



**U.S. Department of Justice**

*United States Attorney  
Southern District of New York*

*86 Chambers Street  
New York, New York 10007*

October 17, 2022

**BY ECF**

Hon. Katherine Polk Failla  
United States Courthouse  
40 Foley Square  
New York, NY 10007

**MEMO ENDORSED**

Re: United States ex rel. GNGH2 Inc. v. SINTX Technologies, Inc.  
22 Civ. 2529 (KPF)

Dear Judge Failla:

This Office represents the United States of America (the “Government”) in the above-referenced *qui tam* action filed pursuant to the False Claims Act (the “FCA”). The Government writes respectfully in response to relator’s October 4, 2022 letter requesting a pre-motion conference concerning its anticipated motion seeking a share of defendant’s repayment of its PPP loan. (Dkt. No. 7.) Relator argues that this repayment constitutes an “alternative remedy” under 31 U.S.C. § 3730(c)(5). Relator’s contemplated motion is without merit. The motion is premature because the *qui tam* lawsuit is still pending and there has been no finding that defendant is liable under the FCA. Absent a valid FCA claim, the relator has no right to seek any recovery in this action, including a share of the loan repayment, which was not based on, and did not resolve or release any, FCA or other fraud-related claim.

*The Qui Tam Lawsuit and the Government’s Decision Not to Intervene.* The *qui tam* complaint alleges that defendant SINTX Technologies, Inc. (“SINTX”), a Utah-based company, improperly obtained a second-draw PPP loan by falsely certifying on its loan application that it was “not an issuer, the securities of which are listed on an exchange registered under section 6 of the Securities Exchange Act of 1934 (15 U.S.C. 78f).” A representative of the loan applicant was required to put their initials next to this representation as well as other certifications related to loan eligibility. Publicly-traded companies were ineligible for second-draw PPP loans, although that was not the case for first-draw PPP loans. Relator, an entity created by counsel for purposes of bringing this and several other PPP fraud *qui tam* cases, bases the claims in this lawsuit on publicly-available data regarding the recipients of PPP loans.

After receiving the *qui tam* complaint, the Government conducted an inquiry and confirmed that SINTX is a publicly-traded company and was thus ineligible for the second-draw PPP loan, which had previously been forgiven. However, SINTX explicitly indicated on the PPP loan application that it was a “publicly traded company,” despite later placing initials next to all

the required eligibility certifications, including the one indicating that the company was not an issuer of securities listed on a national stock exchange. The Government contacted SINTX and the company repaid a total of \$527,944.05, which consisted of the PPP loan amount plus interest and the loan processing fee the SBA paid to the lender. The payment was not related to any administrative proceeding initiated by the Government, and the Government did not agree that the payment would resolve or result in the release of any FCA or other fraud-related claim.

On August 31, 2022, the Government declined to intervene in the *qui tam* action based on its views of the merits of the FCA claim. (Dkt. No. 6.) The Government informed relator of the reasons for the declination, and counsel for the Government is prepared to provide the Court with its reasons *in camera*. On September 1, 2022, the Court issued an Order directing that the Complaint be unsealed and authorizing relator to serve the Complaint. The relator has not served the Complaint or taken any other steps to pursue its FCA claims.

*The FCA's Relator Share and Alternative Remedy Provisions.* A qualified relator in a successful *qui tam* suit is entitled to a share of the proceeds (if any) of the suit or settlement of the claims. *Id.* 31 U.S.C. § 3730(d). Here, relator concedes that any share should be capped at ten percent of the repayment under section 3730(d)(1), presumably because the claims were based primarily on the public disclosure of PPP loan data. (Dkt. No. 7 at 3.)

The FCA recognizes the Government's authority to pursue other remedies for fraud even after a relator has filed a *qui tam* suit. The alternate remedy provision of the FCA states that "the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty." 31 U.S.C. § 3730(c)(5). Congress enacted this provision to afford the United States flexibility in choosing the forum in which it pursues its claims against persons who defraud the Government. *See* S. Rep. No. 99-345, at 27 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5292. The provision authorizes the Government to pursue its fraud claims against defendants administratively rather than through a relator's *qui tam* suit, and specifies that, if the Government elects to pursue an alternate remedy, the relator "shall have the same rights in such proceeding as such person would have had if the action had continued under this section." 31 U.S.C. § 3730(c)(5). However, as the D.C. Circuit recently cautioned, "the alternative remedial proceedings from which a relator can recover a share must redress the same type of falsity and fraud claims that otherwise could be pursued by a private relator's *qui tam* lawsuit under the [FCA]." *United States v. Novo A/S*, 5 F.4th 47, 56 (D.C. Cir. 2021).

*Relator Is Not Entitled to a Relator's Share Absent a Valid FCA Claim.* Relator's contemplated motion for a share under the FCA's alternate remedy provision is meritless because, first, it is premature. The *qui tam* lawsuit is still pending, and the defendant has not been found liable under the FCA. Indeed, it is unclear if relator even intends to pursue the FCA claims in the Complaint. A relator may recover from an alternate remedy only if the relator has a valid *qui tam* action, which is a question still to be resolved in this lawsuit. *See, e.g., United States ex rel. Hefner v. Hackensack Univ. Med. Cent.*, 495 F.3d 103, 112 (3d Cir. 2007) ("a valid *qui tam* action is a prerequisite to a relator's right to recover"). As one court stated when finding that it was premature to determine relator's entitlement to an alternative remedy:

The Court interprets the FCA to require a *qui tam* plaintiff to state a valid *qui tam* claim before the relator may claim any right to a share of an alternate remedy. . . . Where a relator lacks a valid *qui tam* claim on which the government or the relator could proceed, the relator lacks any rights to a recovery in that action. In turn, because the relator lacks any right to recovery in the original action, the relator has no right to recovery that would also apply to an alternate remedy.

*United States ex rel. Lee v. Northern Adult Daily Health Care Center*, 174 F. Supp.3d 696, 703 (E.D.N.Y. 2016).

In other words, before relator may recover a share of any proceeds received by the Government, the Court must determine whether relator has established by a preponderance of the evidence that the defendant defrauded the United States in violation of the FCA. If relator’s suit were to succeed, the Court must then assess the total penalties and damages that may be recovered from the defendant, *see* 31 U.S.C. § 3729(a). The Court must finally determine relator’s share of any recovery, to be paid out of the proceeds of the action, based on what “the court decides is reasonable.” *Id.* § 3730(d)(2). Only after the Court resolves those questions and enters final judgment for relator will relator’s entitlement to a share of the FCA judgment—and if applicable, any alternate remedy—be established. Relator’s attempt to claim a share now would short-circuit the process mandated by Congress for establishing liability under the FCA and calculating any share to which it may later be entitled. To date, defendant has only repaid a government loan that it was ineligible to receive. The repayment did not resolve or address the fraud claim that relator has asserted and thus is not “alternative remedy” under the FCA.

*Relator’s Qui Tam Action Is Likely Subject to Public Disclosure Bar.* Separately, relator’s action is likely subject to dismissal pursuant to the FCA’s public disclosure bar which prohibits relators from bringing FCA claims when “substantially the same” conduct alleged has already been “publicly disclosed.”<sup>1</sup> Here, the core allegations—SINTX is a publicly-traded company that received a second-draw PPP loan—were publicly disclosed by SYNTAX itself in a Form 8-K filing with the SEC. (available at <https://www.sec.gov/Archives/edgar/data/1269026/000149315221006440/form8-k.htm>) A disclosure in an SEC filing is sufficient to trigger the public disclosure bar. *See United States ex rel. CKD Project, LLC v. Fresenius Med. Care Holdings, Inc.*, 551 F. Supp.3d 27, 32-33 (E.D.N.Y. 2021). Furthermore, relator is not an original source as it has no independent knowledge of the information alleged in its Complaint. *See* 31 U.S.C. § 3730(e)(4)(B) (defining “original source”). If relator’s FCA claim is subject to the public disclosure bar, relator has no right to a share of any recovery. *See United States ex rel. Amico v. Deutsche Bank AG*, No. 15 Civ. 9551 (CM), 2017 WL 2266988, at \*5 (S.D.N.Y. May 9, 2017) (denying relator’s alternative remedy claim for a share based on applicability of public disclosure bar). In addition, SYNTAX’s prompt public disclosure of the second-draw PPP loan may also undermine relator’s claim that defendant acted with the scienter required under the FCA.

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<sup>1</sup> *See* 31 U.S.C. § 3730(e)(4) (the court must dismiss a relator’s FCA action “if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed—(i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party; (ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or (iii) from the news media,” unless the relator is “an original source of the information”).

Respectfully submitted,

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The Court is in receipt of the Relator's letter motion for an alternative remedy pursuant to 31 U.S.C. § 3730(c)(5), a relator share pursuant to 31 U.S.C. § 3730(d)(1), and a pre-motion conference regarding same dated October 4, 2022 (Dkt. # 7), and the above response from the Government dated October 17, 2022 (Dkt. # 8). Relator's motion is DENIED without prejudice on the basis that this motion is premature while the *qui tam* lawsuit is still pending.

The Clerk of Court is directed to terminate the pending motion at docket number 7.

Dated: October 18, 2022  
New York, New York

SO ORDERED.



HON. KATHERINE POLK FAILLA  
UNITED STATES DISTRICT JUDGE