No. 20-_____

In the Supreme Court of the United States

UNITED STATES OF AMERICA, ex rel.
CONCILIO DE SALUD INTEGRAL DE LOIZA, INC. ("CSILO")

Petitioners,

v.

J.C. REMODELING, INC. AND JOSE GARCIA-SUAREZ

Respondents

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

PETITION FOR WRIT OF CERTIORARI

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December 2nd, 2020

QUESTIONS PRESENTED

The False Claims Act ("FCA") provides that a violator of the FCA should pay "three (3) times the amount of damages which the Government sustains because of the act of that person". 31 U.S.C. sec. 3729 (a) (1). Although the statute dictates that damages should be tripled, it does not specify how to calculate the damages.

Based on this lack of specificity regarding calculation of damages under the FCA, this Petition presents the following questions:

1) Should this Court resolve a circuit split concerning the question as to whether Courts should allow gross trebling damages or net trebling damages under the FCA?
2) Should this Court resolve and settle an important FCA question concerning as to whether Courts should apply the "benefit of the bargain" analysis or the "tainted claim theory" on intangible benefits that are difficult to calculate?
3) Should this Court reverse the decisions of the lower courts when they erroneously excluded the damages evidence when the Respondents suffered no prejudice or surprise when they admitted that they had knowledge of the damages evidence?

LIST OF PARTIES TO THE PROCEEDING

Concilio de Salud Integral de Loiza, Inc. ("CSILO" and/or "Petitioner") is the Petitioner. CSILO filed a qui tam action under the FCA and is a relator of the United States of America ("USA" and/or "Government").

JC Remodeling, Inc. ("JCR") and Jose Garcia-Suarez ("Garcia") are the Respondents. García is the sole owner and president of JCR.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner CSILO discloses that it is a non-profit corporation registered under the laws of the Commonwealth of Puerto Rico. Furthermore, CSILO submits that it does not have a parent corporation nor does a publicly held corporation own ten percent (10%) or more of its stock.

TABLE OF CONTENTS

APPENDIX INDEX

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit ("First Circuit") denying the appeal and affirming the orders of the United States District Court for the District of Puerto Rico ("District Court") that excluded treble damages that were evidenced at trial.

OPINIONS BELOW

The opinion of the First Circuit is reported at 926 F.3d 34 and set forth at App. 1-22. The orders of the District Court are not reported but are set forth at App. 24-27, 36-37.

JURISDICTION

The judgment of the First Circuit was entered on June 15th, 2020. Petitioner filed a timely Petition for Rehearing on June 29th, 2020. The First Circuit order denying the Petition of Rehearing was entered on July 7th, 2020. App. 23. On March 19th, 2020, the Supreme Court issued an order extending the deadline to file any petition for a writ of certiorari to 150 days from the date of the lower court judgment or order denying a timely Petition of Rehearing. This Court has jurisdiction under 28 U.S.C. sec. 1258.

STATEMENT OF THE CASE

A. Factual Background

CSILO is a non-profit organization in Loiza, Puerto Rico established in 1972 to provide a wide range of primary healthcare services for the uninsured through the use of federal funds. In 2009, CSILO received federal funds from the American Recovery and Reinvestment Act ("ARRA") for the purposes to upgrade and maintain their building and facilities for the benefit of all patients and staff.

After receiving the ARRA funds, CSILO initiated a bidding process for the necessary repairs to waterproof the roof of their main structure. CSILO estimated that the sum amount to be used on the waterproofing project was approximately one hundred and fifty thousand dollars ($150,000.00). Additionally, CSILO requested in its bidding process that all bids submitted must include a minimum ten (10) year manufacturer warranty pursuant to manufacturer specifications and instructions.

On April of 2010, the Respondents submitted a bid with the false representation that Respondents would extend a fifteen (15) year manufacturer warranty for the roof waterproofing product called Wetsuit®. At the time, Respondents represented to CSILO that they were the exclusive distributor of the Wetsuit® product in Puerto Rico and thus could extend a fifteen (15) year manufacturer warranty pursuant to manufacturer specifications and instructions.

CSILO accepted Respondents' bid because the false representation that Respondents would extend a fifteen (15) year manufacturer warranty for the Wetsuit® waterproofing product pursuant to manufacturer specifications and

instructions was material to CSILO's decision. CSILO accepted Respondents' bid because out of all the bids, Respondents' fifteen (15) year manufacturer warranty far outlasted the other bids which limited themselves to a ten (10) year manufacturer warranty. Therefore, Respondents induced CSILO to accept Respondents' bid because the fifteen (15) year manufacturer warranty was material to CSILO's decision.

Unbeknownst to CSILO, the Respondents must comply with certain obligations as an exclusive distributor and Certified Wetsuit® Applicator before they may offer the fifteen (15) year manufacturer warranty. Specifically, Respondents must complete certain steps, specifications and instructions as required by the Wetsuit® Manufacturer in order to extend an offer of fifteen (15) year manufacturer warranty to any prospective buyer. If Respondent complied with these steps, specifications and instructions, then the offer of fifteen (15) year manufacturer warranty from the Wetsuit® Manufacturer could be extended with no additional costs to replace the Wetsuit® product in case any future repairs or reinstallations were necessary. Additionally, if Respondent complied with these steps, specifications and instructions pursuant to the Wetsuit® Manufacturer requirements, then the Wetsuit® product would also be installed in conformity with the manufacturer specifications and instructions.

During the summer of 2010, the Respondents proceeded to install the Wetsuit® product to the roof of CSILO's facilities after CSILO accepted the Respondents' bid and entered into a written contract ("Contract"). Pursuant to the Contract, CSILO paid the Respondents the contract price of one hundred thirty-five thousand dollars

($135,000.00) ("Contract Price"). CSILO accepted and paid the Contract Price because Respondents induced CSILO with their false representation that they have extended a fifteen (15) year manufacturer warranty for the Wetsuit® waterproofing product pursuant to manufacturer specifications and instructions. Unbeknownst to CSILO, Respondents did not comply with their obligations in their role as exclusive distributer and Certified Wetsuit® Applicator. Specifically, Respondents knowingly extended a false offer of a fifteen (15) year manufacturer warranty when they could not because Respondent failed to complete the steps, specifications and instructions as required by the Wetsuit® Manufacturer. Therefore, Respondent extended a false claim knowing that the fifteen (15) year manufacturer warranty to CSILO will not be honored at no additional costs to replace the Wetsuit® product in case any future repairs or reinstallations were necessary.

By June of 2011, a year after the installation, the CSILO facilities began to suffer damages from newly discovered water infiltration originating from their building's rooftop. As a consequence of this newly discovered water infiltration, CSILO requested Respondents to honor the fifteen (15) year manufacturer warranty of the Wetsuit® product. CSILO understood that they would not have to incur in additional costs to replace the Wetsuit® product for said repairs or reinstallations because their request was made within the fifteen (15) year manufacturer warranty.

Unbeknownst to CSILO, Respondents concealed to CSILO that the fifteen (15) year manufacturer warranty from the Wetsuit® Manufacturer was not actually extended without the need to incur in additional costs. Respondents tried to reapply

fourteen (14) drums of the Wetsuit® product, which amounted to a sum between forty to fifty thousand dollars ($40,000.00-$50,000.00). However, even after reapplying these fourteen (14) drums of the Wetsuit® product that amounted to a sum between forty to fifty thousand dollars ($40,000.00-$50,000.00), the CSILO facilities continued to suffer damages from the water infiltration originating from their structure's rooftop.

Throughout 2011 to 2013, CSILO continuously and fruitlessly contacted Respondents to inform them as to the continuous water infiltrations and to request the necessary repairs under the fifteen (15) year manufacturer warranty. However, Respondents did not return to honor the fifteen (15) year manufacturer warranty of the Wetsuit® product and did not try to repair CSILO's roof. Because Respondents failed to respond to CSILO's requests to honor the fifteen (15) year manufacturer warranty, CSILO filed a state court civil suit[1] against Respondents in 2013 requesting Respondents to comply with the (15) year manufacturer warranty of the Wetsuit® product.

The state court civil suit prompted Respondent to return to CSILO's facilities to attempt to fix the roof. However, Respondents used a different product called Chovatek and did not use the Wetsuit® product. When CSILO took notice of the different product and requested Respondents to honor the (15) year manufacturer warranty of the Wetsuit® product, Respondents admitted to CSILO that they did not extend the (15) year manufacturer warranty of the Wetsuit® product and that if they

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[1] The state court civil case is under the following heading: *Concilio de Salud Integral de Loiza, Inc. v. J.C. Remodeling, Inc., et al.*, Civ. No. FCCI2013-002222.

wanted to reinstall the Wetsuit® product they would have to pay for the additional costs for said repairs.

Based on this admission, CSILO gained knowledge that Respondents falsely represented in their April 2010 bid and Contract that they had extended a fifteen (15) year manufacturer warranty for the Wetsuit® product pursuant to manufacturer specifications and instructions. Respondents misled CSILO by falsely representing that they had complied with their obligations to complete certain steps, specifications and instructions as required by the Wetsuit® Manufacturer in order be able to extend a fifteen (15) year manufacturer warranty. Additionally, Respondents misled CSILO to think that no additional costs would be necessary to replace the Wetsuit® product in case future repairs were necessary.

B. The Proceedings Below

On November 13th, 2014, CSILO, filed this Qui Tam Action as a relator of USA pursuant to the FCA, 31 U.S.C. sec. 3729, *et seq.* CSILO alleged in its First Amended Complaint ("Complaint") that Respondents were liable for four hundred and five thousand dollars ($405,000.00) as gross treble damages ("Gross Treble Damages"). This gross treble damage was the sum amount equal to three times the original Contract Price of one hundred thirty-five thousand dollars ($135,000.00). CSILO requested that Respondent should pay the full gross treble damages regardless of any value actually received because the false claim of the fifteen (15) year manufacturer warranty of the Wetsuit® product was "tainted" and difficult to calculate.

On March 1st, 2017, Respondents filed their Answer to the First Amended

Complaint ("Answer"). Respondents admitted that they received a payment from CSILO for an amount that exceeds one hundred thirty-five thousand dollars ($135,000.00). In fact, Respondents admitted that they spent approximately forty-six thousand dollars ($46,000.00) to reapply the Wetsuit® product[2]. Therefore, Respondents' admission of forty-six thousand dollars ($46,000.00) to replace defective Wetsuit® product inferred that CSILO received a value of approximately eighty-nine thousand dollars ($89,000.00). App. 42-43.

On November 27th, 2017, the parties filed the Joint Pretrial Conference Report ("Joint PT Report"). The Joint PT Report references the evidence that sustains the gross treble damages by making reference to the Contract, which states the Contract Price of one hundred thirty-five thousand dollars ($135,000.00) which Respondents admitted and offered to stipulate. The Respondents also did not raise any objection or file any motions *in limine* regarding the evidence which referenced the Contract Price, such as the Respondents' April Bid Proposal, the Contract, the Respondents' Invoices, CSILO's Purchase Orders and Payments to Respondents. After the District Court and the Parties held the Pretrial Conference ("PT Conference"), the District Court allowed CSILO to file a motion to amend the Joint PT Report to specify and clarify the damages evidence.

On January 8th, 2018, CSILO requested leave to amend the Joint PT Order to

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[2] This Court should take note of this admission of forty-six thousand dollars ($46,000.00) to reapply the Wetsuit® product because said fact is important for the "benefit of the bargain" analysis, as well as the gross treble damages and net treble damages analysis. Additionally, this admission demonstrates that manifest injustice did occur because Respondents were neither surprised or prejudiced by the inclusion of the damages evidence because they had knowledge as to the value received if the "benefit of the bargain" analysis would be applied.

clarify the treble damages evidence explaining to the District Court that Respondents would not suffer surprise or undue prejudice because CSILO requested since the inception of its complaint gross treble damages for the full total contract price value, regardless of any value actually received, in the spirit of the "tainted claim theory".

Unfortunately, the District Court erroneously excluded any damages evidence on the grounds that Respondents would be surprised and prejudiced because CSILO did not specify evidence as to the value received, in the spirit of the "benefit of the bargain" analysis. CSILO filed a Motion for Reconsideration and Supplemental Motion to the Motion for Reconsideration (jointly "Reconsideration") requesting the District Court to reconsider its decision because Respondents are not surprised or prejudiced because CSILO requested gross treble damages for the full total contract price value, regardless of any value actually received, since the inception of the case. Unfortunately, the Court denied CSILO's Reconsideration to amend the Joint PT Order to include the gross treble damages. Therefore, the Government suffered a manifest injustice when the District Court excluded the gross treble damages at trial, thereby precluding the Government from receiving any damages whatsoever. App. 24-27.

Extraordinarily, during the course of the trial in late January of 2018, Respondents opened the door and admitted that they had knowledge of the evidence concerning the value received, thereby having knowledge of the damages evidence. Specifically, the Respondents admitted and testified in Court that they used fourteen (14) drums of the Wetsuit® product to try to cure the deficient product. Respondents

admitted and testified that the sum amount of fourteen (14) drums of the Wetsuit® product equals between forty to fifty thousand dollars ($40,000.00-$50,000.00). App. 28-34.

Afterwards, CSILO requested the District Court to allow it to offer as proof the gross treble damages evidence. Unfortunately, even after Respondents' admission of having knowledge of the value received and the damages evidence, the District Court did not allow CSILO to offer as proof anything concerning the gross treble damages. The District Court erroneously excluded the gross treble damages by reiterating its previous orders, again incurring in manifest injustice for the Government. App. 35-38.

On January 31st, 2018, the jury rendered a verdict in favor of CSILO, finding that the Respondents violated the FCA because they made a false representation as to the fifteen (15) year manufacturer warranty. On that same date, the District Court imposed a civil penalty of five thousand and five hundred dollars ($5,500.00). App. 39-41.

Unsatisfied with the manifest injustice for the Government, CSILO filed a timely notice of appeal to request the First Circuit to reverse the District Court's decision to exclude the gross treble damages evidence. Specifically, CSILO requested the First Circuit to reverse the District Court's decision and either 1) determine that Respondents are liable for the gross treble damages of four hundred and five thousand dollars ($405,000.00), in the spirit of the "tainted claim theory", or 2) remand the case back to the Jury for a bifurcated evidence trial focused solely on the

treble damages.

On June 16th, 2020, the First Circuit issued its Opinion denying CSILO's appeal and affirming the District Court's decision of excluding the damages. App. 1-22. The First Circuit erroneously understood that the District Court was bound by the "benefit of the bargain" analysis and rejected CSILO's request for gross treble damages for the full contract price, regardless of the value received, in the spirit of the "tainted claim theory". The First Circuit erroneously affirmed the District Court's reasoning that the damages evidence should be excluded because CSILO did not specify any evidence as to the value received, in the spirit of the "benefit of the bargain" analysis.

Additionally, the First Circuit erroneously opined that the Respondents would have suffered prejudice and hardship with the damages evidence, ignoring the record of the case as to Respondents' knowledge related to damages: 1) the Answer to the Complaint where the Respondents admitted that they received a payment from CSILO for an amount that exceeds one hundred thirty-five thousand dollars ($135,000.00), 2) the Answer to the Complaint where the Respondents admitted that they spent approximately forty-six thousand dollars ($46,000.00) to reapply the Wetsuit® product, 3) the Answer to the Complaint where the Respondents' admission of forty-six thousand dollars ($46,000.00) to replace defective Wetsuit® product inferred that CSILO received a value of approximately eighty-nine thousand dollars ($89,000.00), and 4) the Trial where the Respondents testified and admitted in Court that they used fourteen (14) drums of the Wetsuit® product to try to cure the deficient

product and the sum amount of fourteen (14) drums of the Wetsuit® product equals between forty to fifty thousand dollars ($40,000.00-$50,000.00). App. 28-34, 42-43.

Unsatisfied with the manifest injustice for the Government, CSILO filed a timely Petition for Rehearing on June 29th, 2020. The First Circuit denied the Petition for Rehearing on July 7th, 2020. App. 23.

This Petition for Certiorari follows.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari for three reasons. First, there exists a circuit split on the question as to whether the Courts should allow gross trebling damages or if the Courts should allow net trebling damages. Second, this Court should settle the important FCA question as whether Courts should apply the "benefit of the bargain" analysis or the "tainted claim theory" on intangible benefits that are difficult to calculate. Third, this Court should reverse the First Circuit and District Court decisions to exclude the treble damages at trial because the Respondents suffered no prejudice or surprise whatsoever when they opened the door and admitted in trial that they had knowledge of the treble damages evidence.

I. The Court should grant Certiorari because there exists a circuit split on the question as to whether the Courts should allow gross trebling damages or if the Courts should allow net trebling damages under the FCA.

The FCA states that a violator of the FCA should pay "three (3) times the amount of damages which the Government sustains because of the act of the person."

31 U.S.C. sec. 3729 (a) (1). Unfortunately, said statute does not specify how to calculate damages. This has led to a Circuit split as to whether Courts should calculate damages based on gross treble damages or net treble damages.

The gross trebling damages approach occurs when a Court trebles the amounts paid by the government first, then it subtracts any value received by the government. Under gross trebling, courts calculate damages based on the total amount paid by the government because of the violation. Courts do not subtract the benefits the government may have received until after the damage amount has been tripled. Paden M. Hansen, *True Damages for False Claims: Why Gross Trebling Should be Adopted,* 104 Iowa L. Rev. 2093, 2100 (May 2019).

This gross trebling damages approach is the one that has been followed by the Ninth Circuit in the case of *United States v. Eghbal,* 548 F.3d 1281 (9th Cir. 2008), which accepted gross trebling to determine damages. Said decision was based on *USA v. Bornstein,* 423 U.S. 303 (1976), where the Supreme Court explained that when deducting the "bargain" received from a defendant, a court must begin with the already doubled (and now tripled) amount. *USA v. Bornstein, supra,* 314. The Ninth Circuit in *Eghbal* noted that the FCA speaks of multiplying damages and does not expressly state "net damages" or "uncompensated damages". *United States v. Eghbal, supra,* 1285.

Gross trebling is argued under a "tainted claim" theory. Under the tainted claim theory, contracts made in violation of the FCA are tainted by fraudulent activity and are therefore worthless. As a result, the government's actual damage is

the value of the whole contract. Tainted claim theory argues that gross trebling is appropriate, because had the government known a claim was false, it would not have paid it. In benefit of the bargain terms, when courts subtract the benefit conferred by the offending party to the government as part of the benefit of the bargain analysis, nothing should be subtracted because the value of rendered services is zero. Paden M. Hansen, *True Damages for False Claims: Why Gross Trebling Should be Adopted,* 104 Iowa L. Rev. 2093, 2100-2101 (May 2019) (citing Robert T. Rhoad et al., *Tainted Love - Plaintiffs' Increasing Reliance on the "Tainted Claim' Theory of Damages,* 58 Gov't Contractor 1, 2 (May 11, 2016)).

The net trebling damages approach occurs when a Court subtracts any amounts or value the government has received first. After subtracting the amount first, the result is then trebled. Under net treble damages, it is limited to the total amount expended less any benefit conferred by the violating party. Net trebling argues that violations of the FCA are more akin to contract violations and courts should thus remedy breaches in a similar manner. Traditional contract law suggests that damages are limited to actual loss, rather than the value of the entire contract. Unlike gross trebling, the relevant question is not whether the government would have entered into an agreement had it known of fraudulent activity, but rather whether the government gained the benefit it was seeking. Paden M. Hansen, *True Damages for False Claims: Why Gross Trebling Should be Adopted,* 104 Iowa L. Rev. 2093, 2101 (May 2019) (citing Nicole Henning et al., *Keeping the False Claims Act Civil: Why FCA Damages Should Be Based on the Government's Actual Losses,* 22

Westlaw J. Health Care Fraud 3, 4 (2016) and Restatement (Second) of Contracts § 347 (Am. Law Inst. 1981)).

This net trebling damages approach is followed by the Second, Sixth, Seventh and D.C. Circuits in the cases of *United States ex rel Feldman v. van Gorp,* 697 F.3d 78 (2nd Cir. 2012), *United States v. United Techs. Corp.*, 626 F.3d 313, (6th Cir. 2010), *United States v. Anchor Mortg. Corp.*, 711 F.3d 745 (7th Cir. 2013) and *United States v. Sci. Applications Int'l Corp.*, 626 F.3d 1257 (D.C. Cir. 2010)).

The question as to whether courts should use gross treble damages or net treble damages would seem to be resolved by the case of USA *v. Bornstein, supra,* 314. However, as this Court can see, the net treble damages approach that has been followed by the Second, Sixth, Seventh and D.C. Circuits mentioned above reveals a circuit split that should be settled.

In the case at bar, if the District Court would have allowed gross treble damages as CSILO requested, it would multiply by three the original Contract Price of one hundred thirty-five thousand dollars ($135,000.00), which would equal to four hundred and five thousand dollars ($405,000.00) as gross treble damages.

If the District Court considered that it should deduct the value received from the gross treble damages un the "benefit of the bargain" analysis[3], then the Court should have taken into consideration the admissions of the Respondents in their Answer to the Complaint and in their trial testimony. First, Respondents admitted in their Answer to the Complaint that they spent forty-six thousand dollars

[3] CSILO respectfully rejects the "benefit of the bargain" analysis because it requests this Court to apply the "tainted claim" theory described further below.

($46,000.00) in reapplying the Wetsuit® product after CSILO requests it to honor the fifteen (15) year manufacturer warranty. Second, Respondents corroborated their Answer to the Complaint when Garcia testified that Respondents used fourteen (14) drums of the Wetsuit® product, which equals between forty to fifty thousand dollars ($40,000.00-$50,000.00). App. 28-34, 42-43.

As such, Respondents' admission that forty-six thousand dollars ($46,000.00) were spent to replace the deficient Wetsuit® product would mean that CSILO received a value of approximately eighty-nine thousand dollars ($89,000.00). This value received would be the result of subtracting the forty-six thousand dollars ($46,000.00) of deficient product from the one hundred thirty-five thousand dollars ($135,000.00) Contract Price.

Therefore, under the gross treble damages approach, the Court would have to subtract eighty-nine thousand dollars ($89,000.00) from the gross treble damages of four hundred and five thousand dollars ($405,000.00). The result would be that the gross trebles damages, after subtracting the value received, would be three hundred sixteen thousand dollars ($316,000.00).

In the alternative, if the District Court would have ordered net treble damages, it would subtract the original Contract Price of one hundred thirty-five thousand dollars ($135,000.00), with the value received of approximately eighty-nine thousand dollars ($89,000.00), which would give you the result of forty-six thousand dollars ($46,000.00). Therefore, under the net treble damages approach, the Court would then multiply by three the sum of forty-six thousand dollars ($46,000.00) which

would equal to one hundred thirty-eight thousand dollars ($138,000.00), as net treble damages.

In conclusion, this Court should grant Certiorari to clarify and settle the circuit split on the question as to whether the Courts should allow gross trebling damages or if the Courts should allow net trebling damages under the FCA. CSILO respectfully requests this Court to allow CSILO to claim gross treble damages under the FCA.

II. The Court should grant Certiorari because the Court should settle the important FCA question as to whether Courts should apply the "benefit of the bargain" analysis or "tainted claim theory" on intangible benefits that are difficult to calculate.

The FCA states that a violator of the FCA should pay "three (3) times the amount of damages which the Government sustains because of the act of the person." 31 U.S.C. sec. 3729 (a) (1). Because the statute does not specify how to calculate damages, the Courts do not have a proper framework to follow in order to measure damages. Specifically, this Court should settle the important FCA question regarding whether Courts should apply the "benefit of the bargain" analysis or "tainted claim theory" on intangible benefits that are difficult to calculate.

The FCA allows the Courts to take liberal measures with regards to damages under the FCA. Specifically, the FCA does not specify how damages are to be calculated. *US ex rel Feldman v. Van Gorp*, 697 F.3d 78. At 87. The Government needs to have only suffered the damage because of the violation of the FCA. 31 USC sec. 3729 (a) (1); see also the False Claims Act: Fraud Against the Government sec. 6:3.

The legislative history to the FCA explains why it offers no specific formula for damages:

> No single rule can be, or should be, stated for the determination of damages under the Act ... [T]he courts should remain free to fashion measures of damages on a case by case basis. The Committee intends that the courts should be guided only by the principles that the United States' damages should be liberally measured to effectuate the remedial purposes of the Act, and that the United States should be afforded a full and complete recovery of all its damages. S. Rep. No. 96-615, at 4 (1980) (reporting on S.1981, predecessor to S. 1562).

Since the commencement of this case, CSILO requested and sought the recovery of the full contract price as base for gross treble damages. CSILO alleged in its Complaint that Respondents were liable for gross treble damages equal to the sum amount of four hundred and five thousand dollars ($405,000.00), which was the sum amount equal three times original Contract Price of one hundred thirty-five thousand dollars ($135,000.00). CSILO's request for full gross treble damages is similar in spirit to the "tainted claim theory".

In *United States ex rel. Marcus v. Hess,* 317 US 537 (1943) the Supreme Court found that damages under the FCA are intended to "provide for restitution to the government of money taken from it by fraud. . . " *Id,* at 551-52. Trebling the damages and imposing penalties "was chosen to make sure that the government would be made completely whole." *Id,* at 551-52. The *Marcus* Court used a "but for" test in its analysis of FCA damages. In other words, a court should ask the question of, "How much would the government have paid for the item at issue 'but for' the fraudulent actions of the defendant?" This amount would be the proper measure of damages according

to the *Marcus* court. *Id.* at 551-52.

On the other hand, the Fifth Circuit has mentioned where there is no tangible benefit to the government and the intangible benefit is impossible to calculate, it is appropriate to value damages in the amount the government actually paid to the Defendants. *USA ex rel Longhi v. Lithium,* 575 F.3d 458, 473 (5th Cir. 2009). The Second and Seventh Circuits joined the Fifth Circuit's approach in that the government is entitled to damages equal to the full amount awarded to the defendants based on their false statements. *Feldman v. Van Gorp,* 697 F.3d 78, 87-88 (2nd Cir. 2012) and *USA v. Rogan*, 517 F.3d 449, 453 (7th Cir. 2008).

As explained before, gross trebling is argued under a "tainted claim" theory. Under the tainted claim theory, contracts made in violation of the FCA are tainted by fraudulent activity and are therefore worthless. As a result, the government's actual damage is the value of the whole contract. Tainted claim theory argues that gross trebling is appropriate, because had the government known a claim was false, it would not have paid it. In benefit of the bargain terms, when courts subtract the benefit conferred by the offending party to the government as part of the benefit of the bargain analysis, nothing should be subtracted because the value of rendered services is zero. Paden M. Hansen, *True Damages for False Claims: Why Gross Trebling Should be Adopted,* 104 Iowa L. Rev. 2093, 2100-2101 (May 2019) (citing Robert T. Rhoad et al., *Tainted Love - Plaintiffs' Increasing Reliance on the "Tainted Claim' Theory of Damages*, 58 Gov't Contractor 1, 2 (2016)).

The First Circuit erroneously understood that the District Court was bound by

the "benefit of the bargain" analysis and rejected CSILO's request for gross treble damages for the full contract price, regardless of the value received, in the spirit of the "tainted claim theory". The First Circuit erroneously affirmed the District Court's reasoning that the damages evidence should be excluded because CSILO did not specify any evidence as to the value received, in the spirit of the "benefit of the bargain" analysis.

The First Circuit erroneously opined that CSILO was not entitled for the full contract price as a base of damages because it understood that CSILO received a value. The First Circuit ignored that CSILO's request for the full contract price was based on the fact that CSILO entered into a Contract with Respondents because of their false representation of the existence of a fifteen (15) year manufacturer warranty. This fifteen (15) year manufacturer warranty is an intangible benefit that is difficult to calculate.

In this case, CSILO proved to the Court that it justifiably relied and was substantially motivated to pay the Contract Price of one hundred thirty-five thousand dollars ($135,000.00) based on the Respondents' false representations that it would extend a fifteen (15) year manufacturer warranty for the Wetsuit® waterproofing product pursuant to manufacturer specifications and instructions. However, unbeknownst to CSILO, Respondent did not comply with his obligations to complete the steps, specifications and instructions as required by the Wetsuit® Manufacturer in order be able to extend a fifteen (15) year manufacturer warranty. Therefore, CSILO suffered the total amount of one hundred thirty-five thousand dollars

($135,000.00) because of Respondents' false representation as to the existence of the fifteen (15) year manufacturer warranty. In other words, CSILO would not have acted and paid one hundred thirty-five thousand dollars ($135,000.00) had CSILO known that Respondents did not comply with the manufacturer specifications and instructions to be able to extend the fifteen (15) year manufacturer warranty.

Based on the "tainted claim" theory, the First Circuit and the District Court should have determined that CSILO was entitled to the complete gross treble damages of four hundred and five thousand dollars ($405,000.00). CSILO is entitled to the complete gross treble damages of four hundred and five thousand dollars ($405,000.00) because Respondents violated the FCA when it made false representations that they are able to extend a fifteen (15) year manufacturer warranty when they could not. The fifteen (15) year manufacturer warranty is an intangible benefit that is difficult to calculate. Notwithstanding, the Contract executed between CSILO and Respondents is tainted by fraudulent activity and is therefore worthless. As a result of Respondents' violation of the FCA, by extending a false representation of a worthless fifteen (15) year manufacturer warranty, the Government's actual damage is the value of the whole contract of one hundred thirty-five thousand dollars ($135,000.00).

CSILO's request for the complete gross treble damages of four hundred and five thousand dollars ($405,000.00) is appropriate under the tainted claim theory, because had CSILO known that Respondents' fifteen (15) year manufacturer warranty claim was false, CSILO would not have paid it. Therefore, even if the First

Circuit or District Court would even consider to subtract the benefit conferred by the offending party to the government, of the amount of eighty-nine thousand dollars ($89,000.00), as part of the benefit of the bargain analysis, CSILO maintains that nothing should be subtracted because the value of the fifteen (15) year manufacturer warranty is actually zero. Paden M. Hansen, *True Damages for False Claims: Why Gross Trebling Should be Adopted*, 104 Iowa L. Rev. 2093, 2100-2101 (May 2019) (citing Robert T. Rhoad et al., *Tainted Love - Plaintiffs' Increasing Reliance on the "Tainted Claim' Theory of Damages*, 58 Gov't Contractor 1, 2 (2016)).

In conclusion, this Court should grant Certiorari to settle the important FCA question as to whether Courts should apply the "benefit of the bargain" analysis or "tainted claim theory" on intangible benefits that are difficult to calculate.

III. The Court should grant Certiorari the lower courts erroneously excluded the damages evidence when the Respondents suffered no prejudice or surprise when they admitted that they had knowledge of the damages evidence.

CSILO respectfully requests this Court to grant Certiorari to not only clarify the circuit split regarding gross vs net treble damages and to settle an important FCA matter concerning "benefit of the bargain" analysis vs "tainted claim theory", but to also reverse the lower courts erroneous decisions that precluded the Government from being made whole. This request is being made to prevent manifest injustice.

An appellate court reviews the denial of a motion to amend a pretrial order for an abuse of discretion. *Koch v. Koch Indus., Inc.,* 203 F.3d 1202 at 1222 (10th Cir.

2000). A district court can abuse its discretion when it "bases its ruling on an erroneous conclusion of law," *Kiowa Indian Tribe v. Hoover*, 150 F.3d 1163, 1165 (10th Cir. 1998), or "fails to consider the applicable legal standard," *Ohlander v. Larson*, 114 F.3d 1531, 1537 (10th Cir. 1997).

The lower courts erred by not allowing CSILO to request the full contract price and gross treble damages without any deduction. The lower courts excluded CSILO's request because they understood that CSILO did not provide evidence as to the value received in order to properly apply the "benefit of the bargain" approach.

However, the lower courts erred because these legal matters concerning gross vs net treble damages and the "benefit of the bargain" analysis vs "tainted claim theory" has not been settled and clarified by this Court. Both the circuit split concerning gross vs net treble damages and the unsettled important FCA matter concerning the "benefit of the bargain" analysis vs "tainted claim theory", demonstrates that the lower courts precluded CSILO's requests because they applied Respondents' net treble damages and "benefit of the bargain" analysis alone. The lower courts did not provide CSILO the opportunity to demonstrate the gross treble damages and "tainted claim theory" analysis. The lower courts tied themselves to one analysis and stripped CSILO's due process by not allowing CSILO to prove their case under the gross treble damages and "tainted claim theory" analysis.

If the lower courts would have allowed CSILO to present their request for gross treble damages and "tainted claim theory" analysis as part of the due process, then the lower courts would have likely considered that Respondents had knowledge of

CSILO's damages request since the inception. Therefore, the lower courts refusal to allow CSILO's due process to present their case under the gross treble damages and "tainted claim theory" analysis was the main reason why they excluded the damages sought, damages that have been requested by CSILO since the inception of the case.

Notwithstanding the above, the lower courts erroneously opined that the Respondents suffered prejudice and hardship with the damages evidence, because they understood that CSILO did not provide evidence as to the value received pursuant to the "benefit of the bargain" analysis.

Courts have permitted changes to pretrial orders where such an amendment would result in no surprise and it was supported by the evidence already in the record. *McAlister-Jones v. Foote,* 720 F. App'x 971, 974-975 (11th Cir. 2017) (affirming a district court's allowance of plaintiff's amendment to the pretrial order to include a claim for future lost wages, finding that the defendant would not have suffered substantial harm because he should have been aware of plaintiff's claim for future lost wages); *Bennett v. Emerson Elec. Co.,* 64 F. App'x 708, 718-719 (10th Cir. 2003) (affirming the district court's allowance of plaintiff's amendment to the original pretrial order the day before trial to seek additional damages, finding that the additional damages amount had been part of the discovery exchanged between the parties, had been alleged in plaintiff's expert report, and addressed in the expert's deposition).

As explained above, CSILO's request to amend the Joint PT Report would not have resulted in any surprise or prejudice to Respondents. The lower courts

completely ignored the record of the case as to Respondents' knowledge related to damages and the value received: 1) the Answer to the Complaint where the Respondents admitted that they received a payment from CSILO for an amount that exceeds one hundred thirty-five thousand dollars ($135,000.00), 2) the Answer to the Complaint where the Respondents admitted that they spent approximately forty-six thousand dollars ($46,000.00) to reapply the Wetsuit® product, 3) the Answer to the Complaint where the Respondents' admission of forty-six thousand dollars ($46,000.00) to replace defective Wetsuit® product inferred that CSILO received a value of approximately eighty-nine thousand dollars ($89,000.00), and 4) the Trial where the Respondents testified and admitted in Court that they used fourteen (14) drums of the Wetsuit® product to try to cure the deficient product and the sum amount of fourteen (14) drums of the Wetsuit® product equals between forty to fifty thousand dollars ($40,000.00-$50,000.00). App. 28-34, 42-43.

In conclusion, this Court should grant Certiorari and reverse the lower courts decisions to exclude the damages evidence. The lower courts abused their discretion because they based their rulings on erroneous conclusions of law. These erroneous conclusions of law occurred because there exists a circuit split regarding gross vs net treble damages and there is an unsettled an important FCA matter concerning "benefit of the bargain" analysis vs "tainted claim theory" analysis. CSILO respectfully requests this Court to instruct the lower courts that they should provide CSILO the due process and opportunity to request their damages under the gross treble damages and "tainted claim theory" analysis, thereby allowing the introduction

of the damages evidence that Respondent already had knowledge as demonstrated in the record of the case.

CONCLUSION

Based on the above, CSILO respectfully requests this Court to grant the petition for certiorari.

RESPECTFULLY SUBMITTED, in San Juan, Puerto Rico, this 2nd of December, 2020.

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