NO. 12-7133

ORAL ARGUMENT SCHEDULED FOR NOVEMBER 26, 2013

In The
United States Court of Appeals
For The District of Columbia Circuit

**UNITED STATES OF AMERICA,
EX REL. STEPHEN M. SHEA,**

Plaintiff – Appellant,

v.

CELLCO PARTNERSHIP, doing business as Verizon Wireless; VERIZON BUSINESS NETWORK SERVICES, INC.; VERIZON FEDERAL INC.; MCI COMMUNICATIONS SERVICES, INC., doing business as Verizon Business Services,

Defendants – Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF OF APPELLANT

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REBUTTAL STATEMENT OF FACTS[1]

As a consultant for large commercial customers, Relator Stephen M. Shea recovered over $50 million in overcharges from telecommunications carriers. Shea's first *qui tam* lawsuit, *Verizon I*, recovered $93.5 million in overcharges on the only two Government contracts at issue in that suit. As the district court noted in awarding Shea an enhanced relator's share, "it is certainly more likely that without this lawsuit, Verizon would have continued to overcharge the United States indefinitely, i.e., as long as it could get away with it."[2] Despite its record of overcharging commercial and Government customers, and a history of the Government not realizing it was being overcharged,[3] Verizon characterizes Shea's second False Claims Act suit, alleging overcharges on 20 additional Government contracts, as "parasitic."[4]

Verizon also belittles Shea's intimate knowledge of the billing tactics Verizon uses to overcharge its customers. Verizon characterizes Shea's expertise

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[1] In support of its public disclosure bar argument, Verizon's brief includes a statement of facts quoting and purporting to summarize portions of Relator's deposition, which the district court allowed pending resolution of the motion to dismiss. If this Court considers Verizon's statement of facts, Relator offers this rebuttal. *See also*, Relator's Opposition to Verizon's Motion to Dismiss, pp. 5-8 [Dkt. 54]

[2] *United States ex rel. Shea v. Verizon Communications, Inc.*, 844 F. Supp. 2d 78, 82 (D.D.C. 2012).

[3] *Id.*, 844 F. Supp. 2d at 91 (GSA in possession of documents showing that it was being overcharged, but took no action until Shea explained the fraud).

[4] Verizon Br. at 1.

as mere guesswork based on internet searches.[5] As the district court noted in *Verizon I*, the argument that Shea was not an insider, and that he could only offer assumptions, "is a profoundly unfair characterization of the nature, and extent of the expertise, experience, knowledge, and just plain hard work that Shea, and his lawyers, contributed to this litigation."[6]

Indeed, Shea became so familiar with Verizon's billing practices that Verizon asked his consulting company, TechCaliber, to train Verizon's employees. Shea testified that Verizon employees would ask him, "you know more about some of our billing stuff than we do, can you train us on how you do this? Or can you train our sales force how to better respond to our RFPs?"[7]

The Second Amended Complaint alleges that Shea, through his extensive consulting experience, learned that:

> most telecommunication carriers, including Worldcom, later named MCI Communications Corp., acquired by Verizon in 2006 (collectively "MCI/Verizon"), had a custom and practice of charging "Federal, State and local taxes," "fees," "surcharges," "tax-like surcharges" (and similar names), state and local 911 charges, state service universal service funds, public utility commission fees, Federal Regulatory Fees/Common Carrier Recovery Charges ("CCRC"), Federal Universal Service Charges, ad valorem/property taxes, and business, occupational, and franchise taxes. Carriers then used misleading language to conceal these overcharges from their commercial customers. Shea also learned that surcharges passed on to the carriers' customers frequently had no correlation with the

[5] Verizon Br. at 2-3, 11-12.
[6] 844 F. Supp. 2d at 90.
[7] Shea Deposition, 17:7-21, J.A. 80.

> surcharges levied on the carriers. Shea found that sophisticated commercial customers did not realize they were being overbilled and recovered over $50 million for commercial customers due to his expertise in identifying overcharging.[8]

Based on Shea's direct and independent knowledge of improper billing practices, he discovered that Verizon/MCI overcharged the United States, just like its commercial customers. In 2004, Shea received an MCI document indicating that the company was charging the Government the same illegal surcharges it was charging commercial customers. He immediately recognized that MCI was creating "very small and minute" charges to recover its costs of doing business from its customer, and then telling the customers it was "taxes."[9]

Shea testified that he learned through his consulting practice that it was difficult for Verizon/MCI to turn off these surcharges – and that the surcharges were levied on all customers: "But what we were being told by the tax department is, yeah, that tax module, that's not customer specific, it's -- that just kind of tacks on and we don't waive the crap for anybody. We just -- it just does its thing."[10] As Shea alleged in the Second Amended Complaint: "A former Verizon employee, who worked at the company for over 30 years and retired as a manager, senior staff consultant, confirmed that Verizon did not have a separate billing system for federal customers and commercial customers, and that Verizon's billing system did

[8] Second Amended Complaint ("SAC") ¶ 3, J.A. 54.
[9] Shea Deposition, pp. 86-89, J.A. 98.
[10] Shea Deposition, 199:2-6, J.A. 126.

not have the capability to turn off the surcharges that were generally charged to all customers."[11]

As part of his investigation, Shea also reviewed an individual invoice issued to a Government employee under Verizon's Contract No.GS-35F-0119P with GSA.[12] Shea recalls that the invoice confirmed that Verizon was billing a Federal Universal Service Charge and a Regulatory Charge.[13] The Second Amended Complaint quotes extensively from the modifications to Contract No.GS-35F-0119P and alleges:

> Verizon's careful wordsmithing in the above modifications indicates that Verizon knew that FUSC, Regulatory charges, and similar surcharges were not allowable charges under the contract. Instead of filing a request for an economic price adjustment, which would have required full disclosure of these charges and would have allowed the government to deny the request, Verizon pursued a strategy of "bill, but don't ask." In an effort to provide some legal cover, Verizon filed its confusing and misleading modifications.[14]

Based on the above information, Shea reasonably inferred that Verizon was charging these illegal surcharges to United States. Shea also searched the internet

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[11]SAC ¶ 27, J.A. 59. Relator's counsel inartfully said "billing system," when they should have said "taxing module."

[12] Shea Deposition, 126:21 – 137:15, J.A. 108-110.

[13] Shea Deposition, 133:18-134:4, J.A. 109-110.

[14] SAC, ¶¶ 31-41, J.A. 62-66.Verizon completely mischaracterizes Shea's testimony when it claims that Shea "conceded" that the modifications permitted these illegal surcharges. Verizon Br. 48, n. 15. Shea conceded nothing. He only said: "Q Are you aware of any language that says that those two charges are disallowed? A Using the word 'disallowed,' no." Shea Deposition, 135:21-136:1, J.A. 110. In fact, the modifications do not "permit" these surcharges.

and found chunks of contracts and modifications with misleading language that confirmed his suspicions of fraud.[15]

Shea has already recovered over $93.5 million in overcharges for the Government. Shea has direct and personal knowledge that Verizon's billing generated overcharges on all of its contracts, not just the two contracts at issue in *Verizon I*, and that Verizon used the same practices to overcharge the Government on the 20 contracts alleged in *Verizon II*.

SUMMARY OF THE ARGUMENT

If the first-to-file bar applies, dismissal should be without prejudice. Verizon's argument that "pending" in the first-to-file bar is merely short hand for an earlier-filed action renders "pending" superfluous and contradicts every Court of Appeals that has considered the issue. Further, the first-to-file rule does not bar this case. *First*, *Verizon I* was not pending when Shea filed his Second Amended Complaint. This Court should consider the facts that existed when Shea filed his Second Amended Complaint, not when Shea filed his original complaint. *Second*, the first-to-file bar does not apply to the same relator. Congress intended the first-to-file bar to apply to other relators, not the original relator. *Third*, *Verizon I* and *II* are unrelated because the identity of each contract at issue is a material element of

[15] SAC, ¶¶ 29-41, J.A. 61-66.

fraud under the FCA, and the 20 contracts at issue in *Verizon II* were not at issue in *Verizon I*.

Lastly, this Court should not consider Verizon's arguments based on the public disclosure bar and F.R.C.P. 9(b) because the district court did not address either argument. If this Court considers these arguments, then neither requires dismissal: (1) the fraud alleged in *Verizon II* was not publicly disclosed and, regardless, Shea is an original source; and (2) the allegations in *Verizon II* satisfy the primary purpose of Rule 9(b) by providing Verizon with sufficient notice to prepare a defense and sufficiently alleging the "circumstances" of Verizon's fraud with reasonable particularity.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DISMISSING *VERIZON II* WITH PREJUDICE – "PENDING" PLAINLY IS NOT "SHORT HAND" FOR A PREVIOUSLY FILED BUT DISMISSED OR SETTLED CASE.

Verizon I has not been "pending" since it was settled and dismissed on February 28, 2011. Even if the first-to-file bar applies here and requires dismissal of *Verizon II*, the district court erred in dismissing with prejudice.

Verizon and amicus Chamber of Commerce attempt to defend dismissal with prejudice by offering a "plain language" argument that the district court did not adopt. The first-to-file bar reads: "[w]hen a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5). Verizon/amicus argue that "pending" does not actually mean "pending," but is merely a "short hand" reference to the first-filed action.[16] In other words, Verizon/amicus argue that the first-to-file bar applies in perpetuity, years after the first-filed case ceased to be "pending."

There is a central flaw in this argument. Verizon/amicus are arguing that Congress selected a "short hand" description that would be inaccurate most of the time. Every case is eventually resolved and, at that point, can no longer be

[16] Verizon Br. at 33-36; Brief *Amicus Curiae* of the Chamber of Commerce of the United States of America in Support of Defendants-Appellees ("Amicus Br.") at 7-8.

considered "pending." Yet according to Verizon/amicus, Congress intended the word "pending" to describe False Claims Act cases that have long been resolved. No one would label a file cabinet of closed cases as "pending."

If Congress wanted to bar qui tam cases based on allegations raised in all previously-filed cases, rather than "pending" cases, Congress could have easily done so by omitting the word "pending" and enacting the following: "When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the [] action." Under the Verizon/amicus interpretation, "pending" is thus superfluous, violating a central tenet of statutory construction. *See, e.g. Hibbs v. Winn*, 542 U.S. 88, 101 (2004) ("The rule against superfluities complements the principle that courts are to interpret the words of a statute in context. *See* 2A N. Singer, Statutes and Statutory Construction § 46.06, pp. 181-186 (rev. 6th ed. 2000) ('A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . .')").

There were many better choices available if Congress had really intended "pending" to be a short hand reference to an earlier filed suit: "[w]hen a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying that [prior, prior-

filed, earlier, earlier-filed, previous, previously-filed, first, first-filed, preceding] action."

This Court has already indicated that Congress' use of the term "pending" was not accidental or superfluous. In *United States ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204, 1210 (D.C. Cir. 2011), this Court wrote: "[t]he statutory text imposes a bar on complaints related to earlier-filed, 'pending' actions. The command is simple: as long as a first-filed complaint remains pending, no related complaint may be filed."). Indeed, every other Court of Appeals to consider this issue has also held that "pending" means "pending." *See United States ex rel. Carter v. Halliburton Co.*, 710 F.3d 171, 183 (4th Cir. 2013) (reversing the district court's dismissal with prejudice because the earlier filed action was no longer pending); *United States ex rel. Chovanec v. Apria Healthcare Group Inc.*, 606 F.3d 361, 365 (7th Cir. 2010) (same); *In re Natural Gas Royalties ex rel. United States v. Exxon Co., USA*, 566 F.3d 956, 964 (10th Cir. 2009) ("And yet, if that prior claim is no longer pending, the first-to-file bar no longer applies.").[17]

[17] Verizon argues that the Tenth Circuit's interpretation of "pending" in *Natural Gas Royalties* partly followed from its incorrect rejection of a notice-based standard. Verizon Br. at 38- 39. Verizon has it backwards. The Tenth Circuit rejected the notice-based standard because it first found that "pending" meant "pending:" "If the first-to-file bar had been meant simply as a more draconian public disclosure bar, Congress would not have limited it to 'pending' actions." 566 F.3d at 963-964. Verizon also argues that the Seventh Circuit's *Chovanec* decision interpreted "pending" without analysis, and that the Fourth Circuit's *Carter* decision just followed *Natural Gas Royalties* and *Chovanec.* Verizon Br. at

Verizon/Amicus' argument that "pending" does not mean "pending" would stand the plain language of the first-to-file bar on its head. Even if the first-to-file bar applies here, dismissal must be without prejudice.

II. THE "FIRST-TO-FILE" BAR SHOULD BE APPLIED AT THE TIME RELATOR FILED HIS AMENDED COMPLAINT.

Interpreting the first-to-file bar, the district court tied the phrase "bring an action" to the "pending" requirement, reasoning that the first-filed action has to be "pending" when the second relator "bring[s] a related action." "When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." The district court noted, "[t]his interpretation of the statute is consistent with the fundamental rule that the jurisdiction of the court depends upon the state of things at the time of the action brought.'" J.A. 316-17, *quoting Grupo Dataflux*

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39. While defendant's counsel in *Chovanec* did not present a contrary interpretation of "pending," and the Seventh Circuit readily construed the plain meaning of "pending," defense counsel in *Carter* (including the same firm, Vinson & Elkins, that represents amicus in this case) argued that "pending" was just a short hand reference to the first filed action, and should not be read as a temporal limitation on the first-to-file bar. They relegated that argument to a footnote. *See* Redacted Brief for Defendants-Appellees at fn. 19, *United States ex rel. Carter v. Halliburton Co.*, 710 F.3d 171 (4th Cir. 2013) (No. 12-1011, Dkt. No. 34). The *Carter* opinion implicitly rejected that argument, even if it did not explicitly address it.

v. Atlas Global Group, L.P., 541 U.S. 557, 570 (2004). Verizon endorses the district court's interpretation.[18]

However, the general rule that jurisdiction depends on the facts at the time of filing has many exceptions. The caselaw arguably diverges down irreconcilable paths when considering whether plaintiffs can cure jurisdictional defects by pleading new facts that did not exist at the time of original filing. *Compare Mathews v. Diaz*, 426 U.S. 67, 75(1976)("We have little difficulty with Espinosa's failure to file an application with the Secretary [for Medicare benefits] until after he was joined in this action. Although . . . filing of an application [is] a nonwaivable condition of jurisdiction, Espinosa satisfied this condition while the case was pending in the District Court. A supplemental complaint . . . would have eliminated this jurisdictional issue . . . . it is not too late, even now, to supplement the complaint to allege this fact.");[19] *Simpson v. Socialist People's Libyan Arab Jamahiriya*, 326 F.3d 230 (D.C. Cir. 2003)(post-filing offer to arbitrate with Libya

[18] Verizon Br. at 40. Verizon nowhere acknowledges that by giving meaning to the word "pending," the district court's interpretation directly contradicts Verizon's other argument that "pending" is just a meaningless, "short hand" reference to the earlier-filed suit.

[19] Curiously, Verizon argues that *Mathews* did not actually apply 28 U.S.C. 1653. Verizon Br. at 44 & n.10. *Mathews* specifically cited to section 1653 and wrote, "the statutory purpose of avoiding needless sacrifice to defective pleading applies equally to this case." 426 U.S. at 75 & n.9. Verizon also argues that Shea waived his section 1653 argument by not raising it below. Verizon Br. at 43. It is not possible to waive section 1653 arguments; the statute specifically allows amendment at the appellate level: "Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts."

satisfied potential jurisdictional predicate; 28 U.S.C. 1653 allows amendment to cure jurisdictional defects); *Positive Black Talk, Inc. v. Cash Money Records, Inc.*, 394 F.3d 357 (5th Cir. 2004)(post-filing copyright registration cured jurisdictional failure to register copyright before filing); *M.G.B. Homes, Inc. v. Ameron Homes, Inc.*, 903 F.2d 1486, 1488-89 (11th Cir. 1990)(same); *Walton v. United States*, 80 Fed. Cl. 251, 265 (Fed. Cl. 2008)(same); *Black v. Sec'y of Health & Human Servs.*, 93 F.3d 781, 790 (Fed. Cir. 1996) (supplemental complaint that plaintiff had reached threshold of $1,000 in reimbursable expenses after filing cured jurisdictionally defective initial complaint under Vaccine Act); *Prasco, LLC v. Medicis Pharm. Corp.*, 537 F.3d 1329 (Fed. Cir. 2008)(dicta that supplemental complaint alleging post-filing events could cure jurisdictional requirement of case or controversy, but amended complaint did not allege sufficient case or controversy), *with Keene Corp. v. United States*, 508 U.S. 200, 207 (1993)(28 U.S.C. 1500 expressly provides that Court of Claims has no jurisdiction if plaintiff has related case pending in another court at time of filing in Court of Claims); *Central Pines Land Co. v. United States*, 697 F.3d 1360 (Fed. Cir. 2012)(same); *United States ex rel. Jamison v. McKessson Corp.*, 649 F.3d 322 (5th Cir. 2011)(amended complaint could not save initial defective complaint under FCA public disclosure bar); *Morongo Band of Mission Indians v. Cal. State Bd. of Equalization*, 858 F.2d 1376 (1988)(dicta that district court could not grant leave to

amend if original complaint lacked jurisdiction, where amended complaint also lacked basis for jurisdiction).

Complicating the analysis, some of these cases involve amended or supplemented pleadings, and some do not. The Supreme Court has held that, at least under the FCA, "when a plaintiff files a complaint in federal court and then voluntarily amends the complaint, courts look to the amended complaint to determine jurisdiction." *Rockwell International Corp. v. United States*, 549 U.S. 457, 473-74 (2007)(under FCA public disclosure bar, amended complaint could create defect eliminating jurisdiction)(citations omitted).[20]

Cases attempting to summarize and reconcile the conflicting caselaw concerning the jurisdictional significance of post-filing facts focus on the specific statutes at issue. The Federal Circuit's opinion in *Central Pines* tried to draw a logically questionable distinction between "express prohibitions" against filing suit and statutes imposing a "prerequisite to filing which a plaintiff has failed to meet

[20] Amended complaints supersede original complaints. *Cf. Rockwell*. *See also Nat'l City Mortg. Co. v. Navarro*, 220 F.R.D. 102 (D.D.C. 2004) (denying motion to dismiss as moot because the motion pertained to plaintiff's original complaint rather than the amended complaint); *Anderson v. USAA Cas. Ins. Co.*, 218 F.R.D. 307, 308 (D.D.C. 2003) (denying "without prejudice the pending motions to dismiss because they pertain to the original complaint, now superseded by the amended complaint."). The Court of Claims has held that even though an amended complaint did not cure jurisdictional defects in the original complaint, "[b]ecause the court is treating plaintiff's amended complaint as a de facto supplemental complaint, the amended complaint is analogous to a separate complaint distinct from the initial [complaint]." *Walton*, 80 Fed. Cl. at 266 (*citing Christian Appalachian Project, Inc. v. Untied States*, 10 Cl. Ct. 595, 597 (1986)).

upon filing." *Central Pines*, 697 F.3d at 1365-66. Similarly, Judge Sweeney of the Court of Claims tried to reconcile these conflicting lines of cases by reading *Mathews v. Diaz* and *Black* to focus on whether allowing a supplemental pleading to cure a jurisdictional defect "would not do violence to the applicable statute." *Walton v. United States*, 80 Fed. Cl. at 265-66 (*quoting Black*, 93 F.3d at 791).

While it may be impossible to discern clear organizing principles from these cases, federal courts have shown flexibility in adjudicating the merits when initial jurisdictional defects can be cured, and Congress passed 28 U.S.C. 1653 to avoid "needless sacrifice to defective pleading." *Mathews v. Diaz*, 426 U.S. at 75 & n.9. These cases are indisputably statute-specific. And in the specific context of the False Claims Act, the phrase "bring an action" applies not just to the initial filing of a complaint under seal, but to what happens when the seal is lifted and the United States declines to intervene. Under unique FCA procedure, a relator files an action under seal on behalf of the United States, but does not serve the defendant. Because an earlier-filed "related" case may be "pending" under seal for years, the second relator usually has no way of knowing whether he is bringing a related action. The Department of Justice evaluates the case while it is under seal, and has the statutory power to intervene. Even if a related case is "pending," the first-to-file bar does not prevent the Government from bringing a related action based on a second-filed relator's complaint. Thus, under the *Central Pines*

analysis, the first-to-file bar cannot be read as an express prohibition against filing a related suit.

A relator's sealed complaint is not subject to dismissal under the first-to-file bar at the time the relator first "brings an action." The relator cannot prosecute the case until the seal is lifted and the Government decides not to intervene. Indeed, the Government can prevent the relator from bringing the action at all by moving to dismiss. 31 U.S.C. 3730(c)(2)(A). The first-to-file bar is usually adjudicated, as in this case, when the United States chooses not to intervene, and relator must decide to "bring" the case and serve a complaint or an amended complaint on the defendant. If a first-filed potentially related case is no longer "pending," it would frustrate the purposes of the False Claims Act to require a relator to dismiss his action and re-file a new action under seal to avoid Verizon's interpretation of the first-to-file bar.

In this case, there was no related case "pending" when the seal lifted and Relator could "bring" the case by serving Defendants with the amended complaints. The district court had jurisdiction then. As Judge Hollander wrote, "[i]t would elevate form over substance to dismiss the Amended Complaint on first-to-file grounds at this juncture." *United States ex rel. Palmieri v. Alpharma, Inc.*, 2013 U.S. Dist. LEXIS 29802, *32 (D.Md. March 5, 2013).

III. THE FIRST-TO-FILE BAR DOES NOT APPLY TO THE SAME "PERSON" WHO BROGHT THE EARLIER-FILED CASE.

31 U.S.C. § 3730(b)(5) provides: "When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." For this language to bar a second lawsuit by the same relator, the terms "a person" and "no person" must equally refer to the same person and to different persons, i.e., the language would bar "a person" from intervening in his own lawsuit. That would be an absurd interpretation.

Verizon argues that "under Shea's logic, a sign outside a hospital operating room stating that 'no person may enter without covering their hair and face' would allow a bald man to enter without a facemask because he has no hair to cover." Verizon Br. at 29. That's the wrong analogy. The right analogy would be a sign that read: "When a person is being operated on, no person may enter without covering their hair and face." Under Verizon's "plain language" analysis, the unambiguous language of the sign would apply to the patient as well as all other persons entering the operating room. Yet it would be obvious from the context that the sign was intended to protect the patient from the germs of others, not to require draping the patient's hair and face. "A person" and "no person" in that sentence refer to different people, not the same person. So too with the first-to-file bar.

Verizon tries to describe *Bailey v. Shell W. E&P Inc.*, 609 F.3d 710 (5th Cir. 2010) as a mere procedural decision based on unique facts. Verizon Br. at 30-31. For the reasons stated in Shea's initial brief, the Fifth Circuit's decision in *Bailey* correctly reasoned that the language and purpose of the first-to-file bar did not apply to the same relator. Brief of Appellant at 21-23.

Verizon describes "statements by the Fifth and Tenth Circuits that the first-to-file bar applies to claims filed by 'other private relators'" as "at best unconsidered dicta." Verizon Br. at 31 & n.5, *citing United States ex rel. Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1279 (10th Cir. 2004), and *United States ex rel. Branch Consultants v. Allstate Insurance Co.*, 560 F.3d 371 (5th Cir. 2009). Those statements may be dicta, but if the language of the first-to-file bar "plainly" applies to the same relator, how did two circuit courts of appeal get it so wrong?

Finally, while Verizon cites John T. Boese's treatise in support of its "pending" argument,[21] Verizon failed to mention that Boese's treatise says the first-to-file bar does not apply to the same relator.[22]

[21] Verizon Br. at 33, 37.

[22] *See* Boese, John T., Civil False Claims and Qui Tam Actions (2nd ed. 2005) at 4-124.2-1 (the first-to-file bar "applies only to parties unrelated to the original plaintiff").

IV. SHEA ALLEGES FALSE CLAIMS BILLED ON 20 SEPARATE CONTRACTS; THE IDENTITY OF EACH CONTRACT IS A MATERIAL ELEMENT OF AN FCA CASE ALLEGING FALSE CLAIMS UNDER THOSE CONTRACTS.

The first-to-file bar only applies to "a *related* action based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5) (emphasis added). This Circuit has interpreted "related" to mean a later filed action "incorporating the same material elements of fraud as an action filed earlier." *United States ex rel. Hampton v. Columbia/Hca Healthcare Corp*., 318 F.3d 214, 217 (D.C. Cir. 2003).

Verizon I alleged false claims billed under two identified contracts. The settlement agreement in *Verizon I* applied to those two contracts alone. To prove the false claims alleged in *Verizon I*, relator would have had to prove that the terms of those two contracts did not allow Verizon to bill some of the standard surcharges churned out by Verizon's tax module on all contracts, and that Verizon submitted invoices on those two contracts in reckless disregard as to whether those invoices contained false claims for the surcharges. It is indisputable that the identity of those two contracts was a material element of *Verizon I*.

Verizon II alleges false claims on 20 different contracts. *Verizon II* does not, and could not, seek any recovery based on the two contracts identified (and settled)

in *Verizon I*.[23] Again, to prove the false claims alleged in *Verizon II*, Relator would have to prove that the terms of those 20 contracts did not allow Verizon to bill some of the standard surcharges churned out by Verizon's tax module on all contracts, and that Verizon submitted invoices on those 20 contracts in reckless disregard as to whether those invoices contained false claims for the surcharges. It is indisputable that the identity of each of those 20 contracts is a material element of *Verizon II*. It is also indisputable that those 20 contracts were not material elements in *Verizon I*.

Predictably, Verizon tries to deprive the "material elements" standard of all meaning, conflating it with an amorphous concept of "notice" sufficient to allow the Government to uncover additional fraud through investigation. Verizon Br. at 19-20. It is true that this Circuit's opinion in *United States ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204, 1208-09 (D.C. Cir. 2011) analyzed "notice" as a factor in applying the "material elements" test. But the two complaints in *Batiste* did not have different material elements. Settlement of the Zahara allegations would have precluded Batiste's claims. *Batiste* did not hold that notice sufficient to allow subsequent discovery would be enough, standing alone, to satisfy the material elements test.

[23] Verizon acknowledges that it had notice of *Verizon II* before it chose to settle *Verizon I*. Verizon Br. at 8 & n.2. Verizon thus made the choice to resolve the cases separately, rather than negotiating a settlement with the Government that would have applied to other contracts.

Verizon/amicus advocate a standard with little definition. Where does "notice" end? If a pharmaceutical company has engaged in off-label marketing of one drug, is the Government on notice that the same company is using the same marketing strategies for other drugs? If one, two, or five pharmaceutical companies are charged with off-label marketing of particular drugs, is the Government on notice that it should investigate every pharmaceutical company for off-label marketing of those drugs? Some judges, and some Government lawyers, might believe that initiating expensive, company-wide or industry-wide investigations in those circumstances would be inappropriate. Other judges, and other Government lawyers, might feel very differently. Application of the first-to-file bar should not depend on judges' personal opinions about the presumed scope of Government investigations. Instead, the first-to-file bar should preclude later-filed suits that seek the same recoveries based on claims with the same material elements.

The Tenth Circuit's opinion in *In re Natural Gas Royalties Qui Tam Litigation*, 566 F.3d 956 (10th Cir. 2009) was correct. The public disclosure bar defines when the Government is sufficiently on notice, and its careful protection of original sources indicates the primary intent of the 1986 FCA amendments—to encourage whistleblowers. As the Tenth Circuit held, the first-to-file bar is not about notice:

> The fact that § 3730(b)(5) applies only when another qui tam action is "pending" makes a notice-based standard even more dubious. If the first-to-file bar had been meant simply as a more draconian public disclosure bar, Congress would not have limited it to "pending" actions. While filing the complaint might put the government on notice, and while the government might remain on notice while the action is pending, the government does not cease to be on notice when a relator withdraws his claim or a court dismisses it. And yet, if that prior claim is no longer pending, the first-to-file bar no longer applies. The "pending" requirement much more effectively vindicates the goal of encouraging relators to file; it protects the potential award of a relator while his claim remains viable, but, when he drops his action another relator who qualifies as an original source may pursue his own.

566 F.3d at 964.

For the reasons stated in Appellant's initial brief, this Court should reject Verizon/amicus' argument that *Batiste* substituted "notice" for the "material elements" standard, and should reject the reasoning of the two district court opinions in *United States ex rel. Folliard v. Synnex Corp.*, 798 F. Supp. 2d 66, 73 (D.D.C. 2011) and *United States ex rel. Folliard v. CDW Tech. Servs.*, 722 F. Supp. 2d 37 (D.D.C. 2010). And even if this Court conflates notice and "material elements," it should recognize that alleging different contracts means that *Verizon II* is unrelated to *Verizon I.* Appellant's Br. at 24-33.

V. THE PUBLIC POLICY ARGUMENTS OF VERIZON/AMICUS IGNORE THE OVERALL INTENT OF THE 1986 FCA AMENDMENTS, MISCHARACTERIZE FCA PROCEDURE, AND OVERSTATE THE COSTS OF RELATED QUI TAM SUITS.

This Court analyzed the legislative history of the 1986 amendments to the False Claims Act in *United States ex rel. Springfield-Terminal Rwy Co. v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994). The first version of the FCA "did not prohibit plaintiffs from bringing suits based exclusively on information that was already in the Government's possession." *Springfield-Terminal*, 14 F.3d at 649. In response to the case of *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), where the Supreme Court upheld a relator's claim copied from a publicly-available indictment, Congress amended the act to bar qui tam suits "based on evidence or information the Government had when the action was brought." 31 U.S.C. 3730(b)(4)(superseded). That broad limitation led to a lack of private FCA enforcement and inequitable results where states were denied relator's shares because the federal government already had notice of the fraud as the result of the states' own investigations. *Springfield-Terminal*, 14 F.3d at 650.

Congress passed the 1986 amendments to incentivize whistleblowing by changing the prior regime where relators could not recover when the Government already had evidence or information. The 1986 amendments included a public disclosure bar designed to prevent suits based on information already available from specific sources, while preserving the ability of "original source[s]" to bring

qui tam actions. *Springfield-Terminal*, 14 F.3d at 650-51. The first-to-file bar, applicable only to still "pending" cases, would prevent class actions and multiple party lawsuits, preserving a substantial reward for the first relator to file and encouraging a "race to the courthouse."[24]

Verizon/amicus advocate a first-to-file bar that would deter potential relators from bringing qui tam actions whenever a defendant could argue that allegations from previously closed FCA cases put the Government "on notice," or "equipped the Government to investigate" the fraud. Such a standard would risk returning FCA enforcement to the pre-1986 regime barring FCA suits "based on evidence or information the Government had when the action was brought." Verizon/amicus' arguments about Congressional intent misstate the real purpose of the first-to-file bar and the overall intent of the 1986 amendments.

Verizon/amicus parade the horrible of successive non-intervened suits brought by the same relator, vexing defendants with litigation costs. Relators have no incentive to bring FCA claims piecemeal – the real purpose of the first-to-file bar takes care of that. The same relator will bring related claims because the relator develops new information (as is the case here), or may also bring separate

[24] *Campbell v. Redding Med. Ctr.*, 421 F.3d 817, 821 (9th Cir. 2005); *In re Natural Gas Royalties ex rel. United States v. Exxon Co., USA*, 566 F.3d 956, 961 (10th Cir. 2009) ("The first-to-file bar thus functions both to eliminate parasitic plaintiffs who piggyback off the claims of a prior relator, and to encourage legitimate relators to file quickly by protecting the spoils of the first to bring a claim."); S. Rep. No. 99-345 at 25 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5290.

cases against different defendants alleging the same conduct. For example, Ven-A-Care of the Florida Keys, a small Florida pharmacy, has brought many separate FCA cases against different pharmaceutical companies for the same type of alleged misconduct – reporting false Average Wholesale Prices ("AWP"), a benchmark for federal reimbursement on drugs. Ven-A-Care has returned more than three billion dollars to the federal government and states.[25] Verizon/amicus would have undoubtedly argued in all the Ven-A-Care cases that the Government was already "on notice" and "equipped to investigate the fraud."

A relator has no ability to impose litigation costs while the case is under seal. It is true that some relators dismiss non-intervened cases and re-bring them elsewhere, sometimes because their original lawyers were unwilling to proceed in a non-intervened case, and they found new counsel somewhere else. But most non-intervened cases are simply abandoned by relators, accounting for the high percentage of unsuccessful non-intervened cases. These abandoned cases do not impose significant costs on defendants, who may never be served.

Amicus contends that many non-intervened cases are frivolous, and that non-intervened cases account for only 3.2% of all FCA recoveries. Amicus Br. at 13, *citing* Dep't of Justice, *Fraud Statistics—Overview: Oct. 1, 1987-Sept. 30,*

[25] *See* http://www.bloomberg.com/news/2013-08-13/florida-pharmacists-win-597-million-blowing-whistle-on-scheme.html.

2012, at 1-2 (2012).[26] However, the Government counts as "intervened" cases where the Department does not intervene at first, but then intervenes later, after relator and counsel have prosecuted the case alone. Initially non-intervened cases have brought significant recoveries.[27]

Since passage of the 1986 amendments, the United States has recovered over $40 billion in FCA cases. Congress expanded, not narrowed, the Act's provisions, in the Fraud Enforcement and Recovery Act of 2009 and the Patient Protection and Affordable Care Act of 2010. Many states have passed their own false claims acts. The Department of Justice lauds the FCA as a public policy success.[28]

Verizon/amicus are asking this Court to fix a statute that is not broken.

VI. THIS COURT SHOULD NOT DECIDE VERIZON'S PUBLIC DISCLOSURE AND 9(b) ARGUMENTS IN THE FIRST INSTANCE.

Verizon asks this Court to affirm dismissal with prejudice on two alternative grounds not decided by the district court: the public disclosure bar and F.R.Civ.P. 9(b). If this Court affirms dismissal but decides that "pending" means "pending" and dismissal should be without prejudice, the statutory scheme actually precludes decision on Verizon's alternative grounds. Relator would have to file another suit

[26] Available at http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf

[27] *See* http://www.taf.org/public/drupal/publications/reports/Importance%20of%20Whistleblowers%20to%20Reducing%20Fraud%20-%20June%206%2C%202012.pdf (listing examples of initially non-intervened cases resulting in substantial recoveries).

[28] *See, e.g.* http://www.justice.gov/opa/pr/2012/December/12-ag-1439.html.

under seal. While it may be unlikely that the Government would change its mind and intervene at this stage, the courts are statutorily obligated to await the Government's intervention decision before deciding the public disclosure and 9(b) issues.

If this Court reverses the dismissal on first-to-file grounds, it should remand to the district court to decide the public disclosure and 9(b) issues in the first instance. *United States ex rel. Davis v. District of Columbia*, 679 F.3d 832, 840 (D.C. Cir. 2012) (remanding FCA limitations issue to district court); *United States ex rel. Carter v. Halliburton Co., supra*, 710 F.3d at 183-84 (remanding FCA public disclosure issue to district court); *United States ex rel. Sikkenga v. Regence BlueCross Blueshield of Utah*, 472 F.3d 702, 715 & n.19 (10th Cir. 2006) (remanding 9(b) issue after reversing dismissal based on "presentation" issue).

If this Court considers these two alternative issues in the first instance, Relator's word limitations prevent a full response. In summary, Verizon's public disclosure argument that Shea relied primarily on publicly-available information from the internet ignores this Court's clear holding that "the Act bars suits based on publicly disclosed 'allegations or transactions' not information." *Springfield-Terminal*, 14 F.3d at 653. Shea's allegations of fraud were not publicly disclosed. Verizon has not pointed to any of Shea's internet searches that revealed either allegations of fraud or the "true state of facts" – that Verizon was billing improper

surcharges. In the language of *Springfield-Terminal*, the internet only revealed "X" – that Verizon was billing surcharges using language that made those surcharges seem proper. Shea provided "Y" – the true state of facts that those surcharges were actually improper – and "Z" the allegation of fraud.

In addition, Shea's direct and independent knowledge of non-public information about Verizon's fraudulent billing practices – including his review of the 2004 MCI document and an individual invoice issued to a Government employee under Verizon's Contract No.GS-35F-0119P, his information from two different Verizon employees confirming that Verizon's tax module billing software ran the same way for Government contracts, and his understanding of the misleading language Verizon used in contract modifications submitted to the Government – all confirms that Shea is an "original source." *See Springfield-Terminal*; *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1018 (7th Cir. 1999); *United States ex rel. Balazar v. Werden*, 635 F.3d 866 (7th Cir. 2011) *United States ex rel. Rabushka v. Crane Co.*, 40 F.3d 1509, 1512-13 (8th Cir. 1994); *Kennard v. Comstock Res., Inc.*, 363 F.3d 1039, 1045 (10th Cir. 2004).

Further, the Second Amended Complaint specifically brings separate claims for conduct occurring after March 23, 2010,[29] the effective date of an amendment to the public disclosure bar that expanded the definition of

[29] J.A. 67-69.

"original source" to include a relator "who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions."[30]

Shea's Second Amended Complaint also satisfies Rules 8(a) and 9(b). It satisfies the primary purpose of Rule 9(b), providing all the information Verizon needs to prepare a defense.[31] Verizon can readily determine whether the terms of each of the 20 contracts allowed the types of fraudulent surcharges identified in the Second Amended Complaint. To the extent Rule 9(b) protects defendants against reputational harms suffered as a result of insufficient allegations of fraud, Verizon is in a poor position to complain, given that it has already paid $93.5 million in a public settlement for just two Government contracts.

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[30] *See also*, Relator's Opposition to Verizon's Motion to Dismiss, pp. 35-37 [Dkt. 54].

[31] *See e.g.*, *United States v. First Choice Armor & Equip.*, 808 F. Supp. 2d 68, 73 (D.D.C. 2011) (Roberts, J.) ("[m]otions to dismiss for failure to plead fraud with sufficient particularity are evaluated in light of the overall purposes of Rule 9(b) to ensure that defendants have adequate notice of the charges against them to prepare a defense") (*quoting United States ex rel. McCready v. Columbia/HCA Healthcare Corp.*, 251 F. Supp. 2d 114, 116 (D.D.C. 2003) (Lamberth, J.)); *United States ex rel. Folliard v. Synnex Corp.*, 798 F. Supp. 2d 66, 79 (D.D.C. 2011) (Lamberth, J.) (same); *United States ex rel. Folliard v. CDW Tech. Servs., Inc.*, 722 F. Supp. 2d 20, 33 (D.D.C. 2010) (Huvelle, J.) (same); *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc.*, 238 F. Supp. 2d 258, 270 (D.D.C. 2002) (Lamberth, J.) (same).

Further, the Second Amended Complaint alleges the "circumstances" of this fraud with sufficient particularity. This is not an allegation of an oral fraudulent statement, where the identity of the speaker and the precise words are potentially relevant to determine legal sufficiency. Shea alleges fraud by billing software: a tax module that churned out the same misleading surcharges on millions of invoices, month after month. Shea alleges that two Verizon employees confirmed the operation of that software.[32]

FCA relators need not have precise knowledge of individual false invoices; such a requirement would effectively restrict the class of potential whistleblowers to billing clerks.[33] Verizon is in possession of the relevant documents that would provide even more specificity. *See United States ex rel. Williams v. Martin-Baker Aircraft Co.*, 389 F.3d 1251, 1258 (D.C. Cir. 2004) ("this circuit provides an avenue for plaintiffs unable to meet the particularity standard because defendants control the relevant documents – plaintiffs in such straits may allege lack of access in the complaint").

To the extent the courts believe more particularity is required, Shea should be given an opportunity to provide such details by amendment.[34]

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[32] Fed.R.Civ.P. 9(b) does not also require that a plaintiff allege the required scienter with particularity.
[33] *See* footnote 33.
[34] *See also*, Relator's Opposition to Verizon's Motion to Dismiss, pp. 37-43 [Dkt. 54].

Respectfully submitted,

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Dated: September 3, 2013

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Dated: September 3, 2013

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I hereby certify that on this 3rd day of September, 2013, I caused this Reply Brief of Appellant to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 3rd day of September, 2013, I caused the required copies of the Reply Brief of Appellant to be hand filed with the Clerk of the Court.

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