No. 10-40785

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA, ex rel. BRADLEY SLOAN WRIGHT, on behalf of HARROLD E. (GENE) WRIGHT, ELIZABETH ANN WRIGHT, on behalf of HARROLD E. (GENE) WRIGHT, MARY JO KENNARD, as Attorney-in-Fact for her husband DON KENNARD, n.c.m.,
*Plaintiffs-Appellant*s,

v.

COMSTOCK RESOURCES, INC., et al.,
Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

BRIEF FOR *AMICUS CURIAE* THE UNITED STATES OF AMERICA SUPPORTING PLAINTIFFS-APPELLANTS WITH RESPECT TO CERTAIN ALTERNATIVE ARGUMENTS FOR AFFIRMANCE

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STATEMENT REGARDING ORAL ARGUMENT

Although there may be narrow, evidentiary grounds for affirming the judgment below, this appeal potentially implicates important questions involving the proper application of the False Claims Act. If the Court schedules oral argument in this case, the United States requests permission to participate in the argument, because the United States has a strong and independent interest in the proper development of the legal doctrines in this area. Moreover, as in any action under the False Claims Act, the United States is a real party in interest here.

/s/ Kelsi Brown Corkran
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Attorney for the United States

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Pursuant to Federal Rule of Appellate Procedure 29 and 28 U.S.C. § 517, the United States submits this brief as *amicus curiae* supporting plaintiffs-appellants with respect to certain alternative grounds for affirmance asserted by defendants-appellees.

ISSUES ADDRESSED BY THE UNITED STATES

1. Whether the district court correctly rejected Defendants' argument that the stipulated dismissal of Defendants' prior declaratory judgment action bars Relators from bringing this qui tam suit.

2. Whether the district court correctly rejected Defendants' argument that Relators' suit should be dismissed for failure to join the Indian Tribe on whose behalf the United States was collecting royalties from Defendants.

3. Whether filing royalty remittance forms (MMS 2014s) based on an invalid lease would violate the reverse false claims provision of the False Claims Act, 31 U.S.C. § 3729(a)(7) (2006).

STATEMENT OF FACTS

I. Statutory Background

The False Claims Act ("FCA") imposes civil liability when a person makes false claims in order to secure a payment from the Government. *See* 31 U.S.C. § 3729 *et seq*. This case involves the FCA's reverse false claims provision, 31 U.S.C. § 3729(a)(7) (2006), which imposes 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 or transmit money or property to the Government."[1]

[1] The Fraud Enforcement and Recovery Act of 2009 ("FERA"), Pub. L. No. 111-21, 123 Stat. 1617 (2009), modified and renumbered the subsections of 31 U.S.C. §

The Attorney General may bring a civil action if he finds that a person has committed a violation. 31 U.S.C. § 3730(a). Alternatively, a private person may bring a qui tam action "for the person and for the United States Government." *Id*. § 3730(b)(1); *United States ex rel. Eisenstein* v. *City of New York*, 129 S. Ct. 2230, 2232 (2009). If a qui tam action results in the recovery of damages or civil penalties, the award is divided between the Government and the relator. 31 U.S.C. § 3730(d).

II. Factual And Procedural Background

Many years ago, Defendants (or their predecessors) entered leases to extract oil and gas from land owned by the Alabama and Coushatta Indian Tribes of Texas ("the Tribe"). Under these leases, Defendants are required to pay royalties to the Department of the Interior, which then remits the royalties to the Tribe. Appellants' Record Excerpts ("R.E.") Tab D at 2.

3729(a). The reverse false claims provision is now designated as section 3729(a)(1)(G) and makes liable 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." 31 U.S.C. § 3729(a)(1)(G). Congress made certain revisions under FERA retroactive, *see* Pub. L. No. 111-21, § 4, 123 Stat. 1625 (2009), but not the revised reverse false claims provision. *See United States ex rel. Lusby* v. *Rolls-Royce Corp*., 570 F.3d 849, 855 n.* (7th Cir. 2009). Accordingly, the pre-2009 version of the reverse false claims provision applies in this case.

This qui tam action originated with relator Harrold Wright, who owned royalty interests in a tract of land that is near the Tribe's reservation and also leased to Defendants. After a dramatic drop in his royalty payments, Wright speculated that Defendants were underpaying him and others in the area, including the Tribe. *Id.* at 9. Wright collaborated with relator Don Kennard to investigate Defendants' activities, and in the course of their investigation, they discovered that Defendants' leases to use the Tribe's land may have expired. *Id*. at 9-10. Based on their research, Relators filed this qui tam action against Defendants, alleging that they violated the False Claims Act ("FCA"), 31 U.S.C. § 3729 *et seq*., by knowingly filing false reports with the Department of the Interior regarding the amount of royalties owed to the United States as trustee for the Tribe. Specifically, Relators allege that Defendants knowingly and fraudulently represented that the leases were valid, when in fact they had expired, and that based on this fraud, Defendants knowingly miscalculated royalty payments in order to underpay the Tribe. Appellants' R.E. Tab D at 10.

Although the Tribe initially filed a similar qui tam suit, it shortly thereafter dropped the suit and instead sought to have the leases declared null and void by the tribal court of the Alabama and Coushatta Nation. *Id.* Defendants then filed suit in the United States District Court for the Eastern District of Texas, seeking a declaratory judgment that the leases were valid and that Defendants had performed

their obligations under the leases, including payment of all royalties. The Tribe and the Department of the Interior were named as defendants in the action. *Id.* at 11. After several years of litigation, the parties entered a settlement agreement in the declaratory judgment suit in which the Department of the Interior agreed to dismiss all royalty payment demands sent to Defendants, and the Tribe released Defendants from all claims "arising out of or relating to the Leases or the Wells, or the royalty proceeds attributable to the Leases." Appellees' R.E. Tab M at 4, 13. The parties then filed a stipulation of dismissal with the district court. *Id.* Tab N. The court, upon review of the stipulation, entered an order dismissing with prejudice "all claims and causes of action that have been asserted or that could have been asserted" in the declaratory action. *Id*. Tab O.

At the same time, Relators' qui tam suit moved forward in separate proceedings. After "travel[ing] up and down the federal court system" for six years, including transfer to the District of Wyoming for inclusion in a Multidistrict Litigation proceeding, the qui tam case was eventually remanded to the Eastern District of Texas. Appellants' R.E. Tab D at 12. In March 2009, the district court denied a motion by Defendants to dismiss the suit for failure to join the Tribe as an indispensable party, but granted a motion by Defendants seeking summary judgment on the ground that the settlement agreement in the declaratory judgment action

barred any further litigation of Relators' claims. Dist. Ct. Doc. #203;[2] Appellees' R.E. Tab D. Relators immediately moved for a new trial, arguing that the court erred by giving the judgment in the declaratory action preclusive effect. Dist. Ct. Doc. #206. Although the United States had declined to intervene in the qui tam suit, the district court ordered the Government to file a Statement of Interest with respect to Relators' motion. Dist. Ct. Doc. #209. In response, the Government filed a Statement in support of Relators' position that the declaratory action did not bar the qui tam suit, explaining that "[o]nly an erroneous reading of the law would grant the windfall to Comstock of allowing it to defeat a False Claims Act (FCA) claim that no one, including Comstock, intended to resolve through the declaratory judgment action settlement." Dist. Ct. Doc. #211 at 1.

The district court subsequently ordered additional briefing on whether issue preclusion, rather than claim preclusion, might bar the qui tam suit. Dist. Ct. Doc. #214. The United States then filed a second Statement of Interest, asserting that the United States had not agreed to the resolution of any underlying FCA issues in the settlement agreement, and that, as such, Relators were free to re-litigate those issues as the United States' privies. Dist. Ct. Doc. #216.

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[2] For the purposes of this brief, all "Dist. Ct. Doc." references are to the docket in the Eastern District of Texas, Case No. 9:98-cv-266.

On September 25, 2009, the district court granted the motion for a new trial. The court explained that having considered the motion and briefs, it agreed that its prior summary judgment ruling in favor of Defendants was erroneous and that the judgment in the declaratory action did not have any preclusive effect on Relators' claims or the issues raised in the qui tam suit. Specifically, the court found that neither the stipulation of dismissal nor the settlement agreement indicated that the parties intended that the settlement determine finally any of the issues underlying Relators' qui tam suit, and that as such, the judgment in the declaratory action did not give rise to claim or issue preclusion. In accordance with the court's ruling, the case was reopened. Appellees' R.E. Tab E.

On July 16, 2010, the district court again granted summary judgment to Defendants. Appellants' R.E. Tab D. This time, the court held Relators had failed to demonstrate that the leases at issue were invalid, and that even if the leases were invalid, there was no evidence that Defendants had the knowledge required to establish a violation of the FCA. *Id*. at 25.

Relators appealed to the Fifth Circuit, and filed their opening brief on November 8, 2010. Per an extension, Defendants filed their appellee brief on January 12, 2011. That brief defends the district court's reasoning in granting summary judgment to Defendants, but also argues that the judgment in favor of Defendants may be affirmed on several alternative grounds, including that: (1) Relators' claims

are barred by res judicata, Appellees' Br. 62-68; (2) Relators failed to join the Tribe as an indispensable party, *id*. at 59-62; and (3) even if Defendants lacked valid leases permitting them to remove gas from the Tribe's land, Defendants could not have violated the FCA because their monthly royalty remittance forms (MMS 2014s) contained no false statements, *id.* at 15-17.

SUMMARY OF ARGUMENT

The United States takes no position on the underlying merits of Relators' claims or whether the judgment in favor of Defendants may be affirmed on case-specific, evidentiary grounds. However, the United States is participating as amicus curiae on appeal because three of the legal theories asserted by Defendants are incorrect and potentially detrimental to the Government's ongoing fight against fraud.

First, the United States urges this Court to reject Defendants' argument that the stipulated dismissal of their declaratory judgment action has preclusive effect on Relators' qui tam suit. When the dismissal of a declaratory action is consensual and not based on a judicial determination, res judicata does not bar future suits based on the same underlying issues unless the parties have clearly indicated their intention that the dismissal resolve the merits of the dispute. *See Kaspar Wire Works, Inc.* v. *Leco Eng'g & Mach., Inc.*, 575 F.2d 530, 535-39 (5th Cir. 1978). Here, the overlapping issue between Defendants' declaratory action and Relators' qui tam suit

is the validity of Defendants' leases to extract oil and gas from the Tribe's land. As the district court correctly held, neither the stipulation of dismissal nor the judgment in Defendants' declaratory action purports to resolve that issue. Moreover, the notion that the parties intended the consent dismissal to have preclusive effect is contrary to the content of the settlement agreement. In arguing otherwise, Defendants not only mischaracterize the stipulation of dismissal and settlement agreement, but advocate a position that, if adopted by this Court, would thwart Congress's intent that relators be allowed to pursue qui tam actions where the United States declines to intervene.

The United States also opposes Defendants' argument that Relators' suit should be dismissed for failure to join the Tribe as an indispensable party. Defendants premise this argument on their inaccurate claim that Relators seek to invalidate leases to which the Tribe is a contracting party. Appellees' Br. 59-62. As both the district court and the Tenth Circuit have recognized, this is not a suit to invalidate Defendants' leases, but to recover damages and penalties for alleged false records and statements submitted to the Government. Appellees' R.E. Tab C at 4-6; *United States ex rel. Kennard, et al.* v. *Comstock Res., Inc., et al.*, 363 F.3d 1039, 1048-49 (10th Cir. 2004). Moreover, Defendants and the Tribe have already entered a settlement agreement in which both parties stipulate that the leases are valid and in full force and effect. Accordingly, even to the extent that resolution of Relators' claims requires a judicial determination regarding the leases' validity, Defendants

have failed to demonstrate that such a determination would have any bearing on their contractual relationship with the Tribe.

Finally, the United States opposes Defendants' argument that, even if the leases were expired, Defendants' monthly royalty remittance forms (MMS 2014s) did not actually contain any statements asserting the leases' validity and, as such, Defendants could not have violated the FCA. Appellees' Br. 15-17. Although the United States takes no position in this litigation regarding the validity of the leases, Defendants are wrong in arguing that the FCA's reverse false claims provision would not apply to the filing of an MMS 2014 based on an expired lease. By submitting MMS 2014s, an oil company purports to be the owner of a valid lease, with rights to extract oil and gas from the land covered by the lease. Accordingly, where the underlying lease is invalid, a filed MMS 2014 could properly be viewed as a false record concealing the improper seizure of Government property and concomitant obligation to return that property to the United States.

ARGUMENT

The district court granted summary judgment to Defendants on the ground that Relators failed to demonstrate that the leases at issue were invalid. Appellants' R.E. Tab D at 25. The district court also held that even if the leases were invalid, there was no evidence that Defendants had the knowledge required to establish a violation of the FCA. *Id.* The United States takes no position regarding the underlying merits

of the district court's summary judgment decision. However, Defendants' brief on appeal argues that the judgment in Defendants' favor may also be affirmed on several alternative legal theories, including that: (1) Relators' claims are barred by res judicata, Appellees' Br. 62-68; (2) Relators failed to join the Tribe as an indispensable party, *id.* at 59-62; and (3) even if Defendants lacked valid leases permitting them to remove oil and gas from the Tribe's land, they could not have violated the FCA because their royalty remittance forms contained no false statements, *id.* at 15-17. The United States urges the Court to reject each of these alternative arguments, for the reasons stated below.

I. The District Court Properly Rejected Defendants' Argument That The Stipulated Dismissal Of Their Declaratory Judgment Action Bars Relators' Qui Tam Suit.

The district court properly rejected Defendants' argument that the stipulated dismissal of their declaratory action has preclusive effect on Relators' qui tam suit. Per order by the district court, the United States filed two Statements of Interest addressing this issue below. *See* Dist. Ct. Docs. #211 and #216. Both Statements supported Relators on this point, explaining that Defendants had mischaracterized the settlement agreement, and that applying res judicata under these circumstances would seriously undermine the FCA's effectiveness as a tool for recovering losses sustained from fraud against the Government.

As the district court explained, "'The rule of res judicata encompasses two separate but linked preclusive doctrines: (1) true res judicata or claim preclusion and (2) collateral estoppel or issue preclusion.'" Appellees' R.E. Tab D at 9 (quoting *Test Masters Educ. Servs. Inc.* v. *Singh*, 428 F.3d 559, 571 (5th Cir. 2005)). Claim preclusion provides that "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Oreck Direct LLC* v. *Dyson, Inc.*, 560 F.3d 398, 401 (5th Cir. 2009). Issue preclusion bars "issues of ultimate fact from being relitigated between the same parties in a future lawsuit if those issues have once been determined by a valid and final judgment." *Vines* v. *Univ. of La. at Monroe*, 398 F.3d 700, 705 (5th Cir. 2005). We discuss each doctrine in turn.

A. Claim Preclusion

As a general rule, declaratory judgment dismissals are not entitled to claim preclusive effect. The purpose of declaratory judgment actions is to provide a supplemental (not exclusive) form of relief. *See Kaspar Wire Works, Inc.* v. *Leco Eng'g & Mach., Inc.*, 575 F.2d 530, 536 (5th Cir. 1978). Accordingly, when the dismissal of a declaratory action is consensual and not based on a judicial determination or stipulation of the parties with respect to the merits of the dispute, claim preclusion does not bar reexamination of the issues underlying the declaratory

suit. *See id*. at 535-37; *see also* Restatement (Second) of Judgments § 33 (1982); Moore's Federal Practice § 131.24[3].

In this case, the overlapping issue between Defendants' declaratory action and Relators' qui tam suit is the validity of Defendants' leases to extract oil and gas from the Tribe's land. As the district court explained, neither the stipulation of dismissal nor the judgment in the declaratory action purports to resolve that issue. The stipulation and order do not incorporate the terms of the settlement agreement into the judgment, nor do they include any statements regarding the relation of the parties with respect to the validity of the leases. Appellees' R.E. Tab D at 6-8; *see also id.* Tabs N & O.

Moreover, in the settlement agreement itself, only the Tribe stipulated to the validity of the leases, *id.* Tab M at 4, and only the Tribe and Defendants "acknowledged" that Defendants acted in good faith in making royalty payments under the leases, *id.* at 8. The Secretary of the Interior agreed to neither of these propositions. And while the Secretary agreed to dismiss certain orders to pay that had been issued to Defendants, *id*. at 4, only the Tribe and Defendants were defined in the agreement as "releasing parties" agreeing to broad general releases of claims against each other, *id*. at 13-14. Accordingly, as far as the Government was concerned, the consent dismissal was silent as to the validity of the leases.

Most tellingly, the settlement agreement expressly contemplates the continuation of Relators' suit, identifying the suit by name and docket number, and stating that the Tribe agreed to support Defendants in their defense of Relators' claims by providing testimony and documents relating to the litigation. *Id.* at 11-12. If, as Defendants appear to suggest, this paragraph was intended only to assist Defendants in securing dismissal of the qui tam litigation on res judicata grounds, *see* Appellees' Br. 67, surely the parties would have said so, rather than referring only generally to assistance with testimony and document production. And surely the paragraph would also have secured the Federal Government's cooperation in obtaining dismissal of the suit, given that Relators are asserting the qui tam claims as the United States' privies, and that the claims cannot actually be dismissed without the Government's consent. *See* 31 U.S.C. § 3730(b)(1); *Searcy* v. *Philips Elec. N. Am. Corp.*, 117 F.3d 154 (5th Cir. 1997). To the contrary, however, only the Tribe "agree[d] not to take any action to oppose any effort by [Defendants] to secure the dismissal or settlement of the Qui Tam Litigation" and to "support and assist [Defendants] in such efforts." Appellees' R.E. Tab M at 12. Neither the Department of the Interior nor the United States is even mentioned in the paragraph. The notion that the parties intended that the consent dismissal have preclusive effect on Relators' claims cannot be reconciled with the content of the paragraph or the settlement agreement as a whole.

Defendants' primary basis for asserting res judicata is that the district court's order in the declaratory action dismisses with prejudice "all claims and causes of action that have been asserted or that could have been asserted" by the parties in that suit. Appellees' Br. 64-68. But this Court already held in *Kaspar* that a generalized dismissal with prejudice is insufficient to trigger claim preclusion. *See Kaspar*, 575 F.2d at 539-40. And in any event, Relators' qui tam claims are not claims that could have been asserted by the Government in the declaratory action, because the Secretary of the Interior had no authority to assert FCA claims against Defendants. *See* 31 U.S.C. §§ 3730(a),(b) (giving only the Attorney General and private persons authority to bring suit against individuals who violate section 3729 of the FCA).

Defendants' position is additionally problematic because the FCA provides specific procedural mechanisms that must be followed before the Government can move to settle a qui tam claim pursued by a relator, including notice to the relator and an opportunity for a hearing on the motion. *See* 31 U.S.C. § 3730(c)(2)(A). In addition, the Government may settle a qui tam action over the objection of the relator only if the court makes a finding, after a hearing, "that the proposed settlement is fair, adequate, and reasonable under all the circumstances." *Id.* § 3730(c)(2)(B). None of these procedural requirements was satisfied here. Moreover, once the United States has declined to intervene in a qui tam action, as it did here, it may intervene later only if the court determines that the Government has shown good cause. *Id.* §

3730(c)(3). Given the Government's lack of authority to assert, settle, or dismiss Relators' qui tam claims in the declaratory action, the stipulation of dismissal in that suit cannot be interpreted to preclude those claims.

A holding to the contrary would upend Congress's purposes in enacting the FCA, which provides the Government's primary litigative tool for recovering losses sustained from fraud. *See* S. Rep. No. 99-345, at 1 (1986), as reprinted in 1986 U.S.C.C.A.N. 5266, 5266; *United States ex rel. Marcy* v. *Rowan Companies, Inc.*, 520 F.3d 384, 388 (5th Cir. 2008)*; see also United States* v. *Neifert-White Co.*, 390 U.S. 228, 232-33 (1968) (discussing Congress's broad remedial objectives in enacting the FCA). The Act would be far less effective if defendants, rather than the Government and its whistleblowers, could dictate the timing and forum of an FCA action by unilaterally filing a declaratory judgment suit. *See Kaspar*, 575 F.2d at 536. It simply cannot be the case that the United States must assert an FCA counterclaim in every declaratory judgment action in order to preserve the relators' ability to pursue their claims in a separate pending lawsuit. Congress specifically intended that the FCA be used to enlist private litigants to pursue fraud suits the Government determined not to prosecute on its own. *See* 31 U.S.C. § 3730(c)(3).

B. Issue Preclusion

Issue preclusion applies only to prevent "'relitigation of issues actually litigated and necessary to the outcome of the first action.'" *United States* v.

Davenport, 484 F.3d 321, 326 (5th Cir. 2007) (quoting *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 327 n. 5 (1979)). Thus, when a case is resolved through settlement, issue preclusion ordinarily will not apply. *See, e.g.*, *Arizona* v. *California*, 530 U.S. 392, 414 (2000). Where, as here, the parties have stipulated to the dismissal of a declaratory action, issue preclusion applies only if the parties "indicated clearly the intention that the decree to be entered shall not only terminate the litigation of claims but, also, determine finally certain issues." *Kaspar*, 575 F.2d at 539; *see also Arizona*, 530 U.S. at 414 ("[S]ettlements ordinarily occasion no issue preclusion (sometimes called collateral estoppel) unless it is clear, as it is not here, that the parties intended their agreement to have such an effect.").

Here, neither the stipulation of dismissal nor the settlement agreement indicates that the Government intended, let alone "clearly" intended, that the dismissal of Defendants' declaratory action finally determine any of the issues underlying Relators' qui tam suit. To the contrary, as explained in detail earlier, the Government is conspicuously absent from the provisions of the settlement agreement addressing the validity of the leases and Defendants' "good faith" in making royalty payments, as well as the provision securing cooperation with Defendants' defense of Relators' qui tam claims. *See* supra pp. 13-14 (citing Appellees' R.E. Tab M at 4, 7, 11-12). The Secretary of the Interior did not agree to any of these terms. Nor did the parties ever state that the settlement agreement and stipulation of dismissal were

intended to have preclusive effect on Relators' qui tam claims or any of the issues underlying those claims. If the parties had intended to preclude Relators from litigating the issue of lease validity in this suit, the settlement agreement would have included a provision to that effect. To the contrary, the United States neither pledged to dismiss Relators' suit, nor gave any assurances that it would work to dismiss claims that turn on issues considered in the declaratory action. The district court thus correctly found that Defendants failed to point to any evidence of a "clear intention" of the United States to resolve any underlying issues in the declaratory judgment suit, only to end litigation with a compromise of claims. *See* Appellees' R.E. Tab D at 8-11.

II. The District Court Properly Rejected Defendants' Argument That The Tribe Is An Indispensable Party To This Suit.

As another alternative ground for affirmance, Defendants argue that Relators' suit should be dismissed for failure to join the Tribe as an indispensable party. Appellees' Br. 59-62. Under Federal Rule of Civil Procedure 19, a person must be joined as a party if (1) "in that person's absence, the court cannot accord complete relief among existing parties," or (2) "that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring

double, multiple or otherwise inconsistent obligations because of the interest." Fed. R. Civ. P. 19(a)(1); *see also id*.12(b)(7) (allowing dismissal for "failure to join a party under Rule 19"). Defendants bear the burden of demonstrating that the Tribe is an indispensable party, and the district court's finding that the Tribe is not an indispensable party must be upheld unless it was an abuse of discretion. *See HS Res., Inc.* v. *Wingate*, 327 F.3d 432, 438 (5th Cir. 2003); *see also Hood ex rel. Mississippi* v. *City of Memphis, Tennessee*, 570 F.3d 625, 628 (5th Cir. 2009) ("Determining whether an entity is an indispensable party is a highly-practical, fact-based endeavor, and Federal Rule of Civil Procedure 19's emphasis on a careful examination of the facts means that a district court will ordinarily be in a better position to make a Rule 19 decision than a circuit court would be.") (internal quotation and bracket omitted).

The United States agrees with the district court's order denying Relators' motion to dismiss for failure to join the Tribe as an indispensable party. *See* Appellees' R.E. Tab C. Defendants' argument is premised entirely on the notion that Relators seek to invalidate leases to which the Tribe is a contracting party. Appellees' Br. 59-62. Relying on *Jicarilla Apache Tribe* v. *Hodel*, 821 F.2d 537 (10th Cir. 1987) and *United States ex rel. Hall* v. *Tribal Dev. Corp.*, 100 F.3d 476 (7th Cir. 1996), Defendants assert that "in an action to set aside a lease or contract, all parties who may be affected by the determination of the action are indispensable." Appellees' Br. 59 (internal quotation omitted). But this argument mischaracterizes

Relators' claims. Relators do not seek to invalidate the leases, but to recover damages and penalties for alleged false records and statements submitted to the Government. *See* Appellees' R.E. Tab D at 4-6. As the Tenth Circuit explained when Relators' qui tam claims were part of a multi-district litigation proceeding in the District of Wyoming:

> A qui tam suit is to recover penalties for false statements to the Government . . . The fraud is that which occurs when the person or entity makes a false statement to the Government. The fraud at issue is not that which occurs when the Indian Tribe receives less royalties than those which are due pursuant to the lease. While this suit relates to leases between Comstock and the Tribe, it is an action on behalf of Relators and the Government to redress an alleged fraud on the Government.

United States ex rel. Kennard, et al. v. *Comstock Resources, Inc., et al.*, 363 F.3d 1039, 1048-49 (10th Cir. 2004).

Indeed, Defendants have not identified any way in which the resolution of this suit will affect their contractual relationship with the Tribe. Defendants and the Tribe have already entered a settlement agreement in which both parties stipulate that each of the leases "is, and always has been, valid and in full force and effect, and binding upon the Tribe." Appellees' R.E. Tab M at 4. Accordingly, even to the extent that resolution of Relators' claims requires a judicial determination regarding the validity of the leases, Defendants have failed to demonstrate that such a determination would have any bearing on either their interest or the Tribe's interest in those leases.

In support of their position that the Tribe is an indispensable party, Defendants rely on the district court's observation that "if Relators succeed in this action, Comstock could be subject to . . . inconsistent obligations because of its prior settlement with the Tribe and the Government." Appellees' Br. 62 (quoting Appellees' R.E. Tab C at 7). Defendants misunderstand the district court's point. If Defendants are found liable for submitting false statements or records to the Government about the leases' validity, Defendants' obligation to pay penalties would of course be inconsistent in some sense with the agreement between Defendants and the Tribe that the leases are valid, but that fact falls far short of establishing that a judgment in Relators' favor would create an inconsistency of any legal, or even practical, significance. And more to the point here, any inconsistency between the settlement agreement and the ultimate judgment in this case would have nothing to do with whether the Tribe is a party. As the district court observed, the risk of inconsistent obligations "is not due to the Tribe's absence. The Tribe's presence in this case would not increase or decease that risk in any way." Appellees' R.E. Tab C at 7.

In any event, even if the Tribe were an indispensable party, Relators would not be allowed to join them in the suit because the Tribe has sovereign immunity. *See Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991). And the Tribe cannot join the suit on its own initiative because

the FCA does not allow parties other than the Government to intervene in qui tam suits. *See* 31 U.S.C. § 3730(b)(5). Where, as here, joinder is unfeasible, Rule 19(b) does not mandate dismissal, but instead requires the court to determine "in equity and good conscience" whether the action may proceed, taking into account: (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties; (2) the extent to which any prejudice could be lessened or avoided by protective provisions in the judgment; shaping the relief; or other measures; (3) whether a judgment rendered in the person's absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder. *See* Fed. R. Civ. P. 19(b). All of these factors support the district court's decision to deny Defendants' dismissal motion.

With regard to the first and second factors, neither the Tribe nor Defendants would be prejudiced by any judgment because, as just discussed, Relators do not seek to invalidate the leases and, in any event, both parties have already stipulated to the leases' validity. With regard to the third factor, the Tribe's participation in this case is unnecessary to an adequate judgment because the disposition of Relators' claims turns solely on whether Defendants are subject to liability under the FCA for submitting false statements and records to the Government. Defendants have failed to demonstrate any way in which the resolution of that question requires the Tribe's presence in this suit. With regard to the final factor, courts usually look to whether

the plaintiff may avoid an indispensable party problem by refiling the suit in a court where the missing party may be joined. *See, e.g.*, *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102, 112 (1968); *Int'l Paper Co.* v. *Denkmann Assocs*, 116 F.3d 134, 137 (5th Cir. 1997); *Lone Star Indus., Inc.* v. *Redwine*, 757 F.2d 1544, 1549 (5th Cir. 1985). Relators have no alternative forum in which they can join the Tribe as a party to Relators' qui tam suit against Defendants. *See* supra p. 21 (explaining that the Tribe enjoys sovereign immunity). In short, even if the Tribe were an indispensable party to this suit, which it is not, dismissal of the suit would be unwarranted under Rule 19(b).

Defendants' position is also troubling as a policy matter. The United States recovered $85 million last year in qui tam suits involving natural gas royalties collected on behalf of the Federal Government and Indian tribes, and a number of similar qui tam claims are pending. None of the tribes was, or has sought to be, joined in these suits. Indeed, as mentioned earlier, it does not appear that Indian tribes are allowed to participate in such suits, even if they or another party so desired. *See* supra pp. 21-22. A ruling in Defendants' favor on this issue could significantly compromise the United States' ability to pursue FCA claims involving royalties owed to the Government as trustee for the tribes. Moreover, such a ruling could complicate other FCA cases where the Government brings suit against a perpetrator of false claims without joining others who may have a role, such as States in cases

involving Medicaid claims, or prime contractors in cases involving claims against subcontractors. Defendants' argument is thus contrary not only to the facts of this case, but also Congress's intent that the FCA "reach all types of fraud, without qualification, that might result in financial loss to the Government." *Cook County, Illinois* v. *United States ex rel. Chandler*, 538 U.S. 119, 129 (2003) (internal quotation omitted).

III. The FCA's False Claims Provision Would Apply To The Filing Of A Royalty Remittance Form (MMS 2014) Based On An Invalid Lease.

Defendants argue that even if, as Relators allege, Defendants lacked valid leases permitting them to remove gas from the Tribe's land, their monthly royalty remittance forms (MMS 2014s) did not actually contain any statements asserting the leases' validity and, as such, Defendants could not have violated the FCA. Appellees' Br. 15-17. The United States urges the Court to reject this argument because it construes the FCA too narrowly.

The owner of a federal minerals lease is entitled to produce and sell minerals in exchange for payment of a royalty equal to a percentage of the minerals produced. Every month, the lessee must file an MMS 2014 form with the Government indicating how much royalty is due. Included on the MMS 2014 is an Accounting Identification Number for the lease, the royalty percentage associated with the lease,

the total sales volume and value for the month, and the royalty volume and value for the month. *See* Appellees' R.E. Tab F (sample MMS 2014).

Relators allege that Defendants filed MMS 2014s based on leases that had expired, and that in doing so, Defendants violated the FCA's reverse false claims provision, 31 U.S.C. § 3729(a)(7) (2006), which imposes 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 or transmit money or property to the Government." Appellants' Br. 4. Defendants respond that even if the underlying leases had expired, Relators' claims must fail because Relators cannot demonstrate that any of the individual statements made on Defendants' MMS 2014s are false. Appellees' Br. 15-17.

The United States takes no position in this litigation regarding the validity of the underlying leases. Defendants are wrong, however, in arguing that the FCA's reverse false claims provision would not apply to the filing of an MMS 2014 based on an expired lease. By submitting MMS 2014s, an oil company purports to be the owner of a valid lease, with rights to remove and sell any minerals covered by the lease. Absent a valid lease, a company would not have any reason to file MMS 2014s because it would have no right to extract oil and gas, and therefore no obligation to remit any royalties. Accordingly, where the underlying lease is in fact expired or invalid, any MMS 2014s filed by the lessee could properly be viewed as

false records that conceal the improper seizure of Government property and concomitant obligation to return that property to the United States. Moreover, the portion of the MMS 2014 containing information about the lease would be a false statement if the lease were in fact expired. In addition, the portion of the MMS 2014 indicating the amount of royalty owed to the Federal Government would constitute a false statement because, again, the obligation to remit royalties only arises from the existence of a valid lease. If an oil company knowingly extracted oil and gas from federal or tribal land without a valid lease, it would owe the Government not just a percentage of the proceeds, but all of the proceeds. *See, e.g.*, *United States v. Wyoming*, 331 U.S. 440, 458 (1947). For these reasons, this Court should reject Defendants' argument that the FCA would not apply to the filing of MMS 2014s based on an invalid lease.

CONCLUSION

For the foregoing reasons, this Court should reject Defendants' arguments that (1) Relators' suit is barred by res judicata; (2) Relators' Complaint should be dismissed for failure to join an indispensable party; and (3) the FCA's reverse false claims provision would not apply to the filing of MMS 2014s based on an invalid lease.

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FEBRUARY 2011

BRIEF FORMAT CERTIFICATION

I hereby certify that the foregoing brief complies with the requirements of Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(B) in the following manner:

The Brief was prepared using Corel Wordperfect 12.0. It is proportionately spaced in 14-point type, and contains 6324 words.

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ECF CERTIFICATION

I hereby certify that:

(1) Pursuant to Fifth Circuit Rule 25.2.13, I have complied with this Court's privacy redaction requirements;

(2) Pursuant to Fifth Circuit Rule 25.2.1, the electronic version of this brief has been scanned for viruses using the Microsoft Forefront 1.95.58.00 virus detection program, updated on February 2, 2011, which detected no viruses; and

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of February, 2011, I caused a copy of the foregoing brief to be filed electronically with the Court's CM/ECF system, and that counsel for the parties will be served through that system.

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