No. 16-1398

IN THE

Supreme Court of the United States

VICTAULIC CO.,

Petitioner,

v.

UNITED STATES *EX REL.* CUSTOMS FRAUD INVESTIGATIONS, LLC,

Respondent.

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

RESPONDENT'S SUPPLEMENTAL BRIEF

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RULE 29.6 STATEMENT

Respondent Customs Fraud Investigations, LLC, does not have a parent corporation, and no publicly held corporation owns 10% or more of Customs Fraud Investigations' stock.

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INTRODUCTION

Respondent Customs Fraud Investigations, LLC (CFI) submits this supplemental brief under Rule 15.8 to apprise the Court of the decision of the United States Court of Appeals for the Second Circuit in *United States ex rel. Chorches v. American Medical Response, Inc.*, No. 15-3930, 2017 WL 3180616 (2d Cir. July 27, 2017), decided after submission of the brief in opposition in this case.

In its petition for certiorari, Victaulic Co. referred to the pendency of *Chorches* (then known as *Fabula*) and predicted that the Second Circuit was "likely" to use it to adopt the "strict" view that Federal Rule of Civil Procedure 9(b) requires a complaint in a False Claims Act (FCA) case to identify examples of "actual false claims" submitted to the government. Pet. 18. The Second Circuit's opinion in *Chorches* in fact *rejects* such a requirement and, in the process, explains that the conflict among the circuits on which Victaulic seeks to premise its petition does not exist.

ARGUMENT

In *Chorches*, an FCA plaintiff claimed that the defendant, an ambulance company, had made fraudulent claims for Medicare reimbursement based on false certification that the use of ambulance services to transport specific patients was medically necessary. The plaintiff claimed that the scheme violated 31 U.S.C. §§ 3729(a)(1)(A) and (B), both of which require proof of the submission of false claims for government payments. The complaint alleged substantial details of the defendant's scheme to falsely certify ambulance runs as medically necessary, but did not provide specific examples of actual claims for payment submitted

to the government, as that information was exclusively within the defendant's control. The district court dismissed the complaint on the ground that the absence of specific examples of false claims meant that the complaint failed to plead fraud with the particularity required by Rule 9(b). *Chorches*, 2017 WL 3180616, at *1–3.

The Second Circuit unanimously reversed. The court held that the complaint satisfied Rule 9(b) because it "adduce[d] specific facts supporting a strong inference of fraud," *id.* at *6 (citation omitted)—the same standard applied by the Third Circuit in this case. *See* Pet. App. 29a–30a. The court specifically rejected the argument that pleading examples of specific false claims was essential to support the required strong inference. *See Chorches*, 2017 WL 3180616, at *10–12.

In so holding, the Second Circuit addressed, and rejected, the argument Victaulic makes in its petition: that there is a conflict among the circuits over whether an FCA complaint claiming violations of § 3729(a)(1)(A) or (B) must always identify specific examples of false claims to satisfy Rule 9(b). As the Second Circuit put it, "the reports of a circuit split are, like those prematurely reporting Mark Twain's death, 'greatly exaggerated.'" *Id.* at *12. Rather, the court explained, there is an "[e]merging [c]onsensus" among the circuits around a "case-by-case approach" that does not require identification of examples of false claims if the specific facts pleaded by a plaintiff otherwise support the required strong inference of fraud. *Id*.

The Second Circuit backed up this view with a detailed analysis of the case law in the various circuits,

including the cases addressed at pages 17–18 of CFI's brief in opposition. As the court explained, despite "broad pronouncements in early cases," *id.*, the decisions of the circuits that supposedly take the "strict" view of Rule 9(b) touted by Victaulic "are in fact more nuanced," *id.* at *13, and have not required FCA plaintiffs to plead specific examples of false claims where their specific allegations otherwise give rise to a strong inference of fraud. *See id.* at *13–15. The court added its endorsement to the Sixth Circuit's recognition in *United States ex rel. Prather v. Brookdale Senior Living Communities, Inc.*, 838 F.3d 750 (6th Cir. 2016), that "[e]very circuit" that purportedly applies a stricter standard "has retreated from such a requirement in cases in which other detailed factual allegations support a strong inference that claims were submitted." *Id.* at 772; *see Chorches*, 2017 WL 3180616, at *13; Br. in Opp. 3.

As explained in CFI's brief in opposition, at 13–15, the intercircuit conflict claimed by Victaulic is in any event irrelevant here: This case is a "reverse" FCA action under 31 U.S.C. § 3729(a)(1)(G), which does not involve the submission of false claims to the government and therefore cannot possibly be subject to a "strict" rule requiring pleading of examples of such false claims. *Chorches*, however, underscores that the claimed circuit-split—which constitutes the sole basis for Victaulic's assertion that the Rule 9(b) issue in this case merits review—is not only irrelevant but nonexistent.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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