Significant Victory for *Qui Tam* Whistleblowers: Discovery Materials May Be Used in Amended Complaints

By Sarvenaz "Nazy" J. Fahimi and Kevin J. Boutin

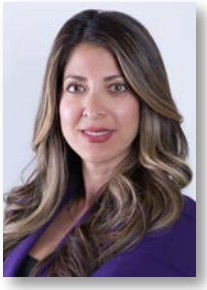
The Eleventh Circuit Court of Appeals recently issued a published opinion holding that courts may not disregard a *qui tam* whistleblower's allegations solely because they reflect information obtained in discovery. This marks an important victory for *qui tam* whistleblowers, as an earlier unpublished decision of the Eleventh Circuit had reached the opposite conclusion. The opinion also has significant implications for pleading standards under Federal Rule of Civil Procedure 9(b) more generally, as it made clear, consistent with Supreme Court precedent, that courts should not impose requirements not found in the Federal Rules of Civil Procedure.

Sedona Partners LLC filed a complaint as a *qui tam* whistleblower (known as a "relator") alleging that shipping companies improperly used foreign flag vessels to ship goods for the United States government, despite a codified "America First Policy" that requires the use of U.S. flag vessels. (See *United States of America, ex rel. Sedona Partners LLC v. Able Moving & Storage Inc., et al.*, Case No. 20-cv-23242.) The defendants' alleged scheme has two parts: First, the defendants allegedly submitted "low-ball bids" to capture awards from the federal General Services Administration to ship the belongings of federal employees across international waters. Second, the defendants allegedly submitted waiver requests falsely certifying that no U.S. flag vessels were available, in order to use foreign flag vessels which are typically much cheaper. Sedona alleges that the defendants' scheme implicated hundreds of millions of taxpayer dollars and violated the federal False Claims Act, which prohibits knowingly presenting false claims to the government, as well as making or using false statements material to false claims to the government. (31 U.S.C. § 3729(a)(1).)

The United States District Court for the Southern District of Florida denied the defendants' motion to stay discovery, and subsequently granted the defendants' motion to dismiss the initial complaint without prejudice. Sedona filed a second amended complaint that included information obtained through discovery regarding at least 96 shipments for which the defendants allegedly submitted false certifications with foreign flag waiver requests.

The defendants moved to dismiss the amended complaint with prejudice under Federal Rule of Civil Procedure 12(b)(6), and to strike allegations derived from materials Sedona obtained in discovery under Federal Rule of Civil Procedure 12(f). The defendants' motions were largely based on an unpublished decision of the Eleventh Circuit, *Bingham v. HCA, Inc.*, 783 F. App'x 868 (11th Cir. 2019), which concluded *qui tam* relators should be prohibited from using materials obtained in discovery to meet the requirements of Federal Rule of Civil Procedure 9(b).

The district court granted the defendants' motion to dismiss with prejudice, striking allegations derived from information that Sedona had obtained in discovery pertaining to the defendants' use of foreign flag vessels. The district court reasoned



Sarvenaz (Nazy) Fahimi is a partner with Cotchett, Pitre & McCarthy, LLP practicing in several areas of litigation, with a focus on high profile cases of fraud, cases involving *qui tam* Relators in False Claims Act cases in federal and state courts, and cases involving commercial disputes. She is a member of the CAOC Board of Directors. www.cpmlegal.com

Kevin J. Boutin is a senior associate with Cotchett, Pitre & McCarthy, LLP. His practice areas include *qui tam* actions under the False Claims Act, employment matters, and consumer class actions. He has represented whistleblowers, employees, and consumers in a variety of disputes in state and federal court and arbitration proceedings. www.cpmlegal.com

Ms. Fahimi and Mr. Boutin appeared for oral argument before the Eleventh Circuit in this case. They represent the whistleblower Sedona Partners LLC along with their co-counsel Adam T. Rabin and Havan M. Clark of Rabin Kammerer Johnson, and Paul Pelletier.

The district court's order was based on the notion, enunciated in *Bingham*, that policy considerations in *qui tam* actions warrant stricter pleading requirements.

that courts may strike "allegations based on materials obtained during discovery ... if it prevents relators from circumventing the particularity requirement of Rule 9(b)." After striking Sedona's allegations regarding specific false waiver requests, the district court concluded the second amended complaint did not satisfy Rule 9(b) and was subject to dismissal under Rule 12(b)(6). The district court's order was based on the notion, enunciated in *Bingham*, that policy considerations in *qui tam* actions warrant stricter pleading requirements.

Sedona appealed the order, and after a lengthy oral argument, a three-judge panel of the Eleventh Circuit comprised of Judge Jill Pryor, Judge Barbara Lagoa, and Judge Kevin Newsom reversed the district court's order striking allegations derived from discovery and vacated the order dismissing the complaint. Noting it was not bound to follow the unpublished *Bingham*, the panel looked to the plain text of Rule 9(b) and concluded "Rule 9(b) does not prohibit pleaders from using, or courts from considering, allegations based on information obtained during discovery." The panel traced its holding to United States Supreme Court precedent admonishing courts not to supplement the Federal Rules of Civil Procedure or add pleading requirements on a case-by-case basis. (*Hill v. McDonough*, 547 U.S. 573, 582 (2006); *Jones v. Bock*, 549 U.S. 199, 224 (2007).) Although these Supreme Court cases did not involve *qui tam* actions, the panel found the same principles precluded the district court from ignoring discovery-based allegations in Sedona's second amended complaint.

The panel also agreed with Sedona that the district court abused its discretion in striking specific allegations regarding the defendants' use of foreign flag vessels under Rule 12(f). Noting that the district court's decision was understandable in light of the outcome in *Bingham*, the panel found no basis to conclude Sedona's discovery-based allegations were "redundant, immaterial, impertinent, or scandalous" under Rule 12(f). *Bingham* never articulated how Rule 12(f)'s plain language could bar at the pleading stage information obtained from discovery, or similarly, how Rule 15 relating to amendment could preclude such information. Thus, the panel determined the district court's order not only improperly supplemented the text of Rule 9(b), but also Rule 12(f) and Rule 15.

This opinion is a significant development for *qui tam* actions, as well as fraud cases more generally. The panel's opinion reinforces the notion that courts should not impose pleading requirements beyond those contained in the plain language of the Federal Rules of Civil Procedure, despite a court's view of policy considerations behind a particular Federal Rule. Under this ruling, where discovery yields information that supports a *qui tam* whistleblower's legal claims, that information may be used in an amended complaint. Considering the federal government loses hundreds of billions of dollars to fraud each year, this opinion will help ensure that important cases involving taxpayer dollars are decided on their merits, and that extra pleading hurdles are not imposed. ■