events at issue.'" *United States ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries, LLC*, 812 F.3d 294, 307 (3d Cir. 2016) (internal quotation omitted).

The decision below, however, creates a new, third standard for evaluating Rule 9(b)'s particularity requirement: a relator with no firsthand knowledge of any false claims need only provide vague and conclusory allegations describing the "opportunity for fraud" that can only be proved or disproved, if at

all, by documents in the defendant's possession. (30a.) More specifically, in the context of this case, the panel majority concluded that a complete outsider alleging the failure to properly mark some unknown amount of imported goods over the course of a decade can simply allege that a non-representative sample of photographs on eBay shows fewer markings than might be expected, "that the way marking duties are assessed provides an opportunity for fraud, and that only Victaulic has access to the documents that could prove or disprove" the allegations. (*Id.*)

This new pleading standard not only conflicts directly with established Third Circuit precedent, but also conflates the plausibility requirement of Rule 8(a) with the particularity requirement of Rule 9(b). *See Foglia*, 754 F.3d at 158 ("a mere opportunity for fraud will not suffice"). "The mere suggestion of fraud, which is all CFI has alleged, is not enough to state a plausible claim or to satisfy the heightened pleading standards of Rule 9(b)." (34a; *see* 60a-61a (Rule 9(b) "has sharper teeth than Rule 8" and requires "a greater level of detail than that associated with mere notice pleading").)

The Third Circuit's adoption of a new standard in the decision below draws more attention to the longstanding circuit split and shows that the conflict regarding the application of Rule 9(b) will not resolve itself. There was already a deep divide among the circuits, with eleven courts of appeals having taken a side in the conflict: "actual false claims" versus "particular details" and "reliable indicia." Now, however, the Third Circuit is also facing an *intra*-circuit split: "particular details" and

"reliable indicia" versus "opportunity for fraud." The divide is too great, and the issue too important, to remain un-reviewed by this Court.

B. The Conflict Concerns an Important Issue that May Affect Hundreds of New Cases Every Year

This Court should grant certiorari to resolve the conflict among and within the courts of appeals because the issue is one of substantial importance that recurs with considerable frequency. Indeed, the Government has repeatedly acknowledged that "[t]he proper application of Rule 9(b) in the FCA context is...a significant issue." U.S. *Nathan* Br. at 16; *see* Brief for the United States as *Amicus Curiae* at 17, *Ortho Biotech Prods., L.P. v. United States ex rel. Duxbury*, No. 09-654 (U.S. May 2010) ("U.S. *Duxbury* Br.") (issue is "both unsettled and significant"). This is no surprise.

"The [FCA] is the government's primary civil remedy to redress false claims for government funds and property under government programs and contracts...." U.S. Dep't of Justice, *Justice Department Recovers Over $4.7 Billion From False Claims Act Cases in Fiscal Year 2016* (Dec. 14, 2016), https://www.justice.gov/opa/pr/justice-department-recovers-over-47-billion-false-claims-act-cases-fiscal-year-2016 ("*FCA Recoveries*"). Indeed, "[t]he [FCA] has been called the single most important tool that American taxpayers have to recover funds when false claims are made to the federal government...." U.S. Dep't of Justice, *Justice Department Celebrates 25th Anniversary of False Claims Act Amendments of 1986* (Jan. 31, 2012), https://www.justice.gov/opa/

pr/justice-department-celebrates-25th-anniversary-false-claims-act-amendments-1986.

In fiscal year 2016 alone, the Government recovered more than $4.7 billion in settlements and judgments. *See Fraud Statistics*. "This is the third highest annual recovery in [FCA] history, bringing the fiscal year average to nearly $4 billion since fiscal year 2009, and the total recovery during that period to $31.3 billion." *FCA Recoveries*. While the amendments leading to the FCA's prominence were enacted 30 years ago, "[a]n astonishing 60 percent of those recoveries [in the past 30 years] were obtained in the last *eight* years." *Id.* (emphasis added).

"The number of lawsuits filed under the *qui tam* provisions of the [FCA] has grown significantly since 1986, with 702 *qui tam* suits filed this past year—an average of *13.5 new cases every week*." *Id.* (emphasis added); *see Fraud Statistics*. The proliferation of these *qui tam* suits will continue as professional outsider relators lacking any firsthand knowledge—like CFI—seek to take advantage of the generous awards available under the FCA. *See* 31 U.S.C. § 3730(d); *United States ex rel. Bogina v. Medline Indus., Inc.*, 809 F.3d 365, 367 (7th Cir. 2016) (describing relators as "bounty hunters" filing suit "in the hope...of being handsomely compensated if the suit succeeds"). Every one of those suits is governed by the standards of Rule 9(b) and potentially the subject of a motion to dismiss on those grounds. However, the uncertainty regarding the application of Rule 9(b)—the issue presented here—"hinders the ability of *qui tam* relators to perform the role that Congress intended them to play in the detection and remediation of fraud

against the United States." U.S. *Duxbury* Br. at 16. This Court should grant certiorari to decide this important and recurring issue once and for all.

Moreover, the continuing—indeed, worsening—divide among the courts of appeals will encourage rampant forum shopping by *qui tam* relators. FCA enforcement generally focuses on some of the largest businesses in the country. *See FCA Recoveries*. Under the FCA, these businesses are subject to suit "in any judicial district in which the defendant...can be found, resides, transacts business, or in which any [FCA violation] occurred." 31 U.S.C. § 3732(a). The practical effect of these broad venue provisions is that a *qui tam* relator can choose from among multiple jurisdictions when filing suit. If the decision is between filing in a jurisdiction requiring "actual false claims" or a jurisdiction requiring "particular details" and "reliable indicia," the latter is clearly preferable. Under the Third Circuit's new "opportunity for fraud" standard, every *qui tam* relator able to file a claim within the Third Circuit will do so—especially if that relator is an outsider with no actual knowledge or evidence of false claims being made. These "attempts at forum shopping constitute the opportunistic and parasitic behavior that the FCA seeks to preclude." *Bailey v. Shell W. E&P, Inc.*, 609 F.3d 710, 721 n. 3 (5th Cir. 2010).

A relator's choice of forum should not dictate whether a case can proceed beyond the motion to dismiss stage (after which an FCA defendant faces significant settlement pressure to avoid the millions of dollars in litigation and discovery costs, as well as potential liability). But that is exactly the circumstance presented by the patchwork of

pleading standards among the courts of appeals. This Court should therefore determine the proper standard and ensure uniformity across the country.

C. The Third Circuit's Decision Is Incorrect and Provides an Appropriate Vehicle for Review

1. The Third Circuit's Decision Is Incorrect

The decision of the Third Circuit below—that Rule 9(b) requires nothing more than vague and conclusory statements describing the mere "opportunity for fraud" that can only be proved or disproved by forcing the defendant to participate in extensive discovery—is incorrect.

Generally, a complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief...." Fed. R. Civ. P. 8(a)(2). Under this standard, courts are to use "experience and common sense" to determine if the complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

However, when a complaint contains allegations of fraud, the complaint must also "state with particularity the circumstances constituting fraud...." Fed. R. Civ. P. 9(b). This generally requires that the plaintiff "support its allegations 'with all of the essential factual background that would accompany the first paragraph of any newspaper story—that is, the who, what, when, where and how of the events at issue.'" *Majestic Blue Fisheries*, 812 F.3d at 207 (internal quotation

omitted). The particularity requirement of Rule 9(b) is a supplement to, rather than a replacement of, the plausibility requirement of Rule 8(a). *See Iqbal*, 556 U.S. at 686-87.

There is a deep divide among the courts of appeals regarding whether Rule 9(b) requires a *qui tam* relator to allege "actual false claims" or "particular details" and "reliable indicia." *Compare Clausen*, 290 F.3d at 1308-14, *with Grubbs*, 565 F.3d at 185-92. In no court, however, has an allegation describing the mere "opportunity for fraud" been sufficient to satisfy Rule 9(b)—until the decision below. The effect of the Third Circuit's decision is to collapse the particularity and plausibility requirements into a single standard. Neither the text of the FCA, nor the requirements of the Federal Rules, nor the decisions of this Court permit the decision below.

2. This Case Provides an Appropriate Vehicle for Review

This Court should grant certiorari because this case provides an appropriate vehicle to consider the requirements of Rule 9(b) as applied to a *qui tam* relator without any procedural impediments.

The pleading standard applied below was outcome determinative. While the Third Circuit required CFI to allege nothing more than the "opportunity for fraud," the panel majority still concluded that "CFI ha[d] done just enough to allow this matter to proceed...." (31a.) Regardless of whether this Court determines that the better approach is requiring "actual false claims" like the Fourth, Sixth, Eighth, and Eleventh Circuits, or

requiring "particular details" and "reliable indicia" like the First, Fifth, Seventh, Ninth, Tenth, and District of Columbia Circuits, the application of either standard would conclude the case against Victaulic.

In prior cases, the Government has acknowledged the importance of this issue but has advocated against certiorari because of procedural impediments in the cases presented for review. For example, in *Nathan*, the Government stated that this Court's review of the Rule 9(b) issue "may ultimately be warranted in an appropriate case." U.S. *Nathan* Br. at 10. However, "[b]ecause the complaint failed not merely for lack of specificity, but also for lack of plausibility, [that case] could not go forward even under the pleading standard most favorable to relators." *Id.* at 11. Similarly, in *Duxbury*, the Government advocated against review because of a jurisdictional limitation (under the former version of the "public disclosure bar") that could render moot any consideration under Rule 9(b). *See* U.S. *Duxbury* Br. at 9. This case presents no such impediments. Indeed, the Government did not even take a position on whether CFI's complaint satisfied Rule 9(b). *See Amicus Curiae* Brief of the United States in Support of Appellant at 1, 16, *United States ex rel. Customs Fraud Investigations, LLC v. Victaulic Co.*, No. 15-2169 (3d Cir. Aug. 14, 2015) ("U.S. *CFI* Br."). This Court should therefore grant review and resolve the deep divide among the courts of appeals.

II. THIS COURT SHOULD ADDRESS THE THIRD CIRCUIT'S NOVEL AND TROUBLESOME INTERPRETATION OF "OBLIGATION" UNDER THE FCA AND RESOLVE THE CONFLICT CREATED BY THAT INTERPRETATION

The FCA imposes liability for "reverse false claims" when a person "knowingly conceals or knowingly and improperly avoids or decreases an *obligation* to pay...the Government...." 31 U.S.C. § 3729(a)(1)(G) (emphasis added). Although not originally a defined term, "obligation" is now defined as "an *established duty*, whether or not fixed...." 31 U.S.C. § 3729(b)(3) (emphasis added). Whether liability for reverse false claims is so broad that it encompasses any potential regulatory violation—even if no duty has been imposed by the Government—is an important question, with billions of dollars of potential liability hanging in the balance.

A. The Third Circuit's Novel Interpretation and Dramatic Expansion of FCA Liability Creates a Conflict Among the Courts of Appeals

In its decision below, the Third Circuit is the first court of appeals to conclude that an alleged failure to pay contingent obligations is actionable as a reverse false claim under the FCA. This decision not only authorizes a new theory of liability, but also establishes a circuit split on the issue.

Under the FCA, reverse false claims liability attaches for the knowing and improper avoidance of an established duty, whether or not fixed, to pay the Government. *See* 31 U.S.C. § 3729(a)(1)(G), (b)(3).

Stated differently, "[i]n a reverse false claims suit, the defendant's action does not result in improper payment by the government to the defendant, but instead results in no payment to the government when a payment is obligated." *United States ex rel. Bain v. Ga. Gulf Corp.*, 386 F.3d 648, 653 (5th Cir. 2004). It is therefore critical that a payment to the Government actually be "established."

To recover for a reverse false claim, "the United States must demonstrate that it was owed a specific, legal obligation....The obligation cannot be merely a potential liability: instead, in order to be subject to the penalties of the [FCA], a defendant must have had a present duty to pay money...." *United States v. Q Int'l Courier, Inc.*, 131 F.3d 770, 773 (8th Cir. 1997). As further explained by the Sixth Circuit:

> A defendant does not execute a reverse false claim by engaging in behavior that might or might not result in the creation of an obligation to pay...the government. Contingent obligations—those that will arise only after the exercise of discretion by government actors—are not contemplated by the statute.

Am. Textile Mfrs. Inst., Inc. v. The Ltd., Inc., 190 F.3d 729, 738 (6th Cir. 1999).

This view is consistent with the general obligation of every business to obey all applicable laws and implementing regulations. If a business chooses not to comply with the laws and regulations, "it could be subjected...to 'statutory fines and penalties', but the mere contingent potential that

such fines or penalties might be (but had not been) sought and imposed does not constitute 'an obligation to pay...the Government'...." *Bain*, 386 F.3d at 658. Indeed, the courts of appeals that have addressed the issue agree that imposing FCA liability for an alleged failure to comply with regulations would "short-circuit the very remedial process the Government has established to address non-compliance with those regulations." *United States ex rel. Wilkins v. United Health Grp., Inc.*, 659 F.3d 295, 310 (3d Cir. 2011); *see also United States ex rel. Rostholder v. Omnicare, Inc.*, 745 F.3d 694, 702 (4th Cir.), *cert. denied*, 135 S. Ct. 85 (2014); *Hoyte v. Am. Nat'l Red Cross*, 518 F.3d 61, 68 (D.C. Cir. 2008); *United States ex rel. Conner v. Salina Reg'l Health Ctr., Inc.*, 543 F.3d 1211, 1222 (10th Cir. 2008); *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1267 (9th Cir. 1996).

Now, however, the Third Circuit has dramatically increased the scope of reverse false claims liability by permitting a *qui tam* relator to pursue a case based on an alleged failure to pay contingent duties. Even the Government acknowledged below that "Congress did not intend to subject to treble damages liability under the [FCA] any 'statutory or regulatory violation that *might have* led to the imposition of a fine' or penalty, which would give the [FCA] an 'incredible scope.'" U.S. *CFI* Br. at 13. While that statement was made in regards to the version of the FCA without a definition of "obligation," the Government also acknowledged that Congress "removed language from the definition of 'obligation' that included 'contingent' obligations...." *Id.* Therefore, the Third Circuit's decision not only creates a conflict with other courts of appeals that

have considered the issue, but also disregards concessions made by the Government in this very case.

This Court should grant certiorari to resolve this conflict among the courts of appeals and to address the Third Circuit's new and novel interpretation of the FCA.

B. The Third Circuit's Decision Is Incorrect

The decision of the Third Circuit below—that liability for reverse false claims includes an alleged failure to pay contingent marking duties—is incorrect.

With certain exceptions, every good imported into the United States must be marked in such a manner "as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article." 19 U.S.C. § 1304(a). If an imported good is not marked, it may be subject to a contingent, 10 percent marking duty. *See id.* § 1304(i). Such marking duties only apply, however, *if* the unmarked goods enter into commerce; *if* the unmarked goods are later detected; *if* the unmarked goods are not subsequently marked, exported, or destroyed under Customs' supervision; and *if* Customs "levies" such duties. *See id.*; *see also* 19 C.F.R. §§ 134.2 (marking duties are "assessable" "unless exported or destroyed"), 134.51(a) ("When articles...are found upon examination not to be legally marked, [Customs] shall notify the importer... to properly mark the article…or to return all released articles to Customs custody for marking, exportation, or destruction."), 134.54 (failure to properly mark or redeliver goods allows Customs to

demand liquidated damages, the amount of which can be reduced *if* marking duties are paid).

Moreover, marking duties may only be levied or assessed prior to finality of "liquidation," i.e., "the final computation or ascertainment of duties...." 19 C.F.R. § 159.1; *see* 19 U.S.C. §§ 1304(i), 1500. Liquidation generally occurs no more than one year after importation and is not delayed or suspended where imported goods are not properly marked. *See* 19 U.S.C. § 1504(a)(1); 19 C.F.R. §§ 159.9(c), 159.11(a), 159.46. In other words, by operation of law, if Customs has not affirmatively imposed marking duties within one year of importation, the imports are liquidated, and no marking duties can ever be owed.[3] Therefore, by their very nature, marking duties are nothing more than contingent obligations to pay the Government.

A reverse false claim occurs when a person "knowingly conceals or knowingly and improperly avoids or decreases an *obligation* to pay...the Government," where obligation is defined as "an *established duty*, whether or not fixed...." 31 U.S.C. § 3729(a)(1)(G), (b)(3) (emphasis added). On its face, this definition does not apply to an alleged failure to pay *contingent* duties of any kind, including contingent marking duties.

The legislative history further supports this conclusion. While the originally-proposed definition included "a contingent duty," contingent duties were

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[3] Customs is not without a remedy if unmarked goods are discovered after liquidation. Instead of marking duties, Customs may seek monetary penalties through an enforcement action. *See* 19 U.S.C. §§ 1304(i), 1592; 19 C.F.R. §§ 134.2, 134.51, 134.54, 159.46(b).

stricken from the definition "after it was pointed out that 'contingent' or 'potential' duties could...impose liability as soon as the conduct on which they are based occurred, but before the obligation to pay them arose." Boese at 1-84.2.

> Obviously, we don't want the Government or anyone else suing under the [FCA] to treble and enforce a fine before the duty to pay that fine has been formally established. It is unlikely that [the Department of] Justice would ever have brought suit to enforce a claim of this nature, but the FCA can also be enforced by private [relators] who often may be motivated by personal gain and not always exercise the same good judgment that the Government usually does.

155 Cong. Rec. S4539 (daily ed. Apr. 22, 2009) (statement of Sen. Kyl). By striking contingent duties from the definition, "Congress reined in broader FCA constructions that could have transformed it into a general all-purpose antifraud statute, imposing treble damages and potentially massive civil penalties upon those who did not have an ongoing economic relationship with the Government." Salcido, 39 Pub. Cont. L.J. at 783.

The Third Circuit's decision below disregards both the actual text of the statute and the applicable legislative history. Instead, it focuses on legislative history discussing the earlier proposed definition of obligation *that was never enacted*. By expanding the scope of liability under the FCA, the Third Circuit sanctioned exactly the kind of contingent claims—

brought by a private relator motivated by personal gain—that Congress sought to prevent.

This Court should grant review to address this erroneous interpretation of the FCA that will have significant consequences for all American businesses.

C. An Expansion of Liability for Reverse False Claims Is an Important Issue that May Subject American Businesses to Billions of Dollars of Potential Liability

In the words of the Government in the court below: "The [FCA] is the United States' primary tool to combat fraud and recover losses as a result of fraud against the federal government. The United States therefore has a strong interest in ensuring that this statute is properly interpreted and applied." Indeed, there can be no question that any issue touching on the FCA—be it the appropriate pleading standard or the scope of liability—is one of significant importance that has wide-ranging implications for American businesses. *See supra*, Section I(B).

The FCA already generates billions of dollars of recoveries for the Government and *qui tam* relators. *See Fraud Statistics*. In the past 30 years, the vast majority of FCA cases have involved health care fraud. *See id.*; *FCA Recoveries*. The expansion of potential liability for reverse false claims created by the decision below, however, will subject every business in the country to the possibility of suit. It will not matter whether those business actually owe any contingent duties to the Government, or even whether the *qui tam* relators have any firsthand

knowledge of alleged fraud. These businesses will still be subject to suit, and many will be forced to settle rather than face the prospect of spending millions of dollars to defend themselves against spurious claims with the chance, however remote, of facing still millions more in potential liability.

Some might consider the Third Circuit's decision an outlier limited to an alleged failure to pay contingent marking duties—as opposed to a decision that opens the door to reverse false claims liability for any alleged failure to pay a contingent obligation. But even such a "limit" has the potential to bankrupt any company that imports goods to the United States, and this case provides a perfect example.

Taking CFI's allegations at face value (though they have no factual support), Victaulic imported 83 million pounds of pipe fittings over the course of 10 years. Based loosely on Victaulic's 2011 public price list, CFI decided that Victaulic's imported products have an average retail price per pound of $36.40. Based on CFI's figures, the value of Victaulic's imports totals $3,021,200,000. Because Victaulic allegedly failed to mark any imported products, CFI claims that Victaulic owes a 10 percent marking duty on all imports. Based on CFI's theory of reverse false claims, as adopted by the Third Circuit, every 10 percent marking duty is automatically converted into a 30 percent penalty under the FCA. Therefore, CFI apparently seeks an award against Victaulic of $906,360,000. Because the Government chose not to intervene, CFI's bounty on these claims would be somewhere in the range of $226 to $272 million. *See* 31 U.S.C. § 3730(d)(2). It is no wonder that CFI has chosen to pursue these claims despite

lacking any firsthand knowledge of Victaulic's business or any alleged fraud.

This is but one case against one defendant, yet the potential liability is more than $900 million. Few companies could survive liability awards of that magnitude. But now every importer faces exactly that prospect—at least within the Third Circuit. This issue is of too great an importance to remain un-reviewed by this Court.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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May 2017

APPENDIX

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[ENTERED: October 5, 2016]

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15-2169

UNITED STATES ex rel.
CUSTOMS FRAUD INVESTIGATIONS, LLC,

Appellant

v.

VICTAULIC COMPANY

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(E.D. Pa. No. 5-13-cv-02983)
District Judge: Honorable Mary A. McLaughlin

Argued on February 11, 2016

Before: FUENTES, KRAUSE and ROTH,
Circuit Judges

(Filed: October 5, 2016)

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O P I N I O N

ROTH, Circuit Judge:

Customs Fraud Investigations, LLC (CFI), the relator in this qui tam action, appeals the District Court's dismissal of its complaint with prejudice and

the court's denial of CFI's subsequent motion for leave to amend its complaint. We hold that the District Court erred in denying CFI's motion to amend its complaint on futility grounds. Consequently, we will vacate that order and remand this case for further proceedings.

I.

Victaulic Co., the defendant in the District Court and the appellee in this matter, is a Delaware corporation with its headquarters in Easton, Pennsylvania. It is a global manufacturer and distributor of pipe fittings. CFI, a limited liability company based in Maryland, is made up of former insiders from the pipe fitting industry. According to CFI, although none of its employees worked for Victaulic, CFI's principals have worked on numerous trade investigations involving pipe and tube products and have provided direct support to senior officials at the U.S. International Trade Commission and the U.S. Department of Commerce on issues in the industry.

To better understand CFI's allegations, it is helpful to explain the regulatory environment in which Victaulic operates. Pipe fittings, such as those Victaulic manufactures, are the subject of specific, non-discretionary import regulations set forth in the Tariff Act of 1930.[1] Pipe fittings must, with limited exceptions, be marked with the English name of the country of origin by means of one of five methods.[2] Only if it is technically or commercially infeasible to

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[1] 19 U.S.C. § 1304(c).

[2] *Id.* § 1304(c)(1).

mark an article by one of the five enumerated methods may a pipe fitting be marked in another manner. Under no circumstances may an article of foreign origin be completely unmarked.[3] If an importer releases unmarked or improperly marked goods into the stream of commerce in the United States, the importer owes a duty of 10 per centum ad valorem on the improperly marked goods.[4] This duty, known as a "marking duty," is deemed to have accrued at the time of importation and must be paid in addition to any other duty imposed by law.[5]

This is not to say, however, that an importer may bring improperly marked goods into the United States merely by paying a marking duty. Instead, if improperly marked goods are imported and discovered by customs officials, an importer has three options: (1) re-export the goods, (2) destroy them, or (3) mark them appropriately so that they may be released from the custody of the United States for sale in the domestic market.[6] Customs officials at United States ports of entry are unable to inspect every import; they rely primarily on the importers themselves to self-report any duties owed and any goods that are unmarked or improperly marked. In those instances where improperly marked goods enter the stream of commerce in the United States, the marking duty is due, retroactive to the time of importation.[7] Imposition of the duty is

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[3] *Id.* § 1304(c)(2).

[4] 19 U.S.C. § 1304(i).

[5] *Id.*

[6] *Id.*

[7] *Id.*

non-discretionary since, by statute, such duties "shall not be remitted wholly or in part nor shall payment thereof be avoidable for any cause."[8] In setting forth this regulatory scheme, Congress specifically noted that marking duties "shall not be construed to be penal" and are to be considered similar to any other customs duty owed.[9]

The gravamen of CFI's allegations is that Victaulic has, over the past decade, imported millions of pounds of improperly marked pipe fittings without disclosing that the fittings are improperly marked. Since this improper marking was not discovered by customs officials, Victaulic avoided paying marking duties on these fittings. As support for its claims, CFI's complaint alleged that Victaulic imported approximately 83 million pounds of fittings from overseas between 2003 and 2013 and a miniscule fraction of Victaulic's pipe fittings for sale in the U.S. bear any indication of their foreign origin, with an even smaller percentage bearing country of origin markings compliant with the applicable statute. According to the complaint, "Victaulic is able to successfully (albeit unlawfully) import its unmarked pipe fittings into the United States by knowingly failing to pay or disclose to the CBP [Bureau of Customs and Border Protection] the marking duties the company owes . . . by, among other things, falsifying its entry documents and otherwise concealing the foreign source of its pipe fittings such that CBP will not detect the company's fraud."

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[8] *Id.*

[9] *Id.*

These actions, according to CFI, give rise to the present qui tam action under the so-called "reverse false claims" provision in the False Claims Act (FCA).[10] Typically, a claim under the FCA alleges that a person or company submitted a bill to the government for work that was not performed or was performed improperly, resulting in an undeserved payment flowing to that person or company. The FCA was enacted as a reaction to rampant fraud and price gouging by merchants supplying the Union army during the Civil War.[11] In this case, by contrast, the allegation is not that Victaulic is obtaining monies from the government to which it is not entitled, but rather that it is retaining money it should have paid the government in the form of marking duties. Wrongful retention cases such as these are known as "reverse false claims" actions.

CFI filed its initial complaint, under seal, on May 30, 2013, in the United States District Court for the Eastern District of Pennsylvania. On August 7, the United States declined to intervene in the matter. After being served, Victaulic filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). Victaulic contested the District Court's jurisdiction by contending that CFI's complaint violated the FCA's ban on suits based primarily on publicly available information.[12] Victaulic alleged, in the alternative, that the

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[10] 31 U.S.C. § 3729(a)(1)(G). This section was formerly codified at 31 U.S.C. § 3729(a)(7).

[11] *See United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994).

[12] 31 U.S.C. § 3730(e)(4)(A).

complaint failed to present a plausible claim because it was too conclusory. Discovery was stayed pending the District Court's decision on the motion to dismiss.

When the District Court held a hearing on Victaulic's motion, argument focused on Victaulic's contentions that the FCA's public disclosure bar was jurisdictional and that all of the information in CFI's complaint was publicly available. In its subsequent opinion, the District Court rejected these arguments, holding that the FCA's public disclosure bar was not jurisdictional and, in any event, CFI's complaint was not based on publicly available information within the meaning of the FCA.

Then, turning to Victaulic's alternative argument that the claim was conclusory, the District Court held that CFI's complaint did not state a claim on which relief could be granted because it failed to cross the *Twombly/Iqbal* threshold from possible to plausible. In doing so, the District Court mentioned that it believed the FCA's reverse false claims provision did not cover failure to pay marking duties, but declined to rule on those grounds because the complaint was based on legal conclusions unsupportable by the facts alleged. The District Court dismissed the complaint with prejudice, without any discussion of why CFI should not be afforded the opportunity to amend its complaint to solve any perceived deficiencies.

CFI promptly moved for relief from judgment and for leave to amend its complaint, including a proposed First Amended Complaint (FAC) that contained substantially more detailed factual allegations. While the contours of the claim remains

the same in both complaints, the FAC includes details that address at least some of the concerns that the District Court had expressed in its opinion. Of particular import, the FAC details the rationale behind CFI's investigation of Victaulic and discusses the methodology CFI used to develop its claims.

This investigation involved a multifaceted analysis before filing suit, consisting of two parts: (1) an analysis of shipping manifest data purporting to show that Victaulic imports the majority of its pipe fittings from overseas and (2) a study of listings from the online auction site eBay for Victaulic products that CFI used as a proxy for the Victaulic product market. Out of the more than 200 listings for Victaulic pipe fittings CFI reviewed, there were virtually no products for sale that CFI considers properly marked. Based on its analysis, CFI concluded that systematic fraud must be occurring, since the majority of Victaulic's products are imported but virtually no products for sale on the secondary market are properly marked with the foreign country of origin markings required by law.

CFI bolstered the FAC by attaching an expert declaration stating that CFI's analysis "provides 'overwhelming evidence' that Victaulic is not properly marking its pipe fittings," and attached actual examples of the data on which CFI and its expert based their analyses. Moreover, the FAC included two allegations that did not appear in the original complaint: a statement from an unnamed witness who recalled a specific instance of obtaining improperly labeled Victaulic products, and a reference to a District Court hearing where, according to CFI, Victaulic showed a photograph of a

pipe fitting to the court that CFI contends was a prime example of improper marking.

The District Court denied CFI's motions on two grounds. First, it held that CFI unduly delayed its motion for leave to amend because it should have been on notice that the District Court was considering dismissing the complaint based on comments the court made at the motions hearing. Second, the District Court held that the FAC was futile, stating explicitly that failure to pay marking duties could not, as a matter of law, give rise to a reverse false claims action because the duties were too attenuated and contingent to qualify as the types of obligations to pay money to the government covered by the FCA. This appeal followed, in which the United States appears as *amicus curiae*, arguing that the District Court's interpretation of the FCA's reverse false claims provision is incorrect and that marking duty obligations are covered by the FCA.[13]

II.

The District Court had jurisdiction over this matter pursuant to 28 U.S.C. § 1331 and 31 U.S.C. § 3732. We have jurisdiction over the District Court's orders dismissing the complaint, denying relief from judgment, and denying CFI's motion for leave to amend pursuant to 28 U.S.C. § 1291. We review a District Court's judgment of dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) de novo.[14]

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[13] The United States expresses no opinion on whether CFI should have been granted leave to amend its complaint or whether the complaint states a claim.

[14] *Bronowicz v. Allegheny Cnty.*, 804 F.3d 338, 344 (3d Cir. 2015).

We accept all factual allegations in the complaint as true and "determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief."[15]

We review a District Court's denial of a Rule 59(e) motion for relief from judgment for abuse of discretion (except for questions of law, which are subject to plenary review).[16] Similarly, we review a Rule 15 motion for leave to amend a complaint for abuse of discretion, and if "a timely motion to amend judgment is filed under Rule 59(e), the Rule 15 and 59 inquiries turn on the same factors."[17] Under such a review, we are cognizant of Rule 15's admonition that leave to amend should be freely given "when justice so requires."[18] "A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law...."[19]

III.

There are three instances when a court typically may exercise its discretion to deny a Rule 15(a) motion for leave to amend: when "(1) the moving party has demonstrated undue delay, bad faith or dilatory motives, (2) the amendment would be futile, or (3) the amendment would prejudice the

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[15] *Id.* (quoting *Powell v. Weiss*, 757 F.3d 338, 341 (3d Cir. 2014)).

[16] *Cureton v. Nat'l Collegiate Ath. Ass'n*, 252 F.3d 267, 272 (3d Cir. 2001).

[17] *Id.*

[18] Fed. R. Civ. P. 15(a)(2).

[19] *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744, 1748 n.2 (2014) (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990)).

other party."[20] The District Court relied on two of those grounds in denying CFI's motion for leave to amend: undue delay and futility. We will explain why CFI's delay was not undue before turning to the merits of the FAC.

A.

Generally, Rule 15 motions should be granted. In *Foman v. Davis*, the Supreme Court held that the fundamental purpose of Rule 15 is to allow a plaintiff "an opportunity to test his claim on the merits," and although "the grant or denial of an opportunity to amend is within the discretion of the District Court," that discretion is abused if it is exercised without giving the plaintiff sufficient opportunity to make her case.[21]

At oral argument before us, counsel for CFI admitted that CFI was "waiting to see what the court said" before filing its motion to amend its complaint because CFI had "thought the court was going to deny the motion to dismiss." The District Court held that this tactic made CFI's delay undue because CFI was "on notice of the defects in its complaint once Victaulic moved for dismissal," and CFI was notified "that the Court was considering a dismissal with prejudice," based on comments made from the bench during a hearing on Victaulic's motion. The record, however, is not so clear.

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[20] *U.S. ex rel. Schumann v. Astrazeneca Pharm. L.P.*, 769 F.3d 837, 849 (3d Cir. 2014) (quoting *Lake v. Arnold*, 232 F.3d 360, 373 (3d Cir. 2000)).

[21] 371 U.S. 178, 182 (1962).

First, the mere fact that a defendant files a motion to dismiss is not necessarily sufficient to put a plaintiff on notice that the court will find his complaint to be deficient. One of the consequences of the Supreme Court's decisions in *Twombly* and *Iqbal*[22] is a general increase in the number of motions to dismiss filed against plaintiffs. As a result, plaintiffs are now twice as likely to face a motion to dismiss.[23] It is highly unlikely that in the years since *Twombly* was decided, plaintiffs' complaints are dramatically worse or less meritorious. Rather, defendants now have incentive "to challenge the sufficiency of the plaintiff's complaint more frequently."[24] More frequent motions to dismiss are not necessarily more meritorious motions to dismiss.

Second, in addition to arguing that CFI's complaint did not pass muster under the applicable pleading standards, Victaulic argued that the public disclosure bar in the FCA deprived the District Court of jurisdiction over the case. Much of the hearing on Victaulic's motion to dismiss dealt with the two relevant parts of that issue: whether the public disclosure bar was jurisdictional and whether the information on which CFI's complaint is based was in the public domain within the meaning of the

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[22] *Twombly* and *Iqbal* require a complaint to "state a claim to relief that is plausible on its face," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

[23] Lonny Hoffman, *Twombly and Iqbal's Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss*, 6 F. Courts L. Rev. 1, 15 (2011).

[24] *Id.*

FCA. The District Court rejected Victaulic's arguments, finding that the information on which CFI based its complaint was not in the public domain and holding that the public disclosure bar is not jurisdictional. Having disposed of these two substantial issues, the District Court then granted the motion to dismiss on the other ground raised by Victaulic: that the complaint was based on legal conclusions, not supported by fact.

CFI then moved to amend its complaint. In denying the motion, the District Court opined that, based on comments from the bench, the court itself had put CFI on notice that its complaint would be dismissed with prejudice. We disagree. As was pointed out at oral argument before us, judges at all levels make statements and ask questions during hearings that may not be a clear indication of the court's views or how a case will eventually be decided. To expect the plaintiff to pick, from dozens of questions and statements over the course of a hearing, those questions that signal what the court will ultimately decide is to expect too much.

Moreover, even though at the hearing the District Court called the plaintiff's complaint "bare bones" and implied that the plaintiff might need to plead more facts, those statements were not a ruling, a holding, or an explanation of how the court intended to rule. We cannot see how, on this record, CFI could have reasonably been expected to understand from the District Court's comments that CFI was in danger of having its entire suit dismissed with prejudice were it not to move to amend its complaint immediately after argument, instead of immediately after the decision came down.

This is not to say that a plaintiff will never be on notice of potential deficiencies based on a motion to dismiss or comments from the bench. Nevertheless, in the context of a typical Rule 12(b)(6) motion, a plaintiff is unlikely to know whether his complaint is actually deficient—and in need of revision—until after the District Court has ruled. Once CFI had actual notice of the perceived deficiencies in its complaint, it promptly moved to file its first amended complaint.

Third, we have rarely upheld a dismissal with prejudice of a complaint when the plaintiff has been given no opportunity to amend. Victaulic attempts to sidestep this fact by arguing that the FAC is a *de facto second* amended complaint because the District Court considered additional evidence outside the original complaint at the hearing on Victaulic's motion. As a procedural matter, there is no basis for this contention. The record is clear that CFI's motion for leave to amend was CFI's first attempt to file an amended complaint.

Moreover, at the outset of the hearing on Victaulic's motion to dismiss, the District Court noted that it had received "a lot of factual material from the plaintiff that goes beyond the allegations of the complaint." Since Victaulic's motion was filed pursuant to Rule 12(b)(1) as well as Rule 12(b)(6), consideration of this information was proper, to a point. When a Rule 12(b)(1) motion is evaluated as a "factual attack" on the Court's subject matter jurisdiction, "the court may consider evidence outside the pleadings" in evaluating that attack.[25]

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[25] *Gould Elecs. Inc. v. United States*, 220 F.3d 169, 176 (3d Cir. 2000).

When a motion to dismiss implicates both Rule 12(b)(6) and Rule 12(b)(1), outside evidence may be considered for Rule 12(b)(1) purposes but not for Rule 12(b)(6) purposes.[26]

CFI's counsel made this point at the hearing before the District Court, stating that CFI had submitted additional information only for purposes of the Rule 12(b)(1) motion and that that evidence should not be considered for the Rule 12(b)(6) motion. The District Court seems to have accepted the point, noting that it believed the additional evidence would help the court evaluate both parts of the motion, but acknowledging that the additional evidence was only submitted for the Rule 12(b)(1) motion. In its opinion, however, the District Court noted that it was not considering "these additional facts in assessing the sufficiency of the complaint itself," but that it would consider the facts "in determining ... whether, having dismissed the original complaint, the Court should grant CFI leave to file an amended complaint containing these additional factual allegations." The District Court did not refer to any legal basis for considering evidence outside the complaint in determining whether to dismiss a complaint with prejudice on a 12(b)(6) motion. Moreover, the District Court did not have a motion to amend pending before it when it issued its opinion, making any consideration of whether to grant such a motion hypothetical at best.

In essence, by considering the evidence submitted on the Rule 12(b)(1) motion when deciding a Rule 12(b)(6) motion, the District Court converted

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[26] *Id.* at 178.

Victaulic's Rule 12(b)(6) motion into a motion for summary judgment. The court could have done so pursuant to Rule 12(d), under which consideration of evidence submitted outside the complaint would be proper. Rule 12(d) requires, however, that the parties "be given a reasonable opportunity to present all the material that is pertinent to the motion."[27] The District Court did not notify the parties that it was converting Victaulic's Rule 12(b)(6) motion to one for summary judgment under Rule 12(d), and CFI was not given a reasonable opportunity to present more information.

In addition to these procedural irregularities, the District Court abused its discretion in finding that CFI's attempt to amend its complaint constituted undue delay. The District Court held that "CFI is imposing an unwarranted burden on the Court by requiring the Court to waste judicial resources revisiting issues that could have been addressed earlier," and that "the FAC rests almost entirely on information that was already before the Court or that CFI could have presented to the Court prior to dismissal."

The District Court relied on several cases[28] to reach its conclusion. That reliance is, however, misplaced. It is true that in *Jang v. Boston Scientific Scimed, Inc.*, we noted that we have "declined to

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[27] Fed. R. Civ. P. 12(d).

[28] *See Jang v. Boston Scientific Scimed, Inc.*, 729 F.3d 357, 368 (3d Cir. 2013); *In re: Adams Golf, Inc. Securities Litigation*, 381 F.3d 267, 280–81 (3d Cir. 2004); *California Public Employees' Retirement System v. Chubb Corp.* (*CPERS*), 394 F.3d 126, 163 (3d Cir. 2004).

reward a wait-and-see approach to pleading."[29] In context, however, that statement was of no practical import, since in *Jang* we reversed the District Court's entry of judgment on the pleadings and remanded for further proceedings, explicitly noting that the plaintiff remained "free to file a new motion for leave to amend."[30]

Similarly, in *In re: Adams Golf, Inc. Securities Litigation*, we reversed a District Court's decision granting a Rule 12(b)(6) motion in part, but affirmed the denial of a motion for leave to amend based on futility and "undue delay."[31] In that case, the District Court had already allowed one Amended Complaint and found that the proposed Second Amended Complaint was futile since it did not contain new material allegations.[32] Also, in *California Public Employees' Retirement System v. Chubb Corp.* (*CPERS*), the case involved allegations of securities fraud subject to the Public Securities Litigation Reform Act. The court affirmed the denial of a motion for leave to amend after the district court had previously allowed two amended complaints, denied both and given extensive guidance to the plaintiff as to the deficiencies the district court saw with the amended complaints.[33]

Finally, the District Court relied upon *Arthur v. Maersk, Inc.*,[34] as an example of our rejection of

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[29] 729 F.3d at 368.

[30] *Id.*

[31] 381 F.3d at 280–81.

[32] *Id.* at 280; 280 n.12.

[33] 394 F.3d at 163.

[34] 434 F.3d at 204.

the "wait-and-see approach to pleading." In *Arthur*, we held that a delay of less than a year from the filing of an initial complaint to the filing of an amended complaint is rarely, if ever, sufficient to become undue.[35] Here, the elapsed time from filing of the initial complaint—which had to be filed under seal pursuant to the FCA and could not be served on the defendant—to the amended complaint was approximately sixteen months. Under the circumstances, the lapse of time is not "so excessive as to be presumptively unreasonable."[36]

In none of the cases the District Court relied upon did we uphold a dismissal with prejudice where the plaintiff had been given no opportunity to amend its complaint and would not be given an opportunity to amend in the future.

For the reasons stated above, we hold that the District Court's denial of the CFI's motion for leave to amend was error. Nevertheless, the District Court would have been justified in denying CFI's motion if the FAC was itself futile, which was the alternative ground on which the District Court based its opinion. We turn to that rationale next.

B.

In rejecting CFI's FAC as futile, the District Court held that, as a matter of law, failure to pay marking duties could not give rise to a reverse FCA claim and that CFI failed to meet the pleading

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[35] *Id.* at 205 (citing *Tefft v. Seward*, 689 F.2d 637, 639–40 (6th Cir. 1982) and *Buder v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 644 F.2d 690, 694 (8th Cir. 1981)).

[36] *Id.*

requirements of Federal Rule of Civil Procedure 9(b). Both holdings were error. We will first address why marking duties fall within the FCA's reverse false claims provision before addressing the alleged deficiencies in CFI's FAC.

1.

The reverse false claims provision of the FCA[37] was revised as part of the Fraud Enforcement and Recovery Act of 2009 (FERA).[38] Although many reforms were enacted as part of the FERA, Congress specifically enacted one portion in response to a perceived narrowing of the scope of the reverse false claims provision.

Prior to 2009, the reverse false claims provision provided for a civil penalty for one who "knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an *obligation* to pay or transmit money or property to the Government."[39] The word "obligation" was not defined in the statute.[40] The FERA made two substantial changes. First, it added to the reverse false claims provision the phrase "or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government".[41] Second, it defined an "obligation" as "an established duty, whether or not fixed, arising from an express or

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[37] 31 U.S.C. § 3729(a)(1)(G) (2009).

[38] Pub. L. No. 111-21, 123 Stat. 1617 (2009).

[39] 31 U.S.C. § 3729(a)(7) (1994) (emphasis added).

[40] *Id.*

[41] 31 U.S.C. § 3729(a)(1)(G) (2009).

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."[42] These two sections broadened the scope to which reverse false claims liability would attach.

The new definition was, in part, a reaction to the decision in *American Textile Manufacturers Institute, Inc. v. The Limited, Inc.* (*ATMI*), which held that the term "obligation" should be afforded "a different, and more limited, meaning" than the meaning afforded the word "claim" in the FCA, and that reverse false claims liability should be viewed more narrowly than general false claims liability.[43] Specifically, the *ATMI* court limited reverse false claims liability to those circumstances where "an obligation in the nature of those that gave rise to actions of debt at common law for money or things owed" would have arisen.[44]

The Senate Report on the FERA states that the new definition of "obligation" was intended to address "confusion among courts that have developed conflicting definitions."[45] The FERA rejected the reasoning in *ATMI*, with the Senate Report highlighting the definition's express inclusion of "contingent, non-fixed obligations" that encompasses "the spectrum of possibilities from the fixed amount debt obligation," typically at issue at

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[42] 31 U.S.C. § 3729(b)(3) (2009).

[43] *See* 190 F.3d 729, 736 (6th Cir. 1999).

[44] *Id.* at 735 (quoting *United States v. Q Int'l Courier, Inc.*, 131 F.3d 770, 773 (8th Cir. 1997)).

[45] S. Rep. 111-10, at 14 (2009).

common law, "to the instance where there is a relationship between the Government and a person that results in the duty to pay the Government money, whether or not the amount owed is yet fixed."[46] In effect, the FERA expressly rejected *ATMI*'s narrow interpretation of the FCA's reverse false claims provision in favor of a more broadly inclusive definition.

Of particular importance here, the Senate Report discussed "customs duties for mismarking country of origin," and how such duties would be covered by the amended reverse false claims provision.[47] The Report notes that an early version of the FERA named marking duties explicitly in the definition of "obligation" so as to leave no doubt about the abrogation of *ATMI*, but the Senate considered the language in the new definition so clear that "any such specific language would be unnecessary," since "customs duties clearly fall within the new definition of the term 'obligation.'"[48] With this background in mind, we turn to the conduct at issue here.

At the outset, in reviewing the marking duty provision of the Tariff Act, the District Court held that "an importer does not owe marking duties upon importation of unmarked or mismarked merchandise." While technically correct, this makes too fine a distinction between the time at which an importer must pay marking duties and the time at which such duties accrue. It is true, as Victaulic

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[46] *Id.* (internal quotation marks omitted).

[47] *Id.* at 14 n.10.

[48] *Id.*

argues, that when mismarked or unmarked goods are in government custody the importer may not simply pay marking duties to obtain the release of such goods.[49] By statute, such goods must be properly marked, re-exported, or destroyed under government supervision.[50] Yet, if such goods nevertheless escape detection and are released into the United States, the ten percent ad valorem duty is deemed to "have accrued at the time of importation" and is due and owing, without exception.[51]

This is precisely what CFI alleges Victaulic did in a systematic way for years. Victaulic, according to CFI, knew its goods were not marked properly and, therefore, knew that the imported pipe fittings should not have been released from government custody. Had Victaulic informed the government of this state of affairs, the goods would not have been allowed into the country. By staying silent, CFI alleges that Victaulic made a choice—to pay the ten percent marking duty owed on its goods, if its scheme was discovered, instead of paying to have the goods marked properly, re-exported, or destroyed. Hence, in CFI's view, Victaulic knowingly concealed information from the government by not informing customs officials that the imported pipe fittings were not marked properly. According to CFI, once the pipe fittings cleared customs, Victaulic knew it owed marking duties that accrued on importation but did not pay them. This, in CFI's

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[49] *See* 19 U.S.C. § 1304(a), (c), (i).

[50] *Id.* § 1304(i).

[51] *Id.*

view, gives rise to reverse false claims liability for the unpaid marking duties.

The plain text of the FCA's reverse claims provision is clear: any individual who "knowingly conceals *or knowingly and improperly avoids or decreases an obligation to pay or transmit money* or property to the Government" may be subject to liability.[52] As alleged by CFI in the amended complaint, Victaulic declined to notify the Bureau of Customs and Border Protection of its pipe fittings' non-conforming status. This failure to notify resulted in the pipe fittings being released into the stream of commerce in the United States and, consequently, marking duties being owed and not paid.

The District Court held that this conduct is immaterial and cannot give rise to a reverse false claims liability. To reach this conclusion, the court followed the reasoning in *ATMI*, but, as previously discussed, that reasoning has been called into doubt, if not entirely abrogated, by the FERA. Prior to the FERA, the "knowingly and improperly avoids or decreases an obligation" language was absent from the FCA.[53] In the pre-FERA FCA, a false statement or record was a necessary element for reverse FCA liability to attach.[54] A false statement is no longer a required element, since the post-FERA FCA specifies that mere knowledge and avoidance of an obligation is sufficient, without the submission of a false

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[52] 31 U.S.C. § 3729(a)(1)(G) (emphasis added).

[53] *Compare id. with* 31 U.S.C. § 3729(a)(7) (1994).

[54] *See* 31 U.S.C. § 3729(a)(7) (1994); *see also ATMI*, 190 F.3d at 736.

record, to give rise to liability.[55] Consequently, the District Court's reliance on *ATMI* and *ATMI*'s focus on the submission of a false record is misplaced.

Indeed, the District Court's lengthy discussion of whether Victaulic filled out its customs forms in a proper manner is ultimately of no import since, under the post-FERA FCA, Victaulic need not have made any express statement to the government to give rise to reverse false claims liability. The statute, 19 U.S.C. § 1484(a)(1), requires an importer to provide "such information as is necessary to enable [CBP] to determine whether [its] merchandise may be released from the custody of [CBP]" and to "enable [CBP] to properly assess duties on [imported] merchandise." If Victaulic knowingly failed to disclose to CBP the fact that its goods were unmarked or improperly marked despite its affirmative obligation to do so under § 1484(a)(1) and if such goods nevertheless escaped detection and were released into the United States, Victaulic would be liable under the FCA. Thus, CFI need only prove that Victaulic knew its pipe fittings were improperly marked and did not notify the Bureau of Customs and Border Protection, since to do so is to conceal information customs officials needed to know in order to determine whether to release Victaulic's goods from its custody.[56]

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[55] 31 U.S.C. § 3729(a)(1)(G).

[56] Given that here, § 1484 requires importers to disclose to CBP that goods are improperly marked, we have no need to address how, if at all, the FCA would apply in the absence of an affirmative obligation to disclose separate from the obligation to pay or transmit money or property to the government.

From a policy perspective, the possibility of reverse false claims liability in such circumstances makes sense in the context of the larger import/export regulatory scheme created by Congress. Because of the government's inability to inspect every shipment entering the United States, an importer may have an incentive to decline to mention that its goods are mismarked on the assumption that the mismarking will not be discovered. In doing so, an importer avoids its obligation under 19 U.S.C. § 1484 to provide the government with such information as is necessary to enable the Bureau of Customs and Border Protection to determine whether the merchandise may be released from government custody or whether it must be properly marked, re-exported or destroyed pursuant to 19 U.S.C. § 1304(i). Moreover, if the importer believes the value of bringing unmarked or improperly marked goods into the country exceeds the risk that the deception will be discovered and the ten percent ad valorem duty will be owed, an importer may decline to mention that its goods are mismarked, since the chance that some goods will be discovered as mismarked and that marking duties will be owed would still result in a net gain to the company. Reverse false claims liability changes that value proposition because a finding of deception carries the possibility of treble damages.

The statutory text, legislative history, and policy rationale underlying the regulatory scheme all lead to one conclusion: reverse false claims liability may attach as a result of avoiding marking duties. Consequently, the District Court erred in holding otherwise.

2.

The District Court's determination that CFI's FAC failed to meet the pleading requirements of Federal Rules of Civil Procedure 8(a)[57] and 9(b)[58] is also in error. At the motion to dismiss stage, a court must "accept as true all of the allegations contained in a complaint," make all reasonable inferences in favor of the plaintiff, and refrain from engaging in any credibility determinations.[59] In the FAC, CFI lays out in great detail each shipment of pipe-fittings Victaulic imported during the requisite time period, as well as the methodology pursuant to which CFI concluded that these shipments consisted of improperly marked or unmarked goods for which the marking duties were not paid. Given the operation of customs marking duties, CFI's discovery of what it believes to be unmarked or improperly marked goods in the stream of commerce in the United States plausibly shows liability under the FCA.

This "discovery" by CFI must of course be based on a reliable methodology. The FAC details the process by which CFI came to its conclusions. After determining that a "significant majority"[60] of Victaulic's pipe fittings were imported from China and Poland, CFI reasoned that "one would expect to see Victaulic pipe fittings sold in the United States

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[57] Rule 8(a)(2) provides that a complaint must contain "a short and plain statement of the claim...."

[58] Rule 9(b) provides that in "alleging fraud ..., a party must state with particularity the circumstances constituting fraud ..."

[59] *See, e.g.*, *Iqbal*, 556 U.S. at 678.

[60] JA 311, 313.

and manufactured in recent years bearing 'Made in China' or 'Made in Poland' country-of-origin markings."[61] In the FAC, CFI then describes how it "executed a unique study of the secondary market for Victaulic pipe fittings (CFI's 'product study'), with the goal of objectively determining what percentage of Victaulic pipe fittings for sale in the United States have foreign country-of-origin markings."[62]

CFI attached to the FAC a report by its expert, Abraham J. Wyner, Ph.D., a professor of Statistics at the University of Pennsylvania's Wharton School of Business. Professor Wyner explained that because CFI did not "have access to direct evidence that traces and tracks imported Victaulic pipe fittings in the U.S. supply chain," "statistical methods can be used to establish indirect evidence." Professor Wyner then "opines that the process chosen by CFI to survey the secondary market for Victaulic products 'is standard practice' in this regard."[63]

As set forth in the FAC, in setting up its survey, CFI determined that Victaulic sold pipe fittings through distributors and directly to end-users[64] and that a review of such sales is only possible through a review of after-market sales.[65] Victaulic products are sold on secondary markets in the United States, including on eBay which CFI

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[61] JA 304.

[62] *Id.*

[63] JA 317.

[64] *Id.*

[65] JA 318.

determined "is an active and diverse secondary sales outlet for Victaulic products."[66] CFI then noted that a review of secondary sales outlets provided a much wider spectrum of total Victaulic sales in the country than a review of the sales of a particular distributor. A secondary market sales review included "different channels of distribution, as well as a wider range of dates in which sales might have been made."[67]

Professor Wyner concluded that "CFI's findings are so stark that *the only conclusion* one can possibly reach is that Victaulic is not properly marking its imports."[68] At the motion to dismiss stage, without the benefit of any discovery, taking all facts as true, and making all reasonable inferences in favor of the plaintiff, we conclude that that showing is enough to allow this matter to proceed.

It is this study, however, that the dissent describes as "unsupported assumptions" and "numerical guesswork." The dissent criticizes the numbers arrived at by CFI, for instance that statistically less than 2% of the Victaulic pipe fittings in the secondary market bore foreign country of origin markings.[69] That finding of less than 2% is not, however, necessary to demonstrate the plausibility that, since Victaulic is importing a "significant majority" of its pipefittings, some approximation of that number of Victaulic

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[66] JA 317.

[67] JA 318.

[68] JA 305 (emphasis added).

[69] JA 304.

pipefittings with foreign country-of-origin markings would show up in the secondary market.[70][71]

The District Court was skeptical of the validity of CFI's methods of determining whether Victaulic had imported unmarked goods. We, too, are skeptical. There is little evidence to show that CFI's unusual procedure of reviewing eBay listings is an accurate proxy for the universe of Victaulic's products available for sale in the United States. Yet, such skepticism is misplaced at the Rule 12(b)(6) stage. For the reasons stated above, we conclude that the variable being measured here, the existence of country of origin markings on Victaulic pipefittings, could support the results of CFI's product study only if Victaulic was not properly marking its imported pipefittings.

Turning then to Rule 9(b), we conclude that the FAC adequately meets the particularity requirements for alleging fraud. In the FCA context, a plaintiff "must provide 'particular details of a

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[70] JA 316.

[71] This result differs from that, for example, in *Burgis v. New York City Department of Sanitation*, 798 F.3d 63 (2d Cir. 2015), in which plaintiffs alleged that the sanitation department was discriminating against employees based on race. The Second Circuit held that statistics could sufficiently allege discriminatory intent as long as they are of "a level that makes other plausible non-discriminatory explanations very unlikely." *Id.* at 69. The statistics there showed only that a majority of employees at multiple levels of the sanitation department were white, but showed nothing about "the qualifications of individuals in the applicant pool and of those hired for each position, or the number of openings at each level." *Id.* at 70. Our case is not analogous because among other things we have a baseline here that was missing in *Burgis*—between 54% and 91% of the entirety of Victaulic pipefittings should have foreign origin markings.

scheme to submit false claims [or avoid obligations] paired with reliable indicia that lead to a strong inference that claims were actually submitted [or obligations avoided].'"[72] The FAC refers to voluminous records detailing the shipments at issue, when they entered the country, the alleged problems with those shipments, and, by operation of law, when liability would have attached.

Although CFI has not, as the dissent points out, alleged "which shipments, during which time periods, at which ports, were supposedly unlawful," in *Foglia*, we held that the facts were sufficient to meet Rule 9(b)'s heightened pleading standard where the plaintiff alleged that a dialysis center was not actually using all of the medicine for which it was getting reimbursed by Medicare. "Accepting the factual assertions made by Foglia as true," we reasoned, we had "patient logs that show that less [medicine] was used than would be required if it were used in the single use fashion"; Medicare's reimbursement scheme presented "an opportunity for the sort of fraud alleged"; and only the defendant "ha[d] access to the documents that could easily prove the claim one way or another."[73] Likewise, here, we accept CFI's allegations, as we must at this stage, that far more Victaulic pipe fittings on the secondary market should have country-of-origin markings, that the way marking duties are assessed provides an opportunity for fraud, and that only Victaulic has access to the documents that could prove or disprove CFI's well-pled allegations.

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[72] *Foglia v. Renal Ventures Mgmt., LLC*, 754 F.3d 153, 157-58 (3d Cir. 2014)

[73] *Id.* at 158.

We conclude that, at this pleading stage, nothing more is required to give Victaulic adequate notice of the claims raised against it.

In sum, failure to pay marking duties may give rise to reverse false claims liability. CFI's FAC contains just enough reference to hard facts, combined with other allegations and an expert's declaration, to allege a plausible course of conduct by Victaulic to which liability would attach. Thus, since CFI did not unduly delay its motion for leave to amend and the proposed amended pleading is not futile, the District Court abused its discretion in denying CFI's motion. We will therefore reverse and remand for further proceedings.

C.

Although we hold that CFI has done just enough to allow this matter to proceed, we are aware of the great expense and difficulty that may accompany False Claims Act discovery and the burden on defendants and their shareholders and investors of having unresolved allegations of fraudulent conduct in pending proceedings. Because of our awareness, we have looked to the recent amendments to the Federal Rules of Civil Procedure; those rules provide some guidance as to how excessive expense and difficulty may be avoided and how discovery should proceed.

In December 2015, a series of amendments to the Federal Rules were enacted to improve a system of civil litigation that "in many cases ... has become too expensive, time-consuming, and contentious, inhibiting effective access to the

courts."[74] To counter these problems, the 2015 amendments placed a greater emphasis on judicial involvement in discovery and case management and cooperation among litigants' counsel.[75]

Rule 26, which governs discovery, was among the rules amended. Rule 26(b)(1) now includes a discussion of proportionality, stating

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

As Chief Justice Roberts wrote of these amendments, "[t]he key here is careful and realistic assessment of actual need" that may "require the active involvement of a neutral arbiter—the federal judge—to guide decisions respecting the scope of discovery."[76] The instant matter is a prime example of the need for such controlled discovery.

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[74] Chief Justice John Roberts, "2015 Year-End Report on the Federal Judiciary," Dec. 31, 2015 (Roberts Report), at 4, *available at* http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf.

[75] *Id.* at 5.

[76] *Id.* at 7.

CFI alleges a massive, systematic effort by Victaulic to avoid paying marking duties on any of its imports. Since Victaulic's motion to dismiss was granted, there has been no answer from the defendant as to whether any of CFI's allegations are true. An answer could shed some light on these allegations. Similarly, while CFI has identified millions of pounds of imported pipe fittings that it alleges were mismarked, proportional discovery would counsel in favor of limiting the scope of early discovery. It will be up to the District Court and counsel to determine an appropriately limited discovery plan, perhaps reviewing the documents and duties paid on a representative sample of the shipments identified by CFI.

In any event, Chief Justice Roberts noted that "[j]udges must be willing to take on a stewardship role, managing their cases from the outset rather than allowing parties alone to dictate the scope of discovery and the pace of litigation."[77] The instant matter will require the active involvement of the District Court, in conjunction with counsel and their clients, to limit the expense and burden of discovery while still providing enough information to allow CFI to test its claims on the merits.

IV.

For the foregoing reasons, we will vacate the order of the District Court denying CFI's motions for relief from judgment and for leave to amend its complaint. We will remand this matter for further proceedings consistent with this opinion.

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[77] *Id.* at 10.

FUENTES, *Circuit Judge*, concurring in part, dissenting in part, and dissenting from the judgment.

Customs Fraud Investigations, LLC ("CFI") brings this action under the False Claims Act, alleging a ten-year scheme to defraud the government on the basis of statistical evidence alone.[1] That evidence consists almost entirely of non-random observations gleaned from product advertisements on the website of the online retailer eBay. Whereas *Twombly* and *Iqbal* require plausible allegations of wrongdoing, CFI gives us unsupported assumptions and numerical guesswork. Whereas Rule 9(b) requires that fraud be alleged with particularity, CFI gives us ten years of raw import data and insists there is evidence of fraud in there, somewhere, while completely failing to identify which shipments, during which time periods, at which ports were illegal. The mere suggestion of fraud, which is all CFI has alleged, is not enough to state a plausible claim or to satisfy the heightened pleading standards of Rule 9(b).

Faced with obvious deficiencies in CFI's allegations, the District Court granted the

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[1] It may be worth noting that CFI appears to be a legal entity created solely for the purpose of bringing this case. *See* Victaulic Br. at 4 ("CFI does not appear to have any function beyond pursuing this case against Victaulic. CFI was formed in August 2012, which was the same time when CFI began its 'investigation' of Victaulic's activities." (internal citation omitted)).

The government has the right to intervene in order to prosecute a *qui tam* suit under the False Claims Act on its own behalf. *See* 31 U.S.C. § 3730(b)(4). The government declined to do so here. *See* J.A. 104, ECF No. 3.

defendant's motion to dismiss the complaint—with prejudice—and then denied CFI's motion to reopen the judgment so that it could file an amended complaint. I disagree with the majority's decision to vacate the District Court's dismissal and reinstate this case. When asserting a violation of the False Claims Act, a plaintiff must state a plausible claim and allege fraud with particularity. CFI has failed in both respects. I therefore partially dissent.[2]

I. The Proposed Amended Complaint Fails to Allege a Plausible Claim

CFI's eight-page, 35-paragraph complaint alleges that Victaulic, a manufacturer of iron and steel pipe fittings, has engaged in a decade-long scheme to defraud the government by mismarking its imported products. The District Court dismissed that complaint for failure to allege a plausible claim within the meaning of *Twombly* and *Iqbal*.[3] When CFI moved to reopen the judgment, the District Court denied that motion too—this time, not on plausibility grounds, but for reasons that included undue delay and CFI's failure to satisfy Rule 9(b)'s heightened standard for pleading fraud in its proposed amended complaint.[4]

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[2] I agree with the majority that the District Court erred by concluding that the False Claims Act does not permit claims on the basis of failure to pay marking duties. Accordingly, I dissent only in part.

[3] *United States ex rel. Customs Fraud Investigations, LLC v. Victaulic Co.*, No. 13-cv-2983, 2014 WL 4375638, at *13–16 (E.D. Pa. Sept. 4, 2014) (relying on *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)).

[4] *United States ex rel. Customs Fraud Investigations, LLC v. Victaulic Co.*, No. 13-cv-2983, 2015 WL 1608455, at *8–10, 15–19 (E.D. Pa. Apr. 10, 2015).

Because this is an appeal from the District Court's final order, we would ordinarily limit our review to issues arising from CFI's motion to reopen the judgment—*i.e.*, undue delay and the proper application of Rule 9(b). But the real problems with the proposed amended complaint run deeper. Since "[w]e exercise plenary review over a decision granting a motion to dismiss [,] . . . '[w]e may affirm the district court on any ground supported by the record.'"[5] I therefore think it's worth exploring whether the proposed amended complaint even raises a plausible allegation under the False Claims Act, much less whether it makes those allegations with the requisite particularity.

CFI says that before suing Victaulic it conducted a "complex and multifaceted analysis."[6] I am not willing to credit this characterization. In my view, CFI's investigation into Victaulic's imports is incapable of supporting the kinds of statistical inferences that CFI wants us to draw. To explain why, I begin by summarizing some basic principles of valid survey design. I then apply those principles to assess the plausibility of the allegations in CFI's proposed amended complaint.

A. The Fundamentals of Statistical Sampling

A valid statistical survey essentially has three steps: (i) identify a population of interest, (ii) take a random sample from that population, and (iii) use

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[5] *Hildebrand v. Allegheny Cty.*, 757 F.3d 99, 104 (3d Cir. 2014) (quoting *Tourscher v. McCullough*, 184 F.3d 236, 240 (3d Cir. 1999)).

[6] Proposed Am. Compl. (J.A. 302–33) ¶ 4.

the observations in the sample to draw inferences about the population as a whole.[7] We see examples of this process every day in opinion polls. A survey firm will identify a population to study, draw a random sample from that population, and then, based on its observations, make inferences about that population to a greater or lesser degree of confidence based on the sample size. These principles apply to all probabilistic surveys, including the kind of survey that CFI conducted—or, at least, attempted to conduct—in this case.

There are a few critical features that are necessary for such a survey to be valid. First, it is important for the sample to be drawn from the correct population of interest. When a survey makes an error relating to "the specification of the population to be sampled ... any estimates made on the basis of the sample data will be biased."[8] This makes sense. If there are differences between the population being studied and the population actually

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[7] *See* 1 Mod. Sci. Evidence § 5:14 (2015–2016 ed.) ("In surveys that use probability sampling methods, a sampling frame (that is, an explicit list of units in the population) is created. Individual units then are selected by a kind of lottery procedure, and measurements are made on the selected units, which constitute 'the sample.' The objective is to generalize from the sample to the population.").

[8] 1 McCormick on Evid. § 208 (7th ed. updated through 2016). To be a bit more technical, "[a] measurement procedure is unbiased if it produces measures that are right on average across repeated applications; that is, if we apply the same measurement procedure to a large number of subjects, sometimes the measure will be too large and sometimes too small, but on average it will yield the right answer." Lee Epstein & Gary King, *The Rules of Inference*, 69 U. Chi. L. Rev. 1, 92 (2002).

sampled, the survey's results will necessarily be unreliable.

Second, a valid statistical sample must be drawn randomly. Surveys rely on random sampling because "[t]he statistics derived from observations or measurements of random samples permit one to estimate the parameters of the population."[9] Indeed, "random selection is the only selection mechanism ... that automatically guarantees the absence of selection bias. That is because when we use random sampling we are, by definition, assuring the absence of any association that may exist between selection rules and the variables in our study."[10] In a nonrandom sample, by contrast, the selection rule "may inadvertently ... introduce bias."[11]

It is frequently the case that a random sample is either not available or difficult to obtain. Survey methodologists and statisticians have developed numerous tools to address this problem. What a researcher cannot do, however, is draw a nonrandom "convenience sample" simply because the data is close at hand and then assume away all the statistical problems that such a technique creates.[12] Unfortunately, this is precisely what CFI did. In the

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[9] 1 McCormick on Evid. § 208.

[10] Epstein & King, 69 U. Chi. L. Rev. at 110.

[11] *Id.* at 111.

[12] Such a sample "provides no rigorous assurance that the sample will represent the population of interest." Ben K. Grunwald, *Suboptimal Social Science and Judicial Precedent*, 161 U. Pa. L. Rev. 1409, 1424 (2013).

words of Charles Seife, we are about to be "Fooled by the Numbers."[13]

B. Step One: The Review of Victaulic Import Data

CFI claims that its president "personally spen[t] at least 700 hours" on its investigation,[14] a figure that is fairly extraordinary on its own and only becomes more so once it becomes clear what CFI actually did—and, more to the point, did not do.

CFI's first step was to estimate the proportion of Victaulic products imported from overseas in recent years. To do so, it reviewed figures from a subscription service, Zepol, that aggregates data from ships carrying imports into the United States.[15] CFI tells us that Zepol is an "expensive fee-based subscription service" with an annual cost of $5,995.[16] It also says that the information in Zepol's database is so unwieldy as to be comprehensible only by persons who have "worked with customs import data over many years ... [who can] understand what conclusions can properly be drawn" from such data.[17]

CFI queried the database for the word "Victaulic" for the nine-year period between 2003

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[13] *See* Charles Seife, Proofiness: How You're Being Fooled by the Numbers 8 (2010) ("[I]f you want to get people to believe something ... just stick a number on it. Even the silliest absurdities seem plausible the moment they are expressed in numerical terms.").

[14] Proposed Am. Compl. ¶ 4.

[15] *Id.* ¶ 23.

[16] *Id.* ¶¶ 23–24.

[17] *Id.* ¶ 25.

and 2012.[18] Its president then "personally reviewed the narrative description for every import entry and culled through line by line to eliminate items that were not iron or steel pipe fittings."[19] We are told that "[o]nly upon completing the above multi-step process was CFI able to obtain a usable database from which Victaulic's imports could then be segregated and tabulated by country and from which CFI could draw reliable conclusions."[20] In an era when Microsoft Excel or, indeed, any data management software can filter data based on complex queries, it is completely unclear why this kind of line-by-line effort was even necessary.

At this point, CFI had constructed a dataset purporting to show all of Victaulic's imports of pipe fittings into the United States. According to these figures, over the period from 2003 through 2012 Victaulic imported 83 million pounds of pipe fittings from China and Poland (an average of about 9.2 million pounds per year).[21] Between 2010 and 2012, this annual average climbed to 15.2 million pounds per year.[22]

Of course, that figure is not helpful without some baseline. Knowing this, CFI sought to convert Victaulic's raw imports into a dollar figure, and then to compare that dollar figure against Victaulic's total revenue. Unfortunately, the Zepol database aggregates information about Victaulic's imports

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[18] *Id.* ¶ 26.

[19] *Id.* ¶ 28.

[20] *Id.* ¶ 30.

[21] *Id.* ¶ 31.

[22] *Id.*

across several, differently-priced product lines. CFI's approach to solving this problem was, at best, extremely problematic.

CFI started by using Victaulic's 2011 price list to compile "a total of 147 separate price observations for 49 different products with three sizes each to arrive at an estimated per pound price of $36.40."[23] CFI admits that this figure may not be reliable, however, because "[d]iscounts off price lists ... are very common in the pipe fittings industry."[24] CFI therefore "assume[s] conservatively" that Victaulic's imported pipe fittings were sold "at deeply discounted prices" averaging between $10 and $15 per pound.[25] Using these figures, CFI estimates that, during the period from 2010 through 2012, Victaulic's annual sales deriving from Chinese and Polish imports were somewhere between $152 million and $228 million per year.[26]

Next, CFI cites unnamed "[a]uthoritative independent sources" for the proposition that "Victaulic's annual revenue is in the approximate range of $250–280 million."[27] It then uses these numbers to claim that pipe fittings imported from China and Poland accounted for between 54% and

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[23] *Id.* ¶ 32.

[24] *Id.* ¶ 37.

[25] *Id.* ¶ 40.

[26] The $152 million figure comes from multiplying 15.2 million pounds by an average price of $10 per pound. The $228 million figure comes from multiplying 15.2 million pounds by an average price of $15 per pound.

[27] Proposed Am. Compl. ¶ 33.

91% of Victaulic's annual sales between 2010 and 2012.[28]

Drawing all inferences in CFI's favor, I accept—at least for the sake of argument—that foreign-made pipe fittings accounted for between 54% and 91% of Victaulic's annual sales during the period from 2010 through 2012.[29] Notice, however, that nothing in the proposed amended complaint so far supports the plausible inference that Victaulic defrauded the government, much less that it did so over ten years. To support *that* allegation, CFI relies on its so-called "eBay investigation." And that is where CFI's claims ultimately fail.

C. Step Two: The "eBay Investigation" and Its Obvious Deficiencies

At this point in our narrative, CFI (i) believes that Victaulic is importing large quantities of foreign-made pipe fittings into the United States,

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[28] The 54% figure comes from dividing $152 million (Victaulic's estimated annual sales from imports at a price of $10 per pound) by $280 million (the upper-bound of Victaulic's annual sales). The 91% figure comes from dividing $228 million (Victaulic's estimated annual sales from imports at a price of $15 per pound) by $250 million (the lower-bound of Victaulic's annual sales).

[29] When an appeal comes to us at the motion to dismiss stage, "we must accept all well-pled allegations in the complaint as true and draw all reasonable inferences in favor of the non-moving party." *Brown v. Card Serv. Ctr.*, 464 F.3d 450, 452 (3d Cir. 2006). The tension here is that "all aspects of a complaint must rest on 'well-pleaded factual allegations' and not 'mere conclusory statements'"—and some of CFI's arithmetic seems awfully conclusory. *Finkelman v. Nat'l Football League*, 810 F.3d 187, 194 (3d Cir. 2016) (quoting *Iqbal*, 556 U.S. at 678–79).

and (ii) suspects that Victaulic is not properly marking those pipe fittings to reflect their countries-of-origin. But how to prove those suspicions? CFI's answer was to survey the online retailer eBay in an attempt to draw inferences about the broader U.S. market.

To that end, CFI's president personally spent between one and five hours *per day* over a period of six months compiling eBay postings for Victaulic pipe fittings.[30] CFI then examined these postings to determine whether they contained photographs of Victaulic products with visible country-of-origin marks.

What was the goal of this investigation? Well, recall that CFI estimates that between 54% to 91% of Victaulic's pipe fittings were imported from China and Poland between 2010 and 2012. According to CFI, we should therefore expect to see "Made in China" or "Made in Poland" markings on somewhere between 54% and 91% of all Victaulic pipe fittings for sale in the United States—and, by corollary, for sale on eBay.[31]

That hypothesis, however, *assumes*, with no basis in alleged fact, that secondhand postings on eBay are representative of all Victaulic products for sale in the United States. It also assumes, again with no basis in alleged fact, that photographs in eBay postings (i) depict the *very items being sold* rather than stock images or photographs of other inventory, and (ii) depict those items in such a way

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[30] Proposed Am. Compl. ¶ 65.

[31] *Id.* ¶ 55.

that foreign country-of-origin markings would be clearly visible. Both of these assumptions are questionable. First, Victaulic claims that "[its] full product line is not available on eBay," meaning that "[r]esellers on eBay would only have access to small quantities of overstock and/or older, used, salvaged, stolen, or counterfeit products."[32] Second, CFI's complaint alleges that U.S.-made products tend to command a higher price than foreign-made products.[33] Resellers on eBay therefore may have a strong incentive to obscure foreign country-of-origin markings. We, of course, cannot credit a defendant's factual assertions at the motion to dismiss stage—but doing so is different from recognizing that the plausibility of CFI's allegations depends on multiple unsupported assumptions about how eBay actually functions.

What is fairly clear to this point is that CFI did not actually base its conclusions on a comprehensive analysis of Victaulic pipe fittings for sale on eBay. What CFI did instead was to construct a subsample of a subsample of a subsample. For example:

- CFI began by searching eBay for "Victaulic" in the "new" subset of the "fittings" product category. These searches "typically resulted in about 600 active eBay listings daily."[34]

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[32] Victualic Br. at 39.

[33] *See* Proposed Am. Compl. ¶¶ 11, 87.

[34] *Id.* ¶ 65.

- In some postings, the word "Victaulic" appeared in the title, but it was clear that the posting was not actually for a Victaulic pipe fitting. These postings were excluded.[35]

- Some postings were for "old stock." These were excluded because CFI's analysis "was intended to examine products of relatively recent manufacture (*e.g.*, from 2005 to the present)." That 2005 number is surprising because CFI's earlier calculations focus on import figures for the period from 2010 to 2012—to say nothing of the fact that CFI actually alleges a fraudulent scheme going back to 2003.

- At this point, 20% of postings "did not include actual photos of the products for sale."[36] These, too, were excluded. Eliminating listings without photos, of course, is the same thing as assuming that 100% of the pipe fittings advertised in those listings lacked foreign country-of-origin marks—an assumption that is itself deeply problematic.

After filtering the data this way, CFI identified 221 postings for Victaulic pipe fittings that contained photographs. Of those 221 postings, 29

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[35] *Id.* ¶ 66.

[36] *Id.* ¶ 67.

contained photographs of products marked as being made in the United States; three contained photographs of products with foreign country-of-origin marks; and 189 contained photographs where no country-of-origin marks were apparent.[37] Of the 189 postings in the third group, "there were approximately 40 listings that had limited or unclear photographs, such that it would have been difficult to see country-of-origin markings."[38]

CFI decided that it wanted more information about the 40 listings with indeterminate photographs. Rather than purchase products from all 40 of them, however, CFI purchased just ten to examine in person. CFI never says whether these products were randomly chosen. Of these, it turned out that one was not a Victaulic product at all, four had no country-of-origin markings, four had U.S. country-of-origin markings, and one item "was packed with a U.S. origin label, but did not appear to have a permanent origin marking."[39]

If we assume (again, with no basis in alleged fact) that the ten-product sample is representative of all products in the group of 40 postings with indeterminate photographs, then the results of the eBay study looks like this:

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[37] *Id.* ¶¶ 70, 72.

[38] *Id.* ¶ 74.

[39] *Id.* ¶ 75.

Table 1: Results of CFI's eBay Investigation

Victaulic Products	Original Tally	Extrapolations
U.S. country-of origin markings	29	45
Foreign country-of-origin markings	3	3
No country-of origin markings	149	149
Photographs unclear	40	---
Not Victaulic products at all	---	4
Total Postings	**221**	**221**

This is the extent of the evidence of a decade-long scheme to defraud the government. CFI points to the extrapolated "fact" that 169 of the Victaulic products in its 221-item sample—about 75% of the total—lack country-of-origin markings.[40] Recall, too, that CFI asserts that at least 54% of Victaulic products for sale on eBay should be stamped "made in China" or "made in Poland." CFI therefore contends that "[t]he only reasonable conclusion that can be drawn from [its] analysis is that Victaulic has unlawfully imported huge quantities of unmarked pipe fittings from its foreign manufacturing plants

[40] CFI extrapolates that half of the products from the 40 postings with unclear photographs must bear U.S. markings and half must bear no country-of-origin markings. *Id.* ¶ 77. This seems to be an error. If we are going to use CFI's bogus methodology, we should at least follow its logic and conclude that one-tenth of the 40 items at issue were not made by Victaulic.

and has then sold those unmarked fittings in the U.S."[41]

Based on the record before us, here is the entire logical chain supporting CFI's allegations:

- **Step one:** Based on import data and information from unnamed sources, 54% to 91% of Victaulic's annual sales between 2010 and 2012 derived from imports of pipe fittings from China and Poland.
- **Step two:** We should therefore expect that, in any representative sample of Victaulic's products for sale in the U.S. market, 54% to 91% of items should bear country-of-origin markings from China and Poland.
- **Step three:** ***Assume*** that Victaulic products available on eBay constitute a perfectly representative sample of Victaulic products for sale in the United States.
- **Step four:** ***Assume*** that photographs on eBay are not stock images but rather accurate depictions of the physical items being sold.
- **Step five:** ***Assume*** that a ***nonrandom*** sample of 221 of

[41] *Id.* ¶ 81.

Victaulic items for sale on eBay is also perfectly representative of Victaulic products sold in the United States.

- **Step six:** While 40 items out of this 221-item sample contain unclear photographs, ***assume*** that we can rectify that problem with a ***nonrandom*** sample of ten items, examined in person.

- **Step seven:** Extrapolating from these two ***nonrandom*** samples, we can conclude that over 75% of Victaulic products for sale on eBay lack country-of-origin marks.

- **Step eight:** Because we have ***assumed*** that eBay is perfectly representative of the U.S. market, we can conclude that 75% of all Victaulic products sold in the United States must lack country-of-origin marks as well.

- **Step nine:** *Therefore*, Victaulic has been defrauding the United States government of accrued marking duties since at least 2003.

This chain of inferences simply does not support a plausible allegation of fraud.

I turn first to the relevant legal standard. As we recently explained in *Finkelman v. National*

Football League,[42] the essence of the Supreme Court's plausibility test under *Twombly* and *Iqbal* is that allegations merely *consistent* with liability are not enough to survive a motion to dismiss.[43] When assessing whether a complaint raises sufficiently plausible allegations, the Supreme Court has instructed us to "draw on [our] judicial experience and common sense."[44]

My common sense tells me that a plaintiff cannot plausibly allege a ten-year scheme to defraud the government on the basis of 221 eBay postings. At most, the eBay study provides evidence *consistent* with fraud.[45] It does not provide any evidence more plausibly suggesting that fraud actually occurred.

The first problem is that CFI surveyed the wrong population. It would have been perfectly acceptable for CFI to draw a random sample from

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[42] 810 F.3d 187 (3d Cir. 2016).

[43] *Id.* at 201 (stating that the *Twombly* plaintiffs "looked around and saw conduct consistent with a conspiracy, but they saw no facts that indicated more plausibly that a conspiracy actually existed"); *see also Santiago v. Warminster Twp.*, 629 F.3d 121, 133 (3d Cir. 2010) ("'[P]ossibility' is no longer the touchstone for pleading sufficiency after *Twombly* and *Iqbal*. Plausibility is what matters.").

[44] *Iqbal*, 556 U.S. at 679.

[45] I say "evidence consistent with fraud" because, of course, CFI could have run the exact same flawed study, with the same faulty criteria, and come up with a sample of 221 eBay postings in which a large proportion of postings did depict foreign country-of-origin markings. In this sense, the results of the eBay study are "more consistent" with fraud than the alternative. But this is different from concluding that the eBay study actually allows us to draw any meaningful inferences about Victaulic's behavior.

eBay if it was trying to draw inferences about the larger universe of Victaulic products actually sold on eBay. The problem is that CFI wants to use eBay as a proxy for the entire U.S. market for Victaulic pipe fittings. Unfortunately, CFI never sampled that larger population. CFI could have rectified this problem by making factual allegations sufficient to support the plausible inference that eBay serves as an appropriate proxy for the entire U.S. market, but the only allegations to that effect in the complaint are entirely conclusory.[46] This is unsurprising, since there is no reason to believe that eBay—an e-commerce platform that sells everything from clothing to electronics to collectible coins, sometimes via auction and sometimes via direct person-to-person transactions—looks or functions anything like the broader market for iron and steel pipe fittings.

This brings us to the second problem with the eBay study—the fact that CFI did not take a random sample at all. Thus, even if we *were* to treat eBay as a viable stand-in for the U.S. market, the eBay study is still fatally flawed because CFI did not take a random sample of Victaulic products for sale on eBay. Instead, it spent weeks building its own curated subset of 221 postings, all the while applying

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[46] CFI claims that eBay is "a reliable evidentiary source." (Proposed Am. Compl. ¶ 64.) But "we have been careful to note that, even at the pleading stage, 'we need not accept as true unsupported conclusions and unwarranted inferences.'" *Finkelman*, 810 F.3d at 202 (quoting *Maio v. Aetna, Inc.*, 221 F.3d 472, 500 (3d Cir. 2000)). Asserting that eBay is a "reliable evidentiary source" from which to draw conclusions about the broader U.S. market is exactly the kind of "unsupported conclusion" we have traditionally rejected.

any number of criteria (including the requirement that postings contain photographs) likely to skew its results. This is to say nothing of the fact that CFI's actual conclusions involve additional extrapolations based on the ten Victaulic products that CFI examined in person. CFI constructed a convenience sample, not a random one, and such a sample "provides no rigorous assurance that the sample will represent the population of interest."[47]

The District Court raised these very objections when it dismissed CFI's first complaint.[48] In an effort to respond to these concerns, CFI hired Dr. Abraham J. Wyner, Director of the Undergraduate Program in Statistics at the University of Pennsylvania's Wharton School, to write a declaration that it attached as an exhibit to the proposed amended complaint. Unfortunately, Dr. Wyner fails to articulate any independent justifications for CFI's methodology. Instead, his declaration rests entirely on CFI's own conclusory assumptions about eBay. Here is the key language:

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[47] Grunwald, 161 U. Pa. L. Rev. at 1424.

[48] *Customs Fraud Investigations, LLC*, 2014 WL 4375638, at *15 ("Even if the Court accepts CFI's assertion that eBay listings constitute a reasonable representative sample of the secondary sale market for pipe fittings in the United States, or that an examination of 221 advertisements from eighty-one sellers over a six-month period could provide data from which to draw accurate wider conclusions about millions of pounds of product imported over a decade, and even assuming that CFI has accurately identified, dated, and examined every Victaulic pipe fitting on eBay, CFI has alleged no facts to show that any of the unmarked pipe fittings on eBay are not, in fact, U.S.-made.").

> My analysis is based on ... very reasonable and quite conservative ***assumptions***.... I will ***assume*** that the slice of the secondary market for Victaulic pipe fittings represented by eBay contains a proportion of imported products at least approximately similar to the proportion of imported products among all U.S. sales and that any significant deviation is caused ***only by chance***.[49]

The sleight of hand here is to assert, without any basis in alleged fact, that it is "very reasonable" to assume that the universe of products being sold on eBay somehow mirrors the entire U.S. market. Indeed, the entire rhetorical gambit of the Wyner declaration is to repeat CFI's conclusory allegations back to the reader in more technical-sounding terms. A few examples illustrate the point.

First, Dr. Wyner recognizes that the findings from the eBay investigation "could be skewed" if eBay were not representative of the U.S. market, but he says that these fears are "contrary to [CFI's] actual observations of eBay as a diverse sales outlet with a representative national cross-section of Victaulic pipe fittings, including geographically and by supplier and product variety."[50] This conclusory

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[49] J.A. 359–60 ¶¶ 11–12 (emphasis added).

[50] *Id.* at 360–61 ¶ 13.

language is lifted directly from the proposed amended complaint.[51]

Second, Dr. Wyner acknowledges that the validity of the eBay study depends on the accuracy of photographs in eBay postings, but he downplays that concern because "[a]ccording to [CFI] ... the vast majority of relevant listings had pictures and the vast majority of these pictures provided views of the Victaulic product such that a country-of-origin marking would have been visible had it existed."[52] In other words: the eBay study is accurate because CFI says it is.

Third, while Victaulic warns that "eBay sellers may have concealed import markings," Dr. Wyner tells us that "[t]his is inconsistent with the evidence provided by [CFI] that only 40 of the 221 items had incomplete or unclear images."[53] This mode of reasoning is exactly backwards. If the results of a survey are biased, those same results cannot support the reliability of the survey design in the first instance.

Accordingly, Dr. Wyner's conclusion—that "assuming the validity of [his assumptions], [he] would be more than 99.9% confident that Victaulic is improperly marking a significant portion of its

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[51] *See* Proposed Am. Compl. ¶ 61 ("eBay is an active and diverse secondary sales outlet for Victaulic products."); *id.* ¶ 64 ("The eBay listings identified included a representative national cross-section of Victaulic iron and steel pipe fittings, including, in most cases, product photos, making it a reliable evidentiary source.").

[52] J.A. 361 ¶ 15 (parentheticals omitted).

[53] *Id.* at 363 ¶ 19.

imports"—is profoundly misleading.[54] If I were to *assume* that the judges of the Third Circuit comprise an accurate cross-section of the U.S. population, I would then be able to conclude that a startlingly high proportion of the general public has a law degree. But of course, it would be frivolous to make that assumption in the first instance. Understood in context, Dr. Wyner's declaration is little more than a reflection of CFI's own unsupported assumptions about eBay, only dressed up in more persuasive-sounding statistical jargon. For this reason, his declaration completely fails to nudge CFI's allegations across the plausibility threshold.

Stepping away from the specifics of CFI's investigation, the significant issue in this case concerns how we think about the plausibility standard when a complaint rests entirely on statistical evidence. In the mine run of cases, of course, *Daubert* and the Federal Rules of Evidence will filter out unreliable statistical evidence in due course.[55] But to my mind, we act contrary to *Twombly* and *Iqbal* when we refuse to ask whether statistical evidence actually supports a plausible inference of wrongdoing at all, particularly when a complaint rests on statistical evidence alone. In the words of one observer, "[s]tatistical studies are neither magic nor snake oil, and the experts neither sorcerers nor (generally speaking) charlatans.

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[54] *Id.* at 360 ¶ 12.

[55] *See Kannankeril v. Terminix Int'l, Inc.*, 128 F.3d 802, 806 (3d Cir.1997) ("Under the Federal Rules of Evidence, it is the role of the trial judge to act as a 'gatekeeper' to ensure that any and all expert testimony or evidence is not only relevant, but also reliable." (citing *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993))).

Rather, what legal actors need to do is treat statistical studies critically."[56] Just so—even at the motion to dismiss stage.

A recent case from the Second Circuit illustrates this point. In *Burgis v. New York City Department of Sanitation*,[57] the plaintiffs alleged that officials had "discriminated against them and others similarly situated on the basis of their race and/or national origin in the [Department of Sanitation's] promotional practices."[58] In support of their Equal Protection claim, they relied exclusively on statistical evidence. The Second Circuit held for the first time that, in a case alleging employment discrimination, "statistics alone may be sufficient" to get past the motion to dismiss stage.[59]

But the Second Circuit also stated that, "to show discriminatory intent ... based on statistics alone, the statistics must not only be statistically significant in the mathematical sense, but they must also be of a level that makes other plausible non-discriminatory explanations very unlikely."[60] The plaintiffs in *Burgis* "failed to allege statistics that me[t] the standards articulated above," in part because their evidence "show[ed] only the raw

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[56] Edward K. Cheng, *Fighting Legal Innumeracy*, 17 Green Bag 2d 271, 275 (2014), *available at* http://www.greenbag.org/v17n3/v17n3_articles_cheng.pdf (last visited Aug. 26, 2016).

[57] 798 F.3d 63 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 1202 (2016).

[58] *Id.* at 66.

[59] *Id.* at 69.

[60] *Id.*

percentages of White, Black, and Hispanic individuals at each employment level, without providing any detail as to the number of individuals at each level, the qualifications of individuals in the applicant pool and of those hired for each position, or the number of openings at each level."[61] In the Second Circuit's view, this was not enough to allege a viable claim.

Burgis demonstrates that numbers alone are not enough to get a litigant past the motion to dismiss stage. Rather, a litigant's statistical evidence must be reliable enough to raise a plausible inference of wrongdoing. Here, I believe that a basic facility with statistical concepts demonstrate that the plaintiff's eBay study supports no plausible inference at all—let alone one that surpasses the high bar to allege fraud.[62]

The ultimate lesson of *Twombly* and *Iqbal* is that a federal lawsuit is *not* a mechanism to confirm a vague suspicion that fraudulent conduct occurred. Sturdier factual allegations are necessary. The *Twombly* plaintiffs, observing parallel conduct in the marketspace, were awfully concerned about an antitrust conspiracy. Finkelman himself observed higher prices in the resale market for Super Bowl tickets and had "a strong suspicion that [his] ticket[s] would have been cheaper if more tickets had been available for purchase by members of the general public."[63] CFI browses postings on eBay and has a powerful inkling that Victaulic has been

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[61] *Id.* at 70.

[62] *See* discussion *infra* at pages 268–69.

[63] *Finkelman*, 810 F.3d at 201.

mismarking its products. In all these instances, what is lacking is either some first-person account indicating that unlawful conduct has actually occurred, or at the very least, some other generalized allegation that raises a plausible inference of wrongdoing.

To be fair, there is one moment in the Proposed Amended Complaint when CFI tries to offer a first-person account of fraudulent conduct. Here it is:

> One witness, who has worked for many years in the pipe and tube industry, recalls a customer procuring Victaulic pipe fittings that the company represented were 100% U.S. manufactured. This witness observed that at the bottom of one box of Victaulic inventory, a packing list indicated that the products had originated from Poland. None of the Victaulic pipe fittings were marked with any foreign country name, however.[64]

This is CFI's best evidence: one unnamed witness in an unknown location who, one time, saw one box of Victaulic pipe fittings that appeared to be mismarked. That single anecdote simply cannot be enough to support plausible allegations of a ten-year scheme to defraud the government. Accordingly, I would affirm the District Court's denial of CFI's motion to reopen the judgment on this alternative ground.

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[64] Proposed Am. Compl. ¶ 83.

II. The Proposed Amended Complaint Also Fails to Satisfy Rule 9(b)

I would also conclude that the proposed amended complaint fails to comply with Rule 9(b). CFI's pleadings contain "voluminous records detailing the shipments at issue, when they entered the country, the alleged problems with those shipments, and, by operation of law, when liability would have attached."[65] In the majority's view, "nothing more is required to give Victaulic adequate notice of the claims raised against it."[66] I respectfully disagree.

We start with the applicable law. Rule 9(b) requires that "a party must state with particularity the circumstances constituting fraud or mistake."[67] In *Foglia v. Renal Ventures Management, LLC*,[68] we explained that two approaches had emerged in the Courts of Appeals regarding how to comply with Rule 9(b) in a False Claims Act suit. Under one approach, "a plaintiff must show 'representative samples' of the alleged fraudulent conduct, specifying the time, place, and content of the acts and the identity of the actors."[69] We adopted a second, more lenient approach, holding that "it is sufficient for a plaintiff to allege 'particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims

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[65] Majority Op. Typescript at 258.

[66] *Id.* at 25.

[67] Fed. R. Civ. P. 9(b).

[68] 754 F.3d 153 (3d Cir. 2014).

[69] *Id.* at 155.

were actually submitted.'"[70] We rejected the stricter alternative because, in our view, it would have required *qui tam* relators to offer a level of "detail at the pleading stage [that] would be 'one small step shy of requiring production of actual documentation with the complaint, a level of proof not demanded to win at trial and significantly more than any federal pleading rule contemplates.'"[71]

Foglia itself was a "close case as to meeting the requirements of Rule 9(b)."[72] Still, we concluded that the plaintiff's allegations were satisfactory because (i) they "suffice[d] to give [the defendant] notice of the charges against it, as is required by Rule 9(b)," and (ii) "only [the defendant] ha[d] access to the documents that could easily prove the claim one way or another—the full billing records from the time under consideration."[73]

Our only precedential opinion to have applied *Foglia* in a subsequent False Claims Act case, *United States ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries, LLC*,[74] made it clear that Rule 9(b) still has sharper teeth than Rule 8. We said there that, under Rule 9(b), "[a] plaintiff alleging fraud [under the False Claims Act] must ... support its allegations 'with all of the essential factual background that would accompany the first

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[70] *Id.* at 156 (quoting *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 190 (5th Cir. 2009)).

[71] *Id.* (quoting *Grubbs*, 565 F.3d at 190).

[72] *Id.* at 158.

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[74] 812 F.3d 294 (3d Cir. 2016).

paragraph of any newspaper story—that is, the who, what, when, where and how of the events at issue.'"[75] This is a greater level of detail than that associated with mere notice pleading.

The proposed amended complaint does not satisfy these standards. While it may be true that CFI's complaint includes "voluminous records detailing the shipments at issue,"[76] it is important to keep in mind that these records detail *all* of Victaulic's imports from China and Poland over the period from 2003 through 2012.[77] Based on its flawed eBay study, CFI insists that some unknown portion of those shipments *must* involve mismarked goods. But CFI fails entirely to tell us which shipments, during which time periods, at which ports, were supposedly unlawful. To suggest that there must be fraud there—somewhere—cannot possibly be enough to satisfy Rule 9(b). Such an approach neither provides us "with reliable indicia that lead to a strong inference that [false] claims were actually submitted,"[78] nor tells us anything specific about "'the who, what, when, where and how

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[75] *Id.* at 307 (quoting *In re Rockefeller Ctr. Props., Inc. Sec. Litig.*, 311 F.3d 198, 217 (3d Cir. 2002)).

[76] Majority Op. Typescript at 258.

[77] A line-by-line printout of these imports takes up 36 pages of the record. *See* J.A. 154–89.

[78] *Foglia*, 754 F.3d at 156 (internal quotation marks omitted).

of the events at issue.'"[79] It is, instead, a data dump camouflaged as a set of particularized allegations.[80]

I would therefore affirm the District Court's termination of this case on this ground as well.

III. Conclusion

The desirability of increasing or decreasing anti-fraud efforts through the mechanism of the False Claims Act is a topic of heated debate.[81] By highlighting the deficiencies in CFI's allegations, I express no opinion on these matters, whose resolution lies more properly with the executive and legislative branches.

Even so, it is certainly within our province to enforce legal standards as they presently exist. In my view, CFI cannot overcome the plausibility bar of *Iqbal* and *Twombly* because its flawed eBay study completely fails to raise a well-supported inference of

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[79] *Majestic Blue Fisheries, LLC*, 812 F.3d at 307 (internal quotation marks omitted).

[80] This becomes immediately apparent once we step away from the False Claims Act and consider Rule 9(b) more generally. We have held, for example, that a claim under the Securities Act triggers Rule 9(b) when it "sound[s] in fraud." *In re Suprema Specialties, Inc. Sec. Litig.*, 438 F.3d 256, 270 (3d Cir. 2006). Would we conclude that a plaintiff alleges securities fraud with particularity by attaching ten years of prospectus statements and financial reports to a complaint and telling us, "There must be some fraudulent statements in there somewhere"? I highly doubt it.

[81] *See, e.g.*, Sean Elameto, *Guarding the Guardians: Accountability in* Qui Tam *Litigation Under the Civil False Claims Act*, 41 Pub. Cont. L.J. 813, 823 & nn. 77–80 (2012) (noting that Congress has recently considered bills that would relax Rule 9(b) in the context of False Claim Act suits).

fraud. CFI cannot satisfy Rule 9(b) because it has failed to allege fraud with particularity. What's more, I also believe that the District Court was correct to deny CFI's motion to reopen the judgment on the ground of undue delay.[82]

I therefore respectfully dissent.

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[82] During the oral argument on Victaulic's motion to dismiss, the District Court told CFI outright that its complaint was deficient. *See* J.A. 195:5–13 ("[Y]ou needed something, sir, because your complaint is just too barebones. I mean, honestly, I'll listen to you, but, you know, if you state these, even if they're facts, they're conclusory kinds of facts that really under *Twombly* and *Iqbal* really don't carry the day." (scrivener's errors corrected)).

Despite this admonition, over seven months passed without CFI filing an amended complaint. Even then, after the District Court granted Victaulic's motion to dismiss, CFI let another four weeks go by before filing a motion to reopen the judgment. And then, instead of offering new factual allegations, its proposed amended complaint was almost entirely an amalgamation of CFI's original complaint and the allegations contained in its earlier witness declaration. The District Court concluded—rightly—that CFI was engaging in dilatory tactics that independently merited denying CFI's motion to reopen the judgment.

[ENTERED: October 5, 2016]

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15-2169

UNITED STATES ex rel.
CUSTOMS FRAUD INVESTIGATIONS, LLC,

Appellant

v.

VICTAULIC COMPANY

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(E.D. Pa. No. 5-13-cv-02983)
District Judge: Honorable Mary A. McLaughlin

Argued on February 11, 2016

Before: FUENTES, KRAUSE and ROTH,
Circuit Judges

JUDGMENT

This case came to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued on February 11, 2016.

On consideration whereof,

IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court, entered April 10, 2015, be and the same is hereby reversed and remanded for further proceedings.

All of the above in accordance with the Opinion of this Court.

ATTEST:

s/Marcia M. Waldron
Clerk

Dated: October 5, 2016

[ENTERED: April 10, 2015]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA *ex rel.* CUSTOMS FRAUD INVESTIGATIONS, LLC	:	CIVIL ACTION
v.	:	
VICTAULIC COMPANY	:	NO. 13-2983

ORDER

AND NOW, this 10th day of April, 2015, upon consideration of the relator's motion to alter or amend judgment, and for leave to file amended complaint (Doc. No. 37), the defendant's opposition thereto, and the relator's reply thereon, and for the reasons set forth in a memorandum opinion bearing today's date, IT IS HEREBY ORDERED that the motion is DENIED.

BY THE COURT:

/s/ Mary A. McLaughlin
MARY A. McLAUGHLIN, J.

[ENTERED: April 10, 2015]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA *ex rel.* CUSTOMS FRAUD INVESTIGATIONS, LLC	:	CIVIL ACTION
v.	:	
VICTAULIC COMPANY	:	NO. 13-2983

MEMORANDUM

McLaughlin, J. April 10, 2015

Customs Fraud Investigations, LLC ("CFI"), a company that conducts research and analysis on possible customs fraud, initiated this action against Victaulic Company ("Victaulic"), to recover damages and civil penalties on behalf of the United States as a *qui tam* relator pursuant to the False Claims Act, 31 U.S.C. §§ 3729, et seq. ("FCA").[1] In a September 4, 2014 memorandum and order, the Court dismissed CFI's complaint with prejudice because CFI failed to state a claim. CFI has filed a motion to alter or amend that judgment and for leave to file an

[1] CFI describes itself as a company that "conducts confidential research and analysis related to potential customs fraud." Compl. ¶ 7. It is not clear from the record whether CFI conducts research and analysis in contexts other than *qui tam* litigation, or whether its sole purpose is to hunt for possible FCA violations such as the one alleged in this case.

amended complaint. The Court will deny the motion because amendment would be inequitable and futile.

I. Background and Procedural History[2]

On May 30, 2013, CFI filed a nine-page, conclusory complaint against Victaulic, a producer of iron and steel pipe fittings manufactured in the United States, China, Poland, and Mexico. CFI, a corporate stranger to Victaulic, alleged that Victaulic violated the FCA by failing to mark and improperly marking its foreign-made pipe fittings as required under the United States Tariff Act of 1930 ("Tariff Act"), 19 U.S.C. §§ 1304(a) and (c), and by falsifying customs entry documents such as CBP Form 7501, to avoid an obligation to pay "marking duties" owed on unmarked or improperly marked foreign products. Because unmarked pipe fittings are assumed in the industry to be U.S.-made, CFI surmised that Victaulic was importing unmarked foreign-made pipe fittings and passing them off as U.S.-made. Approximately two months after CFI filed its complaint, the United States declined to intervene, and the complaint was unsealed.

A. Marking Requirements and Marking Duties

The Tariff Act requires that, with some exceptions, "every article of foreign origin . . . imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and

[2] Most of the background and procedural history discussed here can be found in the Court's September 4, 2014 memorandum granting Victaulic's motion to dismiss. As an understanding of that background is necessary for the disposition of CFI's current motion, the Court will recount much of it here.

permanently as the nature of the article . . . will permit in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article." 19 U.S.C. § 1304(a). The Act imposes specific marking requirements for pipe fittings, which "shall be marked with the English name of the country of origin by means of die stamping, cast-in-mold lettering, etching, engraving, or continuous paint stenciling." Id. § 1304(c)(1).

If imported goods are not marked with the proper country of origin in the prescribed manner, an importer may owe "marking duties" under 19 U.S.C. § 1304(i), which states in relevant part:

> If at the time of importation any article . . . is not marked in accordance with the requirements of this section, and if such article is not exported or destroyed or the article . . . marked after importation in accordance with the requirements of this section . . ., there shall be levied, collected, and paid upon such article a duty of 10 per centum ad valorem, which shall be deemed to have accrued at the time of importation, shall not be construed to be penal, and shall not be remitted wholly or in part nor shall payment thereof be avoidable for any cause.

19 U.S.C. § 1304(i). The United States Bureau of Customs and Border Protection ("CBP") is responsible for collecting marking duties owed by an importer. The circumstances under which an

importer comes to owe marking duties is disputed by the parties, and will be discussed further below.

B. Victaulic's Motion to Dismiss and CFI's Opposition

On October 10, 2013, Victaulic filed a motion to dismiss the complaint for failure to state a claim. Victaulic argued that the failure to pay marking duties does not constitute a FCA violation, and that CFI failed to satisfy the pleading standards of Federal Rules of Civil Procedure 8(a) and 9(b).[3]

In connection with its opposition to the motion, CFI submitted a declaration by its President, Rebecca L. Woodings, with numerous exhibits attached. Doc. No. 18–1 ("Woodings Decl."). Ms. Woodings's declaration revealed that CFI's claims concerning Victaulic's failure to mark its foreign products were entirely predicated on a comparison of two sets of data: (1) an analysis of shipping manifests allegedly establishing that Victaulic imports a significant portion of its pipe fittings (CFI's "import analysis"); and (2) a survey of 221 listings for Victaulic pipe fittings on the internet auction and sale site eBay from which CFI could allegedly determine that at least seventy-five percent of the fittings were unmarked (CFI's "product study"). Woodings Decl. ¶¶ 7–8 & 41.

[3] Victaulic also moved to dismiss on the basis that the FCA's "public disclosure bar," deprived the Court of jurisdiction. See 31 U.S.C. § 3730(e)(4)(A). The Court held that the public disclosure bar neither deprived the Court of jurisdiction nor mandated dismissal of the complaint. The public disclosure bar is not at issue in CFI's current motion.

CFI conducted its import analysis by examining shipping manifests from 2003–2012 using a paid subscriber database. The analysis led CFI to conclude that Victaulic imported approximately eighty-three million pounds of pipe fittings from China and Poland by ship during that time period, with 15.2 million pounds imported annually from 2010–2012. Woodings Decl. ¶¶ 20 & 22. Using Victaulic's 2011 General Price List for the Americas and accounting for standard industry discounts, CFI estimated the average price of Victaulic's pipe fittings in 2011 to be $10.00 per pound at a minimum. Id. ¶ 26. CFI multiplied that estimate by Victaulic's estimated annual imports for 2011 to conclude that, at minimum, the sales value of Victaulic's imports from China and Poland in 2011 was $152 million. Id. ¶ 27. Spreadsheets underlying CFI's analysis were attached to Ms. Woodings's declaration as exhibits. Id. Exs. B–G.

As Victaulic is privately held, CFI could not find any direct information from the company concerning its sales. Accordingly, CFI estimated from "other sources" that Victaulic's annual sales are between $250 million and $281.1 million. Woodings Decl. ¶ 27. CFI divided the $152 million in estimated sales for 2011 by the high and low estimates for Victaulic's annual sales, to conclude that, at minimum, Victaulic's foreign imports represent fifty-four to sixty-one percent of its national sales. Using a higher estimate of $15.00 average cost per pound, Victaulic's foreign imports would represent eighty-two to ninety-one percent of its national sales.

CFI conducted its product study by tracking advertisements for pipe fittings for secondary sale

(i.e., for resale, not for sale by Victaulic itself) on eBay from August to September 2012, and from November 2012 to February 2013. Woodings Decl. ¶ 35. Ms. Woodings's declaration provided various reasons why she believed eBay should be considered a valid source of secondary U.S. sales for Victaulic pipe fittings, and explained CFI's efforts to control for incorrectly listed products and older products. *Id.* ¶¶ 32–33 & 39.

After eliminating from consideration those listings that did not contain any photographs of the listed product, CFI reviewed 221 eBay listings for "new" iron and steel Victaulic pipe fittings that contained at least one photograph of the product being sold. Woodings Decl. ¶¶ 38 & 41. Primarily by observing those photographs and supplementing with product purchases, CFI concluded that only three pipe fittings had foreign country-of-origin markings and that at least seventy-five percent of the Victaulic pipe fittings were unmarked.[4] Id. ¶¶ 41 & 44. According to CFI, in light of Victaulic's significant imports from China and Poland, one would expect to see a higher percentage of pipe fittings bearing foreign country-of-origin markings in the listings it reviewed if Victaulic were complying with the Tariff Act. Id. ¶ 9. CFI also concluded that two of the three pipe fittings on eBay containing foreign country-of-origin markings were marked in a

[4] CFI attached a table describing each of the 221 listings as exhibit H to Ms. Woodings's declaration. A review of the table suggested that CFI purchased seven items-listed at picture numbers 127, 140, 146, 150, 160, 200, and 221–three of which were unmarked and four of which bore markings establishing that they were made in the United States, even though the initial review of the picture was unclear. Woodings Decl. Ex. H.

manner that did not comply with the Tariff Act. Id. ¶¶ 42–43.

C. Hearing on Victaulic's Motion to Dismiss

On January 23, 2014, the Court held a hearing on Victaulic's motion to dismiss. At the outset of the hearing, the Court explained that, although it could not consider Ms. Woodings's declaration and attached exhibits in determining whether the complaint stated a claim, it would consider the information "in deciding, if [the Court] do[es] decide the complaint should be dismissed, whether that [dismissal] should be with or without prejudice." Hr'g Tr. 4 (Doc. No. 28). The Court was explicit with CFI about its assessment of the complaint, twice stating that the pleading was "bare bones," and observing that it was based on "conclusory kinds of facts that . . . under Twombly and Iqbal really don't carry the day." Id. at 5–6. During a later discussion about CFI's product study, the Court again remarked on the absence of factual detail in the complaint. Id. at 39–40. CFI responded that it believed its complaint stated a claim but hoped to amend if the Court disagreed. Id. at 40.

In an effort to demonstrate the limitations of CFI's product study, Victaulic presented the Court with four photographs of one of its pipe fittings, each taken from a different angle. Id. at 13. The fitting was marked as originating from China on the inside rim of the product, but the marking was only visible in one of the four pictures. Id. at 13–14. Accordingly, Victaulic argued that, even if the eBay listings examined by CFI contained two or three pictures of a product for sale, the images do not necessarily reveal

whether the product was marked. Upon viewing the photographs presented at the hearing, CFI took the position that the marking on the product was unlawful because it was not done in one of the five means required by the Tariff Act. Id. at 34–36.

D. CBP Form 7501

CFI alleged in its complaint that Victaulic failed to disclose marking duties owed on unmarked merchandise in connection with documentation filed with CBP such as CBP Form 7501. Compl. ¶¶ 20 & 27. That form, which is part of the paperwork an importer files with CBP to enable proper assessment of duties owed on imported merchandise, requires an importer to report any duties, tariffs, or other fees required by law that are due upon importation. Id. ¶¶ 19–20. At the hearing, Victaulic provided the Court with a copy of CBP Form 7501 and instructions for completing the form.[5] Hr'g Tr. at 15. Although the form does not expressly require an importer to disclose marking duties, CFI argued in its complaint and at the hearing that an importer's obligation to report "other" fees or charges on the form applies to marking duties. Compl. ¶ 20; Hr'g Tr. at 58–59.

There are three locations on CBP Form 7501 where an importer is required to report "other" fees

[5] CBP Form 7501 and related instructions are available on CBP's website. See U.S. Customs and Border Protection, Dep't of Homeland Security, Entry Summary CBP Form 7501, available at http://www.cbp.gov/sites/default/files/documents/CBP%20Form%207501_0.pdf ("CBP Form 7501"); id., CBP Form 7501 Instructions (updated July 24, 2012), available at http://www.cbp.gov/sites/default/files/documents/CBP% 20Form%207501_Instructions.pdf ("CBP Form 7501 Instructions").

or duties not disclosed elsewhere on the form. The instructions for column 29 of Form 7501 direct an importer to "identify any other fee, charge or exaction that applies. Examples include the beef fee, honey fee, pork fee, cotton fee, harbor maintenance fee (HMF), sugar fee, and merchandise processing fee (MPF)." CBP Form 7501 Instructions at 16. For Block 34, the instructions direct the importer to "[r]ecord the estimated duty, AD/CVD [Anti-dumping/Countervailing Duty], I.R. tax, and any other fees or charges calculated. . . ." Id. at 20. Block 39 calls for a summary of the "other fee[s]" owed by an importer. Id. The instructions for that block require the importer to "[r]ecord the total estimated AD/CVD or other fees, charges or exactions paid," i.e., "the amounts actually being paid." Id. at 22. Also for Block 39, "[f]or entries subject to payment of AD/CVD and/or any of the various fees, each applicable fee must be indicated in this area, and the individual amount of each fee must be shown on the corresponding line. . . . The applicable collection code must be indicated on the same line as the fee or other charge or exaction." Id. at 20–21. The instructions provide collection codes for specific fees, none of which is for marking duties.

E. The Court Dismisses CFI's Complaint With Prejudice

On September 4, 2014, more than eight months after the hearing, the Court issued a memorandum and order dismissing CFI's complaint with prejudice for failure to state a claim. The Court explained that CFI's initial complaint was comprised almost entirely of unsupported conclusory allegations insufficient to state a plausible claim

under Rule 8(a) of the Federal Rules of Civil Procedure. U.S. ex rel. Customs Fraud Investigations, LLC v. Victaulic Co., Civ. A. No. 13-2983, 2014 WL 4375638, at *14 (E.D. Pa. Sept. 4, 2014). In accordance with its previously-expressed intentions, the Court considered the additional facts provided by CFI in connection with its briefing to determine whether CFI should be permitted to amend its complaint to incorporate those additional facts. Id. at 1 n.1.

Even considering the facts set forth in Ms. Woodings's declaration, the Court found CFI's allegations insufficient to state a claim under the FCA. That conclusion rested on two observations. First, even assuming that eBay constituted a representative secondary market for Victaulic pipe fittings and that the limited time period during which CFI performed its product study could be extrapolated to draw conclusions about a decade of imports, CFI failed to allege facts establishing that any unmarked pipe fittings it observed on eBay were not U.S.-made, as U.S.-made fittings need not be marked. Id. at *15. Second, even if Victaulic failed to mark or improperly marked its foreign-made pipe fittings, those facts do not lead to the conclusion that Victaulic knowingly concealed or avoided an obligation to pay marking duties. Id.

As an aside, the Court noted additional flaws in CFI's product study. Id. at *15 n.22. The study excluded listings without photographs, potentially excluding any number of foreign-marked products. Additionally, the sellers on eBay may not have described the product or its country of origin accurately, and their photographs may not have

depicted the areas where the products were marked. Finally, if U.S.-made products command higher prices, one would expect to observe more U.S.-made products in the secondary sale market, which would suggest that the unmarked products were U.S.-made.

As CFI failed to satisfy the pleading standard set forth in Rule 8(a), the Court declined to address whether the failure to pay marking duties constitutes a FCA violation. However, the Court expressed doubt that CBP Form 7501 gives rise to an obligation to report marking duties owed on unmarked goods, as well as uncertainty as to when "Victaulic could plausibly be said to have knowingly concealed or avoided an obligation to pay marking duties, or made a false statement or deliberate omission in connection with its alleged avoidance." Id. at *13.

F. CFI's Motion and Proposed First Amended Complaint

In response to the dismissal, CFI filed a motion to alter or amend judgment and for leave to file an amended complaint. As with the initial complaint, the first amended complaint submitted with the motion ("FAC") alleges that Victaulic either misrepresented to CBP that no marking duties were owed on its unmarked or improperly-marked foreign imports or failed to declare the marking duties owed, thereby avoiding and concealing an obligation to pay the Government in violation of the FCA. FAC ¶¶ 1, 11 & 110–13.

The FAC is primarily based on the theory that Victaulic has been sneaking unmarked, foreign-

made pipe fittings into the country in order to pass them off as U.S.-made to take advantage of higher prices for U.S.-made merchandise and opportunities limited to U.S.-made merchandise. FAC ¶¶ 87–91. CFI's allegation that Victaulic does not mark its foreign-made fittings is predominately predicated on a comparison of its import study (from which CFI concluded that Victaulic's foreign-made pipe fittings account for a majority of its U.S. sales) to its product study (from which CFI concluded that a majority of Victaulic pipe fittings in the secondary sale market were unmarked). FAC ¶¶ 5, 8 & 55. The FAC describes CFI's import analysis and product study essentially in the manner set forth in Ms. Woodings's declaration, but with additional factual detail.

With regard to the product study, CFI reviewed listings for Victaulic pipe fittings on eBay and eliminated listings that were for "old stock" or that were not for Victaulic products. FAC ¶ 66. CFI then eliminated approximately twenty percent of the relevant listings, because those listings did not incorporate any photographs of the products for sale. FAC ¶ 67. Of the 221 remaining listings, approximately eighty-two percent included at least one photograph that CFI characterized as "clear," from which CFI could allegedly "determine with 95% confidence whether a marking was present or not." FAC ¶¶ 68 & 70. CFI notes that it was able to view some of the photographs with a "zoom" option, and that it copied and enlarged other photographs to view the image more closely. FAC ¶ 68.

The FAC alleges that forty listings (approximately eighteen percent) contained limited

or unclear photographs. FAC ¶ 74. CFI purchased ten products from nine of those listings for physical examination. FAC ¶¶ 74–75. One of the items purchased did not contain a Victaulic logo and was excluded from the study, four items were unmarked, four items bore U.S.-markings, and one item "was packed with a U.S. origin label, but did not appear to have a permanent origin marking." FAC ¶ 75. CFI also purchased one of the three Chinese-marked products it identified in its product study to inspect the marking. FAC ¶ 73. Based on its review of the 221 listings from seventy-five sellers and the purchase of nine products from among those listings, CFI concluded that at least seventy-five percent of Victaulic pipe fittings sold on eBay were unmarked and less than two percent (a total of three products) bore foreign country-of-origin markings. FAC ¶¶ 7, 56, 76–77 & Ex. 8. A spreadsheet describing the 221 listings, which was provided with Ms. Woodings's declaration, is attached as an exhibit to the FAC. FAC Ex. 8. CFI also attached as exhibits copies of 196 of the listings and many of the photographs underlying its product study. FAC Ex. 9.

In an effort to bolster its conclusion that Victaulic is failing to mark its foreign-made pipe fittings, CFI attached to the FAC a declaration of Abraham J. Wyner, a Professor of Statistics, and incorporated many of Wyner's conclusions into the factual allegations of the FAC. FAC ¶ 57 & Ex. 7 (Wyner Decl.). Wyner opined that, based on the results of CFI's product study, he "would be more than 99.9% confident that Victaulic is improperly marking a significant portion of its imports." Wyner Decl. ¶ 12. That opinion is based on two assumptions: (1) that imported pipe fittings have

comprised a significant portion of Victaulic's U.S. sales in the last decade, and (2) that "the slice of the secondary market for Victaulic pipe fittings represented by eBay contains a proportion of imported products at least approximately similar to the proportion of imported products among all U.S. sales and that any significant deviation is caused only by chance." Wyner Decl. ¶¶ 10–11; FAC ¶ 57. Wyner acknowledged that the second assumption might not hold true if, for example, the eBay market were heavily favored toward U.S. products. Wyner Decl. ¶ 11.

CFI also alleges that a witness "who has worked for many years in the pipe and tube industry, recalls a customer procuring Victaulic pipe fittings that the company represented were 100% U.S. manufactured." FAC ¶ 83. The witness allegedly observed that none of the pipe fittings were marked with a foreign country-of-origin, but a packing list "at the bottom of one box of Victaulic inventory[ ] . . . indicated that the products had originated from Poland." FAC ¶ 83.

Although CFI's primary theory of liability is that Victaulic failed to pay marking duties on unmarked foreign merchandise, the FAC also alleges Victaulic has evaded payment of marking duties owed on improperly-marked foreign merchandise. CFI claims that two of the Chinese-marked pipe fittings it observed on eBay had markings that appeared to be a stamp or stencil, but not a die stamp or continuous stenciling as required by the Tariff Act. FAC ¶ 73. For one of those items, which CFI purchased, the marking was on the interior wall of a coupling, such that it was allegedly

insufficiently conspicuous because the marking would not be visible when the coupling is in use. Id. CFI further contends that the picture Victaulic submitted at the hearing on its motion to dismiss reflected that Victaulic is improperly marking its pipe fittings because the word "China" appears inside the fitting (which is allegedly insufficiently conspicuous) and because the marking "appears to be a single stenciled marking, not a continuous stencil as required by U.S. law." FAC ¶ 84.

CFI contends that Victaulic was obligated to pay marking duties on its unmarked and improperly marked pipe fittings at the time of importation, and that Victaulic was obligated to disclose those marking duties to CBP in documentation such as CBP Form 7501. FAC ¶¶ 92–101. As "CBP physically inspects only a tiny fraction of shipments arriving in the United States," CFI contends that, by failing to disclose marking duties to CBP, Victaulic is able to evade paying marking duties owed on its noncompliant merchandise. FAC ¶ 100. According to CFI, the very fact that unmarked or improperly-marked foreign-made pipe fittings have entered into U.S. commerce establishes that Victaulic failed to disclose marking duties and violated the FCA because, upon proper disclosure, CBP would have ordered proper marking, destruction, or exportation of the merchandise. FAC ¶¶ 99 & 102.

II. Discussion

A. Standard of Review

When a plaintiff files a timely motion to alter or amend judgment pursuant to Rule 59(e) seeking leave to file an amended complaint, the motion is

governed by the standard set forth in Federal Rule of Civil Procedure 15(a). Burtch v. Milberg Factors, Inc., 662 F.3d 212, 230–31 (3d Cir. 2011). Although Rule 15(a) generally favors amendment, a district court may deny leave to amend upon a finding of undue delay, bad faith, dilatory motive, prejudice to the non-moving party, or futility. U.S. ex rel. Schumann v. Astrazeneca Pharm. L.P., 769 F.3d 837, 849 (3d Cir. 2014). "A District Court has discretion to deny a plaintiff leave to amend where the plaintiff was put on notice as to the deficiencies in his complaint, but chose not to resolve them." Krantz v. Prudential Invs. Fund Mgmt. LLC, 305 F.3d 140, 144 (3d Cir. 2002).

"An amendment is futile if the amended complaint would not survive a motion to dismiss for failure to state a claim upon which relief could be granted." Alvin v. Suzuki, 227 F.3d 107, 121 (3d Cir. 2000). To survive dismissal for failure to state a claim, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). In deciding whether dismissal is appropriate, a court may consider the allegations of the complaint, exhibits attached to the complaint, matters of public record, and "document[s] integral to or explicitly relied upon in the complaint." Schmidt v. Skolas, 770 F.3d 241, 249 (3d Cir. 2014) (internal quotations omitted) (emphasis omitted). Although a court must accept any well pled factual allegations as true, it need not credit legal conclusions couched as factual allegations. Iqbal, 556 U.S. at 678.

B. CFI Unduly Delayed Seeking Amendment

Victaulic argues that CFI unduly delayed seeking amendment by waiting until after the Court entered final judgment despite having been on notice of the defects in its complaint from the time Victaulic moved for dismissal. According to Victaulic, a finding of undue delay is further supported by the fact that the FAC does not rely on newly-discovered information.

"Delay may become undue 'when a movant has had previous opportunities to amend a complaint' but instead 'delays making a motion to amend until after [judgment] has been granted to the adverse party,'. . . ." Jang v. Boston Scientific Scimed, Inc., 729 F.3d 357, 368 (3d Cir. 2013) (quoting Cureton v. Nat'l Collegiate Athletic Ass'n, 252 F.3d 267, 273 (3d Cir. 2001)) (alteration in original). In determining whether a party has unduly delayed seeking amendment, a district court should consider the reasons for the delay. Cureton, 252 F.3d at 273. A district court may also consider "whether new information came to light or was available earlier to the moving party." In re Adams Golf, Inc., Sec. Litig., 381 F.3d 267, 280 (3d Cir. 2004). Additionally, "[d]elay becomes 'undue,' and thereby creates grounds for the district court to refuse leave, when it places an unwarranted burden on the court . . . ." Bjorgung v. Whitetail Resort, L.P., 550 F.3d 263, 266 (3d Cir. 2008).

CFI's failure to seek amendment until after entry of final judgment, despite having been notified that the Court was considering a dismissal with

prejudice, constitutes undue delay. CFI was on notice of the defects in its complaint once Victaulic moved for dismissal. See Schumann, 769 F.3d at 849. More importantly, the Court was explicit with CFI at the hearing about the defects in its initial pleading. The Court twice referred to the complaint as "bare bones" and indicated that the complaint failed to state a claim under governing precedent. Hr'g Tr. at 5–6, 39. CFI was also on notice that the Court was considering a dismissal with prejudice depending on whether CFI could satisfy the pleading standard based on the additional factual information set forth in Ms. Woodings's declaration and further developed at the hearing. Id. at 4.

CFI expressed an intention to amend in the event of dismissal, but it never filed a motion with a proposed amendment in the eight months that passed before the Court entered final judgment. Hr'g Tr. at 40. Instead, CFI stood on its complaint, its briefing, and the record from the hearing, and waited for the Court to rule. The Court effectively considered CFI's verbal request for amendment by ruling on the sufficiency of the complaint as pled and as potentially amended to include the other information in the record. Only after the Court found that amendment would be futile did CFI seek leave to amend and present the Court with an amended pleading.[6]

Such a "wait-and-see approach to pleading" is disfavored in this Circuit and weighs against amendment. Jang, 729 F.3d at 368; see also Ca. Pub.

[6] In light of the Court's consideration of the additional factual information provided in CFI's briefing and at the hearing, the FAC is essentially CFI's second effort at amendment.

Employees' Ret. Sys. v. Chubb Corp., 394 F.3d 126, 165 (3d Cir. 2004) (leave to amend was not required when "Plaintiffs chose at their peril not to heed the District Court's guidance and avail themselves of an opportunity to rectify the deficiencies of the Amended Complaint"); In re Adams Golf, Inc., Securities Litig., 381 F.3d at 280 ("Plaintiffs relied at their peril on the possibility of adding to their complaint, but in doing so they clearly risked the prospect of the entry of a final dismissal order."). The Court has already spent considerable resources evaluating CFI's claims and thinking through whether any deficiencies in the complaint could be cured. By waiting for the Court to rule and then filing for leave to amend after the entry of final judgment, CFI is imposing an unwarranted burden on the Court by requiring the Court to waste judicial resources revisiting issues that could have been addressed earlier.

In that regard, a finding that CFI's delay is undue is bolstered by the fact that the FAC rests almost entirely on information that was already before the Court or that CFI could have presented to the Court prior to dismissal. See Lorenz v. CSX Corp., 1 F.3d 1406, 1414 (3d Cir. 1993). The FAC reasserts the same factual allegations set forth in Ms. Woodings's declaration and relies on many of the same exhibits. Although the FAC is more specific and incorporates a majority of the eBay listings and photographs underlying CFI's product study, that information could have been included with CFI's initial filing, its opposition to Victaulic's motion to dismiss, or in response to the Court's concerns after the hearing.

The only potentially new information included in the FAC is a lone allegation concerning a witness who allegedly observed conduct consistent with CFI's theory of liability. It is not clear when CFI learned of that information, although it is apparent that CFI's investigation into Victaulic is ongoing. However, it was CFI's choice to file this action when it did, on the apparent belief that it had a sufficient factual basis to justify a FCA action against Victaulic based on its import analysis and product study. CFI's misjudgment of the strength of its case does not justify its belated effort at amendment.

CFI contends that amendment would not be inequitable, despite any delay, because Victaulic cannot establish prejudice. However, a finding of undue delay is not dependent on a finding of prejudice. See Estate of Olivia ex rel. McHugh v. New Jersey, 604 F.3d 788, 803 (3d Cir. 2010). CFI has offered no cogent reason for the delay, and any "misplaced confidence" in its assessment of its case does not justify its failure to seek amendment in the face of clear notification from the Court that dismissal with prejudice was a likely possibility.[7] In re Adams Golf, Inc. Securities Litig., 381 F.3d at 280; see also CMR D.N. Corp. v. City of Phila., 703 F.3d 612, 629 (3d Cir. 2013) ("[W]e have refused to overturn denials of motions for leave to amend where the moving party offered no cogent reason for

[7] Victaulic also argues that amendment should be denied because CFI has acted in bad faith by improperly including an expert declaration as an exhibit to its FAC and misrepresenting Victaulic's statements at the hearing. The Court disagrees that CFI's inclusion of an expert declaration or its discussion of the hearing reflect bad faith that would preclude amendment.

the delay in seeking the amendment."). The Court therefore concludes that CFI's delay in this case was undue, but will also decide whether amendment would be futile.

C. Amendment Would be Futile

Victaulic also contends that amendment would be futile because the alleged failure to pay marking duties on unmarked or improperly marked merchandise does not constitute a FCA violation. Alternatively, Victaulic argues that amendment would be futile because the factual allegations in the FAC do not cure the defects in CFI's initial pleading. The Court agrees that amendment would be futile.

1. Victaulic's Alleged Failure to Pay Marking Duties Does Not Violate the FCA

CFI's theory of liability is predicated on its allegations that unmarked or improperly marked merchandise is subject to marking duties at the time of importation, and that any marking duties owed on such merchandise must be disclosed in entry documentation such as CBP Form 7501. FAC ¶¶ 92–108. Victaulic relies on American Textile Manufacturers Institute, Inc. v. The Limited, Inc., 190 F.3d 729 (6th Cir. 1999) ("ATMI"), for the proposition that the FAC does not state a claim because any obligation to pay marking duties arose after the alleged false statements were made. Victaulic also argues that no false claims could have been made in this case because nothing in Customs law or CBP Form 7501 requires an importer to report marking duties at the time merchandise is imported.

a. Marking Duties Accrue After Importation

When and under what circumstances an importer owes marking duties is not necessarily straightforward. See Victaulic Co., Civ. A. No. 13-2983, 2014 WL 4375638, at **1–2. However, after reviewing the Tariff Act, Customs regulations, and relevant case law, the Court concludes as a matter of law that an importer does not owe marking duties upon importation of unmarked or mismarked merchandise. To the contrary, an obligation to pay marking dues arises only if unmarked or improperly marked goods are entered into the country and are not subsequently remarked, exported, or destroyed.

To understand how an importer comes to owe marking duties, a basic understanding of the process by which imported merchandise enters the country is necessary. Merchandise arriving by ship is considered "imported" on the date the ship arrives at a U.S. port with the intention to unload the merchandise. 19 C.F.R. § 101.1. To clear the merchandise through CBP, an importer must "make entry" upon or shortly after importation by filing entry documentation with CBP so that CBP can assess the duties owed on the merchandise prior to releasing it. See 19 U.S.C. § 1484(a); 19 C.F.R. § 141.0a(a)-(b). At the same time or shortly after "making entry," an importer must file an "entry summary," which includes CBP Form 7501 or an electronic equivalent. 19 C.F.R. §§ 141.0a(b), 142.2 & 142.11. An importer is obligated to use reasonable care in connection with the entry process. 19 U.S.C. § 1484(a)(1).

In general, entry documentation requires an importer to provide information such as the value of the products imported and the country of origin to allow for an accurate assessment of duties owed at the time of importation. See 19 U.S.C. § 1484(a); 19 C.F.R. § 141.1(a). An importer generally deposits estimated duties owed to CBP at the time entry summary documentation is filed. See 19 U.S.C. § 1505(a); 19 C.F.R. § 141.101(a) & 141.103. Upon receipt of the relevant documentation and an importer's deposit of estimated duties, CBP will release the merchandise. Although CBP has authority to examine the goods, it may release them without inspection and later request samples or additional examination of released goods. See 19 C.F.R. § 151.1; 19 C.F.R. § 151.11; see also United States v. So's USA Co., No. 97-05-00922, 1999 WL 675408, at *2 (Ct. Int'l Trade Aug. 26, 1999). Entries remain open or "unliquidated" for a period of time during which CBP or the importer can review and revise the entry information if necessary. Absent any revisions, the entry will "liquidate" at the duty rate estimated by the importer. See 19 U.S.C. § 1504(a); 19 C.F.R. § 159.11(a).

In the event CBP discovers before release that imported merchandise is not properly marked with country-of-origin information, it will require proper marking, exportation, or destruction of the merchandise. 19 C.F.R. § 134.51(a). Even if CBP conditionally releases the merchandise to the importer, it may request redelivery for proper marking, export, or destruction within a limited time period if it is later revealed that the merchandise was not marked. 19 C.F.R. §§ 134.3(b) 141.113(a)(2); see also 19 C.F.R. §§ 141.0a(i).

If an article is not marked in accordance with marking requirements at the time of importation, "and if such article is not exported or destroyed or . . . marked after importation," then "there shall be levied, collected, and paid upon such article a duty of 10 per centum ad valorem, which shall be deemed to have accrued at the time of importation." 19 U.S.C. § 1304(i). Although marking duties are "deemed to have accrued at the time of importation," they are only "levied, collected, [or] paid" if the unmarked article is not exported, destroyed, or marked after importation. A CBP regulation confirms that "[a]rticles not marked as required . . . shall be subject to additional duties of 10 percent of the final appraised value unless exported or destroyed under Customs supervision prior to liquidation of the entry. . . ." 19 C.F.R. § 134.2 (emphasis added). Case law supports this interpretation of the statute and regulations.[8]

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[8] See Pentax Corp. v. Robison, 125 F.3d 1457, 1463 (Fed. Cir. 1997) ("The act of culpably mismarking goods cannot be said to have deprived the government of the 10 percent *ad valorem* duty assessed under 1304(f). To the contrary, but for the mismarkings (followed by the failure to export, destroy, or remark the articles in accordance with section 1304), the duty could not have arisen."), amended on reh'g by, 135 F.3d 760 (Fed. Cir. 1998); Frontier Ins. Co. v. United States, 185 F. Supp. 2d 1375, 1379 (Ct. Int'l Trade 2002) ("As Customs correctly concludes, § 1304 mandates the assessment of a 10% marking duty when (1) at the time of importation an article is not marked in accordance with the provisions of § 1304(a) and (2) the merchandise is not exported, destroyed or re-marked under the supervision of Customs prior to the liquidation of the entry."); United States v. Golden Ship Trading Co., No. 97-09-01581, 2001 WL 65751, at *3 (Ct. Int'l Trade Jan. 24, 2001) ("Plaintiff correctly notes that 19 U.S.C. § 1304 requires that marking duties accrue if merchandise has been mismarked and

Marking duties are therefore not a duty owed to the Government upon the importation of foreign merchandise. They are, rather, additional duties imposed after the fact on noncompliant merchandise that has been erroneously released into the stream of commerce. Indeed, an importer arriving at a U.S. port with unmarked merchandise does not have the option of paying marking duties to enter that merchandise into the country.[9] Rather, as discussed above, the importer will be obligated to remark, export, or destroy the merchandise. Only when none of those three things occurs does an importer's obligation to pay marking duties arise.

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has entered into the commerce of the United States."); United States v. Pentax Corp., 69 F. Supp. 2d 1361, 1363 (Ct. Int'l Trade 1999) ("Had the mismarking been discovered before release by Customs, the goods would not have been admitted as marked. Remarking, exportation, or destruction, would have been required. If none of these measures were accomplished and if the mismarking had been discovered before liquidation, marking duties would have been assessed." (citations and footnote omitted)).

[9] The Tariff Act provides that "[n]o imported article held in customs custody ... shall be delivered until such article ..., whether or not released from customs custody, shall have been marked in accordance with the requirements of this section or until the amount of duty estimated to be payable under subsection (i) of this section [i.e., marking duties] has been deposited." 19 U.S.C. § 1304(j); see also 19 C.F.R. § 134.3(a). That language arguably suggests marking duties may be paid in lieu of marking. To the contrary, that provision does not afford an importer a choice to either pay marking duties or surrender the merchandise for proper marking, exportation, or destruction. See Globemaster, Inc. v. United States, 340 F. Supp. 974, 977 (Cust. Ct. 1972); see also Hr'g Tr. at 17–18, 23–27; FAC ¶ 99.

CFI appeared to embrace this understanding of marking duties at the hearing. See Hr'g Tr. at 23–27, 31–32. Indeed, CFI acknowledges in its current briefing that "the only circumstance in which an importer actually pays marking duties is if the importation of unmarked goods is detected after-the-fact, and after Customs has the ability to require marking, destruction or re-export." Doc. 37 at 11. Nevertheless, CFI also takes the position that marking duties are owed upon importation and suggests that the Court must defer to its factual allegation as to when marking duties are owed.

When and the circumstances under which an importer owes marking duties is dictated by statute and regulations. It is a legal issue rather than a factual matter, and the Court owes no deference to CFI's legal conclusions. See Iqbal, 556 U.S. at 678. CFI ignores the statutory provisions and regulations discussed above and appears to rely exclusively on the language that marking duties are "deemed to have accrued at the time of importation." 19 U.S.C. § 1304(i). Notably, the statute does not say that marking dues are "owed" or "due" upon importation, but rather "deems" them "to have accrued at the time of importation." That language accords with the notion that marking duties accrue after importation absent remarking, exportation, or destruction, but are retroactively "deemed" to have accrued at importation, presumably to fix a point in time at which to value the imported merchandise so as to calculate the ten-percent marking duty.

CFI's interpretation that marking duties are owed at the time of importation cannot be squared with the language of the statute and regulations. If

marking duties were owed upon importation, as CFI alleges, an importer would owe marking duties on noncompliant merchandise even if that merchandise were subsequently remarked, exported, or destroyed in connection with the entry process or after entry. To the contrary, as explained above, marking duties are additional duties owed on noncompliant merchandise that has not been remarked, exported, or destroyed after entry into commerce. See 19 U.S.C. § 1304(i).

b. CBP Form 7501 Does Not Require an Importer to Report Marking Duties

As noted in the Court's earlier opinion, nothing in CBP Form 7501 requires an importer to report marking duties that may be owed on unmarked merchandise. Victaulic, Civ. A. No. 132983, 2014 WL 4375638 at *13. The form and its instructions do not mention marking duties at all. Furthermore, the location on the form where an importer is instructed to summarize "other" fees requires the importer to denote the "applicable collection code" from a list of codes provided in the instructions. See supra § I.D. None of those collection codes refers to marking duties. There is simply no location on the form where an importer is required to disclose marking duties in accordance with the form instructions.

CFI's construction of Form 7501 is not only inconsistent with the language of the form and related instructions, but it makes no sense in light of when marking duties are owed. Under CFI's interpretation, an importer would be obligated to

disclose marking duties owed on merchandise before any marking duties had in fact accrued. If CBP were notified upon entry-via Form 7501 or in connection with other entry documentation-that imported merchandise did not comply with marking requirements, it would order remarking, exportation, or destruction of the merchandise prior to releasing it. CFI acknowledges that fact. FAC ¶ 102; see also Hr'g Tr. at 31. In that case, however, the importer would not owe marking duties because no obligation to pay marking duties would have accrued. Any prior disclosure of marking duties, to the extent one was made, would have therefore been erroneous.

CFI nevertheless claims that deference is due to its factual allegation that an importer must disclose marking duties on Form 7501. The FAC explicitly relies on form 7501 in connection with its allegation that Victaulic is falsifying entry documentation. FAC ¶ 96. Accordingly, the court may properly consider the form in deciding whether the FAC states a claim. See Schmidt, 770 F.3d at 249. To the extent a document properly before the court "contradict [s] the Complaint's factual allegations, the document[ ] will control." Goldenberg v. Indel, Inc., 741 F. Supp. 2d 618, 624 (D.N.J. 2010) (citing ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 859 n.8 (3d Cir. 1994)). Accordingly, no deference is due to CFI's erroneous allegation that Form 7501 requires disclosure of marking duties.

c. Victaulic's Alleged Failure to Pay Marking Duties Does Not Give Rise to a Claim Under the FCA

Prior to 2009, the FCA imposed liability on whoever "knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government." 31 U.S.C. § 3729(a) (7). Claims brought pursuant to that provision were known as "reverse false claims" because they concerned use of a false record to reduce or avoid a monetary obligation to pay the government rather than fraudulent efforts to cause payment on a false claim. U.S. ex rel. Schmidt v. Zimmer, Inc., 386 F.3d 235, 242 (3d Cir. 2004). In its current form, the FCA imposes liability on whoever "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." 31 U.S.C. § 3729(a)(1)(G) (effective May 20, 2009). The amended version of the reverse false claim provision applies to conduct that occurred after its enactment on May, 20, 2009. See U.S. ex rel. Ahumada v. NISH, 756 F.3d 268, 280 n.7 (4th Cir. 2014) (citing Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4(f), 123 Stat. 1617, 1625).

The Sixth Circuit's opinion in ATMI, supra, is particularly relevant to whether CFI can state a cognizable claim under the FCA based on Victaulic's

alleged failure to pay marking duties. The defendants in that case were alleged to have mismarked merchandise by labeling articles produced in China as having been produced in Hong Kong, and misrepresenting the country of origin in paperwork filed with Customs to avoid textile quotas. The relator claimed that the defendants' conduct subjected them to fines, liquidated damages, and marking duties, and that their filing of false documentation concealed those monetary obligations in violation of the pre–2009 version of the FCA's reverse false claim provision.

The Sixth Circuit relied on two basic principles to conclude that the allegations vis-à-vis marking duties did not state a claim. First, "a plaintiff may not state a reverse false claim unless the pertinent obligation attached *before* the defendant made or used the false record or statement." 190 F.3d at 734. Second, "[w]here an obligation arises if and only if a defendant makes a false statement or files a false claim . . ., an action under the False Claims Act will not lie. . . ." Id. After looking to relevant case law on marking duties, the Sixth Circuit concluded that "the marking duty applies only when a defendant engages in conduct that the statute defines as wrongful" and rejected the reverse false claim on that basis. Id. at 741. Additionally, the relator's claims failed as a matter of law because any false statements were necessarily made before any obligation to pay marking duties attached.

The Court agrees with the logic of ATMI that a defendant cannot be liable for a reverse false claim based solely on conduct necessary to create the

obligation that the defendant allegedly avoided or concealed. For liability to attach under the pre-2009 version of the reverse false claim provision, a defendant had to knowingly make a false statement or use a false record to "conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government." 31 U.S.C. § 3729(a)(7). Under the current version, a defendant is liable if it "knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government," regardless of whether a false statement is made.

In interpreting statutory language, a court should determine the statute's plain meaning, and may use a dictionary to determine the ordinary meaning of the words. See, e.g., Aleynikov v. Goldman Sachs Grp., Inc., 765 F.3d 350, 359 (3d Cir. 2014). The word "avoid" means "to prevent the occurrence or effectiveness of [something]." Merriam–Webster Dictionary, http://www.merriam-webster.com/dictionary/avoid. "Conceal" is defined as "to prevent disclosure or recognition of" or "to place out of sight." Id. http://www.merriam-webster.com/dictionary/conceal. The word "decrease" is defined as "to grow progressively less (as in size, amount, number, or intensity)" or "to cause to decrease." Id. http://www.merriam-webster.com/dictionary/decrease.

When a course of conduct is necessary to create an obligation to pay the Government, that same course of conduct cannot also be said to "conceal," "avoid," or "decrease" the obligation within the ordinary meaning of those words, even if the conduct giving rise to the obligation is fraudulent.

Otherwise, the instant an obligation arises by virtue of a defendant's fraudulent conduct, the defendant could also be said to have concealed, avoided, or decreased that same obligation without doing anything else. The ordinary meaning of the words conceal, avoid, and decrease indicate that a defendant must take some other action to prevent disclosure of or payment on the obligation or to cause that obligation to decrease after the obligation accrues.

CFI contends that "[i]f Victaulic has imported unmarked fittings, then it concealed, withheld, and avoided an obligation to pay the 10% marking duties on those imports, including by failing to provide necessary documentation to CBP for their release and failing to deposit the duties at or before the time of release, as required by statute, as well as by not marking the products in the first place. . . ." Doc. 43 at 14; see also FAC ¶ 102 ("[I]f Victaulic successfully imported and distributed into the stream of commerce unmarked pipe fittings, then it necessarily falsified information on its entry documents and failed to pay marking duties owed."). As explained above, there are no marking duties to report at the time of importation or entry because an importer does not owe marking duties unless he enters unmarked or improperly marked merchandise into the country and that merchandise is not otherwise remarked, exported, or destroyed. Any obligation to pay marking duties on Victaulic's pipe fittings necessarily accrued after importation and entry, such that there would be no duties to report or deposit upon importation or entry.

Accordingly, Victaulic cannot be liable on a reverse false claim based solely on the fact that it

allegedly imported unmarked or improperly marked merchandise because that conduct is necessary to create the obligation in question. Whether an importer comes to owe marking duties by negligently or intentionally skirting marking requirements and entering noncompliant merchandise into the country, the marking duties would not be owed but for that conduct. For the reasons discussed above, the same conduct that gives rise to the obligation to pay marking duties cannot also be said to avoid, conceal, or decrease those duties so as to give rise to a reverse false claim under either version of the statute. Accordingly, amendment would be futile because CFI's claims fail as a matter of law.[10]

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[10] Victaulic also alleges that a failure to pay marking duties is essentially a regulatory violation that does not give rise to a claim under the FCA. Several courts, including the Sixth Circuit in ATMI, held that, under the pre–2009 version of the FCA, unassessed civil and criminal penalties for regulatory violations were "contingent" obligations that could not form the basis of a reverse false claim. 190 F.3d at 738; see also Hoyte v. Am. Nat'l Red Cross, 518 F.3d 61, 67 (D.C. Cir. 2008); U.S. ex rel. Bain v. Ga. Gulf Corp., 386 F.3d 648, 657 (5th Cir. 2004). The 2009 amendments to the FCA added a definition of "obligation," to include "an established duty, whether or not fixed, arising ... from statute or regulation." See 31 U.S.C. § 3729(b)(3). It is apparent from the legislative history that Congress considered "customs duties for mismarking country of origin" to be encompassed within the new definition. S. Rep. 111-10, at n.10, S. Rep. No. 10, 111th Cong., 1st Sess. 2009, 2009 WL 787872, at *24. However, although certain contingent obligations may now form the basis of a reverse false claim, it is still not clear that an unassessed civil or criminal penalty for a regulatory violation constitutes an obligation under the statute. See John T. Boese, Civil False Claims and Qui Tam Actions § 2.01[L] (citing 155 Cong Rec. S. 4539 (daily ed. Apr. 22, 2009) (statement of Sen. Kyl)). The Court declines to address this issue, having resolved the matter on other grounds.

2. The FAC Does Not Satisfy Rule 9(b)

Amendment would also be futile because the FAC fails to satisfy Rule 9(b). Federal Rule of Civil Procedure 9(b) requires a party alleging fraud, including a relator in a FCA action, to "state with particularity the circumstances constituting [the] fraud." Fed. R. Civ. P. 9(b); U.S. ex rel. Wilkins v. United Health Grp., Inc., 659 F.3d 295, 301 n. 9 (3d Cir. 2011). To satisfy Rule 9(b), a relator must "allege 'particular details of a scheme to submit false claims [or otherwise violate the FCA] paired with reliable indicia that lead to a strong inference that claims were actually submitted [or the FCA violated in the manner alleged].'" Foglia v. Renal Ventures Mgmt., LLC, 754 F.3d 153, 156 (3d Cir. 2014) (quoting U.S. ex rel. Grubbs v. Kanneganti, 565 F.3d 180, 190 (5th Cir. 2009)). Although a relator need not plead "representative samples" of fraudulent conduct "specifying the time, place, and content of the acts and the identity of the actors," he must describe more than "a mere opportunity for fraud." Id. at 155 & 158.

"In cases of fraud, Rule 9(b) . . . stand[s] as a gatekeeper to discovery, a tool to weed out meritless fraud claims sooner than later." Grubbs, 565 F.3d at 185. Its particularity requirement is intended "to place the defendants on notice of the precise misconduct with which they are charged, and to safeguard defendants against spurious charges of immoral and fraudulent behavior." Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 742 F.2d 786, 791 (3d Cir. 1984). "[A] claim brought under the [FCA] that rests primarily on facts learned through the costly process of discovery is precisely what Rule

9(b) seeks to prevent." U.S. ex rel. Nathan v. Takeda Pharm. N. Am., Inc., 707 F.3d 451, 456 (4th Cir. 2013) (internal quotations and alterations omitted)).

CFI's primary theory of liability is that, from 20032012, Victaulic failed to mark its foreign-made pipe fittings, snuck those unmarked fittings into the country by failing to disclose them to CBP, and passed them off as U.S.-made to command higher profits.[11] That theory rests almost entirely on a comparison of CFI's import analysis to its product study and Dr. Wyner's related statistical analysis.[12] According to CFI, one can conclude that Victaulic is failing to mark its foreign-made pipe fittings because a considerable portion of the Victaulic products sold on the secondary market (eBay) are unmarked, such that some of those products must be foreign-made in light of the fact that imports account for a significant portion of Victaulic's sales.

Although studies and statistics may be used to satisfy Rule 9(b) in the FCA context, those studies and statistics must be reliable in the sense that they give credence to the relator's allegations of fraud. See U.S. ex rel. Ge v. Takeda Pharm. Co., Ltd., 737

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[11] Victaulic, pointing to its price list, suggests that it has no motive for fraud because it charges the same price for its foreign-made and U.S.-made products. However, the FAC explains that certain legislation created a market for U.S.-made products, which could provide a motive for the fraud alleged by CFI. CFI also alleges that the price list is irrelevant, to some extent, in light of industry discounts commonly provided on pipe fittings.

[12] Victaulic alleges that it was improper for CFI to submit an expert report at this stage of the litigation, and that the Court should not consider it. However, CFI's claims fail even taking Wyner's declaration into account.

F.3d 116, 123–24 (1st Cir. 2013) (explaining that, in some contexts, a relator can satisfy Rule 9(b) by "providing factual or statistical evidence to strengthen the inference of fraud beyond possibility without necessarily providing details as to each false claim" (internal quotations omitted)); U.S. ex rel. Thompson v. Columbia/HCA Healthcare Corp., 125 F.3d 899, 903 (5th Cir. 1997) (relator's allegations based on statistical studies failed to satisfy Rule 9(b) when there was "no indication[ ] . . . that [the] studies directly implicate[d] defendants").

CFI's product study is insufficiently reliable to support its conclusion that Victaulic failed to mark foreign products because it uses unreliable methods. The inherent unreliability of the product study stems from the fact that CFI's conclusions rest on the assumption that it was able to discern from photographs on the internet whether a given product was marked. Of the 221 listings considered by CFI, eighty-two percent allegedly had one or more "clear" photographs (a subjective assessment) from which CFI "was able to determine with 95% confidence whether a marking was present or not."[13] FAC ¶ 68. But reviewing pictures on eBay, which are one-dimensional rather than three-dimensional, does not reliably allow one to draw a conclusion as to whether

[13] Nothing in the FAC or CFI's briefing explains how CFI derived its conclusion that, for the majority of listings, it could ascertain whether a depicted product was marked with ninety-five percent confidence. That figure appears to be an assumption based on CFI's subjective assessment of its ability to make a marking determination from a photograph rather than any data. It is also not apparent from the spreadsheet attached to the FAC each of the listings that CFI deemed "unclear." Compare FAC ¶ 74 with FAC Ex. 8.

the depicted product is marked, especially since there is no indication that sellers were making an effort to display markings in the photographs. Although CFI alleges that it used a "zoom" option and otherwise enlarged images to get a closer look at the products being sold, that matters little if the country-of-origin marking simply is not evident from the photograph.

CFI rejects the notion that it may have missed foreign markings, in particular those located inside the rim of a product (such as the marking displayed in the picture Victaulic presented at the hearing), because it identified one foreign marking inside a pipe fitting and because "approximately two-thirds of the listings provide some view of the inside or rim of a fitting." Doc. 43 at 8. But the fact that certain photographs provided a view of the inside of a fitting does not mean that each image illustrated the location where each product was marked, especially since CFI reviewed different types of products that may have been marked in different locations.

CFI's own allegations illustrate the limits of its products study. When CFI selected a sample of nine products to purchase from the eighteen percent of photographs it designated as "unclear," one of the products purchased was not even marked as a Victaulic product and had to be excluded from the study. FAC ¶ 75. Furthermore, upon purchasing items for sale, CFI realized that "approximately half of the Victaulic pipe fittings CFI purchased were, in fact, marked as made in the U.S.A., although they appeared from the eBay listings to be unmarked." FAC ¶ 76. Although CFI adjusted its results based on that finding, it does not inspire confidence about

the majority of its conclusions, especially since there is no apparent factual basis for the ninety-five percent confidence level CFI attributes to its ability to discern markings from the "clear" photographs.[14] It also does not appear as though CFI accounted for the fact that several listings were for multiple products.

Even if CFI had accurately assessed whether a given product sold on eBay was marked, its study still does not lead to the conclusion that the unmarked products are foreign made, rather than U.S.-made. CFI alleges that eBay is a national market that includes products from different channels of distribution and a range of Victaulic products for sale. FAC ¶¶ 62–65; Doc. 43 at 7. But those allegations do not reliably support an inference that one would expect to find foreign-made and U.S.-made Victaulic products sold on eBay in the same ratio sold by Victaulic. Without a reliable basis for drawing such an inference, CFI's product study cannot plausibly establish that Victaulic is failing to mark a significant portion of its imported fittings. These inherent flaws in CFI's study cast considerable doubt on its conclusions and, by extension, Wyner's statistical analysis, rendering the study an insufficient basis for satisfying Rule 9(b).

The only other factual allegation supporting CFI's theory that Victaulic failed to mark its pipe fittings relates to a witness who worked in the pipe

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[14] The only sufficiently reliable assessments of markings are those made by CFI after purchasing the products from eBay. But nine purchases are not a statistically significant sample from which to conclude, by virtue of a comparison to Victaulic's imports over a decade, that Victaulic is failing to mark its imported fittings.

and tube industry. That witness allegedly "recall[ed] a customer procuring Victaulic pipe fittings that the company represented were 100% U.S. manufactured," yet observed a packing list at the bottom of "one box" of inventory suggesting that the unmarked products originated in Poland. FAC ¶ 83. This allegation is closer to the mark, as it lends support to CFI's theory that Victaulic is failing to mark imported merchandise. However, the non-specific allegations of one witness implicating one box of inventory for an unknown customer at an unknown time does not "lead to a strong inference" that Victaulic has perpetrated a massive fraud involving millions of pounds of product imported over the course of a decade, at least not without additional corroborating allegations. Foglia, 754 F.3d at 158. To conclude otherwise would mean that a complete stranger to a company could run to court and unlock the doors to discovery based solely on the nonspecific allegations of one witness. More is required "for a ticket to the federal discovery apparatus." Grubbs, 565 F.3d at 190.

It is worth noting that CFI is essentially a stranger to Victaulic. It has no inside information, unlike the typical *qui tam* relator, who has usually seen direct or indirect evidence of a fraudulent scheme. A current or former employee of a defendant, or an individual who is otherwise in a position to have inside information about a defendant's practices and conduct, bears some level of reliability when he acts as a *qui tam* relator because he was in a position have observed the alleged fraud through personal experience. See Grubbs, 565 F.3d at 191–92 (relator alleged scheme to improperly bill for patient visits based on "first-hand experience" and direct

communications with other participants in the scheme); U.S. ex rel. Heater v. Holy Cross Hosp., Inc., 510 F. Supp. 2d 1027, 1036 (S.D. Fla. 2007) ("Heater's personal experience with the billing process can provide the 'indicia of reliability' required to survive Holy Cross's Motion to Dismiss.")

When a relator is a complete stranger to the defendant who has constructed a case of fraud entirely from the outside, his allegations do not necessarily bear the same reliability. That is not to say that a corporate outsider cannot function as a relator. However, any outside investigation into a private company's fraud must, in accordance with Rule 9(b), supply the Court with a level of reliable information that strongly supports an inference a FCA violation has occurred. For the reasons above, CFI has not done so here with respect to its claim that Victaulic is failing to mark its foreign-made products. See Ebeid ex rel. U.S. v. Lungwitz, 616 F.3d 993, 998 (9th Cir. 2010) ("To jettison the particularity requirement simply because it would facilitate a claim by an outsider is hardly grounds for overriding the general rule, especially because the FCA is geared primarily to encourage insiders to disclose information necessary to prevent fraud on the government.").

In a secondary theory, CFI alleges that, even when Victaulic marks its foreign-made products, those markings do not technically comply with marking requirements because they are done by an improper method and/or are not conspicuous. That theory is based on one foreign pipe fitting CFI purchased from eBay in connection with its product study, a review of another listing from eBay, and the

picture of a Victaulic pipe fitting that Victaulic submitted at the hearing. FAC ¶¶ 9, 72–73, 84–85 & Ex. 10; Doc. No. 43 at 11; Doc. No. 37–19 at 6 & 29.

It is not clear that any of the products in question fail to comply with the requirement that merchandise must be marked "in a conspicuous place . . . in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article." 19 U.S.C. § 1304(a). "The 'ultimate purchaser' is generally the last person in the United States who will receive the article in the form in which it was imported." 19 C.F.R. § 134.1(d). A marking is "conspicuous" if it is "capable of being easily seen with normal handling of the article or container" and if the ultimate purchaser can easily find the marking and read it without strain. 19 C.F.R. § 19 C.F.R. §§ 134.1(k) & 134.41(b); Customs Ruling No. N1 95078 (Dec. 15, 2011).[15] Whether a marking is conspicuous is determined by looking at "the size of the marking, the location of the marking, whether the marking stands out, and the legibility of the marking," although no factor is conclusive on its own. Customs Ruling HQ 734718 (Apr. 22, 1993). The purpose of the marking requirements is so that "at the time of purchase the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy them, if such marking should influence his will." United States v. Friedlaender & Co., 27 C.C. Pa. 297, 302 (C.C.P.A. 1940).

The markings with which CFI takes issue are visible on the interior of the products. However, they

[15] Customs rulings can be found online at http://rulings.cbp.gov/.

are not "hidden from sight" as CFI alleges, as the black marking contrasts with the orange color of the product. FAC ¶ 84; see also FAC Ex. 10; Doc. No. 37–19 at 6 & 29. CFI further contends that Victaulic's markings do not comply with the Tariff Act because they would not be visible when the product is "in use." FAC ¶ 73. But if a marking is sufficiently conspicuous to convey to an ultimate purchaser where the goods were produced, it is not clear why the marking must also be visible when the product is in use to comply with the law. Cf. Customs Ruling No. N.Y. N045657 (Dec. 24, 2008) (label inside neck on men's garment was conspicuous).

CFI also claims that the three Victaulic products in question are not marked by one of the five methods required by the Tariff Act-die stamping, cast-in-mold lettering, etching, engraving, or continuous paint stenciling. 19 U.S.C. § 1304(c)(1). According to CFI, the picture Victaulic produced at the hearing reflects a product with a foreign marking that "appears to be a single stenciled marking, not a continuous stencil as required by U.S. law." FAC ¶ 84. However, in response to Victaulic's assertion that the product in the photograph was marked by a laser etching (which complies with the Tariff Act), CFI admitted that the manner of marking "cannot be determined simply by looking at the photograph." Doc 43 at 11. CFI's allegation therefore does not provide a reliable basis for concluding that Victaulic failed to mark this particular product in a lawful manner.[16] In any

[16] That Victaulic's foreign-made products may be marked by a different method than its U.S.-made products is irrelevant if the foreign markings comply with the law.

event, given CFI's assertion that "the marking in [the] photograph is not representative of Victaulic's actual practices during the time period covered by this case," it is not clear why CFI would point to the photograph in support of its FCA claim. Doc. 43 at 12.

The Court is left with two Chinese-made products-one of which CFI purchased and one of which it viewed via a photograph-that CFI contends are "stenciled or stamped in black ink (not etched)" in a manner that does not comply with the Tariff Act. Doc. 43 at 11. It is possible that, even if Victaulic's manner of marking does not technically comply with the marking statute, CBP would accept the marking as compliant. See Customs Ruling No. HQ 734795 (Oct. 26. 1994) (concluding that ink stenciling "is sufficiently permanent that it is the equivalent of paint stenciling and, therefore, meets the requirements of 19 U.S.C. 1304(c)"). In any event, CFI's allegations that Victaulic has failed to correctly mark two of its products do not support the vast fraudulent scheme alleged in the FAC.

To the extent anything can be extrapolated from the two products, they at most support an inference that some unknown portion of Victaulic's Chinese-made imports are not marked in one of the five manners set forth in the Tariff Act. The allegations do not plausibly support CFI's scheme that Victaulic engaged in fraudulent conduct as to all of its Chinese and Polish imports over the course of a decade.[17] But improperly marking foreign-made

[17] As CFI acknowledges that one of the Chinese-marked products it viewed on eBay was properly marked, Victaulic's alleged marking failures do not appear to pervade every type of

products does not provide an opportunity to pass those products off as U.S.-made (as in the case of unmarked products), which CFI contends is the motivation driving Victaulic's fraud. In any event, even if CFI could fashion a second amended complaint more narrowly tailored to its theory that Victaulic is marking certain of its Chinese imports in a manner that does not comply with the Tariff Act, amendment would be futile because Victaulic's failure to pay marking duties on improperly marked products does not constitute a violation of the FCA.[18] See supra § II.C.1.

III. Conclusion

For the foregoing reasons, the Court will deny CFI's motion to alter or amend judgment, and for leave to file an amended complaint. Amendment would be inequitable because CFI unduly delayed seeking amendment. Amendment would also be

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product manufactured in China. Additionally, as Victaulic did not start manufacturing in China until 2005, any alleged fraud with respect to Chinese-made products could not have occurred before then. See FAC ¶ 45. It is not appear as though CFI uncovered any specific information concerning how Victaulic marks its Polish-made products.

[18] CFI asserts that it should not be required to plead with particularity that Victaulic failed to pay marking duties because that information is in the hands of Victaulic. In Foglia, the Third Circuit, in a "close case," held that when a relator provided patient logs showing that the defendant was using less of a certain medicine than would have been required unless it complied with certain regulations, the court was required to credit the allegation that the defendant failed to comply with those regulations because the defendant "had access to the documents that could easily prove the claim one way or another." 754 F.3d at 158. The allegations of fraud in that case were far more reliable than the allegations here.

futile because the FAC does not allege a cognizable claim under the FCA and, in any event, does not satisfy Rule 9(b)'s requirement that fraud must be pled with particularity.

An appropriate order shall issue.

[ENTERED: September 4, 2014]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA *ex rel.* CUSTOMS FRAUD INVESTIGATIONS, LLC	:	CIVIL ACTION
v.	:	
VICTAULIC COMPANY	:	NO. 13-2983

ORDER

AND NOW, this 4th day of September, 2014, upon consideration of the defendant's motion to dismiss (Doc. No. 17), the plaintiff's opposition thereto, the defendant's reply, the plaintiff's surreply, and the parties' supplemental briefing, and after oral argument held on January 23, 2014, for the reasons set forth in a memorandum opinion bearing today's date, IT IS HEREBY ORDERED that the motion is GRANTED and the complaint is DISMISSED with prejudice.

BY THE COURT:

/s/ Mary A. McLaughlin

MARY A. McLAUGHLIN, J.

[ENTERED: September 4, 2014]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA *ex rel.* CUSTOMS FRAUD INVESTIGATIONS, LLC	:	CIVIL ACTION
v.	:	
VICTAULIC COMPANY	:	NO. 13-2983

MEMORANDUM

McLaughlin, J. September 4, 2014

The plaintiff, Customs Fraud Investigations, LLC ("CFI") brings this action against the defendant, Victaulic Company ("Victaulic"), to recover damages and civil penalties on behalf of the United States as a *qui tam* relator pursuant to the False Claims Act, 31 U.S.C. §§ 3729, et seq. ("FCA"). Victaulic is a producer of iron and steel pipe fittings manufactured in the United States, China, Poland, and Mexico. CFI is a company that conducts research and analysis related to potential customs fraud. CFI alleges that Victaulic has violated the FCA by failing to mark or mismarking its foreign-made pipe fittings as required under the United States Tariff Act of 1930 ("Tariff Act"), 19 U.S.C. §§ 1304(a) and (c), and by falsifying customs entry documents, to avoid an obligation to pay "marking

duties" due on mismarked or unmarked foreign products under 19 U.S.C. § 1304(i).

CFI filed its one-count complaint in this Court on May 30, 2013. On August 7, 2013, the United States declined to intervene or enter its appearance in the case, and the complaint was unsealed. Victaulic has moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(1), on the grounds that § 3730(e)(4)(A) of the FCA requires dismissal of a private enforcement action based on publicly disclosed allegations or transactions of fraud.

Victaulic has also moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), on the grounds that (1) the failure to mark goods or to pay marking duties under the Tariff Act does not give rise to a claim under the FCA; and (2) even if these actions do give rise to a claim under the FCA, CFI has failed to state a claim for such a violation under either Rule 8(a) or Rule 9(b) of the Federal Rules of Civil Procedure.

Because the Court finds that CFI has failed to allege facts sufficient to support its allegations that Victaulic failed to mark its imported pipe fittings, or knowingly concealed or avoided any obligation to pay marking duties, the complaint will be dismissed with prejudice.

I. Factual Background[1]

A. Marking Duties Under the Tariff Act

The Tariff Act requires that, with some exceptions, "every article of foreign origin . . . imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article . . . will permit in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article." 19 U.S.C. § 1304(a).

The Act further provides that, with few exceptions, ". . . pipes of iron, steel, or stainless steel, to pipe fittings of steel, stainless steel, chrome-moly steel, or cast and malleable iron . . . shall be marked with the English name of the country of origin by means of die stamping, cast-in-mold lettering, etching, engraving, or continuous paint stenciling." 19 U.S.C. § 1304(c)(1). Because imported pipe fittings should bear country-of-origin markings that conform to one of the five methods listed above, unmarked pipe fittings are generally presumed in

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[1] The facts set forth herein are taken not only from the complaint, but also from the much more detailed factual allegations and explanations provided by the plaintiff in connection with its briefing to the motion to dismiss and at the January 23, 2014 hearing on the motion. As the Court explained at the hearing, the Court does not consider these additional facts in assessing the sufficiency of the complaint itself, but will consider these facts in determining (1) whether this action should be dismissed under the public disclosure bar of the False Claims Act; or (2) whether, having dismissed the original complaint, the Court should grant CFI leave to file an amended complaint containing these additional factual allegations. Hr'g Tr. 4, 6 (Doc. No. 28).

the industry to be U.S.-made. Woodings Decl. ¶ 45 (Doc. No. 18-1).

If imported goods are not marked with the country of origin in the prescribed manner, additional payments known as "marking duties" may be due under 19 U.S.C. § 1304(i), which states:

> If at the time of importation any article . . . is not marked in accordance with the requirements of this section, and if such article is not exported or destroyed or the article . . . marked after importation in accordance with the requirements of this section (such exportation, destruction, or marking to be accomplished under customs supervision prior to the liquidation of the entry covering the article, and to be allowed whether or not the article has remained in continuous customs custody), there shall be levied, collected, and paid upon such article a duty of 10 per centum ad valorem, which shall be deemed to have accrued at the time of importation, shall not be construed to be penal, and shall not be remitted wholly or in part nor shall payment thereof be avoidable for any cause. Such duty shall be levied, collected, and paid in addition to any other duty imposed by law and whether or not the article is exempt from the payment of ordinary customs duties.

19 U.S.C. § 1304(i).

Despite the statutory language directing that marking duties "shall be deemed to have accrued at the time of importation, shall not be construed to be penal, and shall not be remitted wholly or in part nor shall payment thereof be avoidable for any cause," it is not clear at precisely what point in time marking duties become due and owing. At the motion hearing, the parties agreed that marking duties are not necessarily due at the time the unmarked foreign goods cross into the United States; instead, such duties become due if the goods are not subsequently marked, immediately exported, or destroyed. Hr'g Tr. 17–18,23, 25–27. The parties also agreed that if the marking failure is discovered by the United States Bureau of Customs and Border Protection ("CBP") before the goods leave the custody of CBP, marking duties cannot be paid in lieu of properly marking the goods; instead, marking duties generally are levied if the goods leave CBP custody unmarked, and the marking failure is discovered after the fact. Hr'g Tr. 17–18, 23, 25–27; Woodings Decl. ¶ 47.[2]

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[2] The Court notes that other language in the Tariff Act and related Customs regulations supports the conclusion that marking duties – although "deemed to have accrued at the time of importation" – do not become due until the articles leave CBP custody unmarked, at the earliest. Other language also suggests that, under some circumstances, marking duties might be paid in lieu of marking.

For example, 19 U.S.C. § 1304(j) states that "[n]o imported article held in customs custody for inspection, examination, or appraisement shall be delivered until such article . . . , whether or not released from customs custody, shall have been marked in accordance with the requirements of this section or until the amount of duty estimated to be payable under subsection (i) of this section has been deposited."

B. Allegations in the Complaint

The allegations in the complaint itself are limited and conclusory. CFI alleges generally that Victaulic has knowingly failed to mark its imported pipe fittings with country-of-origin markings, in violation of the Tariff Act. CFI also alleges that Victaulic has knowingly concealed the true origin of its pipe fittings, and falsified customs entry documents, both to avoid paying customs marking duties and so that it can pass off its foreign pipe fittings as U.S.-made, to command the higher price generally paid for domestic-made pipe fittings. Compl. ¶ 45.[3]

(emphasis added). See also 19 C.F.R. § 134.2 ("Articles not marked as required . . . shall be subject to additional duties of 10 percent of the final appraised value unless exported or destroyed under Customs supervision prior to liquidation of the entry . . . .") (emphasis added); 19 C.F.R. § 134.3(a) ("Any imported article . . . held in CBP custody . . . will not be delivered until marked with its country of origin, or until estimated duties payable . . . or adequate security for those duties . . . are deposited.") (emphasis added). Cf. 19 C.F.R. §§ 134.54(a) & (c) ("If . . . the importer does not properly mark or redeliver all merchandise previously released to him, the port director shall demand payment of liquidated damages . . . in an amount equal to the entered value of the articles not properly marked or redelivered. . . . Any relief from the payment of the full liquidated damages incurred will be contingent upon the deposit of the marking duty . . . and the satisfaction of the . . . Officer that the importer was not guilty of bad faith in permitting the illegally marked articles to be distributed . . . .") (emphasis added).

[3] CFI explained at the hearing that – contrary to the language in its complaint – it does not allege that Victaulic has concealed from or misrepresented to CBP the origin of its imported products, or falsified customs entry documents with regard to country-of-origin. Hr'g Tr. 29. (And in fact, CFI could

Consequently, CFI alleges, Victaulic "routinely made or used, or caused to be made or used, false and fraudulent records and statements material to Victaulic's obligation to pay marking duties to the U.S. Government, an obligation that Victaulic further knowingly concealed and knowingly and improperly avoided or decreased, in violation of the FCA, 42 U.S.C. § 3729(a)(l)(G)." Compl. ¶ 28.

In support of these claims, CFI explains that its analysis of shipping manifests shows that Victaulic has imported approximately eighty-three million pounds of pipe fittings from foreign sources between 2003–2012, and "upon information and belief," CFI alleges these imports account for a "significant majority" of Victaulic's annual sales in the United States. Compl. ¶ 23. CFI also asserts that "almost all" of Victaulic's pipe fittings available for sale in the U.S. bear either no country-of-origin marking, or are marked "Made in the U.S.A." Compl. ¶ 25. CFI therefore concludes that Victaulic has knowingly failed to mark or has mismarked its imported pipe fittings, and has falsified its customs entry documents to avoid paying marking duties.

C. CFI's Investigation

In its briefing in opposition to Victaulic's motion to dismiss, CFI provides further detail as to how it reached its conclusions regarding the quantity of pipe fittings imported during the relevant time period, the percentage of Victaulic's annual U.S.

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not have determined the volume of foreign imports from Zepol if Victaulic's customs entry documents had not identified China and Poland as countries of origin.)

sales that consist of imported pipe fittings, and its determination that only a "miniscule fraction" of Victaulic's pipe fittings sold in the U.S. bear foreign markings.

First, CFI examined shipping manifests from 2003–2012 using a paid subscriber database called Zepol. Zepol collects and makes available to its subscribers the shipping manifest and import information collected by CBP. CFI's "Import Analysis" showed that, since 2003, Victaulic has imported approximately eighty-three million pounds of pipe fittings from China and Poland by ship.[4]

After calculating Victaulic's average annual imports for the years 2010–2012, reviewing Victaulic's pricing lists, and accounting for standard industry discounts, CFI calculated that the average price of these imported pipe fittings was $10.00 to $15.00 per pound. CFI calls this portion of its analysis its "retail price cross-check." Based on this average price per pound, CFI concluded that the sales value of Victaulic's imports from China and Poland in 2011 was approximately $152 million.

CFI concedes that, because Victaulic is a privately held company, CFI has not been able to find any information from Victaulic itself regarding its annual U.S. or global sales. CFI alleges that other unidentified sources suggest that Victaulic's annual U.S. sales are somewhere between $250 million and $281.1 million. Woodings Decl. ¶ 27. Therefore CFI concludes that, based on an average price of $10.00

[4] Victaulic also imports pipe fittings from Mexico, but as these are generally imported overland, Mexican imports do not appear on shipping manifests. Woodings Decl. ¶ 11.

per pound, imported pipe fittings could have accounted for fifty-four to sixty-one percent of Victaulic's 2011 U.S. sales. Assuming a higher average price of $15.00 per pound, imported pipe fittings could have accounted for eighty-two to ninety-one percent of U.S. sales.

From August and September 2012, and from November 2012 to February 2013, CFI tracked advertisements for pipe fittings for secondary sale (i.e., for resale, not for sale by Victaulic itself) on the internet auction and sale site eBay ("CFI's Product Study"). Ms. Woodings's declaration explains CFI's efforts to control for incorrectly listed products, second-hand products, older products, and provides various reasons why eBay should be considered a valid source of secondary U.S. sales information in the pipe-fitting industry. Woodings Decl. ¶ ¶ 31–39.

Ultimately, CFI selected for further examination 221 eBay listings from approximately eighty-one sellers describing their products as new Victaulic pipe fittings. Woodings Decl. ¶¶ 40–41 & Ex. H. CFI did not examine any listings that were not accompanied by photographs, because CFI used the photographs provided by the sellers to determine whether and how the products were marked.

Of the 221 listings selected, CFI determined that twenty-four products were marked, labeled, or described by the seller as having been made in the United States. Of the listings that were unclear as to markings, or where markings could not be seen clearly in photographs, CFI selected approximately nine pipe fittings to purchase for physical examination. Of those purchases, three pipe fittings

were marked as having been made in China, four were marked as made in the United States, and two were unmarked. Of the pipe fittings marked as made in China, one was properly marked with a cast-in-mold marking, but the other two were stenciled in ways that CFI asserts do not conform to Tariff Act requirements for marking pipe fittings. Woodings Decl. ¶¶ 41–43. The remaining eBay listings examined by CFI online are described as: "Product description and photos examined; no country of origin markings evident." Woodings Decl., Ex. H.

Based on these 221 listings, CFI alleges that at least seventy-five percent of the Victaulic pipe fittings available on eBay are unmarked. CFI also alleges that the fact that only three products were marked as having been made in China, and only one of those markings was compliant with Tariff Act requirements, "strongly suggests that Victaulic is engaging in an intentional practice of leaving its foreign-made pipe fittings unmarked." Woodings Decl. ¶ 45.

CFI further alleges that it "has reason to believe that Victaulic has been falsifying its entry documents and otherwise misrepresenting to CBP that no marking duties are owed on these imports," "[b]ased on CFI's knowledge and expertise regarding CBP's operations." Woodings Decl. ¶ 46. Namely, because CBP "physically inspects only a tiny fraction of shipments arriving in the United States" and "importers normally pay marking duties only if CBP detects a marking violation after [thirty days after entry]," CFI concludes that "it is highly unlikely that Victaulic imported and introduced into U.S. commerce the quantities of unmarked foreign goods

found by CFI by truthfully representing and paying the amount or marking duties owed." Woodings Decl. ¶¶ 47–48.

D. Customs Entry Documents

At the time of importation of foreign merchandise, an importer is required to file various entry documents with CBP, which enable CBP to "determine whether the merchandise can be released from the custody of [CBP];" to "properly assess duties on the merchandise;" and to "determine whether any other applicable requirement of law . . . is met." 19 U.S.C. §§ 1484(a)(l)(A), (a)(1)(B)(i), (a)(1)(B)(iii). Entry documents typically include descriptions and value of the products imported, country of origin, and other information which would affect the duty or tariff charged at importation.

In its complaint, CFI alleges that "Victaulic is able to successfully (albeit unlawfully) import its unmarked pipe fittings into the United States by knowingly failing to pay or disclose to CBP the marking duties the company owes as a result of importing unmarked or improperly marked foreign goods. Victaulic commits this fraud on the U.S. Government by, among other things, falsifying its entry documents and otherwise concealing the foreign source of its pipe fittings such that CBP will not detect the company's fraud." Compl. ¶ 26.

At the hearing, CFI explained this allegation in further detail. Specifically, CFI asserts that Victaulic has falsified customs entry summary form 7501, which requires an importer or consignee to report in several places any and all duties, tariffs, or other fees that may be required by law. Compl. ¶ 20;

Hr'g Tr. 28, 58–59. For example, the instructions for Column 29 of Form 7501 direct the importer to "identify any other fee, charge or exaction that applies. Examples include the beef fee, honey fee, pork fee, cotton fee, harbor maintenance fee (HMF), sugar fee, and merchandise processing fee (MPF)." CBP Form 7501 Instructions at 16. For Block 34, the instructions direct the importer to "[r]ecord the estimated duty, AD/CVD [Anti-dumping/Countervailing Duty], I.R. tax, and any other fees or charges calculated . . . ." Id. at 20. For Block 39 ("Other Fee Summary"), the importer must "[r]ecord the total estimated AD/CVD or other fees, charges, or exactions paid." Id. at 22. Also for Block 39, "[f]or entries subject to payment of AD/CVD and/or any of the various fees, each applicable fee must be indicated in this area, and the individual amount of each fee must be shown on the corresponding line. . . . The applicable collection code must be indicated on the same line as the fee or other charge or exaction." Id. at 20–21.[5]

CFI argues that phrases such as "estimated duty" and "any other fees or charges" in the instructions require an importer to report not only the listed fees, but also, if applicable, the ten percent marking duties for improperly marked products. On information and belief, CFI alleges that Victaulic has not reported on these customs entry forms that

[5] Collection codes are provided for the following: "AD, CVD, Tea Fee, Misc. Interest, Beef Fee, Pork Fee, Honey Fee, Cotton Fee, Pecan Fee, Sugar Fee, Potato Fee, Mushroom Fee, Watermelon [Fee], Blueberry Fee, Avocado [Fee], Mango [Fee], Informal Entry MPF, Dutiable Mail Fee, Merchandise Processing Fee (MPF), Manual Surcharge, and Harbor Maintenance Fee (HMF)." CBP Form 7501 Instructions at 21.

it owes marking duties, and has therefore misrepresented, omitted, or avoided its marking duties, in violation of the False Claims Act.[6] Victaulic contends that Form 7501 does not provide any mechanism to report potential marking duties, that the list of fees in the instructions for Form 7501 is exclusive, and that all the fees listed are of a type that are due at the time of importation, unlike marking duties.

II. Analysis

A. The Public Disclosure Bar of the False Claims Act

Victaulic has moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction, because § 3730(e)(4)(A) of the FCA – a subsection known as the "public disclosure bar" – requires dismissal of an action if substantially the same allegations or transactions as alleged by the *qui tam* relator were publicly disclosed, unless the relator is an "original source" of the information.

The public disclosure bar of the FCA "'[s]eek[s] the golden mean between adequate

[6] For example, on the sample Form 7501 provided to the Court by the defendant at the hearing, the country of origin is identified as China, but a dollar amount for "marking duties" does not appear anywhere on the form. CFI does not allege that it has examined Victaulic's 7501 forms or other customs entry documents, because the forms themselves are apparently not accessible through Zepol or another public source. "Rather, it is only due to CFI's knowledge and expertise regarding CBP's operations that CFI is able to allege in good faith that Victaulic falsified its entry documents," such as Form 7501. Pl.'s Opp' n at 24.

incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own.'" Graham Cnty. Soil & Water Conservation Dist. V. U.S. ex rel. Wilson, 559 U.S. 280, 294 (2010) (quoting U.S. ex rel. Springfield Terminal R. Co. v. Quinn, 14 F.3d 645, 649 (D.C. Cir. 1994)). To that end, Congress enacted the bar "in an effort to strike a balance between encouraging private persons to root out fraud and stifling parasitic lawsuits" based on publicly available information. Id.

1. 2010 Amendments to the FCA

First, the parties dispute whether the public disclosure bar remains "jurisdictional" after certain amendments to the FCA made in 2010 as part of the Patient Protection and Affordable Care Act, Pub. L. 111–148, § 10104(j)(2), 124 Stat. 119, 901–02. The parties also disagree as to which version of the bar should apply in this case, because the alleged conduct took place both before and after the effective date of the amendments.

Before the 2010 amendments, the FCA stated:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of 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, unless the action is brought by the Attorney General or the

> person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A) (2006). Section 3730(e)(4)(A) now provides:

> 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 claims 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.

31 U.S.C. § 3730(e)(4)(A) (2010).[7]

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[7] An "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 actions . . . ." 31 U.S.C. § 3730(e)(4)(B) (2010).

Before the 2010 amendments, courts placed the burden on the relator to establish jurisdiction, and were entitled to consider and weigh evidence outside the pleadings, because the jurisdictional challenge was to the actual facts supporting the claim, not to how the claim was pleaded. See, e.g., U.S. ex rel. Atkinson v. PA. Shipbldg. Co., 473 F.3d 506, 514 (3d Cir. 2007). CFI argues that the amended language of the FCA no longer deprives this Court of jurisdiction over a claim based on publicly disclosed information, and that any challenge to a complaint under this subsection is now an affirmative defense to be pleaded and proved by the defendant. Alternatively, CFI argues that a such a challenge must be evaluated under a Rule 12(b)(6) standard for failure to state a claim, rather than under a Rule 12(b)(1) analysis for lack of jurisdiction.

An issue arises as to whether the public disclosure bar remains a question of jurisdiction after the 2010 amendments, or what allegations are now sufficient to survive a motion to dismiss based on subsection 3730(e)(4)(A). Recently, the Fourth Circuit held that, by "delet[ing] the unambiguous jurisdiction-removing language previously contained in § 3730(e)(4) and replac[ing] it with a generic, not-obviously-jurisdictional phrase ('shall dismiss'), while at the same time retaining jurisdiction-removing language in §§ 3730(e)(1) and (e)(2)," Congress had "ma[d]e it clear that the public disclosure bar is no longer a jurisdiction-removing provision." U.S. ex rel. May v. Purdue Pharma L.P., 737 F.3d 908, 916 (4th Cir. 2013). Cf. U.S. ex rel. Absher v. Momence Meadows Nursing Ctr., Inc., --- F.3d ---, 2014 WL 4092258, at *4 (7th Cir. 2014)

(noting that it is no longer clear that § 3730(e)(4) is a jurisdictional requirement).

This Court is persuaded by the reasoning in Purdue that the deliberate removal of the jurisdictional language from this subsection suggests that Congress intended to change the jurisdictional nature of the public disclosure bar.

This Court, however, also believes that under the plain language of the amended statute, which commands that a court "shall dismiss" any action based on an enumerated disclosure, the public disclosure bar remains at least a threshold question for dismissal. The bar's stated purpose of discouraging opportunistic lawsuits would largely be defeated by shifting the entire public disclosure analysis to a later stage of litigation.[8]

The parties also dispute which version of the FCA should apply to the claims at issue here. Victaulic argues that the pre-amendment jurisdictional version of the public disclosure bar applies, and the Court should look to facts outside the complaint in conducting a Rule 12(b)(1) analysis. CFI contends that, even though a majority of the relevant time period as defined by CFI (2003 to January 9, 2013) elapsed before the March 23, 2010 effective date of the amendments, the bulk of the imports on which it has based its claims took place after the effective date of the amendments.

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[8] But see, e.g., U.S. ex rel. Beauchamp v. Academi Training Ctr., Inc., 933 F. Supp. 2d 825, 839 n. 23 (E.D. Va. 2013) ("If the public disclosure bar [were] not jurisdictional, then it would be an affirmative defense and would be appropriately addressed at the summary judgment stage.").

The Supreme Court has twice held that the 2010 FCA amendments are not applicable to cases pending before the effective date of the amendments. See Graham Cnty., 559 U.S. at 283 n.1; Schindler Elevator Corp. v. U.S. ex rel. Kirk, 131 S. Ct. 1885, 1889 n.1 (2011). In Purdue, the Fourth Circuit held that the amendments are also inapplicable to claims arising from conduct that took place before the effective date, even if the complaint was filed after that date. Purdue, 737 F.3d at 915 (citing Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994)).

The Court is persuaded by the reasoning in Purdue that the 2010 amendments should not apply to claims based on conduct before March 23, 2010. And under either standard, the plaintiff must allege at least some facts to show that substantially the same allegations or transactions have not been publicly disclosed by way of a listed source. Therefore, the Court will consider the additional facts set forth in the parties' briefing and at the hearing in determining whether the action is barred.

2. Public Disclosure of an Allegation or Transaction of Fraud

The pre-amendment version of the public disclosure bar provides that no court shall have jurisdiction over an action "based upon the public disclosure of allegations or transaction 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, unless the action is brought by the Attorney General or the person bringing the action is

an original source of the information." 31 U.S.C. § 3730(e)(4)(A) (2006).

The post-amendment version provides that a court shall dismiss an action or claim "if substantially the same allegations or transactions as alleged in the action or claims" were disclosed by way of certain sources: "(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." 31 U.S.C. § 3730(e)(4)(A) (2010).

The Third Circuit has "adopted a formula to represent when information publicly disclosed in a specified source qualifies as an allegation or transaction of fraud: 'If X + Y = Z, Z represents the allegation of fraud and X and Y represent its essential elements. In order to disclose the fraudulent transaction publicly, the combination of X and Y must be revealed, from which readers or listeners may infer Z, i.e., the conclusion that fraud has been committed.'" U.S. ex rel. Zizic v. Q2Administrators, LLC, 728 F.3d 228, 236 (3d Cir. 2013) (quoting U.S. ex rel. Dunleavy v. Cnty. of Del., 123 F.3d 734, 741 (3d Cir. 1997)). Thus, the public disclosure bar applies "if either Z (fraud) or both X (misrepresented facts) and Y (true facts) are disclosed by way of a listed source." Atkinson, 473 F.3d at 519.[9]

[9] The pre-2010 version of the section barred actions "based upon" publicly disclosed transactions or allegations of fraud. Some courts held that this language meant the plaintiff

Here, Victaulic argues that both the true state of facts (that Victaulic imports many millions of pounds of pipe fittings from China and Poland) and the allegedly "misrepresented" facts (customs data forms on which Victaulic allegedly omitted to state that marking duties were due on its imported goods) have been publicly disclosed in either the "news media" or in Federal or administrative reports.

CFI, on the other hand, contends that (1) the Zepol database is not "news media," and is not generally available to the public because subscribers pay a substantial fee to access its information; and (2) even if the import data is publicly disclosed, CFI's claims are based in large part on the sales information CFI extracted from eBay advertisements, which – although certainly readily accessible to the general public – do not fall within any of the categories of public disclosure listed in § 3730(e)(4)(A).

This action does not fit neatly into the X + Y = Z formula articulated by the Third Circuit. Here, the

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must have "actually derived" his claims from the publicly disclosed source. See, e.g., Purdue, 737 F.3d at 917. The Third Circuit, however, has long held that "to be 'based upon' the publicly revealed allegations or transactions the complaint need only be 'supported by' or 'substantially similar to' the disclosed allegations and transactions." Atkinson, 473 F.3d at 519 (quoting U.S. ex rel. Mistick v. Hous. Auth. of Pittsburgh, 186 F.3d 376, 385–88 (3d Cir. 1999) (rejecting a rule that "based upon" means "actually derived from," because such a rule would render the original source exception superfluous)). The post-2010 version, which requires only that "substantially the same allegations or transactions as alleged in the action or claims were publicly disclosed," appears to codify the Third Circuit's interpretation.

alleged fraud "Z" is that Victaulic knowingly misrepresented its obligation to pay marking duties, and knowingly failed to pay marking duties that it owed. Assuming for the sake of argument that Victaulic was required to report marking duties on certain customs entry forms, then misrepresented fact "X" is Victaulic's alleged omission of marking duties from the forms. "Y–1" is the true fact that Victaulic imports millions of pounds of pipe fittings from China and Poland. But these two facts do not create any inference of fraud without the additional allegation that only a small percentage of Victaulic's pipe fittings in the United States bear foreign markings (allegedly true fact "Y–2").

Absent "Y–2", the alleged omission of marking duties on customs entry forms is equally consistent with the inference that Victaulic's imported pipe fittings were, in fact, properly marked, and no marking duty was owed. Only the additional allegation regarding the small percentage of pipe fittings with foreign markings on eBay creates any inference that Victaulic did not mark some imported pipe fittings.[10] Accordingly, CFI's action is not barred unless both Zepol and eBay qualify as sources of public disclosure under § 3730(e)(4)(A).

The Supreme Court has held that the "sources of public disclosure in § 3730(e)(4)(A), especially 'news media,' suggest that the public disclosure bar provides 'a broa[d] sweep.'" Schindler Elevator Corp., 131 S.Ct. at 1891 (quoting Graham Cnty., 130 S. Ct. at 1404) (alteration in original)). Nevertheless, not

[10] Whether that inference is sufficient to give rise to an inference that Victaulic did not pay marking duties is a separate question, which the Court will address below.

all information in the public domain is publicly disclosed within the meaning of the FCA.

Several courts have held that information obtained through a publicly available website implicates the public disclosure bar of the FCA. See, e.g., U.S. ex rel. Repko v. Guthrie Clinic, P.C., No. 04-1556, 2011 WL 3875987, at *7 (M.D. Pa. Sept. 1, 2011) ("Generally accessible websites are available to anyone with an internet connection and a web browser, and access is not restricted. Though they are not traditional news sources, they serve the same purpose as newspapers or radio broadcasts, to provide the general public with access to information. They are easily accessible and any stranger to a fraud transaction could discover the relevant information on them."), aff'd, 490 F. App'x 502 (3d Cir. Aug. 1, 2012).[11]

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[11] See also U.S. ex rel. Brown v. Walt Disney World Co., No. 06-1943, 2008 WL 2561975, at *4 (M.D. Fla. June 24, 2008) (finding that Wikipedia qualifies as the news media); U.S. ex rel. Davis v. Prince, 753 F. Supp. 2d 569, 585 (E.D. Va. 2011) (finding that a government audit report was disclosed, because report was generally available to the public after it was posted on a website maintained by the "online publication Talking Points Memo"); U.S. ex rel. Barber v. Paychex, Inc., No. 09-20990, 2010 WL 2836333, at *8 (S.D. Fla. July 15, 2010) ("newspaper and magazine articles, court decisions, cable news shows, securities filings, analyst reports and internet websites – constitute the kind of 'public disclosure' covered by" the FCA). But see U.S. ex rel. Liotine v. CDW Gov't, Inc., No. 05-33, 2009 WL 3156704, at *6 n. 5 (S.D. Ill. Sep. 29, 2009) ("hesita[ting] to find that *any* posting on the internet constitutes 'news media'" and holding that an internal memorandum archived on a University purchasing services website was "not easily available to the public" and thus not a public disclosure).

In Repko, for example, the district court held that four websites that collected and disseminated financial information and information about non-profits to the public, both for free and for a subscription fee, and which provided searchable on-line databases of information and articles, were "news media" for purposes of the public disclosure bar. Id. at *8.

In U.S. ex rel. Simpson v. Bayer Corp., No. 05-3895, 2013 WL 4710587 (D.N.J. Aug. 30, 2013), however, the district court held that informal on-line message boards and community forums did not qualify as sources of public disclosure under § 3730(e)(4)(A). Id. at *7 ("[W]hile it is certainly the case that websites may constitute news media in certain instances, not everything posted on the internet qualifies."). The court in Simpson distinguished Repko, explaining that "the sources involved in Repko were well recognized or industry specific outlets which contained articles, a comprehensive database, and a number of other tools geared toward the dissemination of reliable information. Unlike an article on a website maintained by a recognized news outlet, a trade journal, or even a promotional website geared toward the dissemination of information, the anonymous postings in [Simpson] amounted to nothing more than vague allegations in an informal forum discussion without any indicia of reliability or substantiation." Id.

This Court agrees that, at minimum, a publicly available website may qualify as "news media" where the information provided is to some extent curated – that is, where the authors or editors

of the website actively gather and disseminate information, provide search tools for the public to analyze data, provide some editorial content, or exercise some control over the information provided – and where the information bears at least some of the "indicia of reliability or substantiation" common to more traditional news media sources.

a. Zepol

Victaulic argues that Zepol, which collects import data from CBP and provides it to subscribers in a searchable database, qualifies as both "news media" and "administrative reports" or "Federal reports" for purposes of the public disclosure bar.[12]

The District Court for the District of Columbia recently held that shipping manifest information disclosed on an on-line database similar to Zepol was publicly disclosed for purposes of the FCA. U.S. ex rel. Doe v. Staples, Inc., 932 F. Supp. 2d 34, 40 (D.D.C. 2013). In Staples, the relator based its allegations that the defendant had misrepresented the country of origin of imported pencils on "shipping data obtained from reports published by PIERS Global Intelligence Solutions ("PIERS"), a company which 'compiles manifest information submitted to Customs by all shippers'." Id. The district court held that "[w]hile not a traditional news source, [PIERS]

[12] See http://www.zepol.com/products/tradeiq-import.aspx ("Zepol's TradeIQ Import online database contains over 134 million U.S. import bills of lading, received directly from U.S. Customs. Easily see who is importing what products to the United States, within days of arrival. . . . Filter search criteria by imported product, U.S. importer, overseas exporter, country of origin, and much more to find exactly the information you need.")

qualifies as 'news media' in light of the ample precedent in favor of broad construction of the channels of public disclosure listed in § 3730(e)(4)(A) . . . ." in large part because the PIERS reports are "readily accessible to the public on the PIERS website." Id.[13]

This Court does not need to decide whether a website that simply collects raw data and makes it available through a searchable database without exercising editorial control over the contents would qualify under a traditional definition of news media, because, like the financial analysis websites at issue in Repko, Zepol also purports to provide data, analysis, and articles to many media outlets worldwide.[14]

Moreover, like the data collected by PIERS in Staples, the manifest data that CFI obtained from Zepol is collected and made available for purchase to both the press and the public by CBP itself. See 19 C.F.R. § 103.31(a) (describing the manifest information and data that may be examined and reported to the public by the press) and 19 C.F.R. § 103.31(e) (explaining that manifest data acquired from AMS is available to the public on CD-ROM). The data made available by CBP includes, among other things, the carrier code, vessel country code, district/port of unlading, estimated arrival date, bill of lading number, foreign port of lading, manifest

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[13] Although CFI relied on Zepol, the underlying data on which CFI bases its claims would also be available through PIERS, or other websites that collect and disseminate the data made available to the public through CBP's Automated Manifest System.

[14] See http://www.zepol.com/about/news-events/news.aspx.

quantity, manifest units, weight, weight unit, shipper name, consignee name, piece count, and a description of goods. See 19 C.F.R. § 103.31. In short, CBP collects and disseminates to the public all the information that CFI relied upon in formulating its "Import Analysis." The Court therefore finds that the shipping manifest data has been publicly disclosed in either the "news media" or "administrative reports" or "federal reports" within the meaning of 31 U.S.C. § 3730(e)(4)(A).[15]

b. eBay

The Court does not find, however, that the information CFI obtained through sales listings on eBay has been publicly disclosed by way of an enumerated source. The Supreme Court has explained that, where the statute does not define a term, a court should "look first to the word's ordinary meaning" and "consider the [public disclosure bar]'s 'entire text,' read as an 'integrated whole.'" Schindler Elevator Corp., 131 S.Ct. at 1891 (quoting Graham Cnty., 130 S.Ct. at 1406 n.12)). But eBay, an on-line auction site and marketplace, does not qualify as "news media" under even a generous interpretation of the term. As the defendant conceded at oral argument, if the products listed for sale on-line on eBay were instead available in a brick-and-mortar storefront, the information obtained from observing

[15] See Staples, 932 F. Supp. 2d at 40. See also Schindler Elevator Corp., 131 S.Ct. at 1893 (holding that a written agency response to a FOIA request is a "report," as are any records attached to the response, regardless of whether the record itself is a report). In Schindler, the records attached to the DOL's FOIA response were VETS–100 Reports submitted to the Secretary of Labor by the defendant, which were later requested from the DOL by the plaintiff under FOIA.

the products would not be publicly disclosed within the meaning of § 3730(e)(4)(A).

The Court concludes that, because the product information on which CFI's allegations largely depend was not publicly disclosed by way of a source listed in § 3730(e)(4)(A), the action is not barred under either the current or pre-amendment versions of the FCA.[16]

B. Marking Duties Under the False Claims Act

Victaulic has also moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6), on the grounds that a failure to properly mark goods or to pay marking duties under § 1304(i) of the Tariff Act does not give rise to any claim under the False Claims Act.

Before 2009, the reverse-false-claim[17] provision of the FCA provided that any person who "knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government," is liable under the Act. 31 U.S.C. § 3729(a)(7) (2008). Subsection (b) did not define "obligation."

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[16] Because the Court has determined that not all the information was publicly disclosed under § 3730(e)(4)(A), the Court need not address CFI's status as an "original source" under § 3730(e)(4)(B).

[17] "Reverse false claims are centered around an alleged fraudulent effort to reduce a liability owed to the government rather than to get a false or fraudulent claim allowed or paid." Atkinson, 473 F.3d at 513 n.12.

31 U.S.C. § 3729 was amended as part of the Fraud Enforcement and Recovery Act of 2009 ("FERA"). The current version states that any person who "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," shall be liable under the Act. 31 U.S.C. § 3729(a)(1)(G). The amendments also added a definition of the term "obligation." 31 U.S.C. § 3729(b)(3).

Before the 2009 amendments, a number of courts held that a violation of a statute that creates only a "contingent" obligation to pay money to the government (*i.e.,* an obligation that might accrue in the future, once penalties or fees were assessed), does not implicate the FCA. See, e.g., Am. Textile Mfrs. Inst. v. The Limited, Inc., 190 F.3d 729, 738 (6th Cir. 1999) ("ATMI").

ATMI involved claims under the FCA for the avoidance of penalties under various statutes, including 19 U.S.C. § 1592, and for the avoidance of marking duties under 19 U.S.C. § 1304(h) (now codified at § 1304(i)). The Sixth Circuit held that "contingent obligations" were not within the scope of the reverse-false-claims provision. The court defined "contingent obligations" as "those that will arise only after the exercise of discretion by government actors," such as "those arising from civil and criminal penalties that impose monetary fines after a finding of wrongdoing." ATMI, 190 F.3d at 738. Accordingly, the court held that penalties under 19

U.S.C. § 1592 were "contingent" and could not be recovered under the FCA. Id. at 741.

The Sixth Circuit also held that, although the claim regarding marking duties "present[ed] the most difficulty," those too could not be recovered under the FCA. Id. at 741–42. See also Hoyte v. Am. Nat'l Red Cross, 518 F.3d 61, 67 (D.C. Cir. 2008) ("an unassessed potential penalty for regulatory noncompliance does not constitute an obligation that gives rise to a viable FCA claim"); U.S. ex rel. Bain v. Ga. Gulf Corp., 386 F.3d 648, 657–58 (5th Cir. 2004) ("the reverse false claims act does not extend to the potential or contingent obligations to pay the government fines or penalties which have not been levied or assessed").

The parties dispute whether ATMI, Hoyte, and Bain remain good law after FERA. The 2009 amendments expanded the language of the reverse-false-claim provision to impose liability for any knowing concealment or avoidance of an obligation, whether or not a false statement or record was made or used in connection with the avoidance. See 31 U.S.C. § 3729(a)(1)(G). The post-FERA version also defines "obligation" as "an established duty, whether or not fixed, arising . . . from statute or regulation. . . ." 31 U.S.C. § 3729(b)(3).

As discussed above, the Tariff Act states that duties for failure to mark are "10 per centum ad valorem, which shall be deemed to have accrued at the time of importation, shall not be construed as penal, and shall not be remitted wholly or in part nor shall payment thereof be avoidable for any cause." 19 U.S.C. § 1304(i). CFI argues that the plain language of § 1304(i) creates an established duty (if

not necessarily a fixed duty) to pay money that becomes due automatically at the time of importation, which is not a penalty. Victaulic contends, on the other hand, that marking duties under § 1304(i) are merely fines that Victaulic might owe if it imported unmarked or mismarked products and subsequently failed to export, destroy, or properly mark them.[18]

In its reply brief, Victaulic argues that the term "obligation" as defined post-FERA may apply to tariff-based customs duties recoverable under 19 U.S.C. § 1592, but not to marking duties under 19 U.S.C. § 1304(i). In its surreply, CFI argues that any ambiguity in the plain language of the statute is resolved by the legislative history of FERA.[19]

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[18] Victaulic analogizes marking duties to penalties a company might have to pay if it were discovered to have violated an environmental regulation. Under those circumstances, Victaulic argues, the company's concealment of its environmental violation might give rise to some additional penalties, but would not state a claim under the False Claims Act, because no penalty has yet been assessed, and therefore no obligation has been avoided. Hr'g Tr. 95–97.

[19] See S. Rep. 111-10, S. Rep. No. 10, 111th Cong., 1st Sess. 2009, 2009 WL 787872, at *13–14. ("The term 'obligation' is now defined under new Section 3729(b)(3) and includes fixed and contingent duties owed to the Government -- including fixed liquidated obligations such as judgments, and fixed, unliquidated obligations such as tariffs on imported goods. It is also noteworthy to restate that while the new definition of 'obligation' expressly includes contingent, non-fixed obligations, the Committee supports the position of the Department of Justice that current section 3729(a)(7) speaks of an 'obligation,' not a 'fixed obligation.' By including contingent obligations such as, implied contractual, quasi-contractual, grantor-grantee, licensor-licensee, fee-based, or similar relationship, this new section reflects the Committee's view . . . that an 'obligation'

In support of its argument that the 2009 amendment was intended to bring marking duties within the scope of the False Claims Act, CFI also notes that one of the stated purposes of the amendment was to "overrule" the Sixth Circuit's ATMI decision.[20] CFI argues that, if the amendments were designed to address the narrow definition of "obligation" used in ATMI, then the current definition of "obligation" must include "either marking duties under 19 U.S.C. § 1304, or penalties under 19 U.S.C. § 1592, or both." Pl.'s Surreply at 23.[21]

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arises across the spectrum of possibilities from the fixed amount debt obligation where all particulars are defined to the instance where there is a relationship between the Government and a person that results in a duty to pay the Government money, whether or not the amount owed is yet fixed.") (internal quotation marks omitted).

[20] See S. Rep. No. 111-10, at n.10, 2009 WL 787872, at *24. ("The new definition of the term 'obligation' in S. 386 does not include specific reference to 'customs duties for mismarking country of origin,' which was a singular type of obligation referred to in S. 2041. The Committee originally included this language in S. 2041 in response to the decision in [ATMI] where the Sixth Circuit Court of Appeals narrowly defined the term 'obligation' to apply reverse false claims to only fixed obligations and dismissing a claim for false statements made by importers to avoid paying customs duties. . . . After subsequent discussion with the Department of Justice, the Committee decided to remove the 'customs duties' language in S. 386, as the Committee believes that customs duties clearly fall within the new definition of the term 'obligation' absent an express reference and any such specific language would be unnecessary.").

[21] Victaulic also argues that this Court should apply pre-FERA statutory language and case law to CFI's claims because the majority of the relevant time period of importation, as defined by CFI, falls before the amendments' effective date of May 20,

Whether the 2009 amendments to the FCA capture country-of-origin mismarking or failure to pay marking duties is apparently a novel question. Amicus Curiae Br. 4 (Doc. No. 24-1 at 7). Although instructive, neither the legislative history of the amendments nor pre-FERA case law from other circuit courts is binding on this Court's interpretation of the current language of the statute.

As the Court discussed above, the language of the Tariff Act itself is not very clear as to precisely when the obligation to pay marking duties arises, even if the duty is "deemed to have accrued at importation." It is difficult to determine, therefore, at what point an importer may be said to have "avoided" or "concealed" an "established" duty to pay marking duties arising under § 1304(i).

Nor is it clear that CBP Form 7501 gives rise to an obligation to report that goods are unmarked, or that an importer may owe marking duties. CFI contends that the "any fee" language in the instructions for Form 7501 requires Victaulic to report whether it owes or may owe marking duties, and that Victaulic's omission of a dollar figure for marking duties therefore constitutes a false statement under the FCA.

The Court observes that CBP Form 7501 and its instructions do not refer to marking obligations or duties, and do not provide any collection code under

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2009. CFI contends that (1) the current statutory language should apply because the majority of the pipe fittings which serve as the basis for its claims were imported after May 2009; and (2) even if this Court were to hold that the 2009 amendments do not apply in this instance, the plain language of the pre-amendment version of the FCA also covered marking duties.

which an importer could report estimated marking duties. Nor does Form 7501 ask the importer to state whether the goods described in the form are properly marked. The form does require the importer to identify a country of origin for the relevant goods, but CFI does not contend that Victaulic has ever misstated that information. In short, the Court is unsure from CFI's allegations at what point Victaulic could plausibly be said to have knowingly concealed or avoided an obligation to pay marking duties, or made a false statement or deliberate omission in connection with its alleged avoidance.

Ultimately, however, the Court need not decide whether the pre- or post-FERA version of the FCA applies to these claims, or whether a failure to mark imported goods or to pay marking duties under the Tariff Act gives rise to a claim under either version of the FCA, because the Court finds that CFI has failed to allege that Victaulic did not properly mark its pipe fittings or avoided any obligation to pay marking duties.

C. Failure to State a Claim for Marking Violations

Victaulic has moved to dismiss the complaint under Rule 12(b)(6) on the grounds that, even if a failure to mark goods or to pay marking duties under the Tariff Act gives rise to a claim under the False Claims Act, CFI has failed to state a claim for such violations under the pleading standards of either Rule 8(a) or Rule 9(b) of the Federal Rules of Civil Procedure. The Court agrees.

Although Federal Rule of Civil Procedure 8(a) requires that a complaint contain only "a short and

plain statement of the claim showing that the pleader is entitled to relief," to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests," the plaintiff must nonetheless plead "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (citations omitted). "Factual allegations must be enough to raise a right to relief above the speculative level." Id. Naked assertions devoid of further factual enhancement will not suffice. See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Twombly, 550 U.S. at 557). Nor is the court "bound to accept as true a legal conclusion couched as a factual allegation." Id.

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678 (citing Twombly, 550 U.S. at 556). "While the plausibility standard does not impose a 'probability requirement,' it does demand 'more than a sheer possibility that a defendant has acted unlawfully.'" In re Schering Plough Corp. Intron/Temodar Consumer Class Action, 678 F.3d 235, 243 (3d Cir. 2012) (quoting Iqbal, 556 U.S. at 678). "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 557) (quotation marks omitted).

Further, because claims under the False Claims Act are claims of fraud, CFI must also state its claims with the heightened specificity required by

Federal Rule of Civil Procedure 9(b), which demands that a plaintiff "state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). Recently, in Foglia v. Renal Ventures Management, LLC, 754 F.3d 153 (3d Cir. 2014), the Court of Appeals determined what Rule 9(b) requires of an FCA claimant in the Third Circuit. Following the lead of the First, Fifth, and Ninth Circuits, the Third Circuit took "a more nuanced reading" of the Rule 9(b) pleading requirements, and held that "it is sufficient for a plaintiff to allege 'particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted.'" Foglia, 754 F.3d at 156 (quoting U.S. ex rel. Grubbs v. Kanneganti, 565 F.3d 180, 190 (5th Cir. 2009)) (rejecting the approach of circuit courts that require an FCA plaintiff to identify "representative samples" of the alleged fraudulent conduct, specifying the time, place, and content of the acts and identity of the actors). Nevertheless, "[d]escribing a mere opportunity for fraud will not suffice." Id. at 158.

CFI's original complaint is virtually devoid of non-conclusory factual allegations. At most, CFI alleges that based on its review of shipping manifest data, Victaulic has imported approximately 83 million pounds of pipe fittings from China and Poland between 2003 and 2012. In the complaint itself, CFI provides no facts to support its assertions that imported pipe fittings constitute a majority of Victaulic's U.S. sales, or that only a "miniscule fraction" of Victaulic's pipe fittings for sale in the United States bear foreign markings. Finally, CFI provides no basis for its wholly conclusory allegations that Victaulic has falsified its customs

entry documents or knowingly avoided paying any required marking duties. Assuming that such actions give rise to a claim under the FCA, the very limited factual allegations in the complaint do not state a claim.

Even taking into account the facts set forth in CFI's opposition briefing and in the declaration of Ms. Woodings, and the further explanations and details provided at oral argument, CFI has not "nudged" its claims "across the line from conceivable to plausible." Iqbal, 556 U.S. at 680 (quotations omitted).

The facts alleged in Ms. Woodings's declaration regarding Victaulic's 2003–2012 imports and CFI's price-per-pound estimates reasonably support an inference that imported pipe fittings have comprised a significant portion of Victaulic's U.S. sales in the last decade. These additional facts do not, however, support CFI's conclusions that the majority of Victaulic's imported pipe fittings for sale in the United States are unmarked, or that Victaulic has knowingly failed to mark its imported products.

Even if the Court accepts CFI's assertion that eBay listings constitute a reasonable representative sample of the secondary sale market for pipe fittings in the United States, or that an examination of 221 advertisements from eighty-one sellers over a six-month period could provide data from which to draw accurate wider conclusions about millions of pounds of product imported over a decade, and even assuming that CFI has accurately identified, dated, and examined every Victaulic pipe fitting on eBay, CFI has alleged no facts to show that any of the

unmarked pipe fittings on eBay are not, in fact, U.S.-made.[22] CFI has not identified, for example, any pipe fitting on eBay that is described by a seller as foreign-made, but does not appear to be marked. Nor, unlike the Chinese-made pencils for sale in Staples, has CFI identified characteristics of the unmarked pipe fittings suggesting they are of Chinese or Polish origin.

Based on the large number of pipe fittings imported by Victaulic in recent years, it is certainly possible that some of the unmarked pipe fittings for sale on eBay are foreign-made. But that possibility is not sufficient to support a reasonable inference that Victaulic has deliberately failed to mark the vast majority of its imported pipe fittings.

More importantly, the absence of markings on imported pipe fittings (or presence of inadequate markings, such as the two that CFI apparently found) is not dispositive with regard to the payment

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[22] Victaulic has identified various other flaws in CFI's eBay product study which give the Court pause. For example, CFI eliminated from examination any eBay listing that did not contain photographs, and therefore did not take into account any number of products that may have had foreign markings. Further, there is no guarantee that the sellers' descriptions of their products are accurate or reliable; the products shown may not be Victaulic products at all, and sellers may have falsely described the country of origin. In addition, the photographs examined by CFI may not have depicted the areas where the products were marked. If, as CFI has alleged, U.S.-made pipe fittings command higher prices, sellers would be motivated to conceal (if not actively misrepresent) the foreign origin of the pipe fittings. Moreover, if U.S.-made products command higher prices, one would also expect to observe a higher percentage of U.S.-made products in the secondary sale market.

of marking duties.[23] Even if CFI were able to prove that the unmarked pipe fittings available for sale on eBay were Victaulic imports, that fact shows only a failure to mark the products under 19 U.S.C. §§ 1304(a) and (c). It tells the Court nothing about Victaulic's payment of marking duties under § 1304(i), much less whether Victaulic knowingly avoided or concealed an obligation to pay the duties.[24]

Where, as here, the complaint pleads facts that are "merely consistent with" a defendant's liability, the plaintiff has failed to state a claim.[25]

III. Conclusion

Because CFI has failed to allege facts in either its complaint or its opposition briefing sufficient to support a plausible claim that Victaulic has failed to mark its imported pipe fittings, that Victaulic falsified customs entry documents, that Victaulic owed marking duties, or that Victaulic knowingly concealed or avoided any obligation to pay marking duties, the motion to dismiss is granted, and the complaint is dismissed with prejudice.

An appropriate order shall issue.

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[23] Because, for example, Victaulic may have paid marking duties on those pipe fittings, if CBP discovered the marking failure after distribution. See, supra, note 2.

[24] Similarly, the fact the Victaulic did not report estimated marking duties on a customs entry form is equally consistent with the conclusion that its imported goods were, in fact, properly marked, as it is with the conclusion that Victaulic deliberated omitted to report duties owed.

[25] Because the Court finds that CFI has failed to state a claim even under the less demanding requirements of Rule 8(a), the Court will not address the sufficiency of the pleadings under Rule 9(b).

[ENTERED: February 22, 2017]

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15-2169

UNITED STATES ex rel.
CUSTOMS FRAUD INVESTIGATIONS, LLC,

Appellant

v.

VICTAULIC COMPANY

(D.C. Civ. No. 5-13-cv-02983)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, MCKEE, AMBRO, *FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ, KRAUSE, RESTREPO, **ROTH and **FUENTES, Circuit Judges

The petition for rehearing filed by appellee in the above-entitled case having been submitted to the judges who participated in the decision of this Court

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* The Honorable D. Michael Fisher assumed senior status on February 1, 2017

** The votes of the Honorable Jane R. Roth and Julio M. Fuentes are limited to panel rehearing only.

and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ Jane R. Roth
Circuit Judge

Dated: February 22, 2017

CJG/cc: Anna C. Haac, Esq.
Suzanne I. Schiller, Esq.
Jonathan K. Tycko, Esq.
Stephen S. Asay, Esq.
Jeetander T. Dulani, Esq.
Thomas C. Hill, Esq.
Brian R. Tipton, Esq.
Michael S. Raab, Esq.
Henry C. Whitaker, Esq.
Joseph M. Spraragen, Esq.

19 U.S.C. § 1304

§ 1304. Marking of imported articles and containers

(a) Marking of articles

Except as hereinafter provided, every article of foreign origin (or its container, as provided in subsection (b) hereof) imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article. The Secretary of the Treasury may by regulations--

(1) Determine the character of words and phrases or abbreviations thereof which shall be acceptable as indicating the country of origin and prescribe any reasonable method of marking, whether by printing, stenciling, stamping, branding, labeling, or by any other reasonable method, and a conspicuous place on the article (or container) where the marking shall appear;

(2) Require the addition of any other words or symbols which may be appropriate to prevent deception or mistake as to the origin of the article or as to the origin of any other article with which such imported article is usually combined subsequent to importation but before delivery to an ultimate purchaser; and

(3) Authorize the exception of any article from the requirements of marking if--

(A) Such article is incapable of being marked;

(B) Such article cannot be marked prior to shipment to the United States without injury;

(C) Such article cannot be marked prior to shipment to the United States, except at an expense economically prohibitive of its importation;

(D) The marking of a container of such article will reasonably indicate the origin of such article;

(E) Such article is a crude substance;

(F) Such article is imported for use by the importer and not intended for sale in its imported or any other form;

(G) Such article is to be processed in the United States by the importer or for his account otherwise than for the purpose of concealing the origin of such article and in such manner that any mark contemplated by this section would necessarily be obliterated, destroyed, or permanently concealed;

(H) An ultimate purchaser, by reason of the character of such article or by reason of the circumstances of its importation, must necessarily know the country of origin of such article even though it is not marked to indicate its origin;

(I) Such article was produced more than twenty years prior to its importation into the United States;

(J) Such article is of a class or kind with respect to which the Secretary of the Treasury

has given notice by publication in the weekly Treasury Decisions within two years after July 1, 1937, that articles of such class or kind were imported in substantial quantities during the five-year period immediately preceding January 1, 1937, and were not required during such period to be marked to indicate their origin: *Provided*, That this subdivision shall not apply after September 1, 1938, to sawed lumber and timbers, telephone, trolley, electric-light, and telegraph poles of wood, and bundles of shingles; but the President is authorized to suspend the effectiveness of this proviso if he finds such action required to carry out any trade agreement entered into under the authority of sections 1351, 1352, 1353 and 1354 of this title, as extended; or

(K) Such article cannot be marked after importation except at an expense which is economically prohibitive, and the failure to mark the article before importation was not due to any purpose of the importer, producer, seller, or shipper to avoid compliance with this section.

(b) Marking of containers

Whenever an article is excepted under subdivision (3) of subsection (a) of this section from the requirements of marking, the immediate container, if any, of such article, or such other container or containers of such article as may be prescribed by the Secretary of the Treasury, shall be marked in such manner as to indicate to an ultimate purchaser in the United States the English name of the country

of origin of such article, subject to all provisions of this section, including the same exceptions as are applicable to articles under subdivision (3) of subsection (a) of this section. If articles are excepted from marking requirements under clause (F), (G), or (H) of subdivision (3) of subsection (a) of this section, their usual containers shall not be subject to the marking requirements of this section. Usual containers in use as such at the time of importation shall in no case be required to be marked to show the country of their own origin.

(c) Marking of certain pipe and fittings

(1) Except as provided in paragraph (2), no exception may be made under subsection (a)(3) of this section with respect to pipes of iron, steel, or stainless steel, to pipe fittings of steel, stainless steel, chrome-moly steel, or cast and malleable iron each of which shall be marked with the English name of the country of origin by means of die stamping, cast-in-mold lettering, etching, engraving, or continuous paint stenciling.

(2) If, because of the nature of an article, it is technically or commercially infeasible to mark it by one of the five methods specified in paragraph (1), the article may be marked by an equally permanent method of marking or, in the case of small diameter pipe, tube, and fittings, by tagging the containers or bundles.

(d) Marking of compressed gas cylinders

No exception may be made under subsection (a)(3) of this section with respect to compressed gas cylinders designed to be used for the transport and storage of compressed gases whether or not certified prior to

exportation to have been made in accordance with the safety requirements of sections 178.36 through 178.68 of title 49, Code of Federal Regulations, each of which shall be marked with the English name of the country of origin by means of die stamping, molding, etching, raised lettering, or an equally permanent method of marking.

(e) Marking of certain castings

No exception may be made under subsection (a)(3) of this section with respect to inlet frames, tree and trench grates, lampposts, lamppost bases, cast utility poles, bollards, hydrants, utility boxes, manhole rings or frames, covers, and assemblies thereof each of which shall be marked on the top surface with the English name of the country of origin by means of die stamping, cast-in-mold lettering, etching, engraving, or an equally permanent method of marking in a location such that it will remain visible after installation.

(f) Marking of certain coffee and tea products

The marking requirements of subsections (a) and (b) of this section shall not apply to articles described in subheadings 0901.21, 0901.22, 0902.10, 0902.20, 0902.30, 0902.40, 2101.10, and 2101.20 of the Harmonized Tariff Schedule of the United States, as in effect on January 1, 1995.

(g) Marking of spices

The marking requirements of subsections (a) and (b) of this section shall not apply to articles provided for under subheadings 0904.11, 0904.12, 0904.20, 0905.00, 0906.10, 0906.20, 0907.00, 0908.10, 0908.20, 0908.30, 0909.10, 0909.20, 0909.30, 0909.40, 0909.50,

0910.10, 0910.20, 0910.30, 0910.40, 0910.50, 0910.91, 0910.99, 1106.20, 1207.40, 1207.50, 1207.91, 1404.90, and 3302.10, and items classifiable in categories 0712.90.60, 0712.90.8080, 1209.91.2000, 1211.90.2000, 1211.90.8040, 1211.90.8050, 1211.90.8090, 2006.00.3000, 2918.13.2000, 3203.00.8000, 3301.90.1010, 3301.90.1020, and 3301.90.1050 of the Harmonized Tariff Schedule of the United States, as in effect on January 1, 1995.

(h) Marking of certain silk products

The marking requirements of subsections (a) and (b) of this section shall not apply either to--

(1) articles provided for in subheading 6214.10.10 of the Harmonized Tariff Schedule of the United States, as in effect on January 1, 1997; or

(2) articles provided for in heading 5007 of the Harmonized Tariff Schedule of the United States as in effect on January 1, 1997.

(i) Additional duties for failure to mark

If at the time of importation any article (or its container, as provided in subsection (b) of this section) is not marked in accordance with the requirements of this section, and if such article is not exported or destroyed or the article (or its container, as provided in subsection (b) of this section) marked after importation in accordance with the requirements of this section (such exportation, destruction, or marking to be accomplished under customs supervision prior to the liquidation of the entry covering the article, and to be allowed whether or not the article has remained in continuous customs custody), there shall be levied, collected,

and paid upon such article a duty of 10 per centum ad valorem, which shall be deemed to have accrued at the time of importation, shall not be construed to be penal, and shall not be remitted wholly or in part nor shall payment thereof be avoidable for any cause. Such duty shall be levied, collected, and paid in addition to any other duty imposed by law and whether or not the article is exempt from the payment of ordinary customs duties. The compensation and expenses of customs officers and employees assigned to supervise the exportation, destruction, or marking to exempt articles from the application of the duty provided for in this subsection shall be reimbursed to the Government by the importer.

(j) Delivery withheld until marked

No imported article held in customs custody for inspection, examination, or appraisement shall be delivered until such article and every other article of the importation (or their containers), whether or not released from customs custody, shall have been marked in accordance with the requirements of this section or until the amount of duty estimated to be payable under subsection (i) of this section has been deposited. Nothing in this section shall be construed as excepting any article (or its container) from the particular requirements of marking provided for in any other provision of law.

(k) Treatment of goods of NAFTA country

(1) Application of section

In applying this section to an article that qualifies as a good of a NAFTA country (as defined in section 3301(4) of this title) under the

regulations issued by the Secretary to implement Annex 311 of the North American Free Trade Agreement--

(A) the exemption under subsection (a)(3)(H) of this section shall be applied by substituting "reasonably know" for "necessarily know";

(B) the Secretary shall exempt the good from the requirements for marking under subsection (a) of this section if the good--

(i) is an original work of art, or

(ii) is provided for under subheading 6904.10, heading 8541, or heading 8542 of the Harmonized Tariff Schedule of the United States; and

(C) subsection (b) of this section does not apply to the usual container of any good described in subsection (a)(3)(E) or (I) of this section or subparagraph (B)(i) or (ii) of this paragraph.

(2) Petition rights of NAFTA exporters and producers regarding marking determinations

(A) Definitions

For purposes of this paragraph:

(i) The term "adverse marking decision" means a determination by the Customs Service which an exporter or producer of merchandise believes to be contrary to Annex 311 of the North American Free Trade Agreement.

(ii) A person may not be treated as the exporter or producer of merchandise regarding which an adverse marking decision was made unless such person--

(I) if claiming to be the exporter, is located in a NAFTA country and is required to maintain records in that country regarding exportations to NAFTA countries; or

(II) if claiming to be the producer, grows, mines, harvests, fishes, traps, hunts, manufactures, processes, or assembles such merchandise in a NAFTA country.

(B) Intervention or petition regarding adverse marking decisions

If the Customs Service makes an adverse marking decision regarding any merchandise, the Customs Service shall, upon written request by the exporter or producer of the merchandise, provide to the exporter or producer a statement of the basis for the decision. If the exporter or producer believes that the decision is not correct, it may intervene in any protest proceeding initiated by the importer of the merchandise. If the importer does not file a protest with regard to the decision, the exporter or producer may file a petition with the Customs Service setting forth--

(i) a description of the merchandise; and

(ii) the basis for its claim that the merchandise should be marked as a good of a NAFTA country.

(C) Effect of determination regarding decision

If, after receipt and consideration of a petition filed by an exporter or producer under subparagraph (B), the Customs Service determines that the adverse marking decision--

(i) is not correct, the Customs Service shall notify the petitioner of the determination and all merchandise entered, or withdrawn from warehouse for consumption, more than 30 days after the date that notice of the determination under this clause is published in the weekly Custom Bulletin shall be marked in conformity with the determination; or

(ii) is correct, the Customs Service shall notify the petitioner that the petition is denied.

(D) Judicial review

For purposes of judicial review, the denial of a petition under subparagraph (C)(ii) shall be treated as if it were a denial of a petition of an interested party under section 1516 of this title regarding an issue arising under any of the preceding provisions of this section.

(l) Penalties

Any person who, with intent to conceal the information given thereby or contained therein,

defaces, destroys, removes, alters, covers, obscures, or obliterates any mark required under the provisions of this chapter shall--

(1) upon conviction for the first violation of this subsection, be fined not more than $100,000, or imprisoned for not more than 1 year, or both; and

(2) upon conviction for the second or any subsequent violation of this subsection, be fined not more than $250,000, or imprisoned for not more than 1 year, or both.

31 U.S.C. § 3729

§ 3729. False claims

(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[1]), 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

[1] So in original. Probably should be "101-410".

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.

Federal Rules of Civil Procedure Rule 9

Rule 9. Pleading Special Matters

(a) CAPACITY OR AUTHORITY TO SUE; LEGAL EXISTENCE.

(1) *In General.* Except when required to show that the court has jurisdiction, a pleading need not allege:

(A) a party's capacity to sue or be sued;

(B) a party's authority to sue or be sued in a representative capacity; or

(C) the legal existence of an organized association of persons that is made a party.

(2) *Raising Those Issues.* To raise any of those issues, a party must do so by a specific denial, which must state any supporting facts that are peculiarly within the party's knowledge.

(b) FRAUD OR MISTAKE; CONDITIONS OF MIND. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

(c) CONDITIONS PRECEDENT. In pleading conditions precedent, it suffices to allege generally that all conditions precedent have occurred or been performed. But when denying that a condition precedent has occurred or been performed, a party must do so with particularity.

(d) OFFICIAL DOCUMENT OR ACT. In pleading an official document or official act, it suffices to allege

that the document was legally issued or the act legally done.

(e) JUDGMENT. In pleading a judgment or decision of a domestic or foreign court, a judicial or quasi-judicial tribunal, or a board or officer, it suffices to plead the judgment or decision without showing jurisdiction to render it.

(f) TIME AND PLACE. An allegation of time or place is material when testing the sufficiency of a pleading.

(g) SPECIAL DAMAGES. If an item of special damage is claimed, it must be specifically stated.

(h) ADMIRALTY OR MARITIME CLAIM.

(1) *How Designated.* If a claim for relief is within the admiralty or maritime jurisdiction and also within the court's subject-matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or maritime claim for purposes of Rules 14(c), 38(e), and 82 and the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. A claim cognizable only in the admiralty or maritime jurisdiction is an admiralty or maritime claim for those purposes, whether or not so designated.

(2) *Designation for Appeal.* A case that includes an admiralty or maritime claim within this subdivision (h) is an admiralty case within 28 U.S.C. § 1292(a)(3).