PANEL DECISION ENTERED APRIL 11, 2014

No. 12-7133

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, No. 09-cv-1050 (Kessler, J.)

DEFENDANTS-APPELLEES' MOTION FOR SUPPLEMENTAL BRIEFING ON ALTERNATIVE GROUNDS FOR AFFIRMANCE

SETH P. WAXMAN
JONATHAN G. CEDARBAUM
THOMAS G. SPRANKLING
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 663-6000
(202) 663-6363 (fax)
seth.waxman@wilmerhale.com

June 5, 2015

MOTION FOR SUPPLEMENTAL BRIEFING ON ALTERNATIVE GROUNDS FOR AFFIRMANCE

On June 1, 2015, the Supreme Court issued an order vacating the judgment of this Court and remanding the case for further proceedings in light of its decision in *Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter* (No. 12-1497). *See United States ex rel. Shea v. Cellco P'ship*, No. 14-238, 2015 WL 2464044 (U.S. June 1, 2015). The Supreme Court's ruling in *Kellogg Brown & Root Services* confirmed that this action was properly dismissed based on the False Claims Act's first-to-file bar, but rejected the reasoning of this Court's opinion affirming dismissal *with prejudice*. *Compare United States ex rel. Shea v. Cellco P'ship*, 748 F.3d 338, 343-344 (D.C. Cir. 2014), *with Kellogg*, No. 12-1497, slip op. 11-13 (U.S. May 26, 2015).[1] The *Kellogg Brown & Root Services* decision left untouched, however, two alternative grounds for affirmance of the dismissal of Shea's action with prejudice that Defendants-Appellees (collectively "Verizon") advanced in both the district court and this Court, namely, the False Claims Act's public disclosure bar and failure to plead fraud with particularity as required by Federal Rule of Civil Procedure 9(b). *See* Dist. Ct. Dkt. 51-2, at 20-42; Dist. Ct. Dkt. 55, at 12-25 (Verizon's opening and reply briefs on its motion to dismiss); Verizon D.C. Cir. Br. 45-56. Pursuant to Federal Rule of Appellate Procedure 27

[1] The slip opinion in *Kellogg Brown & Root Services, Inc.* is attached hereto as Exhibit 1.

and D.C. Circuit Rule 27, Verizon respectfully requests that this Court permit supplemental briefing on those alternative grounds for affirmance so that this Court may address them. Proceeding in this manner represents the most efficient way to resolve this long-running litigation.

Several considerations support Verizon's request.

First, although neither this Court nor the district court addressed these alternative grounds for upholding dismissal of Shea's action, it is well established that this Court "review[s] the district court's judgment, not its reasoning," and accordingly "may affirm on any ground properly raised" in the district court even if that court "never addressed" the issue. *See, e.g.*, *EEOC v. Aramark Corp.*, 208 F.3d 266, 268 (D.C. Cir. 2000). This Court has previously ruled on an alternative ground following the reversal and vacating of its earlier opinion, even in the absence of the district court's views. *See, e.g.*, *Zivotofsky v. Secretary of State*, 725 F.3d 197, 220 & n.20 (D.C. Cir. 2013); *see also Rasul v. Myers*, 563 F.3d 527, 532 n.5 (D.C. Cir. 2009). There can be no doubt that the public disclosure bar and Rule 9(b) issues were properly raised, both in the district court and in this Court. *See* Dist. Ct. Dkt. 51-2, at 20-42; Dist. Ct. Dkt. 55, at 12-25 (Verizon's opening and reply briefs on its motion to dismiss); Verizon D.C. Cir. Br. 45-56.[2]

[2] Verizon's district court briefs are attached hereto as Exhibits 2 and 3. Verizon's brief in this Court is attached hereto as Exhibit 4.

Second, application of these grounds for dismissal would be reviewed by this Court de novo in any event. *See, e.g.*, *United States ex rel. Davis v. District of Columbia*, 413 F. App'x 308, 309 (D.C. Cir. 2011) (public disclosure bar); *United States ex rel. Williams v. Martin-Baker Aircraft Co.*, 389 F.3d 1251, 1256 (D.C. Cir. 2004) (sufficiency of a complaint under Rule 9(b)); *cf. Escambia Cnty. v. McMillan*, 466 U.S. 48, 51-52 (1984) (remanding for court of appeals to consider question of law in the first instance). Thus, there is no need to return the case to the district court for fact-finding or issuance of an initial decision to which this Court might give deferential review.

Third, the facts that support Verizon's public-disclosure argument are indisputable because they are established chiefly by statements from Shea's own deposition. *See* Verizon D.C. Cir. Br. 45-52. Given that the relator's own statements confirm that his suit is foreclosed by the public disclosure bar, it is entirely appropriate for this Court to resolve the case on this basis.

Fourth, by affirming on the basis of these grounds and directing dismissal with prejudice, this Court could bring this case—which has lingered in the court system in various incarnations for nearly ten years—to a prompt conclusion. A

remand to the district court will inevitably add months and possibly years to the time it takes to resolve Shea's meritless False Claims Act suit.[3]

Respectfully submitted,

/s/ Seth P. Waxman

SETH P. WAXMAN
JONATHAN G. CEDARBAUM
THOMAS G. SPRANKLING
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 663-6000
(202) 663-6363 (fax)
seth.waxman@wilmerhale.com

June 5, 2015

[3] In the alternative, if this Court decides to remand the case to the district court, Verizon respectfully requests that it instruct the district court to address the two already briefed alternative grounds for dismissal—the public disclosure bar and Rule 9(b), *see* Dist. Ct. Dkt. 51-2, at 20-38; Dist. Ct. Dkt. 55, at 12-25.

CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Seth P. Waxman
SETH P. WAXMAN

ADDENDUM

CERTIFICATE OF PARTIES

Pursuant to D.C. Circuit Rules 27(a)(4) and 28(a)(1)(A), Defendants-Appellees make the following certificate of counsel:

Plaintiff-Appellant Stephen M. Shea appeared in the district court and is a party in this Court.

Defendants-Appellees Verizon Business Network Services Inc., Verizon Federal Inc., MCI Communications Services, Inc. d/b/a Verizon Business Services, and Cellco Partnership d/b/a Verizon Wireless appeared in the district court and are parties in this Court.

The United States of America did not intervene in the district court, *see* JA34-35, but did file a Statement of Interest "request[ing] that if the Court dismisses this action, that such dismissal be without prejudice to the United States," JA302.

No amici appeared in the district court. On July 11, 2013, this Court granted the Chamber of Commerce of the United States leave to participate in this appeal as an amicus curiae supporting Defendants-Appellees. On May 30, 2014, this Court granted the United States of America leave to participate in this appeal as an amicus curiae supporting Plaintiff-Appellant's petition for rehearing.

/s/ Seth P. Waxman
SETH P. WAXMAN

June 5, 2015

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rules 26.1 and 27(a)(4), Defendants-Appellees provide the following corporate disclosure statement:

Cellco Partnership is a general partnership formed under Delaware law in which Verizon Communications Inc. indirectly holds a 100 percent interest. Verizon Communications Inc. is a publicly traded company.

Verizon Business Network Services Inc. is owned by MCI Communications Corporation, which is owned by Verizon Business Global LLC, which is owned by Verizon Communications Inc.

MCI Communications Services, Inc. is owned by MCI Broadband Solutions, Inc., which is owned by Terremark Worldwide, Inc., which is owned by Verizon Business Network Services Inc., which is owned by Verizon Communications Inc.

Verizon Federal Inc. is owned by Verizon Investments LLC, which is owned by Verizon Communications Inc.

As relevant to the litigation, Cellco Partnership, Verizon Business Network Services Inc., MCI Communications Services, Inc., and Verizon Federal Inc. are telecommunications service providers.

EXHIBIT 1

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

KELLOGG BROWN & ROOT SERVICES, INC., ET AL. *v.* UNITED STATES EX REL. CARTER

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 12–1497. Argued January 13, 2015—Decided May 26, 2015

Private parties may file civil *qui tam* actions to enforce the False Claims Act (FCA), which prohibits making "a false or fraudulent claim for payment or approval," 31 U. S. C. §3729(a)(1), "to . . . the United States," 3729(b)(2)(A)(i). A *qui tam* action must generally be brought within six years of a violation, §3731(b), but the Wartime Suspension of Limitations Act (WSLA) suspends "the running of any statute of limitations applicable to any offense" involving fraud against the Federal Government. 18 U. S. C. §3287. Separately, the FCA's "first-to-file bar" precludes a *qui tam* suit "based on the facts underlying [a] pending action," §3730(b)(5).

In 2005, respondent worked for one of the petitioners, providing logistical services to the United States military in Iraq. He subsequently filed a *qui tam* complaint (*Carter I*), alleging that petitioners, who are defense contractors and related entities, had fraudulently billed the Government for water purification services that were not performed or not performed properly. In 2010, shortly before trial, the Government informed the parties that an earlier-filed *qui tam* suit (*Thorpe*) had similar claims, leading the District Court to dismiss *Carter I* without prejudice under the first-to-file bar. While respondent's appeal was pending, *Thorpe* was dismissed for failure to prosecute. Respondent quickly filed a new complaint (*Carter II*), but the court dismissed it under the first-to-file rule because *Carter I*'s appeal was pending. Respondent then dismissed that appeal, and in June 2011, more than six years after the alleged fraud, filed the instant complaint (*Carter III*). The District Court dismissed this complaint with prejudice under the first-to-file rule because of a pending Maryland suit. Further, because the WSLA applies only to criminal

charges, the court reasoned, all but one of respondent's civil actions were untimely. Reversing, the Fourth Circuit concluded that the WSLA applied to civil claims and that the first-to-file bar ceases to apply once a related action is dismissed. Since any pending suits had by then been dismissed, the court held, respondent had the right to refile his case. It thus remanded *Carter III* with instructions to dismiss without prejudice.

Held:

1. As shown by the WSLA's text, structure, and history, the Act applies only to criminal offenses, not to civil claims like those in this case. Pp. 5–11.

(a) The 1921 and 1942 versions of the WSLA were enacted to address war-related fraud during, respectively, the First and Second World Wars. Both extended the statute of limitations for fraud offenses "now indictable under any existing statutes." Since only crimes are "indictable," these provisions quite clearly were limited to criminal charges. In 1944, Congress made the WSLA prospectively applicable to future wartime frauds rather than merely applicable to past frauds as earlier versions had been. In doing so, it deleted the phrase "now indictable under any statute," so that the WSLA now applied to "any offense against the laws of the United States." Congress made additional changes in 1948 and codified the WSLA in Title 18 U. S. C. Pp. 5–6.

(b) Section 3287's text supports limiting the WSLA to criminal charges. The term "offense" is most commonly used to refer to crimes, especially given the WSLA's location in Title 18, titled "Crimes and Criminal Procedure," where no provision appears to employ "offense" to denote a civil violation rather than a civil penalty attached to a criminal offense. And when Title 18 was enacted in 1948, its very first provision classified all offenses as crimes. In similar circumstances, this Court has regarded a provision's placement as relevant in determining whether its content is civil or criminal. *Kansas* v. *Hendricks*, 521 U. S. 346, 361. The WSLA's history provides further support for this reading. The term "offenses" in the 1921 and 1942 statutes, the parties agree, applied only to crimes. And it is improbable that the 1944 Act's removal of the phrase "now indictable under any statute" had the effect of sweeping in civil claims, a fundamental change in scope not typically accomplished with so subtle a move. The more plausible explanation is that Congress removed that phrase in order to change the WSLA from a retroactive measure designed to deal exclusively with past fraud into a permanent measure applicable to future fraud as well. If there were any ambiguity in the WSLA's use of the term "offense," that ambiguity should be resolved in favor of a narrower definition. See *Bridges* v. *United States*, 346

Syllabus

U. S. 209, 216. Pp. 7–11.

2. The FCA's first-to-file bar keeps new claims out of court only while related claims are still alive, not in perpetuity. Thus, dismissal with prejudice was not called for in this case. This reading of §3730(b)(5) is in accordance with the ordinary dictionary meaning of the term "pending." Contrary to petitioners' reading, the term "pending" cannot be seen as a sort of "short-hand" for first-filed, which is neither a lengthy nor a complex term. Petitioners' reading would also bar even a suit dismissed for a reason having nothing to do with the merits, such as *Thorpe,* which was dismissed for failure to prosecute. Pp. 11–13.

710 F. 3d 171, reversed in part, affirmed in part, and remanded.

ALITO, J., delivered the opinion for a unanimous Court.

SUPREME COURT OF THE UNITED STATES

No. 12–1497

KELLOGG BROWN & ROOT SERVICES, INC, ET AL, PETITIONERS *v.* UNITED STATES, EX REL. BENJAMIN CARTER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[May 26, 2015]

JUSTICE ALITO delivered the opinion of the Court.

Wars have often provided "exceptional opportunities" for fraud on the United States Government. See *United States* v. *Smith*, 342 U. S. 225, 228 (1952). "The False Claims Act was adopted in 1863 and signed into law by President Abraham Lincoln in order to combat rampant fraud in Civil War defense contracts." S. Rep. No. 99–345, p. 8 (1986). Predecessors of the Wartime Suspension of Limitations Act were enacted to address similar problems that arose during the First and Second World Wars. See *Smith*, *supra*, at 228–229.

In this case, we must decide two questions regarding those laws: first, whether the Wartime Suspension of Limitations Act applies only to criminal charges or also to civil claims; second, whether the False Claims Act's first-to-file bar keeps new claims out of court only while related claims are still alive or whether it may bar those claims in perpetuity.

I

A

The False Claims Act (FCA) imposes liability on any person who "knowingly presents . . . a false or fraudulent claim for payment or approval," 31 U. S. C. §3729(a)(1)(A), "to an officer or employee of the United States," 3729(b)(2)(A)(i). The FCA may be enforced not just through litigation brought by the Government itself, but also through civil *qui tam* actions that are filed by private parties, called relators, "in the name of the Government." §3730(b).

In a *qui tam* suit under the FCA, the relator files a complaint under seal and serves the United States with a copy of the complaint and a disclosure of all material evidence. §3730(b)(2). After reviewing these materials, the United States may "proceed with the action, in which case the action shall be conducted by the Government," or it may "notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action." §3730(b)(4). Regardless of the option that the United States selects, it retains the right at any time to dismiss the action entirely, §3730(c)(2)(A), or to settle the case, §3730(c)(2)(B).

The FCA imposes two restrictions on *qui tam* suits that are relevant here. One, the "first-to-file" bar, precludes a *qui tam* suit "based on the facts underlying [a] pending action." §3730(b)(5) (emphasis added). The other, the FCA's statute of limitations provision, states that a *qui tam* action must be brought within six years of a violation or within three years of the date by which the United States should have known about a violation. In no circumstances, however, may a suit be brought more than 10 years after the date of a violation. §3731(b).

B

The Wartime Suspension of Limitations Act (WSLA)

suspends the statute of limitations for "any offense" involving fraud against the Federal Government. 18 U. S. C. §3287. Before 2008, this provision was activated only "[w]hen the United States [was] at war." *Ibid.* (2006 ed.). In 2008, however, this provision was made to apply as well whenever Congress has enacted "a specific authorization for the use of the Armed Forces, as described in section 5(b) of the War Powers Resolution (50 U.S.C. 1544(b))." *Ibid.* (2012 ed.).

II

Petitioners are defense contractors and related entities that provided logistical services to the United States military during the armed conflict in Iraq. From January to April 2005, respondent worked in Iraq for one of the petitioners as a water purification operator. He subsequently filed a *qui tam* complaint against petitioners (*Carter I*), alleging that they had fraudulently billed the Government for water purification services that were not performed or not performed properly. The Government declined to intervene.

In 2010, shortly before trial, the Government informed the parties about an earlier filed *qui tam* lawsuit, *United States ex rel. Thorpe* v. *Halliburton Co.*, No. 05–cv–08924 (CD Cal., filed Dec. 23, 2005), that arguably contained similar claims. This initiated a remarkable sequence of dismissals and filings.

The District Court held that respondent's suit was related to *Thorpe* and thus dismissed his case without prejudice under the first-to-file bar. Respondent appealed, and while his appeal was pending, *Thorpe* was dismissed for failure to prosecute. Respondent quickly filed a new complaint (*Carter II*), but the District Court dismissed this second complaint under the first-to-file rule because respondent's own earlier case was still pending on appeal. Respondent then voluntarily dismissed this appeal, and in

June 2011, more than six years after the alleged fraud, he filed yet another complaint (*Carter III*), and it is this complaint that is now at issue.

Petitioners sought dismissal of this third complaint under the first-to-file rule, pointing to two allegedly related cases, one in Maryland and one in Texas, that had been filed in the interim between the filing of *Carter I* and *Carter III*. This time, the court dismissed respondent's complaint with prejudice. The court held that the latest complaint was barred under the first-to-file rule because the Maryland suit was already pending when that complaint was filed. The court also ruled that the WSLA applies only to criminal charges and thus did not suspend the time for filing respondent's civil claims. As a result, the court concluded, all but one of those claims were untimely because they were filed more than six years after the alleged wrongdoing.

The Fourth Circuit reversed, rejecting the District Court's analysis of both the WSLA and first-to-file issues. *United States ex rel. Carter* v. *Halliburton Co.,* 710 F. 3d 171 (2013). Concluding that the WSLA applies to civil claims based on fraud committed during the conflict in Iraq,[1] the Court of Appeals held that respondent's claims had been filed on time. The Court of Appeals also held that the first-to-file bar ceases to apply once a related action is dismissed. Since the Maryland and Texas cases had been dismissed by the time of the Fourth Circuit's decision, the court held that respondent had the right to refile his case. The Court of Appeals thus remanded *Carter III* with instructions to dismiss without prejudice.

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[1] The Court of Appeals held that the Authorization for Use of Military Force Against Iraq Resolution of 2002, 116 Stat. 1498, note following 50 U. S. C. §1541, p. 312, was sufficient to satisfy the "at war" requirement in the pre-2008 version of the WSLA. The Court of Appeals consequently found it unnecessary to decide whether the pre- or post-2008 version of the WSLA governed respondent's claims.

After this was done, respondent filed *Carter IV*, but the District Court dismissed *Carter IV* on the ground that the petition for a writ of certiorari in *Carter III* (the case now before us) was still pending.

We granted that petition, 573 U. S. ___ (2014), and we now reverse in part and affirm in part.

III

The text, structure, and history of the WSLA show that the Act applies only to criminal offenses.

A

The WSLA's roots extend back to the time after the end of World War I. Concerned about war-related frauds, Congress in 1921 enacted a statute that extended the statute of limitations for such offenses. The new law provided as follows: "[I]n offenses involving the defrauding or attempts to defraud the United States or any agency thereof . . . and *now indictable under any existing statutes*, the period of limitations shall be six years." Act of Nov. 17, 1921, ch. 124, 42 Stat. 220 (emphasis added). Since only crimes are "indictable," this provision quite clearly was limited to the filing of criminal charges.

In 1942, after the United States entered World War II, Congress enacted a similar suspension statute. This law, like its predecessor, applied to fraud "offenses . . . now indictable under any existing statutes," but this time the law suspended "any" "existing statute of limitations" until the fixed date of June 30, 1945. Act of Aug. 24, 1942, ch. 555, 56 Stat. 747–748.

As that date approached, Congress decided to adopt a suspension statute which would remain in force for the duration of the war. Congress amended the 1942 WSLA in three important ways. First, Congress deleted the phrase "now indictable under any statute," so that the WSLA was made to apply simply to "any offense against

the laws of the United States." 58 Stat. 667. Second, although previous versions of the WSLA were of definite duration, Congress now suspended the limitations period for the open-ended timeframe of "three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress." *Ibid.* Third, Congress expanded the statute's coverage beyond offenses "involving defrauding or attempts to defraud the United States" to include other offenses pertaining to Government contracts and the handling and disposal of Government property. *Ibid.*, and §28, 58 Stat. 781.

Congress made more changes in 1948. From then until 2008, the WSLA's relevant language was as follows:

> "When the United States is at war the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not . . . shall be suspended until three years after the termination of hostilities as proclaimed by the President or by a concurrent resolution of Congress." Act of June 25, 1948, §3287, 62 Stat. 828.

In addition, Congress codified the WSLA in Title 18 of the United States Code, titled "Crimes and Criminal Procedure."

Finally, in 2008, Congress once again amended the WSLA, this time in two relevant ways. First, as noted, Congress changed the Act's triggering event, providing that tolling is available not only "[w]hen the United States is at war," but also when Congress has enacted a specific authorization for the use of military force. Second, Congress extended the suspension period from three to five years. §855, 122 Stat. 4545.[2]

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[2]The claims giving rise to the present suit originated in 2005, but

B

With this background in mind, we turn to the question whether the WSLA applies to civil claims as well as criminal charges. We hold that the Act applies only to the latter.

We begin with the WSLA's text. The WSLA suspends "the running of any statute of limitations applicable to any *offense* . . . involving fraud or attempted fraud against the United States or any agency thereof." 18 U. S. C. §3287 (emphasis added). The term "offense" is most commonly used to refer to crimes. At the time of both the 1948 and 2008 amendments to the Act, the primary definition of "offense" in Black's Law Dictionary referred to crime. Black's Law Dictionary 1110 (8th ed. 2004) (Black's) ("A violation of the law; a crime, often a minor one. See CRIME"); *id.*, at 1232 (4th ed. 1951) ("A crime or misdemeanor; a breach of the criminal laws"); *id.*, at 1282 (3d ed. 1933) (same). The 1942 edition of Webster's similarly states that "offense" "has no technical legal meaning; but it is sometimes used specifically for an indictable crime . . . and sometimes for a misdemeanor or wrong punishable only by fine or penalty." Webster's New International Dictionary 1690 (2d ed.). See also Webster's Third New International Dictionary 1566 (1976) (Webster's Third) ("an infraction of law: CRIME, MISDEMEANOR"); American Heritage Dictionary 1255 (3d ed. 1992) ("A transgression of law; a crime").

It is true that the term "offense" is sometimes used more broadly. For instance, the 1948 edition of Ballentine's Law Dictionary cautions: "The words 'crime' and 'offense' are not necessarily synonymous. All crimes are offenses, but some offenses are not crimes." Ballentine's Law Dic-

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respondent filed the operative complaint in 2011. Resolution of the questions before us in this case does not require us to decide which of these two versions of the WSLA applies to respondent's claims.

tionary 900.

But while the term "offense" is sometimes used in this way, that is not how the word is used in Title 18. Although the term appears hundreds of times in Title 18, neither respondent nor the Solicitor General, appearing as an *amicus* in support of respondent, has been able to find a single provision of that title in which "offense" is employed to denote a civil violation. The Solicitor General cites eight provisions,[3] but not one actually labels a civil wrong as an "offense." Instead, they all simply attach civil penalties to criminal offenses—as the Deputy Solicitor General acknowledged at oral argument. See Tr. of Oral Arg. 28–29.

Not only is this pattern of usage telling, but when Title 18 was enacted in 1948, the very first provision, what was then 18 U.S.C. §1, classified all offenses as crimes. That provision read in pertinent part as follows:

> "§1. Offenses classified.
>
> "Notwithstanding any Act of Congress to the contrary:
>
> "(1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.
>
> "(2) Any other offense is a misdemeanor." 62 Stat. 684 (repealed Oct. 12, 1984).

The Solicitor General correctly points out that regulatory provisions outside Title 18 sometimes use the term "offense" to describe a civil violation, see Brief for United States as *Amicus Curiae* 10 (United States Brief), but it is significant that Congress chose to place the WSLA in Title 18. Although we have cautioned against "plac[ing] too much significance on the location of a statute in the United States Code," *Jones* v. *R. R. Donnelley & Sons Co.,* 541 U. S. 369, 376 (2004), we have in similar circumstances

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[3] 18 U. S. C. §§38; 248, 670, 1033(a), 1964, 2292(a), 2339B, 2339C.

regarded the placement of a provision as relevant in determining whether its content is civil or criminal in nature, see *Kansas* v. *Hendricks*, 521 U. S. 346, 361 (1997). It is also revealing that Congress has used clearer and more specific language when it has wanted to toll the statutes of limitations for civil suits as well as crimes. Only two months after enacting the WSLA, Congress passed a tolling statute for "violations of the antitrust laws . . . now indictable *or subject to civil proceedings*." Act of Oct. 10, 1942, ch. 589, 56 Stat. 781 (emphasis added). Congress obviously could have included a similar "civil proceedings" clause in the WSLA, but it did not do so.

The WSLA's history provides what is perhaps the strongest support for the conclusion that it applies only to criminal charges. The parties do not dispute that the term "offenses" in the 1921 and 1942 suspension statutes applied only to crimes, Brief for Petitioners 23; Brief for Respondent at 24–25, and after 1942, the WSLA continued to use that same term. The retention of the same term in the later laws suggests that no fundamental alteration was intended.

Respondent and the Government latch onto the 1944 Act's removal of the phrase "now indictable under any statute" and argue that this deletion had the effect of sweeping in civil claims, but this argument is most improbable. Simply deleting the phrase "now indictable under the statute," while leaving the operative term "offense" unchanged would have been an obscure way of substantially expanding the WSLA's reach. Fundamental changes in the scope of a statute are not typically accomplished with so subtle a move. Converting the WSLA from a provision that suspended the statute of limitations for criminal prosecutions into one that also suspended the time for commencing a civil action would have been a big step. If Congress had meant to make such a change, we

would expect it to have used language that made this important modification clear to litigants and courts.

Respondent's and the Government's interpretation of the significance of the deletion of the phrase "now indictable" ignores a more plausible explanation, namely, Congress' decision to make the WSLA applicable, not just to offenses committed in the past during or in the aftermath of particular wars, but also to future offenses committed during future wars. When the phrase "now indictable" first appeared in the 1921 Act, it meant that the statute of limitations was suspended for only those crimes that had already been committed when the Act took effect. This made sense because the 1921 Act was a temporary measure enacted to deal with problems resulting from the First World War. The 1942 Act simply "readopt[ed] the [same] World War I policy" to deal with claims during World War II. *Bridges* v. *United States,* 346 U. S. 209, 219 (1953).

The 1944 amendments, however, changed the WSLA from a retroactive measure designed to deal exclusively with past fraud into a measure applicable to future fraud as well. In order to complete this transformation, it was necessary to remove the phrase "now indictable," which, as noted, limited the applicability of the suspension to offenses committed in the past. Thus, the removal of the "now indictable" provision was more plausibly driven by Congress' intent to apply the WSLA prospectively, not by any desire to expand the WSLA's reach to civil suits. For all these reasons, we think it clear that the term "offense" in the WSLA applies solely to crimes.

But even if there were some ambiguity in the WSLA's use of that term, our cases instruct us to resolve that ambiguity in favor of the narrower definition. We have said that the WSLA should be "narrowly construed" and "'interpreted in favor of repose.'" *Id.,* at 216 (quoting *United States* v. *Scharton*, 285 U. S. 518, 521–522 (1932). Applying that principle here means that the term "offense"

must be construed to refer only to crimes. Because this case involves civil claims, the WSLA does not suspend the applicable statute of limitations under either the 1948 or the 2008 version of the statute.[4]

IV

Petitioners acknowledge that respondent has raised other arguments that, if successful, could render at least one claim timely on remand. We therefore consider whether respondent's claims must be dismissed with prejudice under the first-to-file rule. We conclude that dismissal with prejudice was not called for.

The first-to-file bar provides that "[w]hen a person brings an action . . . 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) (emphasis added). The term "pending" means "[r]emaining undecided; awaiting decision." Black's 1314 (10th ed. 2014). See also Webster's Third 1669 (1976) (defining "pending" to mean "not yet decided: in continuance: in suspense"). If the reference to a "pending" action in the FCA is interpreted in this way, an earlier suit bars a later suit while the earlier suit remains undecided but ceases to bar that suit once it is dismissed. We see no reason not to interpret the term "pending" in the FCA in accordance with its ordinary meaning.

Petitioners argue that Congress used the term "pending" in a very different—and very peculiar—way. In the FCA, according to petitioners, the term "pending" "is 'used as a short-hand for the first filed action.'" Brief for Petitioners 44. Thus, as petitioners see things, the first-filed action remains "pending" even after it has been dismissed, and it forever bars any subsequent related action.

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[4]This holding obviates any need to determine which version of the WSLA applies or whether the term "war" in the 1948 Act applies only when Congress has formally declared war.

This interpretation does not comport with any known usage of the term "pending." Under this interpretation, *Marbury* v. *Madison*, 1 Cranch 137 (1803), is still "pending." So is the trial of Socrates.

Petitioners say that Congress used the term "pending" in the FCA as a sort of "short-hand," but a shorthand phrase or term is employed to provide a succinct way of expressing a concept that would otherwise require a lengthy or complex formulation. Here, we are told that "pending" is shorthand for "first-filed," a term that is neither lengthy nor complex. And if Congress had wanted to adopt the rule that petitioners favor, the task could have been accomplished in other equally economical ways—for example, by replacing "pending," with "earlier" or "prior."

Not only does petitioners' argument push the term "pending" far beyond the breaking point, but it would lead to strange results that Congress is unlikely to have wanted. Under petitioners' interpretation, a first-filed suit would bar all subsequent related suits even if that earlier suit was dismissed for a reason having nothing to do with the merits. Here, for example, the *Thorpe* suit, which provided the ground for the initial invocation of the first-to-file rule, was dismissed for failure to prosecute. Why would Congress want the abandonment of an earlier suit to bar a later potentially successful suit that might result in a large recovery for the Government?

Petitioners contend that interpreting "pending" to mean pending would produce practical problems, and there is some merit to their arguments. In particular, as petitioners note, if the first-to-file bar is lifted once the first-filed action ends, defendants may be reluctant to settle such actions for the full amount that they would accept if there were no prospect of subsequent suits asserting the same claims. See Brief for Petitioners at 56–57. Respondent and the United States argue that the doctrine of claim

preclusion may protect defendants if the first-filed action is decided on the merits, *id.*, at 60–61; United States Brief 30, but that issue is not before us in this case. The False Claims Act's *qui tam* provisions present many interpretive challenges, and it is beyond our ability in this case to make them operate together smoothly like a finely tuned machine. We hold that a *qui tam* suit under the FCA ceases to be "pending" once it is dismissed. We therefore agree with the Fourth Circuit that the dismissal with prejudice of respondent's one live claim was error.

* * *

The judgment of the United States Court of Appeals for the Fourth Circuit is reversed in part and affirmed in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

-and-

STEPHEN M. SHEA,

Plaintiffs,

v.

VERIZON BUSINESS NETWORK SERVICES, INC.; VERIZON FEDERAL INC.; MCI COMMUNICATIONS SERVICES, INC. d/b/a VERIZON BUSINESS SERVICES; and CELLCO PARTNERSHIP d/b/a VERIZON WIRELESS,

Defendants.

No. 1:09-cv-01050-GK

Pretrial Conference: Not Yet Scheduled

ORAL ARGUMENT REQUESTED

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

Randolph D. Moss (D.C. Bar No. 417749)
Jennifer M. O'Connor (D.C. Bar No. 460352)
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Tel.: (202) 663-6000
Fax: (202) 663-6363
randolph.moss@wilmerhale.com

Attorneys for Defendants

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INTRODUCTION

In this *qui tam* complaint under the False Claims Act ("FCA"), Relator Stephen M. Shea ("Relator") alleges that Defendants Verizon Business Network Services, Inc., Verizon Federal Inc., and MCI Communications Services, Inc. d/b/a Verizon Business Services (collectively, "Verizon") and Defendant Cellco Partnership d/b/a Verizon Wireless ("Verizon Wireless") improperly billed the Government for certain taxes and surcharges that purportedly were not permitted under certain contracts. The case is a near carbon copy of the action Relator filed against Verizon in 2007 in this Court. In that case (the "2007 Lawsuit"), Relator alleged that Verizon had improperly billed taxes and surcharges under two related government contracts that allegedly permitted recovery of only certain specified charges. Relator claimed in the 2007 Lawsuit to have gained knowledge of Verizon's allegedly improper billing from his work as a telecommunications consultant and from a leaked document. The case settled without an admission of liability after the Government intervened.

In the present action (the "2009 Lawsuit"), Relator brings no new information to bear. He merely reasserts the allegations from his 2007 Lawsuit and claims that they also apply to 20 additional Verizon and Verizon Wireless contracts whose names he located on the Internet. Relator does not make particularized allegations about what taxes and surcharges are permitted by those additional contracts or whether Defendants in fact billed for such taxes and surcharges. Instead, he simply assumes, "on information and belief," that because Defendants allegedly improperly billed for taxes and surcharges for the contracts at issue in the 2007 Lawsuit, the same is true for 20 other of Defendants' contracts. The United States has not intervened in the present action.

Relator's complaint in this case—his Second Amended Complaint—must be dismissed in its entirety for three independent reasons:

First, this action is barred by 31 U.S.C. § 3730(b)(5), which provides that "[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*." (Emphasis added.) Section 3730(b)(5)'s jurisdictional bar applies where a relator seeks to pursue on behalf of the United States a case that "incorporat[es] 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). Only the Government, having been put on notice of the prior action, may bring such a related case. Here, there can be little doubt that § 3730(b)(5) forecloses Relator's claims. Relator has conceded that this action is "related" to the 2007 Lawsuit, *see* SAC ¶ 5 & Civil Cover Sheet (Dkt. No. 1), and a simple comparison of the complaints in the two actions confirms that they are based on the same material elements of alleged fraud. *See also* Decl. of Randolph D. Moss (Sept. 12, 2012) ("Moss Decl."), Ex. 1 (Shea Dep. 150:5-6) (acknowledging that "a lot of the issues are the same" between his two lawsuits) (hereinafter "Shea Dep."). Because Relator's 2007 Lawsuit put the Government on notice of the fraud alleged in the present case, Relator's current *qui tam* suit cannot proceed.

Second, the FCA's "public disclosure" bar, 31 U.S.C. § 3730(e)(4), forecloses the present action. Section 3730(e)(4) requires dismissal of a *qui tam* action where the material elements of the allegation of fraud were previously "publicly disclosed" in certain specified sources—including court filings and in the media—unless the relator is the "original source" of the information disclosed. The "material elements" of Relator's allegations in this case are that (1) 20 Verizon contracts disallowed certain surcharges and (2) Verizon invoiced the government for those surcharges. Relator concedes that he found the information that allegedly demonstrates those material elements—certain "chunks" of contract language and "mock-up billing and billing

presentations"—on the Internet. *See* Shea Dep. 152:18-153:2; *see also, e.g.*, Shea Dep. 21:12-17; 25:4-7; 40:16-41:5; 51:5-8; 53:21-54:2; 55:14-15; 56:7-21; 59:1-3; 62:15-16; 100:17-21; 104:1-2; 106:11-13; 108:7-8; 109:12-15; 110:2-3; 113:1-3; 119:9-17; 120:2-7; 127:4-6; 137:9-10; 142:9-16; 147:12-13. Relator, moreover, was not an "original source" of any of the relevant information. As a result, this action is foreclosed under the "public disclosure" bar.

Third, the Second Amended Complaint fails to meet the pleading requirements of Federal Rules of Civil Procedure 8 and 9(b). Under Rule 8, conclusory assertions are insufficient; supporting facts demonstrating that the claim is more plausible than other possibilities must be alleged. *See, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009). And under Rule 9(b)—applicable to claims under the False Claims Act—a plaintiff must plead with particularity details regarding the "who, what, when, where, and how" of the fraud. *Boone v. MountainMade Found.*, 684 F. Supp. 2d 1, 8 (D.D.C. 2010). Relator's Second Amended Complaint satisfies neither standard. It does not plead facts sufficient to show that the contracts at issue prohibited the billing practices alleged. While the Second Amended Complaint alleges that Defendants fraudulently billed the United States on 20 separate contracts, it does not identify a single contractual provision that Verizon allegedly violated. Indeed, Relator concedes that he has not even read many of the contracts at issue and has reviewed only "chunks" of others. *See, e.g.*, Shea Dep. 117:1-3 ("I have not read every single one of these contracts in their entirety because I don't have them."); *id.* at 28:12-14, 18-20; 34:4-5; 40:20-21; 51:5-6; 100:20-21; 104:7-8; 106:18-19. For 18 of the 20 contracts, the Second Amended Complaint does not set forth any terms or conditions; for another, the Second Amended Complaint quotes operative contractual language, but that language itself makes clear that certain types of surcharges were permitted; and, for the last, the Second Amended Complaint merely quotes language from various modifications to the

contract (but not the contract itself), none of which supports Relator's claims. Nor does the Second Amended Complaint provide any particularized allegations regarding the purportedly fraudulent claims. The Second Amended Complaint does not identify any *particular* surcharge that was allegedly billed in violation of any *particular* contractual term or condition. It does not identify a single invoice containing a prohibited tax or surcharge. It does not allege even a general time frame for the purported fraud, and it does not identify anyone allegedly involved in the purported fraud. Because it lacks allegations providing any "particularity" regarding these essential elements of a fraud claim, the Second Amended Complaint cannot stand.

For each of these reasons, this case should be dismissed. Relator's role under the False Claims Act was completed when his 2007 Lawsuit was settled and he obtained a substantial reward for having notified the Government that Verizon was allegedly improperly billing certain taxes and surcharges. The decision whether to pursue a related action along the lines of the one Relator now asserts—an action that simply seeks to extend previously disclosed theories of fraud to *publicly identifiable* contracts—is for the Government alone to make. Verizon emphatically disputes that it has engaged in the fraud Relator alleges. But if the Government were for some reason to reach a contrary conclusion, it no doubt could and would take action to seek to protect its interests. Because the Government has not done so here, the Second Amended Complaint should be dismissed.

Finally, dismissal of this action should be with prejudice. Relator has already amended his complaint and should not be permitted to file an additional complaint. Relator cannot plead around the first-to-file and public disclosure bars, which arise from the fundamental nature of this action. For the reasons explained below, moreover, Relator is not entitled to attempt to cure the deficiencies in his pleadings under Federal Rules of Civil Procedure 8 and 9(b).

BACKGROUND

Relator's 2007 Lawsuit Against Verizon

Relator filed his first *qui tam* complaint against Verizon on January 17, 2007. *See* Moss Decl., Ex. 2 (Civ. No. 1:07-cv-0111(GK) (Dkt. No. 1)) (hereianfter "2007 Compl."). The 2007 complaint explained that the "action concern[ed] the knowing submission to the United States of certain prohibited surcharges under contracts to provide telecommunications services between defendant Verizon Communications Inc (and its division Verizon Business) and the General Services Administration." 2007 Compl. ¶ 2. Relator claimed that he "discovered the false and fraudulent claims that are at issue in this case through his extensive work as a private telecommunications consultant to Fortune 100 companies including reviewing invoices to ensure that the vendors ha[d] correctly implemented the negotiated contracts." *Id.* ¶ 12. The complaint alleged that "[d]uring the course of this work for private clients, Relator Shea became aware of the practice of MCI billing corporate clients not only for federal, state and local taxes levied on the customer but also for surcharges (often labeled as, or lumped together with, taxes) that were added to bills by MCI to inflate the revenue it received for telecommunication services." *Id.* Relator then claimed he "learned that MCI was attempting to pass on the same surcharges to the United States under its FTS2001 Contract even though Federal Acquisition Regulations (FAR) and the terms of the FTS2001 Contract precluded such surcharges." *Id.* ¶ 13. The complaint

also alleged that Verizon continued MCI's billing practices after the 2006 merger between MCI and Verizon. *See id.* ¶ 69.[1]

Specifically, the complaint alleged that "[o]n or about August 13, 2004, Relator Shea received an MCI document that purported to show 'the taxes and surcharges that the Federal Government is responsible for.'" *Id.* ¶ 70.[2] The complaint alleged that "MCI appear[ed] to have been invoicing the United States in the same way it invoiced many of its commercial clients notwithstanding the terms of the FTS2001 Contract and governing FAR regulations," *id.* ¶ 79, and that "MCI used the same billing platform that it used for enterprise [or corporate] customers to bill the United States without modifying its systems to reflect the terms of the FTS2001 Contract," *id.* ¶ 80. Similarly, the complaint alleged that "Verizon Business also uses the same billing platform that it uses for its business customers to bill the United States without modifying its systems to reflect the terms of the FTS2001 Contract or the FTS2001 Bridge Contract." *Id.* ¶ 81. Relator pointed to multiple specific provisions of the FTS2001 and FTS2001 Bridge Contracts that he claimed disallowed the charges, *id.* ¶¶ 30-45, along with particular aspects of the "Cost Proposal" for those agreements, *id.* ¶¶ 46-61, which he claimed demonstrated that Verizon's imposition of surcharges was improper under the terms of the contracts.

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[1] Verizon Communications Inc., the parent company initially named in this action, was formed on June 30, 2000, with the merger of Bell Atlantic Corp. and GTE Corp. *See* http://www22.verizon.com/investor/corporatehistory.htm. As the Second Amended Complaint acknowledges, Verizon did not acquire MCI (which had previously been named Worldcom) until 2006. *See* SAC ¶¶ 3, 6. Verizon also has numerous subsidiaries that predate the merger. *See, e.g., id.* ¶ 6 (listing subsidiaries). It is also a partial owner of Cellco Partnership, which operates as Verizon Wireless. *See id.* ¶ 10. The other co-owner of Cellco Partnership is Vodafone, a British telecommunications company. *Id.*

[2] The document allegedly showed that MCI billed the government the following charges: "Federal Regulatory Fee surcharges, state sales, excise and utility taxes; and surcharges based on the following state and local fees, contributions and taxes assessed on the carrier: public utility commission fees, state universal service fund and high cost fund contributions; state 'deaf taxes;' state and local gross receipts taxes; business license fees; 911 taxes; tele-relay service charges; ad valorem taxes; business, occupational and franchise taxes." *Id.* ¶ 71.

The United States intervened in the 2007 Lawsuit, and the parties reached a settlement agreement in February 2011 that did not include any admission of liability.

Relator's Initial Complaint in the Current Lawsuit

While the 2007 Lawsuit remained pending, Relator filed the current case—a second *qui tam* complaint against Verizon (the "2009 Lawsuit"). Relator filed the 2009 Lawsuit as a "related case" to the 2007 Lawsuit. *See* 2009 Compl. ¶ 7 (Dkt. No. 1) ("In 2007, Relator Stephen Shea filed a related action, Civ. Action No. 07CV0111 (GK) …."); Civil Cover Sheet (marking related case box). Relator himself acknowledges that "a lot of the issues are the same" in his two lawsuits. Shea Dep. 150:5-6. Like the 2007 complaint, Relator's 2009 complaint alleged that Verizon "knowingly submits claims to the United States for payment of illegal surcharges under contracts to provide telecommunication services." 2009 Compl. ¶ 2; *cf.* 2007 Compl. ¶ 2.

Just as in the 2007 complaint, Relator claimed in the 2009 complaint that he "discovered the false and fraudulent claims that are at issue in this case through his extensive work as a private telecommunications consultant to Fortune 100 companies including reviewing invoices to ensure that the vendors ha[d] correctly implemented the negotiated contracts." 2009 Compl. ¶ 22; cf. 2007 Compl. ¶ 12. The 2009 complaint also repeated the allegation from the 2007 complaint that "[d]uring the course of this work for private clients, Relator Shea became aware of the practice of MCI billing corporate clients not only for federal, state and local taxes levied on the customer but also for surcharges (often labeled as, or lumped together with, taxes) that were added to bills by Verizon to inflate the revenue it received for telecommunications services." 2009 Compl. ¶ 22; *cf.* 2007 Compl. ¶ 12. The 2009 complaint then, again, alleged that Relator "learned that MCI was attempting to pass on the same illegal surcharges, designated

as "'federal, state and local taxes,' 'fees,' 'surcharges,' or 'tax-like surcharges' and other similar names to the United States," 2009 Compl. ¶ 23, and that Verizon allegedly was doing the same, *see id*. ¶ 24; *cf*. 2007 Compl. ¶ 13.

Again in the 2009 complaint, Relator identified the same source of his supposed insider knowledge: "On or about August 13, 2004, Relator Shea received an MCI document that purported to show 'the taxes and surcharges that the Federal Government is responsible for.'" 2009 Compl. ¶ 52; *cf*. 2007 Compl. ¶ 70.3 The 2009 complaint also then alleges that "Verizon is invoicing the United States in the same way that it invoices many of its business customers notwithstanding the governing FARs or applicable contracts," 2009 Compl. ¶ 80; *cf*. 2007 Compl. ¶ 79, and again alleged that "Verizon uses the same billing systems that it uses for its business customers to bill the United States without modifying these systems to reflect the terms of the contracts with the United States or the FARs," 2009 Compl. ¶ 80; *cf*. 2007 Compl. ¶¶ 80-81.

Relator made no attempt in the 2009 Lawsuit to distinguish the theory or circumstances of fraud that he asserted in the 2007 Lawsuit. Indeed, Relator explicitly connected the two complaints under a single theory of fraud, stating that the 2009 Lawsuit "alleges that Verizon's pattern and practice of submitting false claims extends beyond the FTS2001 and FTS2001 Bridge Contract." 2009 Compl. ¶ 15. Relator asserted that his allegations of fraud applied to "multiple contracts including, but not limited to, the contracts for wireless services including WITS2001 administered by GSA, the Metropolitan Area Acquisition (MAA) contract administered by GSA, and contracts held by the Department of Defense, the United States Postal

[3] The document allegedly showed that MCI billed the Government for the same taxes and surcharges alleged in the 2007 Lawsuit. *See* 2009 Compl. ¶ 53; *cf*. 2007 Compl. ¶ 71.

Service, the United States House of Representatives and the United States Senate, and other federal agencies." *Id.*

In November 2011, the United States informed this Court that it was "not intervening at this time" in the 2009 Lawsuit. *See* Notice Of The United States That It Is Not Intervening At This Time (Dkt. No. 26).

Relator's Amended Complaint in the Current Lawsuit

Although the 2009 Lawsuit was unsealed on March 29, 2012, Relator did not serve the existing complaint at that time. Instead, Relator filed a First Amended Complaint almost four months after the case was unsealed and over three years after the initial complaint was filed. On September 12, 2012, Relator filed a Second Amended Complaint ("SAC") that is substantively identical to the First Amended Complaint but (at Defendants' request) substitutes three Verizon subsidiaries in place of Verizon Communications Inc.[4] Like the initial complaint in this action, the Second Amended Complaint acknowledges that this suit is "related" to the 2007 Lawsuit (*see* SAC ¶ 5) and attempts to extend the allegations from Relator's now-settled 2007 Lawsuit to additional Verizon government contracts.

Like the prior complaints, the Second Amended Complaint alleges that Relator discovered the purported fraud while "consulting with large commercial telecommunications customers." SAC ¶ 3; *cf.* 2009 Compl. ¶ 22; 2007 Compl. ¶ 12. It alleges that as a consultant, Relator "learned that most telecommunication carriers, including Worldcom, later named MCI Communications Corp., acquired by Verizon in 2006 (collectively 'MCI/Verizon'), had a custom

[4] *See* Stipulation Regarding Amended Complaint. (Dkt. No. 48) at 3 ("IT IS HEREBY STIPULATED by the parties—subject to approval by the Court—that Relator will file a Second Amended Complaint that is substantively identical to the First Amended Complaint but substitutes Verizon Business Network Services, Inc.; Verizon Federal Inc.; and MCI Communications Services, Inc. d/b/a Verizon Business Services in place of Verizon Communications Inc.").

and practice of charging" certain taxes and surcharges. SAC ¶ 3; *cf.* 2009 Compl. ¶ 22; 2007 Compl. ¶ 12.[5] The Second Amended Complaint then alleges that "MCI/Verizon overcharged the United States, just like its commercial customers." SAC ¶ 4; *see also id.* ¶ 27; 2009 Compl. ¶ 24; 2007 Compl. ¶ 13.

Specifically, the Second Amended Complaint—like the prior complaints—alleges the source of Relator's purported insider knowledge: "In 2004, Shea received an MCI document indicating that the company was charging the government for regulatory fee surcharges, and various state taxes, including utility taxes, ad valorem/property taxes, and business, occupational, and franchise taxes." SAC ¶ 4; *cf.* 2009 Compl. ¶ 52; 2007 Compl. ¶ 70. The Second Amended Complaint further alleges—again like the prior complaints, but this time referencing an unnamed "former Verizon employee"—that "Verizon did not have a separate billing system for federal customers and commercial customers." SAC ¶ 27; *cf.* 2009 Compl. ¶ 80; 2007 Compl. ¶¶ 80-81. In the Second Amended Complaint, Relator then asserts that his allegations apply not only to the FTS2001 and FTS2001 Bridge Contracts, but also to 20 additional contracts between Defendants and the United States—each of which is listed on publicly accessible websites. The only facts Relator provides about these 20 contracts, however, he admittedly gleaned from the Internet. *See* Shea Dep. 152:18-153:2; *see also, e.g.*, Shea Dep. 21:12-17; 25:4-7; 40:16-41:5; 51:5-8; 53:21-54:2; 55:14-15; 56:7-21; 59:1-3; 62:15-16; 100:17-21; 104:1-2; 106:11-13; 108:7-8; 109:12-15; 110:2-3; 113:1-3; 119:9-17; 120:2-7; 127:4-6; 137:9-10; 142:9-16; 147:12-13.

[5] The taxes and surcharges alleged to have been improperly billed are described as: "'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." SAC ¶ 3. Assuming its own conclusion, the Second Amended Complaint calls these charges "Non-Allowable Tax-Like Charges." *Id.*

Beyond the general allegation that Defendants committed fraud with respect to each agreement, the Second Amended Complaint provides no specific allegations supporting Relator's claims. Notably, the Second Amended Complaint does not contain allegations supporting the claim that any particular contract at issue prohibited passing along any particular surcharge that Verizon allegedly charged the Government. Other than listing them by name, the Second Amended Complaint provides no detail at all for 17 of the 20 contracts at issue.[6] Although Relator's claims depend on the notion that the listed contracts prohibited Defendants from imposing certain surcharges on the Government, the Second Amended Complaint does not even set forth or describe the operative contractual provisions for almost all of the 20 listed contracts. *Cf.* Shea Dep. 44:22-45:3 (Relator agrees that "different contracts have different surcharge provisions"). In fact, Relator admits that he does not know this information at this stage, and instead hopes to rely on discovery to construct his case. *See* Shea Dep. 192:19-22 ("I don't know what I don't know. But … when we see the documents and the invoicing we're going to know."); *id.* at 34:4-6 ("Again, I haven't read and seen every -- every single full whole contract. And I'm -- I'm anticipating to see that."). As to the couple of listed agreements for which the Second Amended Complaint refers to relevant contractual language—which Relator never read in their entirety, *see, e.g.*, *id.* at 117:1-3; 122:11-14; 142:9-11—the allegations do not support Relator's claims. *See* SAC ¶¶ 30, 32-40. Moreover, the Second Amended Complaint does not even set forth the general time frame for Relator's allegations, much less identify the specific time of each purportedly false claim. Nor does the Second Amended Complaint contain any allegations regarding the amounts of the allegedly false claims or the particular

[6] Indeed, Relator readily admits that he has not even read many of the contracts at issue or has reviewed only "chunks" of them that he obtained on the Internet. *See, e.g.*, Shea Dep. 28:12-14; 34:4-5; 40:20-21; 51:5-6; 100:20-21; 104:7-8; 106:18-19; 117:1-3; *see also* Moss Decl., Ex. 3 (Verizon Federal Contract User Guide).

circumstances of the claims. The Second Amended Complaint does not make allegations regarding any particular person asserted to be involved in the purported fraud or provide any detail regarding the alleged fraudulent scheme.

ARGUMENT

I. THE SECOND AMENDED COMPLAINT MUST BE DISMISSED UNDER THE FCA'S FIRST-TO-FILE BAR

The Second Amended Complaint must be dismissed under Federal Rule of Civil Procedure 12(b)(1) because the Court lacks jurisdiction over a suit by a private relator—rather than the Government—under the FCA's "first-to-file" bar, 31 U.S.C. § 3730(b)(5).

A. The First-To-File Bar Precludes Subsequent *Qui Tam* Actions Based On The Same Material Facts Alleged In A Prior Suit

When Congress amended the False Claims Act in 1986, it sought to "walk a fine line between encouraging whistle-blowing and discouraging opportunistic behavior" of relators who bring repetitive suits. *United States ex rel. Hampton v. Columbia/HCA Healthcare Corp.*, 318 F.3d 214, 217 (D.C. Cir. 2003) (internal quotation marks omitted). As part of that effort, Congress enacted the "first-to-file" bar, which prohibits relators—but not the Government—from bringing "a related action based on the facts underlying [a] pending action." 31 U.S.C. § 3730(b)(5); *see Hampton*, 318 F.3d at 217. The D.C. Circuit has explained that the first-to-file bar serves the "twin goals of rejecting suits which the government is capable of pursuing itself, while promoting those which the government is not equipped to bring on its own." *United States ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204, 1208 (D.C. Cir. 2011) (quoting *Hampton*, 318 F.3d at 217); *see also United States ex rel. Poteet v. Medtronic, Inc.*, 552 F.3d 503, 516 (6th Cir. 2009) (noting that interpretation of the first-to-file rule should comport with the policy of "ensuring that the government has notice of the essential facts of an allegedly fraudulent scheme" (internal citations omitted)); *Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276,

1279 (10th Cir. 2004) ("Once the government is put on notice of its potential fraud claim, the purpose behind allowing *qui tam* litigation is satisfied.").

The first-to-file bar is jurisdictional. *See, e.g., United States ex rel. Ortega v. Columbia Healthcare, Inc.*, 240 F. Supp. 2d 8, 11 (D.D.C. 2003) ("If an action 'based on the facts underlying' a pending case comes before a court, it must dismiss the later-filed case *for lack of jurisdiction*." (emphasis added)); *see also Batiste*, 659 F.3d at 1206-1207 (affirming dismissal for "lack of subject matter jurisdiction"); *id.* at 1208 ("Appellate courts review *de novo* the dismissal of a complaint *for lack of jurisdiction*" (emphasis added)). A motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) requires the plaintiff to establish that the court has jurisdiction to hear his claims. *United States ex rel. Ervin & Assocs., Inc. v. Hamilton Sec. Group, Inc.*, 332 F. Supp. 2d 1, 4 (D.D.C. 2003) (citing *United States ex rel. Fine v. Advanced Scis., Inc.*, 99 F.3d 1000, 1003 (10th Cir. 1996)). Thus, Relator bears the burden of demonstrating that the Second Amended Complaint is not sufficiently related to the 2007 complaint to trigger the first-to-file bar. Relator cannot meet this burden.

The touchstone for whether a *qui tam* suit is "related" to another action under the first-to-file bar is whether the first action "gave the government sufficient notice to discover the allegedly fraudulent [activity]." *United States ex rel. Folliard v. Synnex Corp.*, 798 F. Supp. 2d 66, 73 (D.D.C. 2011). Thus, it is well established in this Circuit that § 3730(b)(5) bars any action "incorporating the same material elements of fraud as an action filed earlier." *Hampton*, 318 F.3d at 217. The D.C. Circuit has expressly rejected the notion that the first-to-file bar precludes only successive suits based on "identical facts," *see id*. at 218, because "interpreting section 3730(b)(5) to bar only suits alleging facts identical to those in previous actions would defeat the law's primary objectives," *Synnex Corp.*, 798 F. Supp. 2d at 72 (quoting *United States*

ex rel. LaCorte v. SmithKline Beecham Clinical Laboratories, Inc., 149 F.3d 227, 233 (3d Cir. 1998)). Instead, a relator may overcome the first-to-file bar only if he or she can demonstrate that the later-filed suit alleges "a different *type* of wrongdoing, based on different material facts." *Synnex Corp.*, 798 F. Supp. 2d at 73 (emphasis in original) (internal quotation marks omitted). A second suit is barred "if it contains 'merely variations' of the fraudulent scheme described in the first action." *United States ex rel. Folliard v. CDW Tech. Servs., Inc.*, 722 F. Supp. 2d 37, 40 (D.D.C. 2010) ("*CDW II*") (quoting *Hampton*, 318 F.3d at 218). Under the first-to-file bar, the Court must compare the two complaints "at a sufficiently high level of generality." *CDW II*, 722 F. Supp. 2d at 41*; see also Synnex Corp.*, 798 F. Supp. 2d at 72.

B. Relator's 2009 Lawsuit Is Based On The Same Material Facts As The 2007 Lawsuit

Because Relator's Second Amended Complaint alleges the same material elements of fraud (and even the same supporting facts) as the 2007 complaint, it must be dismissed under the first-to-file bar. The 2009 Lawsuit is a prototypical example of a successive suit that brings no material new information to the Government's attention and therefore provides no additional benefit to the Government. It simply takes a theory of fraud that Relator asserted in his prior 2007 *qui tam* lawsuit and guesses that the same theory might apply to additional government contracts.

"When evaluating a § 3730(b)(5) first-to-file motion to dismiss, the only evidence needed to determine if the complaint is barred is the complaints themselves." *Synnex Corp.*, 798 F. Supp. 2d at 72 (quoting *United States ex rel. Ortega v. Columbia Healthcare, Inc.*, 240 F. Supp. 2d 8, 15 (D.D.C. 2003)) (internal quotation marks and alterations omitted). Here, a comparison of the 2007 complaint to the Second Amended Complaint demonstrates that the material

elements of the alleged fraud, as well as the alleged facts supporting those elements, are strikingly similar in all relevant respects:

Allegation	**2007 Complaint**	**Second Amended Complaint**
Type of Fraud	"This action concerns the knowing submission to the United States of certain prohibited surcharges under contracts to provide telecommunication services." ¶ 2.	"This lawsuit is based on a scheme by Defendants … to defraud the United States by knowingly billing the government for non-allowable surcharges." SAC ¶ 1.
Specific Allegations	Verizon submitted line item charges "that reflected [its] cost of doing business" and therefore were not reimbursable. ¶ 68.	Verizon "billed the government for Non-Allowable Tax-Like Charges" and concealed that such "charges are imposed not on the United States, but on the carrier, as a cost of doing business." ¶ 26.
Legal Arguments	Verizon was prohibited from charging for the surcharges under FAR 52.229-04 and the provisions of the contract. ¶¶ 4, 20.	Verizon was prohibited from charging for the surcharges under FAR 52.229-04 and the provisions of the contracts. ¶¶ 22, 29.
Circumstances of Discovery	Relator discovered fraud "through his extensive work as a private telecommunications consultant" and "became aware of the practice of [Verizon] billing corporate clients … for surcharges." ¶ 12.	Relator discovered fraud "[b]ased on his experience consulting with large commercial telecommunications customers" and learned "that most telecommunication carriers, including [Verizon], had a custom and practice of charging [surcharges.]" ¶ 3.
Specific Source of Knowledge	"On or about August 13, 2004, Relator Shea received an MCI document that purported to show 'the taxes and surcharges that the Federal Government is responsible for.'" ¶ 70; *see also* Moss Decl., Ex. 4 (Decl. of Relator Stephen Shea in Supp. of Mot. for Relator Share Award (Dkt. No. 63-2) ¶ 18) (hereinafter "Shea Decl.") ("The primary basis of my allegations was an 'insider' MCI document that I received from a MCI contact that purported to show 'the taxes and surcharges that the Federal	"In 2004, Shea received an MCI document indicating that the company was charging the government for regulatory fee surcharges, and various state taxes, including utility taxes, ad valorem/property taxes, and business, occupational, and franchise taxes." ¶ 4.

	Government is responsible for."); *id.* ¶ 19.	
Allegations About Verizon's General Billing Practices	Verizon "use[d] the same billing platform that it uses for its business customers to bill the United States without modifying its systems…" ¶ 81. *See also* Shea Decl. ¶ 8 ("I learned from two MCI insiders in a position to know about tax and surcharge issues, that MCI was not customer specific in imposing surcharges and that it had built its billing platforms in ways that made it difficult to turn taxes and surcharges 'on' and 'off' for certain customers.").	"A former Verizon employee … confirmed that Verizon did not have a separate billing system for federal customers and commercial customers, and that Verizon's billing system did not have the capability to turn off the surcharges that were generally charged to all customers." ¶ 27.

Relator's Second Amended Complaint thus plainly does not allege a different *type* of wrongdoing than alleged in his first *qui tam* action. Indeed, Relator identified the 2007 Lawsuit as a "related" case when he filed his 2009 complaint, *see* Dkt. No. 1 (Civil Cover Sheet), and he describes the 2007 Lawsuit as a "related action" in the Second Amended Complaint, *see* SAC ¶ 5. Relator's requests for production of documents also describe the 2007 Lawsuit as a "Related" case and seek all documents produced to the Government in the earlier action.[7] D.C. District Court Rule 40.5(3) provides that "[c]ivil . . . cases are deemed related when the earliest is still pending on the merits in the District Court and they (i) relate to common property, or (ii) involve common issues of fact, or (iii) grow out of the same event or transaction or (iv) involve the validity or infringement of the same patent." A plaintiff seeking to file a related suit must certify to the Court that the case falls under one of the four categories specified in Rule 40.5(3). Here, to file the present lawsuit as "related" to the 2007 Lawsuit, Relator must have

[7] *See* Dkt. No. 43-1 (Request 24: "All documents produced to the United States in Civ. Action No. 07CV0111(GK) filed in the United States District Court for the District of Columbia ("the Related Action").").

certified either that the cases "involve common issues of fact" or that they "grow out of the same event or transaction." Indeed, Relator later acknowledged that he gets the two suits "mixed together in my mind because … a lot of the issues are the same." Shea Dep. 150:3-6.

The only difference in the Second Amended Complaint is that Relator has now extended his allegations of fraudulent billing of surcharges to 20 additional contracts.[8] But this Court has rejected the notion that a relator who merely identifies different contracts in a later-filed complaint can avoid the first-to-file bar. *Synnex Corp.*, 798 F. Supp. 2d at 73; *CDW II*, 722 F. Supp. 2d at 41. In *Synnex Corp*., the Court noted that "the fact that [relator] alleges that defendants made false claims to different agencies under different contracts does not mean that the complaints incorporate different material elements." 798 F. Supp. 2d at 73. Similarly, in *CDW II*, a relator argued that the material elements of fraud in his suit differed from those in an earlier complaint because they "involve[d] 'completely different contracts and completely different agencies'. . . ." The Court rejected that argument, concluding that "the text of § 3730 and the statute's underlying policies do not support the creation of a distinction between the two complaints on this basis." 722 F. Supp. 2d at 41.

The D.C. Circuit has made clear that the relevant inquiry is "whether the [later-filed] [c]omplaint alleges a fraudulent scheme the government already would be equipped to investigate based on the [earlier-filed] [c]omplaint." *Batiste*, 659 F.3d at 1209. In *Batiste*, for example, the D.C. Circuit compared two *qui tam* actions against federal student loan servicer Sallie Mae and held that the second case was barred even though the first case focused on "the

[8] The fact that the 2007 Lawsuit has now been settled and dismissed is irrelevant for purposes of the first-to-file bar, since the 2007 Lawsuit was indisputably pending at the time Shea filed the current suit in 2009. *See United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1188 (9th Cir. 2001) ("To hold that a later dismissed action was not a then-pending action would be contrary to the plain language of the statute and the legislative intent. Dismissed or not, [the first] action promptly alerted the government to the essential facts of a fraudulent scheme—thereby fulfilling the goal behind the first-to-file rule." (internal citations omitted)).

fabrication of oral forbearance requests" and the second "focused on the offering of forbearances to unqualified borrowers." *Id*. The Court generalized that both cases alleged "fraudulent forbearance practices" and concluded that the allegations in the first complaint were sufficient to "put the U.S. government on notice of allegedly fraudulent forbearance practices." *Id*. at 1209-10.[9] Similarly, in the *Hampton* case, the D.C. Circuit applied the first-to-file bar to a subsequent suit naming different defendants and alleging that the fraud at issue occurred independently at different subsidiaries, including subsidiaries not at issue in the prior complaint. *See* 318 F.3d at 218-219.

Here, Relator's 2007 complaint put the Government on notice as to Verizon's allegedly fraudulent billing practices with respect to surcharges on government contracts, as well as information that Relator alleged supported his theory of fraud. Relator has indicated that he learned prior to filing the 2007 Lawsuit "that MCI (and later Verizon) was billing the government for surcharges as though they were surcharges imposed on the transaction when, in fact, they were seeking to collect back their own costs of doing business." *See* Moss Decl., Ex. 5 (Relator's Mem. in Support of Motion for Relator Share Award (Dkt. No. 63-1) at 9) (hereinafter "Relator Share Mem."). Relator then allegedly received "an 'insider' MCI document," which "purported to show 'the taxes and surcharges that the Federal Government is responsible for.'" *Id.* He provided notice of what he had learned to the Government,[10] and he alleged in his 2007 complaint that "Verizon Business … uses the same billing platform for its business customers to

[9] *See also United States ex rel. Chovanec v. Apria Healthcare Grp. Inc.*, 606 F.3d 361, 363 (7th Cir. 2010) (noting that "[t]he actions are related in the sense that both allege that [defendant] billed the federal government too much for medical devices and services," and concluding that different time periods and geographic regions were not sufficient to overcome the first-to-file bar).

[10] The FCA requires that a *qui tam* relator turn over to the Government "substantially all material evidence and information the person possesses." 31 U.S.C. § 3730(b)(2).

bill the United States without modifying its systems to reflect the terms of the FTS2001 Contract or the FTS2001 Bridge Contract." 2007 Compl. ¶ 81.

Following the 2007 complaint, the Government was on notice of Relator's allegations about Verizon's billing systems and practices. Relator conceded as much in seeking an increased share of the 2007 settlement. *See* Relator Share Mem. at 4 ("GSA gained valuable information about the practices of Verizon in billing enterprise customers …."); *id.* at 22 ("GSA presumably has gained increased knowledge about the carriers' practices of imposing surcharges through this litigation and will be in a better position to enforce its contract, including [a particular new contract], going forward."). Accordingly, the Government was well positioned to investigate the billing of surcharges on other contracts as it saw fit and to pursue recovery for itself. As this Court observed in *CDW II*, "[i]t is reasonable to conclude that the government, armed with [the allegations in an earlier *qui tam* action] about government procurement of [misrepresented] products from [defendant], was 'equipped . . . on its own' to discover the extent to which defendants had other federal procurement contracts that were governed by the [statute in question] and, in turn, whether any wrongdoing had occurred." 722 F. Supp. 2d at 43 (quoting *Hampton*, 318 F.3d at 218). Once the Government was on notice, Relator's ability to proceed as a relator in a *qui tam* suit came to an end. *See United States ex rel. Bane v. Life Care Diagnostics*, No. 8:06-cv-467-T-33MAP, 2008 WL 4853599, at *7 (M.D. Fla. Nov. 10, 2008) (affirming dismissal of a relator's second *qui tam* complaint and noting "the FCA requires that a relator allege the basis for all known and related false or fraudulent claims in the first-filed action and that the information be served on the Government at the time of filing.").

* * *

Whatever the merits of Relator's 2007 Lawsuit, the present action has no jurisdictional basis. The complaint in this case alleges the same fraud asserted in the prior case; it simply seeks to extend those allegations of fraud to 20 new Verizon contracts, all of which can be identified on publicly available websites. Because the present action is "related" to, and based on the facts underlying, the 2007 Lawsuit, it could be brought only by the Government, not a private relator. Accordingly, Relator's Second Amended Complaint should be dismissed with prejudice for lack of jurisdiction under § 3730(b)(5).

II. THE SECOND AMENDED COMPLAINT MUST BE DISMISSED UNDER THE FCA'S PUBLIC DISCLOSURE BAR

The Second Amended Complaint also must be dismissed under the FCA's "public disclosure" bar, 31 U.S.C. § 3730(e)(4). To the extent the Realtor adds anything to the allegations in this action beyond what was in his 2007 complaint, he relies on information that was publicly available on the Internet, which is where Relator admits he found it. That Relator may have relied on his previous consulting experiences to understand that public material is of no moment, because it is well settled in this Circuit that merely applying expertise to publicly available facts is insufficient to overcome the public disclosure bar.

A. The Public Disclosure Bar

The FCA's public disclosure bar prevents a relator—but not the Government—from pursuing an action that rests on allegations that were previously "publicly disclosed" in specified sources unless the relator is the "original source" of the information disclosed. At the time this action was filed, the bar provided:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing,

> audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A) (2009).[11]

A *qui tam* action is barred if it is "based upon" or "substantially similar" to information disclosed in any of the FCA's enumerated sources. *United States ex rel. Davis v. District of Columbia*, 679 F.3d 832, 836 (D.C. Cir. 2012). If the suit is based upon public disclosures, the bar "prevents suits by those other than an 'original source' when the government already has enough information to investigate the case and to make a decision whether to prosecute, or where the information could at least have alerted law-enforcement authorities to the likelihood of wrongdoing." *Id.* (internal quotation marks omitted). Congress thus sought to achieve "the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own." *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994).

The public disclosure bar forecloses *qui tam* actions "where all of the material elements of the fraudulent transaction are already in the public domain" and the relator merely "comes forward with additional evidence" that cumulatively adds to information already in the public domain. *Id.* at 655. The bar therefore "precludes suits by individuals who base *any part* of their allegations on publicly disclosed information." *United States ex rel. J. Cooper & Assocs., Inc. v.*

[11] Congress amended the public disclosure bar in the Patient Protection and Affordable Care Act ("PPACA"), which was signed into law on March 23, 2010. PPACA's amendments do not apply retroactively to cases pending at the time of enactment, *see Schindler Elevator Corp. v. United States ex rel. Kirk*, 131 S. Ct. 1885, 1889 n.1 (2011); *Graham Cnty. Soil and Water Conservation Dist. v. United States ex rel. Wilson*, 130 S. Ct. 1396, 1400 n.1 (2010); *United States ex rel. Green v. Serv. Contract Educ. & Training Trust Fund*, 843 F. Supp. 2d 20, 29 n.7 (D.D.C. 2012), and, in any event, as explained below, the outcome of this case would be the same under either version of the bar.

Bernard Hodes Group, Inc., 422 F. Supp. 2d 225, 235 n.10 (D.D.C. 2006) (emphasis in original and internal quotation marks omitted); *United States ex rel. Vuyyuru v. Jadhav*, 555 F.3d 337, 351–52 (4th Cir. 2009) ("Section 3730(e)(4)(A)'s public disclosure jurisdictional bar encompasses actions even partly based upon prior public disclosures."). It is not necessary that "the relevant public disclosures irrefutably prove a case of fraud[;] [i]t is sufficient that the publicly disclosed transaction is sufficient to raise the inference of fraud." *United States ex rel. Settlemire v. District of Columbia*, 198 F.3d 913, 919 (D.C. Cir. 1999) (internal quotation marks, citation omitted).

Further, the D.C. Circuit has made clear that the relator cannot overcome the public disclosure bar simply by utilizing his "expertise" to make allegations of fraud based on publicly disclosed facts. *Springfield Terminal Ry. Co.*, 14. F.3d at 655 (using "[e]xpertise" in a given field to deduce that a fraud has been committed does "not in itself give a *qui tam* plaintiff the basis for suit when all the material elements of fraud are publicly available, though not readily comprehensible to nonexperts"). Indeed, a *qui tam* is barred where the relator merely possesses "background information which enables [him or her] to understand the significance of a publicly disclosed transaction or allegation." *Id.* (citation and internal quotation marks omitted).

B. The Public Disclosure Bar Forecloses Relator's Claims Because They Are Based On Publicly Available Contract And Billing Information

The public disclosure bar squarely forecloses this action. The claims in the Second Amended Complaint are comprised of two material elements: (1) that 20 contracts between Verizon and various government entities disallowed certain surcharges, and (2) that Verizon invoiced the government for these surcharges. *See* SAC ¶ 28 ("Verizon improperly billed for Non-Allowable Tax-Like Charges on the following federal telecommunication contracts ….").

As discussed in Section III *infra*, both of these allegations are wholly conclusory and insufficient

because the Relator fails to identify which surcharges Verizon actually invoiced to the Government or any provisions within the 20 contracts that disallow them. The allegations also fail because Relator admits that even the conclusory information he possesses about the 20 named contracts and the contents of invoices that allegedly contain impermissible charges was publicly available. He found it on the Internet.

1. Relator's Information Regarding The Content Of The Contracts Is From The Internet

As explained in more detail below, *see infra* pp. 32-33, for 17 of the 20 contracts, Relator pleads only the contract name and number and literally nothing at all about the content of the contract. *See* SAC ¶ 28. Relator (or anyone else) could identify these contract names and numbers simply by searching publicly available websites,[12] and Relator admitted that he compiled his list from such websites. *See* Shea Dep. 21:12-17 ("Most of these from this specific list came from a contract—a document on Verizon—I believe it was Verizon's website[.]"); *id.* 151:18-153:4 & Ex. 2 (source of contract descriptions, which Relator found online).[13] As for the three contracts for which Relator sets forth minimal detail other than the contract name and number, that information also can be found on the Internet, as Relator also admitted:

[12] *See, e.g.*, Moss Decl. ¶ 4 & Ex. 3 (online Verizon Federal Contract User Guide) (identifying by name and number the contracts named in SAC ¶¶ 28(a), 28(b), 28(c), 28(f), 28(h), 28(i), 28(j), 28(k), 25(l), & 28(m)); *id.* ¶ 7 & Ex. 6 (DoD website) (identifying by name and number the contract named in ¶ 28(e)); *id.* ¶ 8 & Ex. 7 (FedBixOpps.com website) (identifying by name and number the contract named in ¶ 28(g)); *id.* ¶ 9 & Ex. 8 (online Verizon GSA Schedule Program) (identifying by name and number the contract named in ¶ 28(d)).

[13] It is appropriate for the Court to consider evidence outside the pleadings in evaluating this aspect of Defendants' motion. The public disclosure bar affects the jurisdiction of the Court. *See* 31 U.S.C. § 3730(e)(4) (2009). In considering a motion to dismiss for lack of subject matter jurisdiction, courts routinely rely on a factual record. *See, e.g.*, *Coal. for Underground Expansion v. Mineta*, 333 F.3d 193, 198 (D.C. Cir. 2003) (noting that the Court could resolve factual questions in considering a motion to dismiss for lack of subject matter jurisdiction); *United States ex rel. Green v. Serv. Contract Educ. & Training Trust Fund*, 843 F. Supp. 2d 20, 37 n.11 (D.D.C. 2012) (considering relator's declaration in support of his jurisdictional argument under the public disclosure bar). Indeed, even if the bar were not jurisdictional, the Court could consider evidence on this issue. *See* Fed. R. Civ. P. 12(d).

Paragraph(s)	**Contract**	**Allegation / Source**
¶ 29	FEMA Contract No. HSFEHQ-04-D-0023	Relator pleads that the contract allegedly "did not mention Non-Allowable Tax-Like Surcharges," a statement that, even if true, does not allege that the contract's language disallows any particular surcharge. Because Relator does not plead any actual contractual language, he effectively has done nothing more than identify the contract itself, which is information that can be found on Verizon's website. In his deposition, Relator could not recall having ever seen this contract but admitted that he found the contract number and description on the Internet.[14]
¶ 30	WITS 3 Contract No. GS11T08BJD6001	Relator quotes Sections H.16 and H.27 of the contract. Relator admitted that he found this contract language on the Internet.[15]
¶¶ 32-40	Verizon Wireless Federal Supply Schedule, Contract No. GS-35F-0119P	Relator quotes from modifications 7, 8, 12, 18, and 20 to the contract. Relator admitted that he found on the Internet all of the modifications to this contract that he possesses.[16]

Because Relator obtained the facts that he alleges regarding the contracts on the Internet (Verizon's website or government websites or other publicly available websites, *see* Shea Dep. 21:21:-22:10), this information was publicly disclosed.

2. Relator's Information Regarding The Content Of The Invoices That Allegedly Contain Impermissible Charges Is From The Internet

Although Relator did not plead any specific facts regarding Verizon's invoices, he admitted that what he knows about which allegedly impermissible surcharges were actually

[14] *See* Shea Dep. 113:1-3 ("I found this one, that contract number, on a description kind of a – on Verizon's website"); 116:7-9("Do you think you have a copy of this contract? I'm not sure."); 113:22-114:4 ("Do you know if you have a copy of it? Again, I have – I have lots of copies of chunks of these contracts. This one on FEMA, again, I don't have any instant recall.").

[15] Shea Dep. 120:6-7 ("Where did you get it? Most likely online.")

[16] Shea Dep. 127:12-13; 137:9-10; 142:4-16.

charged on Verizon's invoices was also gleaned from the Internet.[17] For some contracts, Relator was able to find online what he described as "mock-up invoicing" or "training invoices," which in some cases contained a section on taxes and surcharges.[18]

For example, Relator explained in his deposition that "with a lot of these things, you can find these [mock-up invoices] by taking the contract number…and you just stick them in Google." Shea Dep. 47:1-6. He explained that these billing "mock-ups" are not the "actual billing" but do include the "billing format," *id.* at 47:14-16, and a "section on taxes and surcharges," *id.* at 47:22-48:1. Relator remembered "vividly" seeing tax and surcharge provisions in one of the 20 contracts, *id.* at 53:7-12, and recalled or thought he recalled "mock-up" bills for six other contracts, *id.* at 48:5-10; 55:16-19; 63:5-9, 103:18-22, 109:16-110:1; 124:6-10, which he claimed "provide[d] [him] with enough information to know what surcharges are charged [on the relevant contract]," *id.* at 55:20-56:6.

That the documents that Relator admits he found on the Internet do not appear to be actual Verizon invoices is of no moment. What matters is that, according to Relator, information regarding which surcharges Verizon charged to government customers can be found on the Internet. They are thus publicly disclosed for the purposes of the public disclosure bar.

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[17] In his deposition, Relator stated that he "got a sample bill of a wireless, like, a Blackberry device from someone on the Judiciary Committee." Shea Dep. 127:13-16. However, Relator conceded that the only surcharges shown on this bill—the Federal Universal Service Charge and Regulatory Charge—were the very ones that the contract modification language quoted in his Second Amended Complaint indicates were permitted to be charged under the Wireless Schedule, and that he was aware of no contract or modification language that disallowed these charges. *See* Shea Dep. 129:1-14; 131:1-10; 133:15-136:1. Accordingly, this Wireless Schedule invoice does not support the allegations in the Second Amended Complaint that Verizon charges impermissible surcharges, and it thus is irrelevant to the public disclosure bar analysis.

[18] Shea Dep. 46:11-16; 47:22-48:1; 48:10; 50:6-8; *see also id.* at 53:16-54:2 (describing an online mock-up bill for the contract named in SAC ¶ 28(e)); 55:16-56:21 (describing same as to contract named in ¶ 28(f)).

3. Material Available On Public Internet Sites Is Publicly Available

Earlier this year, this Court held that websites that are available to the general public are "news media" for purposes of the public disclosure bar. *United States ex rel. Green v. Svc. Contract Educ. & Training Trust Fund*, 843 F. Supp. 2d 20, 32 (D.D.C. 2012).[19] In *Green*, the Court dismissed a lawsuit where "the fact that defendant contractors had service contracts with federal agencies is readily available on the Internet" via a labor union's website. *Id*. at 31. The Court noted that the public disclosure bar is given "a broad sweep," *id*. at 32 (quoting *Schindler Elevator*, 131 S. Ct. at 1891), and it concluded that the key consideration is the "ready accessibility" of the information, and not whether the website is a news source in the traditional sense, *Green*, 843 F. Supp. 2d at 33; *see also United States ex rel. Brown v. Walt Disney World Co.*, No. 6:06-cv-1943-Orl-22KRS, 2008 WL 2561975, at *4 (M.D. Fla. June 24, 2008) (Wikipedia qualifies as "news media"); *United States ex rel. Unite Here v. Cintas Corp.*, No. C 06-2413 PJH, 2007 WL 4557788, at *14 (N.D. Cal. Dec. 21, 2007) (finding that "[t]he 'fact' of the contracts between [defendant] and the federal government was publicly disclosed in the news media, as that information was available on the Internet").

C. Any Purportedly Non-Public Information Relied Upon By Relator Was Merely Cumulative

As explained above, the elements of Relator's claims have been publicly disclosed. Although Relator has alleged very little regarding the content of the 20 contracts at issue, what he described about them can be—and in fact was—found on the Internet. Similarly, although he has alleged very little regarding the content of Verizon's invoices, what he knows about specific allegedly impermissible charges on the contracts at issue in this action he found on the Internet.

Relator cannot avoid the public disclosure bar by pointing to the limited other

[19] PPACA did not alter the "news media" disclosure provision.

information he cites as the basis for his allegations, because it adds only cumulative information to the "essential elements" of his allegations that were already publicly disclosed. As the D.C. Circuit has explained, where the material elements of an allegation have been publicly disclosed, the case is barred where the Relator merely "comes forward with additional evidence." *Springfield Terminal Ry. Co.*, 14 F.3d at 655. The only specific facts Relator has identified as the basis for his current suit that he does not admit he found on the Internet are (1) an MCI document Relator says he received in 2004, *see* SAC ¶ 4, and (2) the contention that Verizon does not have a separate billing system for federal and commercial customers and that its "billing system do[es] not have the capability to turn off the surcharges that were generally charged to all customers," *see id.* ¶ 27. This information is simply "additional evidence" supporting the material elements of Relator's allegations.[20]

The 2004 document lists taxes and surcharges, but Relator admits that these taxes and surcharges are not charged on all of the 20 contracts at issue. Shea Dep. 165:6-14 ("Some of them will be [charged on the 20 contracts], some of them won't be. It's going to vary depending on what the services are. It's going to vary on where the services are provided. It's going to vary on, you know, the billing platform."); *id.* at 170:10-12 ("[S]ome of these charges aren't going to appear on some of the services under some of the contracts"). Accordingly, the 2004

[20] In any event, these allegations were publicly disclosed in the 2007 Lawsuit. *See supra* Section I. Because the 2007 complaint was under seal at the time the 2009 complaint was filed, Relator may argue that the disclosure was not "public" for purposes of the public disclosure bar. *See United States ex rel. Hockett v. Columbia/HCA Healthcare Corp.*, 498 F. Supp. 2d 25, 46-47 (D.D.C. 2007). That argument, however, fails for multiple reasons. Most notably, it ignores the fact that the primary purpose of the rule is to bar suit where the government is constructively on notice of the allegations. *See Davis*, 679 F.3d at 836 (public disclosure bar prevents suits "when the government already has enough information to investigate the case and to make a decision whether to prosecute" (internal quotation marks omitted)). Moreover, the 2007 complaint was unsealed (*see* Dkt. No. 56, Civ. No. 1:07-cv-00111) over a year *before* Relator served the Second Amended Complaint, which was the first time that Relator identified 17 of the contracts that he contends involved improper billing. Finally, these allegations fall at the core of what Relator is precluded from alleging under the first-to-file bar. *See supra* Section I.

document adds little to the billing information Relator found on the Internet in preparing his case. The knowledge about Verizon's billing system from a former Verizon employee, SAC ¶ 27, is similarly cumulative of—and less specific than—the information Relator located on the Internet. Indeed, Relator conceded that Verizon has multiple billing systems, Shea Dep. 195:9-14, that the Verizon employee did not indicate which billing system he was referring to, *id.* at 195:15-20; 212:7-9, and that Verizon does in fact have the capability to turn off surcharges or to credit back surcharges or use other work-arounds in order to avoid charging surcharges to particular customers, *id.* at 227:17-231:2. Against this backdrop, Relator's purported "inside" information about Verizon's billing systems is at most "additional evidence" that is far from sufficient to avoid the public disclosure bar. *Springfield Terminal Ry.*, 14 F.3d at 655; *see also Bernard Hodes Group*, 422 F. Supp. 2d at 235 n.10 (bar "precludes suits by individuals who base *any part* of their allegations on publicly disclosed information" (emphasis in original)).

Finally, Relator cannot avoid the public disclosure bar by pointing generally to his industry experience and claiming that it allowed him to recognize the significance of the publicly disclosed contract and billing information. In his deposition, when asked for the source of allegations against Defendants, Relator referred repeatedly to what he had learned through his years as a consultant on telecommunications contracts—none of which were federal government contracts, let alone any of the contracts named in this suit—and at one point referred to this knowledge as the "special sauce" that allowed him to make sense of the "salt and pepper" that "everybody knows."[21] The D.C. Circuit has clearly held, however, that such "expertise" is not sufficient to surmount the public disclosure bar. *See Springfield Terminal Ry.*, 14 F.3d at 655

[21] Shea Dep. 70:17-71:1; *see also, e.g.*, *id.* at 137:12-13 ("Again, a lot of my knowledge in terms of what this stuff is from my industry stuff."); *id.* at 23:17-18 (explaining how "industry knowledge" helps him understand the bills and contracts); *id.* at 34:21-35:2 (stating that his "industry experience" leads him to expect that "there's going to be a whole heck of a lot of charges that are not allowable").

("[T]here may be situations in which all of the critical elements of fraud have been publicly disclosed, but in a form not readily accessible to most people, *i.e.*, engineering blueprints on file with a public agency. Expertise in the field of engineering would not in itself give a *qui tam* plaintiff the basis for suit when all the material elements of fraud are publicly available, though not readily comprehensible to nonexperts.").

D. Relator Is Not The Original Source

Because Relator's new allegations are "based upon" publicly disclosed materials found on the Internet, his lawsuit "can proceed only if he is an 'original source.'" *Davis*, 679 F.3d at 837. Relator, however, is obviously not an "original source" of the contract and billing information about the 20 listed contracts that he found on the Internet. Relator lacks "direct and independent knowledge of" that information. 31 U.S.C. § 3730(e)(4)(B) (2009). "'Direct' signifies marked by absence of an intervening agency," and "'[i]ndependent knowledge' is knowledge that is not itself dependent on the public disclosure." *Springfield Terminal Ry. Co.*, 14 F.3d at 656 (internal citations and quotation marks omitted). The D.C. Circuit has held "this definition to impose a conjunctive requirement—direct *and* independent—on *qui tam* plaintiffs." *Id*. (emphasis in original). Relator admitted that he did not have "independent" or "direct" access to Defendants' contracts and bills; all he saw were "chunks" of contracts and "mock-up" bills that he found on publicly available sources such as the Internet.

Relator would not be an "original source" even under PPACA's amended definition of the term.[22] Relator could not have "voluntarily disclosed" the information that he has about the contracts or invoices to the Government "prior to" the "public disclosure" of that information on

[22] Relator's Second Amended Complaint asserts separate causes of action for conduct occurring before and after the date of enactment of PPACA, suggesting that PPACA's amendments apply to claims submitted after its enactment. *But see supra* n.11 (noting that PPACA does not apply retroactively to cases pending on the date of enactment). Even if PPACA did apply to conduct after March 23, 2010, it would not affect the outcome of this motion.

the Internet, 31 U.S.C. § 3730(e)(4)(B) (2012),[23] since he admitted he found it on the Internet.[24] Further, he does not bring any additional information that is "independent of and materially adds to the publicly disclosed allegations or transactions," because—as discussed above—the only other information on which Relator bases his lawsuit is cumulative. Relator has never been an employee of Verizon or a consultant to a federal government agency with respect to a Verizon contract, Shea Dep. 16:3-11; 20:2-9, and does not claim to have had direct access to Verizon's contracts or invoices. To the contrary, Relator claims to have applied "expertise" he gained as a commercial consultant to publicly disclosed information about Verizon, which is insufficient. "If a relator merely uses his or her unique expertise or training to conclude that the material elements already in the public domain constitute a false claim, then a *qui tam* action cannot proceed." *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 688 (D.C. Cir. 1997).

* * *

For all of these reasons, this follow-on action by Relator—which does no more than assert conclusory allegations regarding material he admits is available on the Internet—is foreclosed by § 3730(e)(4)'s "public disclosure" bar.

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[23] After PPACA, § 3730(e)(4)(B) provides:

> For purposes of this paragraph, "original source" means an individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.

[24] *See, e.g.*, Shea Dep. 21:12-17; 25:4-7; 40:16-41:5; 51:5-8; 53:21-54:2; 55:14-15; 56:7-8; 59:1-3; 62:15-16; 100:19-21; 104:1-2; 106:11-13; 108:7-8; 109:12-15; 110:2-3; 113:1-3; 119:9-17; 120:2-7; 127:4-6; 137:9-13; 142:9-16; 147:12-13.

III. THE SECOND AMENDED COMPLAINT FAILS TO SATISFY THE PLEADING STANDARDS OF RULES 8 AND 9(b)

The Second Amended Complaint must also be dismissed under Federal Rule of Civil Procedure 12(b)(6) because it fails to meet the pleading requirements of Rules 8 and 9(b).

A. Applicable Legal Standards

Rule 8 requires a plaintiff to allege facts that, if true, would plausibly entitle him to relief. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Thus, "a complaint [does not] suffice if it tenders naked assertions devoid of further factual enhancement." *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009). "Instead, the complaint must plead facts that are more than 'merely consistent with' a defendant's liability; 'the pleaded factual content must allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *United States ex rel. Head v. Kane Co.*, 798 F. Supp. 2d 186 (D.D.C. 2011) (quoting *Iqbal*, 556 U.S. at 663 (internal alterations omitted)); *see also Sharma v. District of Columbia*, --- F. Supp. 2d ---, Civ. A. No. 10-1033(GK), 2012 WL 3195141, at *4 (D.D.C. Aug. 8, 2012) ("[T]he court need not accept inferences drawn by plaintiffs if such inferences are unsupported by facts set out in the complaint." (quoting *Kowal v. MCI Communications Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994))). Dismissal under Rule 8 is appropriate where a complaint fails to provide facts sufficient to "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555.

Because the FCA is an anti-fraud statute, it is well established that FCA claims must also meet the more stringent pleading requirements of Rule 9(b), which requires a complaint to "state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b); *see, e.g., United States ex rel. Totten v. Bombardier Corp.*, 286 F.3d 542, 551-552 (D.C. Cir. 2002). This Court has specified that under Rule 9(b)'s heightened standard, an "FCA relator must state the time, place, and contents of the false representations, the facts misrepresented, and what was

obtained or given up as a consequence of the fraud." *United States ex rel. Bender v. N. Am. Telecommc'ns, Inc.*, 686 F. Supp. 2d 46, 49 (D.D.C. 2010); *see also United States ex rel. Williams v. Martin-Baker Aircraft Co.*, 389 F.3d 1251, 1256 (D.C. Cir. 2004) (same). In other words, a relator must allege the "who, what, when, where, and how" of the fraud. *Boone v. MountainMade Found.*, 684 F. Supp. 2d 1, 8 (D.D.C. 2010).

B. The Second Amended Complaint Fails To Plead Facts Sufficient To Support The Inference That Fraud Occurred

The Second Amended Complaint fails the pleading requirements of Rule 8, much less the heightened pleading requirements of Rule 9(b). It lists 20 Verizon government contracts by name and number and states "on information and belief" that Verizon improperly billed certain surcharges under the contracts. SAC ¶ 28. But the Second Amended Complaint does not allege that any *particular* surcharge was prohibited under any *particular* contract and does not offer any particularized allegations regarding the purportedly fraudulent charges submitted by Defendants, including what they were for, when and by whom they were submitted, and what contract provision they purportedly violated. As explained below, the Second Amended Complaint is deficient in numerous respects.

1. The Second Amended Complaint Fails To Demonstrate That The Named Contracts Prohibited The Surcharges

The Second Amended Complaint alleges that "Verizon improperly billed for Non-Allowable Tax-Like Charges"[25] on 20 of its contracts with the federal Government. SAC ¶ 28. But the Second Amended Complaint provides no support for its conclusory assertion that the specified charges were not permitted under the 20 contracts at issue. It recognizes that whether a particular tax or surcharge may be billed to the Government turns on the particular terms of each

[25] *See* SAC ¶ 3 (defining "Non-Allowable Tax-Like Charges); *see supra* note 5.

contract and that those terms vary between contracts. *See, e.g.*, SAC ¶¶ 17, 22-23 (articulating the differences between a "firm-fixed-price contract" (¶ 17) and a contract that "excludes Federal, State, and local taxes and duties from the contract price" (¶¶ 22-23)); *id.* ¶ 29 (alleging merely that "*many*" of the 20 listed contracts "never discussed Non-Allowable Tax-Like Charges" (emphasis added)); *id.* ¶ 30 (conceding that some of the 20 listed contracts "specifically excluded certain surcharges from the list price," and thus permitted those surcharges to be billed in addition to the list price). Therefore, for this Court to "draw the reasonable inference that the defendant is liable for the misconduct alleged," *Kane Co.*, 798 F. Supp. 2d at 193, and in order to allege "the circumstances constituting fraud," *id.*, Relator would need to plead facts sufficient to demonstrate a *particular* surcharge was barred under a *particular* contract and that the Government was fraudulently billed for that surcharge.

Relator's 2007 Lawsuit set forth with specificity the provisions of the contracts at issue. *See* 2007 Compl. ¶¶ 28-64. The Complaint acknowledged that the contracts permitted certain surcharges while prohibiting others. *See id.* ¶ 66 ("The Federal Universal Service Fund surcharge, the PICC surcharge, and certain other taxes were acceptable line item charges under the FTS2001 Contract."); *id.* ¶ 67 ("No other surcharges were to be included as separate line items on the invoices under the FTS2001 Contract."). In contrast to the 2007 complaint, the Second Amended Complaint in the present action contains almost no description of the contractual provisions at issue. The Second Amended Complaint does not provide *any information at all* about 17 of the 20 named contracts (beyond contract name and number). And for the other three, it provides only minimal allegations that are insufficient to show improper billing by Defendants:

First, as to Verizon's contract with the Federal Emergency Management Agency ("FEMA"), the Second Amended Complaint includes only a single sentence stating simply that the contract "did not mention Non-Allowable Tax-Like Charges." SAC ¶ 29. But the fact that the FEMA contract purportedly is *silent* on the issue of surcharges does not demonstrate that any particular surcharge was prohibited.

Second, the Second Amended Complaint concedes that Verizon's WITS3 Contract "specifically excluded certain surcharges from the list price, like the Federal Universal Service Charge," permitting them to be charged separately. SAC ¶ 30. The Second Amended Complaint thus alleges only that Verizon "mischaracterized" the Federal Universal Service Charge as a "mandatory tax." But the purported mischaracterization is not alleged to have been in some bill or charge or any other statement submitted or drafted by Verizon; it is in the contract language itself, which Relator never alleges was drafted by Verizon—as opposed to by the Government.

Third, the Second Amended Complaint describes at length certain modifications to the "Verizon Wireless Federal Supply Schedule" contract. *See* SAC ¶¶ 32-40. But the Second Amended Complaint does not cite the operative provisions of the agreement that dictate whether Verizon may or may not impose surcharges nor otherwise allege facts showing that Verizon was prohibited from charging surcharges under the Wireless Schedule.

The allegations regarding the Verizon Wireless Federal Supply Schedule illustrate the deficiencies of Relator's pleading. Rather than point to the specific contractual provisions that address whether and what surcharges can be billed, the Second Amended Complaint points to language from contract modifications to assert that Verizon misled the Government about the nature of its surcharges. The language cited, however, belies Relator's allegations. For example, the Second Amended Complaint alleges that Modification 8 to the Wireless Schedule suggested

that Verizon was "required" to bill the "Federal Universal Service" surcharge. SAC ¶ 34. But a few lines later, Modification 8 states: "*In addition to surcharges and fees that we are required to collect*, we will also collect charges to recover or help defray costs of taxes and governmental surcharges and fees imposed on us…. *These charges include*, among others, a Regulatory Charge and *a Federal Universal Service Charge*…" *Id.* (emphasis added). Relator acknowledges the clarifying language but asserts (incorrectly) that it appears "[o]nly [in] the fine print" and that it is "in the second half of the modification." *Id.* ¶ 35. The Second Amended Complaint then alleges—without further basis—that "Verizon's careful wordsmithing" in the modifications indicates that "Verizon knew [the surcharges] were not allowable charges under the contract." *Id.* ¶ 41. But that allegation makes an unsubstantiated and conclusory logical leap, simply assuming that the charges were not allowable, while the Second Amended Complaint does not identify any contractual term in the Verizon Wireless Federal Supply Schedule that prohibits them.

Instead of pointing to the language of the contracts, Relator seeks to rely on various provisions of the Federal Acquisition Regulations ("FAR"), *see* SAC ¶¶ 16-25, but those provisions themselves make clear that it is the language of the contracts that ultimately governs whether charges are allowable. Thus, Relator generally asserts that "[t]hese contracts incorporated FAR provisions which stated that 'the contract price includes all applicable Federal, State, and local taxes and duties,'" and that "Verizon had no basis for subsequently collecting surcharges under these contracts." SAC ¶ 29. But a mere seven paragraphs earlier in the Second Amended Complaint, Relator concedes that the application of the FAR provisions is dependent on the particular terms of the contract. *Id.* ¶ 22; *see* 48 C.F.R. § 52.229-4(b) ("*Unless otherwise*

provided in th[e] contract, the contract price includes all applicable Federal, State, and local taxes and duties." (emphasis added)).

Thus, the Second Amended Complaint fails to plead facts sufficient to determine which particular taxes and surcharges Relator contends were not permitted under each of the 20 listed contracts.

2. The Second Amended Complaint Lacks Allegations Sufficient To Demonstrate That Any Improper Billings Actually Occurred

Not only does the Second Amended Complaint fail to plead facts sufficient to demonstrate whether *particular* surcharges were prohibited under *particular* contracts, but it also fails to plead facts sufficient to show what particular surcharges were allegedly imposed on the Government under the particular contracts. Relator does not allege knowledge of Verizon's billing practices with regard to the specific contracts named or over any particular time period. Instead, the Second Amended Complaint includes the conclusory allegation that, on "information and belief," "Verizon improperly billed … on the following federal telecommunication contracts." SAC ¶ 28.

The sole basis set forth in the Second Amended Complaint for the conclusion that the taxes and surcharges it lists were billed under each of the listed contracts appears to be the allegation (1) that Relator learned from a former Verizon employee that Verizon allegedly "did not have a separate billing system for federal customers and commercial customers, and that Verizon's billing system did not have the capability to turn off the surcharges that were generally charged to all customers," SAC ¶ 27; and (2) that in 2004 Relator received an MCI document indicating that MCI was charging certain fees under an unspecified contract, *see id.* ¶ 4. Those allegations, however, are insufficient to support the sweeping inference that each of the Verizon companies that entered into the 20 contracts at issue in this case engaged in improper billing.

Among other things, the allegations do not identify when Relator supposedly learned the information from the former employee, over what time period Defendants allegedly maintained the billing system described, for which contracts such a billing system was used, and what contract and what period of time the MCI document covered. The Second Amended Complaint, for example, provides no basis to infer that alleged billing practices by old MCI, *see* SAC ¶ 3, affected any particular current Verizon entity or affiliate, such as Cellco Partnership, which, as the Second Amended Complaint notes, is a joint venture between Verizon and Vodafone (a British company) with no alleged connection to old MCI, *see, e.g.*, *id.* ¶ 6 (listing various Verizon subsidiaries), ¶ 10 (Cellco Partnership). Without those details, there is an insufficient basis under Rule 9(b) to infer that the billing system purportedly described by the former employee supports Relator's allegations as to any particular contract at issue.

At bottom, the Second Amended Complaint consists of nothing more than generalized speculation that Defendants may have billed some *unspecified* non-allowed surcharges to the Government under *some* contracts over some *unspecified* period of time in some *unknown* amount. But such a "possibility of misconduct" is insufficient to satisfy the pleading standards of Rule 8, let alone Rule 9(b). *See Iqbal*, 556 U.S. at 678; *cf. Kane*, 798 F. Supp. 2d at 204 (finding pleadings adequate where the Relator and the Government detailed "the circumstances of the fraudulent scheme and the location, Kane Company executive-level meetings").

3. The Second Amended Complaint Fails To Identify *When* The Allegedly Fraudulent Claims Were Made

Also absent from the Second Amended Complaint is any allegation identifying the time period of the fraud. The D.C. Circuit has held that a *qui tam* complaint must be dismissed for lack of particularity under Rule 9(b) if it fails to specify the start date or duration of the allegedly fraudulent scheme. *See Williams*, 389 F.3d at 1257 ("Several paragraphs nebulously allege that

the period in question is 'at least through 2002,' but nowhere does the complaint allege a start date."). The Second Amended Complaint is even more deficient than the one dismissed in *Williams*, for it lacks any reference to any time period for any of the allegedly false billings. *See Bender*, 686 F. Supp. 2d at 51 (dismissing complaint that states when contract commenced but "contains no further details as to when the fraud began or for how long it existed"); *Kane*, 798 F. Supp. 2d at 204 (noting that the Government provided "a specific time period" and that even the Relator, who alleged "a more open-ended time-period," set forth the date the scheme allegedly began). "While a complaint that covers a multi-year period may not be required by Rule 9(b) to contain a detailed allegation of all facts supporting *each and every instance* of submission of a false claim, *some information on the false claims* must be included." *United States ex rel. Barrett v. Columbia/HCA Healthcare Corp.*, 251 F. Supp. 2d 28, 35 (D.D.C. 2003) (emphasis added). Relator's complaint fails to specify even "any representative claims" from among untold numbers of claims. *United States ex rel. Digital Healthcare, Inc. v. Affiliated Computer Servs., Inc.*, 778 F. Supp. 2d 37, 53 (D.D.C. 2011).

4. The Second Amended Complaint Fails To Identify With Particularity *Who* Made The Allegedly Fraudulent Statements Or Claims

Finally, the Second Amended Complaint is deficient because it fails to "identify individuals allegedly involved in the fraud." *Williams*, 389 F.3d at 1256; *see also Bender*, 686 F. Supp. 2d at 53 ("[False Claims Act] cases in this circuit reveal that specificity regarding the identities of individual actors is required." (internal citations omitted)). The Second Amended Complaint does not mention a single individual who allegedly was involved with or had knowledge of the purported fraud. *Cf. Kane*, 798 F. Supp. 2d at 204 (noting that both "Relator and the Government also specifically identify those Kane Company personnel involved in perpetrating the scheme"). Such "imprecise pleading" fails to give the defendant enough

information to respond and "subjects it 'to vague, potentially damaging accusations of fraud,' which is precisely what Rule 9(b) seeks to avoid." *Digital Healthcare*, 778 F. Supp. 2d at 53 (quoting *Williams*, 389 F.3d at 1257).

Having failed to identify any individuals allegedly engaged in the fraud, it is no surprise that the Second Amended Complaint also fails adequately to allege scienter. To state a claim under the FCA, a Relator must show that the defendant acted with scienter—mere mistakes are insufficient. *See, e.g., United States v. Science Applications Int'l Corp.*, 626 F.3d 1257, 1274 (D.C. Cir. 2010) ("Congress clearly had no intention to turn the FCA, a law designed to punish and deter fraud, into a vehicle for either 'punish[ing] honest mistakes or incorrect claims submitted through mere negligence'…." (quoting S. Rep. No. 99-345 at 7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5272)). While state of mind need not be pled with particularity under Rule 9(b), the Second Amended Complaint fails to satisfy even Rule 8 in this regard. Scienter is a necessary element of an FCA claim that requires more than simply the "collective knowledge" of a corporation. *See Sci. Applications Int'l Corp.*, 626 F.3d at 1275 (rejecting "collective knowledge" theory of FCA scienter, which would have allowed "a plaintiff to prove scienter by piecing together scraps of 'innocent' knowledge held by various corporate officials"). The Second Amended Complaint, however, fails to allege any facts about who submitted the allegedly false claims to the Government, who knew about the allegedly impermissible surcharges, and whether those who submitted the claims knew about the contract language prohibiting those surcharges.

IV. DISMISSAL SHOULD BE WITH PREJUDICE

Dismissal of Relator's Second Amended Complaint should be with prejudice. Relator has already had an opportunity to amend his complaint, and any further amendment would be futile. Relator cannot simply plead around the first-to-file and public disclosure bars. As

discussed above, those bars are triggered by the very nature of Relator's suit. No amount of added detail can alter the fact that this suit is based on the same general allegations that underlie the 2007 Lawsuit and that the material elements of the allegations of the Second Amended Complaint have been publicly disclosed.

Even if the Court were to dismiss based only on the failure to satisfy the pleading requirements of Rules 8 and 9(b), dismissal should be with prejudice. It is apparent from the deposition of Relator that he lacks sufficient information to state his alleged claims with particularity. Relator has not even read many of the contracts at issue and has seen only "chunks" of the others. *See, e.g.*, Shea Dep. 117:1-3 ("I have not read every single one of these contracts in their entirety because I don't have them."); *id.* at 28:12-14, 18-20; 34:4-5; 40:20-21; 51:5-6; 100:20-21; 104:7-8; 106:18-19. The only way for Relator to add the specific allegations required would be to rely on discovery materials obtained from Defendants. It is well established, however, that a relator cannot use materials obtained in discovery to cure pleading deficiencies in an FCA case. *See United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 231 (1st Cir. 2004) ("[A] qui tam relator may not present general allegations in lieu of the details of actual false claims in the hope that such details will emerge through subsequent discovery."), *abrogated on other grounds by United States ex rel. Gagne v. City of Worcester*, 565 F.3d 40 (1st Cir. 2009); *see also United States ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 379 (4th Cir. 2008); *United States ex rel. Joshi v. St. Luke's Hosp., Inc.*, 441 F.3d 552, 559 (8th Cir. 2006); *United States ex rel. Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1313-14 n.24 (11th Cir. 2002).

The FCA represents a careful compromise. It provides significant incentives for private parties to file suit for false claims alleged to have been submitted to the Government, *see* 31

U.S.C. § 3730(d) (permitting awards of 15-30% of recovery plus fees and costs), but private parties can bring suit only if they possess material *non-public* information that a false claim has been submitted, *see United States ex rel. Russell v. Epic Healthcare Mgmt. Grp.*, 193 F.3d 304, 309 (5th Cir. 1999) ("[T]he False Claims Act grants a right of action to private citizens only if they have *independently obtained* knowledge of fraud." (emphasis added)), *abrogated on other grounds by United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928 (2009). As noted above, a *qui tam* action by a private relator is barred if it is based on information that has already been "publicly disclosed" unless the relator is the "original source" of the information. *See* 31 U.S.C. § 3730(e)(4). Moreover, the Act mandates that a "copy of the complaint and *written disclosure of substantially all material evidence and information the person possesses* shall be served on the Government" at the time a complaint is filed. 31 U.S.C. § 3730(b)(2) (emphasis added). Permitting a *qui tam* relator to cure pleading deficiencies based on information obtained in discovery would undermine these limitations. *See Karvelas*, 360 F.3d at 231; *Joshi*, 441 F.3d at 560.

Prohibiting *qui tam* relators who have failed to meet 9(b)'s particularity requirement from using discovery to replead is necessary to fulfill the purpose of Rule 9(b). As the D.C. Circuit has emphasized, one of the principal purposes of Rule 9(b) is to "'prevent[ ] the filing of a complaint as a pretext for the discovery of unknown wrongs.'" *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1279 n.3 (D.C. Cir. 1994) (citations omitted); *see also Karvelas*, 360 F.3d at 231 (noting ''[t]he reluctance of courts to permit qui tam relators to use discovery to meet the requirements of Rule 9(b) reflects, in part, a concern that a qui tam plaintiff, who has suffered no injury in fact, may be particularly likely to file suit as a pretext to uncover unknown wrongs.'' (internal quotation marks, citation omitted)); *Acosta Orellana v. CropLife Int'l*, 711 F. Supp. 2d

81, 97 n.17 (D.D.C. 2010); *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999). Especially where, as here, the Second Amended Complaint does not come close to satisfying Rule 9(b), dismissal with prejudice is required to prevent Relator from bypassing the requirements of Rule 9(b) altogether by demanding discovery first and attempting to file a sufficient complaint later.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court dismiss the Second Amended Complaint with prejudice.

Dated: September 12, 2012

Respectfully submitted,

/s/ Randolph D. Moss

Randolph D. Moss (D.C. Bar No. 417749)
Jennifer M. O'Connor (D.C. Bar No. 460352)
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Tel.: (202) 663-6000
Fax: (202) 663-6363
randolph.moss@wilmerhale.com

Attorneys for Defendants

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

-and-

STEPHEN M. SHEA,

Plaintiffs,

v.

VERIZON BUSINESS NETWORK SERVICES, INC.; VERIZON FEDERAL INC.; MCI COMMUNICATIONS SERVICES, INC. d/b/a VERIZON BUSINESS SERVICES; and CELLCO PARTNERSHIP d/b/a VERIZON WIRELESS,

Defendants.

No. 1:09-cv-01050-GK

Pretrial Conference: Not Yet Scheduled

ORAL ARGUMENT REQUESTED

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

Randolph D. Moss (D.C. Bar No. 417749)
Jennifer M. O'Connor (D.C. Bar No. 460352)
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Tel.: (202) 663-6000
Fax: (202) 663-6363
randolph.moss@wilmerhale.com

Attorneys for Defendants

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INTRODUCTION

Relator's opposition brief confirms that this is not a proper *qui tam* action under the False Claims Act ("FCA"). The FCA's *qui tam* provisions are meant to encourage and reward whistleblowers—private citizens in possession of non-public information regarding false claims submitted to the United States. But the Act limits the circumstances in which a private party is permitted to step into the shoes of the United States and recover rewards from the public fisc. Relator brought—and was rewarded for—a prior FCA case alleging that Verizon improperly billed non-allowable surcharges under two related government contracts. Prior to filing that case, Relator appears to have reviewed the relevant contracts and learned what surcharges Verizon was billing under them through a 2004 MCI document related specifically to those contracts. In this case, Relator is just guessing. In his deposition, Relator admitted that he has not read most of the contracts at issue and has reviewed only "chunks" of others. *See, e.g.*, Shea Dep. 117:1-3 ("I have not read every single one of these contracts in their entirety because I don't have them."); *id.* at 28:12-14, 18-20; 34:4-5; 40:20-21; 51:5-6; 100:20-21; 104:7-8; 106:18-19. In his opposition brief, Relator concedes (at 41) that he "cannot allege with certainty whether any particular contracts at issue permitted the Non-Allowable Tax-Like Surcharges."

Lacking any actual information—but hypothesizing that Verizon might be improperly billing certain surcharges under additional government contracts—Relator simply found the names of 20 contracts on the Internet and filed this action based on his claims in the prior litigation, these additional contracts, and other information he found on the Internet. The FCA's first-to-file and public disclosure bars forbid this. It is also no surprise that, in these circumstances, Relator is unable to plead fraud with particularity under Federal Rule of Civil Procedure 9(b) or even to meet the general pleading requirements of Rule 8.

I. THE FIRST-TO-FILE BAR REQUIRES DISMISSAL OF THIS ACTION

A. This Action Is Related To The 2007 Lawsuit

The first-to-file bar precludes a person other than the Government from bringing a subsequent FCA action that is "related" to a prior action. 31 U.S.C. § 3730(b)(5). Here, Relator provides no basis to refute his own repeated representations that this case is "related" to his 2007 Lawsuit. *See* 2009 Compl. ¶ 7 (Dkt. No. 1) ("In 2007, Relator Stephen Shea filed a related action, Civ. Action No. 07CV0111 (GK) …."); *see also* Defs. Mem. 7, 16. Relator does not and cannot dispute that both actions allege a scheme by Verizon to bill the Government for non-allowable surcharges on telecommunications contracts. *See* Defs. Mem. 15 (chart, "Type of Fraud" and "Specific Allegations"). Nor does Relator contest that both actions allege that (1) Verizon was prohibited from charging the surcharges at issue under the Federal Acquisition Regulations ("FAR"), *see id.* at 16 (chart, "Legal Arguments"); (2) Relator discovered his allegations through consulting work for commercial telecommunications customers who Verizon purportedly billed for the surcharges at issue, *see id.* (chart, "Circumstances of Discovery"); (3) Relator received an MCI document indicating that Verizon was charging the Government for certain surcharges, *see id.* (chart, "Specific Source of Knowledge"); and (4) Verizon purportedly did not have a separate billing system for federal customers and commercial customers, and that it was difficult or impossible for Verizon's billing system to turn off the surcharges for government customers, *see id.* (chart, "Allegations About Verizon's General Billing Practices").

Relator's two actions are thus much more closely "related" than the actions deemed related by the D.C. Circuit in *U.S. ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204 (D.C. Cir. 2011), which involved allegations of different kinds of fraudulent forbearance practices. *See* Defs. Mem. 17-18. And, Relator's actions here are at least as closely related as the ones in *U.S. ex rel. Hampton v. Columbia/HCA Healthcare Corp.*, 318 F.3d 214, 217 (D.C. Cir. 2003), involving

different subsidiaries, which the Court also found sufficiently related for the bar to apply. *See* 318 F.3d at 218-19; Defs. Mem. 18.

Although Relator contends (at 19) that his two suits are not "related" because they involve different contracts with different agencies,[1] he nonetheless acknowledges that two decisions of this Court have held that "complaints which allege similar fraudulent schemes on different contracts with different federal agencies do not materially differ under the first-to-file rule." Opp. 20 (citing *U.S. ex rel. Folliard v. Synnex Corp.*, 798 F. Supp. 2d 66, 73 (D.D.C. 2011) (fact that new case involved false claims to "different agencies under different contracts" immaterial); *U.S. ex rel. Folliard v. CDW Tech. Servs., Inc.*, 722 F. Supp. 2d 37, 41 (D.D.C. 2010) ("*CDW II*") (rejecting the argument that case was distinguishable from a prior action because it involved "'completely different contracts and completely different agencies'")).[2]

Relying on *In re Natural Gas Royalties Qui Tam Litigation* (*CO2 Appeals*), 566 F.3d 956 (10th Cir. 2009), Relator argues (at 20) that this Court's prior decisions "incorrectly applied a notice-based standard to the first-to-file bar." But that is precisely the standard that applies in this Circuit. In *Batiste*, the D.C. Circuit embraced the same notice-based approach that Relator contends this Court incorrectly applied in *Synnex* and *CDW II*:

> In other words, we must determine whether the [second c]omplaint alleges a fraudulent scheme the government already would be *equipped to investigate* based on the [first c]omplaint. . . . [A]lthough the complaints allege somewhat different facts, [the first] complaint suffices to put the U.S. government *on notice* of allegedly fraudulent . . . practices . . . , and [the second] complaint alleges the same material elements of the same fraud.

[1] Relator argues that six agencies that were signatories to contracts involved in the present case were not signatories to the contracts in the 2007 Lawsuit. Notably, however, Relator does not contend that those agencies did not procure services (and pay surcharges) under the GSA FTS2001 and FTS2001 Bridge contracts at issue in the 2007 Lawsuit.

[2] Relator also notes that one type of surcharge at issue here was not involved in the 2007 Lawsuit, but Relator provides no support for concluding that this minor difference is material.

Batiste, 659 F.3d at 1209 (emphasis added).[3]

Relator suggests (at 23) that a notice-based approach "undermines the FCA's goals," because it would mean that his 2007 Lawsuit could preclude an action by a "Verizon insider, with direct knowledge that Verizon was illegally charging the United States prohibited surcharges under other telecommunications contracts." But if any such relator were to bring forward genuinely new information—information of which the Government was not already on notice—then the notice-based approach would by definition present no obstacle. The bar precludes suit only when the material elements of the alleged fraud are sufficiently similar to put the Government on notice to initiate whatever investigation it deems appropriate. The first-to-file rule thus "furthers the [FCA's] twin goals of rejecting suits which the government is capable of pursuing itself, while promoting those which the government is not equipped to bring on its own." *Batiste*, 659 F.3d at 1208 (internal quotation marks omitted).

Finally, citing *U.S. ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371 (5th Cir. 2009), Relator argues (at 23-24) that if naming different defendants in a subsequent suit is a material difference, "then alleging that the same defendant committed a similar fraud on different contracts with different federal agencies is also a material difference." But that is incorrect. The Government is far more likely to initiate an investigation of whether the same defendant might have engaged in the same conduct under multiple contracts than it is to investigate whether *unrelated* defendants (such as those at issue in both *Branch* and *Natural Gas Royalties*[4]) engaged in that same conduct. Relator's prior submissions confirm this point: In seeking a share of the

[3] Relator suggests (at 18) that his two actions are unrelated because they "give rise to different investigations and different recoveries." But the Court in *Batiste* explained that an examination of possible recovery merely "'aids in the determination of whether the later-filed complaint alleges a different type of wrongdoing on new and different material facts.'" 659 F.3d at 1210 (quoting *U.S. ex rel. Ortega v. Columbia Healthcare*, 240 F. Supp. 2d 8, 13 (D.D.C. 2003)).

[4] Relator concedes (at 21 n.17) that the D.C. Circuit has held that "merely adding on subsidiaries [as defendants] [i]s not a material difference." *See Hampton*, 318 F.3d at 218-19.

recovery in the 2007 Lawsuit, Relator argued that the suit enabled the Government to conduct its own investigation of additional contracts. Defs. Mem. 19.[5]

B. The First-To-File Bar Applies To Successive Actions By The Same Relator

Relator's contention that the first-to-file bar does not apply to actions by the same relator is equally flawed. Statutory interpretation "begins with the statutory text, and ends there as well if the text is unambiguous," as it is here. *BedRoc Ltd., LLC v. U.S.*, 541 U.S. 176, 183 (2004) (plurality). Section 3730(b)(5) states: "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." (Emphasis added.) Because Relator is not the Government, the first-to-file bar applies.

The case law supports this plain reading of the unambiguous statutory text. The most exhaustive analysis appears in *U.S. ex rel. Smith v. Yale-New Haven Hospital, Inc.*, 411 F. Supp. 2d 64 (D. Conn. 2005), *aff'd on reconsideration*, 2006 WL 387297 (D. Conn. 2006). The relator in *Smith* had filed a previous *qui tam* action raising "almost identical . . . allegations." *Id.* at 76. Considering "whether [§ 3730(b)(5)] should apply to two cases involving the same plaintiff-relator," the court held that "the plain language of the statute" dictated an affirmative answer:

> If a qui tam action has been brought, no one other than the Government may intervene or bring another related action. The statute does not say "no *other* person except the Government may bring an action," it simply says "no person" which would apply equally to the original relator as any other person.

Id. at 74-75 (emphasis added).

Similarly, in *U.S. ex rel. Bane v. Lincare Holdings, Inc.*, No. 8:06-cv-467 (M.D. Fla. Mar. 14, 2008) (attached as Ex. A), the court rejected exactly the argument that Relator makes

[5] Relator notes (at 24-25) that the Government made an argument similar to his in *CDW*. If anything, however, that weighs against the argument here: It has been considered and rejected.

here, finding not a single "case in which a relator was allowed to proceed in a second cause of action brought under the FCA against a defendant based on the same fraudulent scheme that formed the basis for claims against that defendant." *Id.* at 7; *see also U.S. ex rel. Bane v. LifeCare Diagnostics*, No. 8:06-cv-467, 2008 WL 4853599, at *4 (M.D. Fla. Nov. 10, 2008) (applying § 3730(b)(5) to successive suit by same relator). In *U.S. ex rel. Carter v. Halliburton Co.*, No. 1:10CV864, 2011 WL 2118227, at *4 (E.D. Va. May 24, 2011), the court also applied the first-to-file bar to a second suit by the same relator, noting that the court was bound to apply the plain terms of the statute. Finally, in *U.S. ex rel. LaCorte v. Wagner*, 185 F.3d 188, 191 (4th Cir. 1999), the Fourth Circuit likewise held that the plain meaning of the "no person other than the Government" language of § 3730(b)(5) was controlling in an action involving attempted intervention in an FCA case: "The application of section 3730(b)(5) to this case is straight forward. Wagner and Dehner are persons other than the government. Therefore, the statute on its face precludes them from intervening in this action."[6]

Application of the first-to-file bar to successive claims by the same relator also serves Congress's purpose. As noted, the "first-to-file rule . . . furthers the statute's 'twin goals of rejecting suits which the government is capable of pursuing itself, while promoting those which the government is not equipped to bring on its own.'" *Batiste*, 659 F.3d at 1208. "[O]nce the government knows the essential facts of a fraudulent scheme, it has enough information to discover related frauds." *U.S. ex rel. LaCorte v. SmithKline Beecham Clinical Labs., Inc.*, 149 F.3d 227, 234 (3d Cir. 1998). This purpose is served by barring any subsequent related *qui tam*

[6] *See also Her v. Regions Financial Corp.*, Nos. 07-2017, 06-2178, 06-2153, 2008 WL 5381321 (W.D. Ark. Dec. 22, 2008) (applying § 3730(b)(5) to dismiss an action brought by two of the relators who had filed the prior action, *U.S. ex rel. Tou Yang Lee v. Chambers Bank*, No. 06-cv-02134-RTD (W.D. Ark. July 20, 2006)); *In re Pharmaceutical Indus. Average Wholesale Price Litig.*, 498 F. Supp. 2d 389, 400 (D. Mass. 2007) (assuming in *dicta* that bar applied to cases by same relator); *U.S. ex rel. Mailly v. HealthSouth Holdings, Inc.*, Nos. 07-2981, 09-483, 2010 WL 149830, at *1, *4 (D.N.J. Jan. 15, 2010) (same).

action—whether brought by the same or a different relator.

If anything, the FCA suggests that the first-to-file bar should apply with even greater force when the same relator brings successive actions. The statute strikes a bargain: In exchange for a share of any recovery, the relator must hand over to the Government—as soon as he files his complaint—"substantially *all* material evidence and information" in his possession. 31 U.S.C. § 3730(b)(2) (emphasis added). It is only fair to enforce that bargain by demanding that the relator "come[] forward with all the information he or she has in the first suit, rather than file piecemeal lawsuits." *Smith*, 411 F. Supp. 2d at 75. A relator who seeks a bounty in a second case, while providing only information that he knew or could reasonably have known at the time of his initial complaint, is not holding up his end of the deal and is in violation of § 3730(b)(2). Relator's argument ignores this bargain, and, indeed, would permit him to bring yet a third or fourth case based on nothing more than additional contracts he finds on the Internet, each time returning to Court making the same allegations asserted in the 2007 Lawsuit.[7]

The authorities cited by Relator are not to the contrary. Neither *U.S. ex rel. Taxpayers Against Fraud v. GE*, 41 F.3d 1032 (6th Cir. 1994), nor *Walburn v. Lockheed Martin Corp.*, 431 F.3d 966 (6th Cir. 2005), even purported to address the issue presented here. In both cases, the court was simply summarizing the *qui tam* provisions and various bars to recovery. Neither case had anything to do with the issue presented here.

The decision in *Bailey v. Shell Western E & P Inc.*, 609 F.3d 710 (5th Cir. 2010), is equally unavailing. Relator argues in a footnote (at 10, n.11) that the *Bailey* decision is not a "mere procedural exception" to the first-to-file bar. But the procedural posture of that case is

[7] *See Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1279 (10th Cir. 2004) ("Once an initial qui tam complaint puts the government and the defendants on notice of its essential claim, all interested parties can expect to resolve that claim in a single lawsuit.").

precisely what drove the decision. The same relators brought *qui tam* claims in the federal District of Colorado, then filed "virtual[ly] identi[cal]" counterclaims in long-running and earlier-filed Texas state litigation in order to remove that litigation to federal court. *U.S. v. Kinder Morgan CO2 Co.*, No. 04-CV-00716, 2005 WL 3157998, at *1-*3 (D. Colo. Nov. 21, 2005).[8] The Colorado district court transferred its case to Texas over the relators' protest that the Texas court lacked jurisdiction under the first-to-file bar. The cases were consolidated before the Texas court, which entered summary judgment for the defendant. On appeal, the Fifth Circuit rejected the relators' argument that the case should have proceeded in Colorado because the Texas court lacked jurisdiction over relators' counterclaims, holding that "the first-to-file bar does not apply when the same plaintiff, for whatever reason, files the same claim in a different jurisdiction." 609 F.3d at 720 (internal quotation marks omitted).

The court in *Bailey* thus permitted the relators to pursue only *one* FCA action, unlike what Relator seeks to do here. The issue in *Bailey* was not whether it was permissible to bring serial FCA claims but whether the relators should be permitted to engage in the gamesmanship of alleging an FCA claim as a basis for removing a case to federal court and then objecting when forced to litigate that claim in that federal court. *See* 609 F.3d at 721 n.3 ("Plaintiffs' attempts at forum shopping constitute the opportunistic and parasitic behavior that the FCA seeks to preclude."). As the Fifth Circuit explained, the "goals of § 3730(b) are to encourage whistleblowing and to discourage opportunistic behavior." *Id.* at 721. Those policy concerns *support* dismissal here. Relator was under an obligation to bring all of his relevant information to the Government's attention when he filed his original case, he was well rewarded for doing so,

[8] Relator incorrectly asserts (at 10, n.11) that the Texas case began after the Colorado litigation and that the *Bailey* relators filed counterclaims in the Texas case after removing it, rather than as a basis for removal. *Compare* Opp. 9-10 *with Bailey*, 609 F.3d at 717.

and any follow-on litigation based on the same underlying information must be brought by the Government—not Relator.

Relator incorrectly argues that *Bailey* built on a prior Fifth Circuit decision holding that "'[i]t would be reasonable to read the statute as prohibiting the same claim being made by a different party rather than the same party as is the case here.'" Opp. 10 n.11 (citing *U.S. ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 376 (5th Cir. 2009)). In fact, the quoted language does not come from *Branch*, but from the district court decision that transferred the claims at issue in *Bailey* from Colorado to Texas. *See Kinder Morgan CO2 Co.*, 2005 WL 3157998, at *2. Accordingly, the case that Relator actually quotes involved exactly the same concerns about gamesmanship and venue shopping at issue in *Bailey*. In contrast, the *Branch* case did not involve a successive action by the same relator and certainly did not articulate "well-reasoned policy grounds" (Opp. 10 n.11) for permitting the same relator to bring successive cases based on the same material elements of alleged fraud.

Relator's position also finds no support in *U.S. ex. rel. Precision Co. v. Koch Industries*, 31 F.3d 1015 (10th Cir. 1994). The question before the court there was whether § 3730(b)(5)'s intervention bar prevents the "joinder" of closely related parties in an amended complaint under Federal Rule of Civil Procedure 15 or forbids only "*intervention*" by unrelated parties under Rule 24. Applying the unambiguous language of the statute, the court adopted the latter view:

> We believe the focal point for proper analysis is the word "intervene" contained in § 3730(b)(5). Is that word to be interpreted in its narrow, Fed. R. Civ. P. 24 plain legal meaning, or should it be granted greater breadth, as defendants suggest, to include any form of joinder? Our judgment tells us the statute implies intervention of the types set forth in Rule 24(b)(2), and the addition of parties does not constitute intervention.

Id. at 1017. The case did not address whether the same relator could bring successive suits, but whether a bar on "interven[ing]" should extend to "joinder." Not surprisingly, the court held that

the bar, by its plain terms, extends only to intervention. It was in this context that the court said § 3730(b)(5) "prohibit[s] parties unrelated to the original plaintiff from joining the suit to assert a claim based on the same facts relied upon by the original plaintiff." *Id.* at 1017-18.[9]

C. This Suit Is Barred Despite The Dismissal Of The 2007 Lawsuit In 2011

Relator's argument that the first-to-file bar does not apply here because the 2007 Lawsuit was not "pending" at the time Relator filed his Second Amended Complaint ("SAC") also fails. The bar applies because the 2007 Lawsuit was pending when Relator brought this action.

The language of § 3730(b)(5) makes clear that the relevant inquiry turns on when a successive action is initially commenced, not when a complaint is amended. It provides that "[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." (Emphasis added.) There is a vast difference between amending a complaint in an existing action and "bring[ing] a[n] . . . action." One brings an action by commencing a lawsuit with the filing of an initial complaint. *See* Black's Law Dictionary (9th ed. 2009) (defining "bring an action" as "[t]o sue" or "*institute* legal proceedings" (emphasis added)). As one district court has squarely held, "[t]he use of the term 'action' in" § 3730(b)(5) "indicates that the Court should look to the jurisdictional facts that existed at the time the action was filed, as opposed to facts that existed when the relator later filed an amended complaint." *U.S. ex rel. Branch Consultants, L.L.C. v. Allstate Ins. Co.*, 782 F. Supp. 2d 248, 259 (E.D. La. 2011); *see also U.S. ex rel. Sandager v. Dell Mktg., L.P.*, No. 08-4805, 2012 WL 1453610, at *6 (D. Minn. April 26, 2012) ("[T]hree previously filed actions . . . were pending at the time Sandager filed his original

[9] Relator also cites (at 12) the Boese treatise. But the quoted language simply describes the holding of *Precision Co.*, which affords Relator no support because it is about whether the intervention prong of the first-to-file bar extends to joinder. *See* John T. Boese, *Civil False Claims and Qui Tam Actions* § 4.03[C][2][a][iv] (4th ed., CCH through 2012).

Complaint, which is the operative complaint for [this] purpose[].").[10]

A bedrock principle of federal jurisdiction also dictates this rule: "[T]he jurisdiction of the court depends upon the state of things at the time of the action brought." *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 570 (2004) (internal quotation marks omitted). Under this "longstanding rule," the "amendment process cannot be used to create jurisdiction retroactively where it did not previously exist." *U.S. ex rel. Jamison v. McKesson Corp.*, 649 F.3d 322, 328 (5th Cir. 2011) (internal quotation marks omitted). If a relator's "complaint did not establish jurisdiction," "his amendments cannot save it." *Id.*; *see Morongo Band of Mission Indians v. Cal. St. Bd. of Equalization*, 858 F.2d 1376, 1380 (9th Cir. 1988).[11]

U.S. ex rel. Ortega v. Columbia Healthcare, 240 F. Supp. 2d 8 (D.D.C. 2003), is entirely consistent with these principles. In *Ortega*, the relator had filed a *qui tam* action in 1995 and then amended it in 1997 to allege a kickback scheme distinct from the misconduct alleged in the original complaint. *Id.* at 11. There was no dispute about the court's jurisdiction over the original complaint. Rather, the defendant moved to dismiss the amended *kickback* claim under the first-to-file bar. *Id.* The relator argued that her amended complaint should relate back to her original complaint, such that she would have priority in asserting the kickback claim even though others had brought it first. The court sensibly disagreed, holding that "it is clearly outside the intent and purpose of § 3730(b)(5) to permit relation back" in these circumstances. *Id.* at 14.

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[10] As the district court noted in *Branch*, "the pre-filing disclosure requirement of § 3730(e)(4)(B) could not function if a court could acquire jurisdiction over a qui tam complaint through amendment. . . . [A] relator could neglect to inform the government of the information upon which the allegations are based before filing his or her action," then "provide that information to the government at a later time" and "amend the complaint, even in a trivial fashion, to ensure jurisdiction." 782 F. Supp. 2d at 263.

[11] *See also A-J Marine, Inc. v. Corfu Contractors, Inc.*, 810 F. Supp. 2d 168, 174 (D.D.C. 2011); *U.S. ex rel. Davis v. District of Columbia*, 591 F. Supp. 2d 30, 35-36 (D.D.C. 2008); *Hunt Const. Group, Inc. v. National Wrecking Corp.*, 542 F. Supp. 2d 87, 90 (D.D.C. 2008); *Termorio S.A. E.S.P. v. Electrificadora Del Atlantico S.A. E.S.P.*, 421 F. Supp. 2d 87, 95 (D.D.C. 2006).

The court did not address the question presented here—whether a party "brings an action" by amending a previously filed complaint.[12]

Relator argues (at 16-17) that he should be permitted to proceed with his SAC because the first-to-file bar should be construed to permit him to file an entirely new action. But even if the bar permitted an entirely new action (which it does not, *see infra* p. 25 & n.22), that would provide no basis for permitting the SAC to proceed. Relator cites no authority for the remarkable proposition that a court can permit an amended complaint to proceed where the first-to-file bar precludes the initial complaint. Whether or not Relator could pursue a new action, he cannot proceed in this case.[13]

II. THE PUBLIC DISCLOSURE BAR REQUIRES DISMISSAL OF THIS ACTION

A. The Material Elements Of Relator's Allegations Were Publicly Disclosed

The SAC also must be dismissed under the public disclosure bar because the material elements of Relator's allegations were disclosed on the Internet before he filed suit. Relator alleges that Verizon billed taxes and surcharges to the Government that were not permissible under the language of Verizon's contracts with the Government. *See* SAC ¶ 28. Verizon explained in its opening brief (at 22) that these allegations are comprised of two material elements: (1) that 20 contracts between Verizon and various government entities allegedly disallowed certain surcharges, and (2) that Verizon allegedly invoiced the Government for these surcharges. Defendants then demonstrated that, to the extent Relator has non-speculative

[12] Relator argues (at 15-16 & n.15) that Defendants should have focused on a paragraph of the D.C. Circuit's decision in *Batiste*. But as Relator acknowledges, *Batiste* did not "expressly decide" whether the amendment of a complaint after the dismissal of a first-filed action could establish jurisdiction; the relator in *Batiste* had waived that argument. 659 F.3d at 1208.

[13] There are, of course, real differences between proceeding on an existing complaint and having to file a new complaint. For example, the reach of the statute of limitations would differ and public disclosures made before the filing of the new action could foreclose that suit.

information about these material elements, he found it on the Internet. *See id.* at 23-25. Relator does not contest that publication on the Internet triggers the bar, and he has no real response to these showings.[14]

Relator does not respond to Defendants' showing that the purported invoice content on which he relied ("mock ups" of invoices for some contracts, *see* Defs. Mem. 25) was publicly available on the Internet. Nor does Relator dispute that he found the contractual language upon which he relies on the Internet. His only response is the puzzling contention that the contracts he found on the Internet did not publicly disclose the "true state of facts" because their wording is allegedly "confusing." Opp. 28 (quoting SAC ¶¶ 32 & 41). But Relator fails to explain how the contract terms themselves do not reveal the "true state of facts," when it is the actual terms of the contracts that govern which taxes and surcharges are allowable. Indeed, Relator himself contends (at 38) that all one needs to do to determine whether fraud allegedly occurred is to compare the contracts to the invoices.[15] Nor does Relator explain how contractual language agreed upon by both Verizon and the Government could "deceive" the Government. It is thus clear that any material information in Relator's possession regarding the essential elements of his claims was publicly disclosed.

Relator's efforts to identify some non-public information that he brings to this case merely reinforces that conclusion. He says that he "learned about Verizon's [allegedly]

[14] Relator argues (at 27) that Defendants misstated the law by failing to recognize that either allegations of fraud or the essential elements of the fraud must have been publicly disclosed, not just some "information" about the fraud. But Defendants argued that the "material elements" or "essential elements" of Relator's fraud claims had been disclosed. *See* Defs. Mem. 2, 22, 26, 27 ("where the material elements of an allegation have been publicly disclosed, the case is barred" (citing *U.S. ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 655 (D.C. Cir. 1994))).

[15] In any event, Relator's SAC alleges only that two of the twenty contracts at issue were confusing. *See* SAC ¶¶ 30 (WITS 3 Contract), 32-41 (Verizon Wireless Federal Supply Schedule). And the SAC itself indicates that the alleged misstatements in those contracts could be discerned, for example, by consulting provisions of the U.S. Code (*see* ¶ 30) or simply by reading the entire text of the provision at issue (*see* ¶¶ 32-39).

fraudulent billing practices through his consulting business with large *commercial* customers," Opp. 29 (emphasis added), but he admitted in deposition that he did not work on *federal government contracts* as a consultant and that whatever conversations he had as a consultant with Verizon employees about their billing systems were on behalf of his *commercial* customers, *see* Shea Dep. 16:3-22; 218:18-221:1.[16] He says (at 30) that he learned "that Verizon used the same tax module for commercial and government contracts," but he admitted that Verizon has a variety of billing systems and he does not know whether his information about the billing systems applied to any particular contract, let alone those at issue in this case. *See* Shea Dep. 195:9-14; 199:7-202:6; 213:18-214:12; 216:3-8. And he says (at 30) that he confirmed "his suspicions by reviewing an inside MCI document indicating that MCI" charged the United States for certain surcharges, but he admitted that this document was *specifically related to MCI's FTS contract*—which was the subject of his first *qui tam* suit, but is not at issue in this case. Shea Dep. 66:4-7 ("I believe it was related to the FTS contracts"); 70:2-7 (same); 84:14-18 (same).

Relator is thus entirely unlike the relator in *Springfield Terminal Railway Co*. who alleged that an arbitrator he had hired to mediate a dispute overbilled the Government for his services. *See* 14 F.3d at 647. Although the arbitrator's billing records had been publicly disclosed, the days the arbitrator actually worked had not. The relator knew these non-public facts "[b]ased upon its own involvement in the arbitration," and thus the case was allowed to proceed. *Id*. at 648.

[16] Relator claims (at 6) that his consulting experience made him "so familiar with Verizon's billing practices" that Verizon asked his company "to train Verizon employees." But the portion of the deposition that he cites reveals that Relator was in fact being asked to train Verizon's "sales force" on how to more effectively respond to contract solicitations or "RFPs [Requests for Proposal]"—not Verizon's billing systems or how it invoices customers. Shea Dep. 17:20-21.

In short, Relator's purportedly non-public information bears no nexus to the actual allegations in the SAC and merely supports his speculation that the basis for Relator's original FCA case might extend to 20 additional contracts he located on the Internet. But, as Relator must concede, his only actual information about those 20 contracts and the relevant billing under those contracts came from entirely public sources. To the extent his speculation that Verizon might have billed for certain surcharges was confirmed, as he suggests, by publicly available information, it is that publicly available information that is controlling for purposes of the public disclosure bar, and any duplicative evidence of the elements of the alleged fraud "cannot suffice to surmount the jurisdictional hurdles." *Springfield Terminal Ry*., 14 F.3d at 655.

B. Relator Is Not An Original Source

Because the SAC is based upon public disclosures, Relator's claims can proceed only if he qualifies for the "original source" exception. As explained below, he does not.

1. Relator's opposition nowhere identifies any non-public information of which he is purportedly an "original source," let alone explains how his knowledge of that information is both "direct" *and* "independent." *See Springfield*, 14 F.3d at 656.[17] Instead, Relator vaguely claims (at 32) that he is an original source because his background allowed him to "understand the significance of the publicly disclosed contract information." He later explains (at 34) that what he did was speculate that based on his experience with commercial customers Defendants were "likely" overbilling the United States, and then set out to confirm that hunch with "publicly

[17] Relator argues (at 32) that Defendants suggested that he "must have 'direct and independent knowledge' of the 'transactions' between the United States and Verizon." But Defendants do not dispute that under *Springfield* a relator need not be the original source of *all* the material elements of a claim. 14 F.3d at 656-57. Here, however, Relator is not an original source because he lacks direct and independent knowledge of "*any* essential element of the underlying transaction"—neither the invoice content *nor* the contract terms. *Id*. at 657.

available, but obscure and difficult to understand contract and billing information."[18] But a hunch and subsequent research through public sources is not enough. Relator's failure to identify any non-public information on which his allegations are based is fatal to his argument that he is an "original source" of the allegations.

The D.C. Circuit, together with many other circuits, has consistently rejected the view that piecing together publicly disclosed elements is sufficient to make a relator the "original source" of the allegations, even if the documents require special expertise to interpret. *See U.S. ex rel. Findley v. FPC-Boron Emps.' Club*, 105 F.3d 675, 688 (D.C. Cir. 1997) ("If a relator merely uses his or her unique expertise or training to conclude that the material elements already in the public domain constitute a false claim, then a qui tam action cannot proceed."); *see also Springfield Terminal Ry. Co*, 14 F.3d at 655; *U.S. ex rel. Kreindler & Kreindler v. United Techs. Corp*., 985 F.2d 1148, 1159 (2d Cir. 1993); *U.S. ex rel. Stinson, Lyons, Gerlin & Bustamante P.A. v. Prudential Ins. Co*., 944 F.2d 1149, 1160 (3d Cir. 1991). Courts have rejected attempts by *qui tam* relators to argue that they are original sources with "direct" information by asserting that they gathered the information "through [their] own investigation," *U.S. ex rel. Feingold v. AdminaStar Fed., Inc*., 324 F.3d 492, 497 (7th Cir. 2003), or through "research and review of public records," *U.S. ex rel. Reagan v. E. Texas Med. Ctr. Reg'l Healthcare Sys*., 384 F.3d 168, 178-179 (5th Cir. 2004).

Relator relies (at 32-34) on a Tenth Circuit case, *Kennard v. Comstock Resources, Inc*.,

[18] Notably, Relator does not attempt to rely upon the 2004 MCI document or his alleged knowledge of Verizon's billing systems to support his claim of being an "original source." Relator admitted that he obtained this information second- or third-hand, thus failing to satisfy the "direct" prong of the original source inquiry. *See* Shea Dep. 66:8-18, 78:16-18 (MCI document was obtained "from a guy that used to do some subcontracting work for me" who got it from an unnamed Verizon employee); *id*. at 209:14-210:18 (information regarding billing systems came from former Verizon employee interviewed by a private investigator).

363 F.3d 1039 (10th Cir. 2004). But that case does not support his position. First, *Kennard* did not hold that the effort of an investigation alone is sufficient to make a relator an original source; in fact, the *Kennard* court specifically noted that "[a] mere compilation of documents or reports already in the public domain will not allow a relator to qualify as an original source." *Id.* at 1045. Second, the relators in *Kennard*—unlike Relator here—did not just rely on public documents. Rather, they relied on "personal, private royalty records" to determine that the defendant was committing fraud in submitting oil and gas lease payments to the Government, and used public records of oil and gas leases to "to *support the discovery* of the alleged fraud." *Id*. at 1046 (emphasis added); *see also id*. ("Relators were not just assemblers of information."). Third, unlike here, the publicly available information that the *Kennard* relators used was not a public disclosure from an enumerated source under the FCA. Other courts have rejected the proposition that *Kennard* has any application when the public information on which relator relies is itself a "public disclosure." *U.S. ex rel. Atkinson v. Penn. Shipbuilding Co.*, 473 F.3d 506, 522 (3d Cir. 2007). Finally, even if *Kennard* could be read to support Relator's position, such a reading would be squarely in conflict with the law of this circuit.

2. The version of the public disclosure bar amended in March 2010 by the Patient Protection and Affordable Care Act ("PPACA") does not apply to this case, which was already pending when PPACA was enacted. *See* Defs. Mem. 21 n.11.[19] But the analysis would be the

[19] Relator argues (at 36) that the PPACA amendments should apply to claims that arise after the effective date of the statute. The cases he cites, however, do not support that contention. *Atkinson* and *Lujan* held when a complaint was filed *after* the effective date of the 1986 amendments to the FCA, the pre-amendment version of the public disclosure bar nonetheless applied to pre-amendment conduct. *Atkinson*, 473 F.3d at 512-13; *U.S. ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027, 1031 (9th Cir. 1998). That does not address whether amendments can be applied to create jurisdiction over later-accruing conduct where the complaint was filed *before* the amendments were effective. *See U.S. ex rel. Estate of Cunningham v. Millennium Labs. of Cal.*, 841 F. Supp. 2d 523, 527-529 (D. Mass. 2012) (applying pre-amendment version of public disclosure bar based on the date of filing of the original complaint).

same even if the post-PPACA version applied to a portion of Relator's claims. After PPACA, a relator is an original source only if he "has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions[.]" 31 U.S.C. § 3730(e)(4)(B) (2012). As discussed above, Relator does not identify *any* non-public information that materially adds to the publicly disclosed information underlying his claims. Instead, he simply refers vaguely (at 37) to his "extensive knowledge of Verizon's internal billing procedures," which he claims "allowed him to infer" that Defendants were improperly billing the United States. Relator's suppositions and inferences, however, cannot substitute for actual "knowledge" that would materially support his claims of fraud as to the 20 contracts he names in this suit. Accordingly, Relator's claims must be dismissed regardless of whether this Court applies the pre- or post-PPACA version of the public disclosure bar to claims that accrued after March 2010.

III. THE SECOND AMENDED COMPLAINT DOES NOT SATISFY RULES 8 & 9(b)

For all of the reasons set forth in Verizon's opening brief, the SAC should be dismissed for failure to satisfy Rule 8 and the heightened pleading standard of Rule 9(b). Relator does remarkably little in his opposition to defend the SAC as drafted. Relator concedes (at 41) that he "cannot allege with certainty whether any particular contracts at issue permitted the Non-Allowable Tax-Like Surcharges"; indeed, the SAC fails to provide *any information at all* about 17 of the 20 named contracts (beyond contract name and number), *see* Defs. Mem. 33. Relator concedes (at 42) that he "lacks access to [the] documents" showing "which surcharges [Verizon] charged the government under each of the contracts." He concedes (at 42) that the SAC "does not provide the dates of Verizon's [alleged] fraud." He concedes (at 43) that he "never worked for Verizon" and cannot "identify the particular Verizon employees involved in the [allegedly] fraudulent scheme." And, he fails to offer any response to Verizon's showing that, even under the more liberal pleading requirements of Rule 8, he fails adequately to allege scienter. In short,

Relator offers no basis to conclude that the SAC provides any particularity regarding the "who, what, when, where, and how" of the alleged fraud.

Rather than defend the sufficiency of the allegations in the SAC, Relator devotes the bulk of his response to arguing that Rule 9(b) does not mean what it says and that the particularity requirement should be relaxed in this case. Each of Relator's arguments should be rejected.

1. Relator contends (at 39) that the D.C. Circuit has taken a "'generous approach'" to pleadings in FCA cases. To the contrary, the D.C. Circuit has made clear in FCA cases that Rule 9(b)'s heightened pleading standard requires that a complaint "'state the time, place and content of the false misrepresentations, the fact misrepresented and what was retained or given up as a consequence of the fraud,'" and "identify individuals allegedly involved in the fraud." *U.S. ex rel. Williams v. Martin-Baker Aircraft Co.*, 389 F.3d 1251, 1256 (D.C. Cir. 2004) (quoting *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1278 (D.C. Cir. 1994)); *see U.S. ex rel. Totten v. Bombardier Corp.*, 286 F.3d 542, 552 (D.C. Cir. 2002); *U.S. ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1385-86 (D.C. Cir. 1981); *see also U.S. ex rel. Head v. Kane Co.*, 798 F. Supp. 2d 186, 203 (D.D.C. 2011) (quoting *Williams*, 389 F.3d at 1256). Those required allegations are referred to as "the 'who, what, when, where, and how'" of the alleged fraud. *Boone v. MountainMade Found.*, 684 F. Supp. 2d 1, 8 (D.D.C. 2010) (quoting *U.S. ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir. 1997)).

In arguing for a relaxed standard, Relator cites *U.S. v. Kellogg Brown & Root Services, Inc.*, 800 F. Supp. 2d 143 (D.D.C. 2011). *Kellogg* relied on *U.S. ex rel. Ortega v. Columbia Healthcare, Inc.*, 240 F. Supp. 2d 8 (D.D.C. 2003). *Ortega*, in turn, relied on the D.C. Circuit's decision in *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111 (D.C. Cir. 2000). *Sparrow*, however, was about Rule 8—not Rule 9(b)—and was not an FCA case. *See id.* at 1113-14,

1118; *see also Ortega*, 240 F. Supp. 2d at 18 (noting that "Rule 8 . . . governed *Sparrow*"). The cases thus do not support relaxation of Rule 9(b) here.

2. Relator also contends (at 38) that Rule 9(b) is satisfied as long as the SAC "provide[s] enough information to allow Verizon to prepare a defense." But Rule 9(b) is not directed merely toward ensuring notice. As the D.C. Circuit has stated:

> Rule 9(b)'s particularity requirement serves several purposes. It "discourage[s] the initiation of suits brought solely for their nuisance value, and safeguards potential defendants from frivolous accusations of moral turpitude. . . . And because 'fraud' encompasses a wide variety of activities, the requirements of Rule 9(b) guarantee all defendants sufficient information to allow for preparation of a response."

Williams, 389 F.3d at 1256 (quoting *Joseph*, 642 F.2d at 1385) (alterations in original). Notably, a primary purpose of Rule 9(b) is to "prevent[ ] the filing of a complaint as a pretext for the discovery of unknown wrongs." *Kowal*, 16 F.3d at 1279 n.3 (internal quotation marks omitted; alteration in original); *see also U.S. ex rel. Clausen v. Lab. Corp. of Am.*, 290 F.3d 1301, 1313 n.24 (11th Cir. 2002). As this Court explained in *U.S. ex rel. Batiste v. SLM Corp.*, 740 F. Supp. 2d 98 (D.D.C. 2010), "[t]he point of Rule 9(b)'s *heightened* pleading standard is that it provides *more* than what is normally required to give adequate notice of the essential elements of a claim"—"a complaint may give adequate notice without also satisfying Rule 9(b)." *Id.* at 104 (emphasis in original); *see also Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 531-32 (2002) (contrasting the "simple requirements of Rule 8(a)," under which a complaint "must simply give the defendant fair notice," with the "greater particularity" requirements of Rule 9(b) (internal quotation marks omitted)).

In any event, Relator's contention (at 38) that he has provided Verizon with "enough information" to "prepare a defense" is meritless. It is not sufficient notice to allege that there "likely" (Opp. 34) were some improper surcharges under some of 20 contracts. The SAC fails to

provide the *specific* notice of the alleged fraud so as to enable Defendants "to respond specifically and quickly to the potentially damaging allegations." *U.S. ex rel. Joshi v. St. Luke's Hosp. Inc.*, 441 F.3d 552, 556 (8th Cir. 2006) (internal quotation marks omitted). Indeed, Relator's failure to identify which contractual provisions were allegedly violated, and how, deprives Defendants of the ability, if appropriate, to move to dismiss those claims as legally insufficient. To provide the higher degree of notice that Rule 9(b) requires, a complaint must allege the who, what, when, where, and how of the asserted fraud. The SAC plainly fails to do this. Even the cases Relator cites (at 40) as examples of sufficient notice under Rule 9(b) show that the SAC is insufficient because they provide far more of the required particulars than Relator does. *See, e.g., U.S. v. First Choice Armor & Equip., Inc.*, 808 F. Supp. 2d 68, 76 (D.D.C. 2011) ("The government sets out in detail the time, place, and content of the false representations and identifies individuals allegedly involved in the fraud[.]"); *Synnex*, 798 F. Supp. 2d at 80 (providing specific dates of allegedly fraudulent orders placed through GSA website).

3. Relator also suggests that the Court should "relax" Rule 9(b)'s heightened standard because the alleged fraudulent scheme in this case was "'particularly complex.'" Opp. 39 (quoting *Kane*, 798 F. Supp. 2d at 203 n.22). But there is no basis in D.C. Circuit case law for such an approach. *See supra* at p. 19; *see also U.S. ex rel. Grynberg v. Ala. Pipeline Co.*, No. Civ. 95-725, 1997 WL 33763820, at *3 (D.D.C. Mar. 27, 1997) (noting that the D.C. Circuit examined the argument that Rule 9(b) should be "reduced in complex cases" and held that "a complaint alleging fraud must at least state the time, place, and content of [the] false representations, the facts misrepresented, and the consequence of the fraud" (citing *Joseph*, 642 F.2d at 1385)). Moreover, the reason for relaxation, if ever appropriate, is primarily one of

"logistical efficiency." *U.S. ex rel. Bledsoe v. Cmty. Health Sys.*, 501 F.3d 493, 509 (6th Cir. 2007). "Where the allegations in a relator's complaint are complex and far-reaching, pleading every instance of fraud would be extremely ungainly, if not impossible." *Id.* (internal quotation marks omitted). But a relator must still provide "*representative samples* of the broader class of claims" submitted to the Government to survive a Rule 9(b) challenge. *Id.* at 510. Here, Relator's complaint fails to specify "*any* representative claims," *U.S. ex rel. Digital Healthcare, Inc. v. Affiliated Computer Servs., Inc.*, 778 F. Supp. 2d 37, 53 (D.D.C. 2011) (emphasis added); the absence of detail is not merely to avoid an "ungainly" complaint.

4. Citing the D.C. Circuit's *Williams* decision, Relator also argues (at 42) that Rule 9(b)'s standard should be relaxed because he has "limited access" to relevant documents. Although *Williams* noted that the D.C. Circuit had considered lack of access to documents in *Kowal*, the Court ultimately did not render a holding on this point because the relator had raised the argument too late. *See* 389 F.3d at 1258. *Kowal*, moreover, was not an FCA case and was addressing whether to permit pleading "on information and belief." *See* 16 F.3d at 1279 n.3.[20] In FCA cases, however, it is particularly important to hold a relator to his obligation of complying with Rule 9(b) because a relator is required actually to possess non-public information about a fraud on the Government *when he brings suit*—he cannot simply wait for discovery in the hope of finding information that might make out a claim. *See* Defs. Mem. 40-42. Courts have thus repeatedly rejected Relator's argument and have declined to relax Rule 9(b) in FCA cases due to lack of access to information. *See U.S. ex rel. Karvelas v. Melrose-*

[20] Relator also relies on *Kane*, but the footnote Relator cites similarly addressed the propriety of pleading on "information and belief" and did not consider the unique structure of the FCA. *See* 798 F. Supp. 2d at 206 n.29. In any event, *Kowal* makes clear a plaintiff must at least set forth "the facts upon which the allegations are based." 16 F.3d at 1279 n.3. Here, Relator concedes (at 41) that he "cannot allege with certainty whether any particular contracts at issue permitted the Non-Allowable Tax-Like Surcharges."

Wakefield Hosp., 360 F.3d 220, 229-231 (1st Cir. 2004) (rejecting the notion "that the particularity requirements of Rule 9(b) may be relaxed in an FCA *qui tam* action where the information relevant to the fraud is peculiarly within the perpetrator's knowledge" (internal quotation marks omitted)); *Joshi*, 441 F.3d at 559-560 (rejecting argument that court should apply "relaxed pleading standard" because "information concerning the alleged fraud is uniquely within the defendants' control"); *U.S. ex rel. Russell v. Epic Healthcare Mgmt. Grp.*, 193 F.3d 304, 308 (5th Cir. 1999) ("A special relaxing of Rule 9(b) is a qui tam plaintiff's ticket to the discovery process that the statute itself does not contemplate."), *abrogated on other grounds by U.S. ex rel. Eisenstein v. City of New York*, 556 U.S. 928 (2009).[21]

5. In any event, even under a "relaxed" application of Rule 9(b), the SAC is deficient. Relator does not dispute that he failed to allege the terms of the 20 relevant contracts or the billings under those contracts with any particularity. Relator also does not dispute that he failed to allege when the alleged fraud occurred. He asserts (at 40) that the SAC's failure to specify when the alleged fraud occurred is immaterial, since Verizon is capable of determining "the life of each contract" at issue. But speculation that Verizon might have improperly billed for some surcharge on one or more of those 20 contracts at some point in time does not even arguably satisfy Rule 9(b)'s heightened standard. Although "a complaint that covers a multi-year period may not be required under Rule 9(b) to contain detailed allegation of all facts supporting each and every instance of submission of a false claim, *some information* on the false

[21] *See Clausen*, 290 F.3d at 1314 n.25 (rejecting "argument that [the court] should apply a more lenient pleading standard because evidence of fraud was uniquely held by the defendant"); *Ebeid ex rel. U.S. v. Lungwitz*, 616 F.3d 993, 999 (9th Cir. 2010) ("To jettison the particularity requirement simply because it would facilitate a claim by an outsider is hardly grounds for overriding the general rule, especially because the FCA is geared primarily to encourage insiders to disclose information necessary to prevent fraud on the government.").

claims must be included." *U.S. ex rel. Barrett v. Columbia/HCA Healthcare Corp.*, 251 F. Supp. 2d 28, 35 (D.D.C. 2003) (emphasis added). Here, that specificity is entirely lacking.

Relator also argues (at 43) that the Court should excuse the requirement to identify the "who" of the alleged fraud because Relator "never worked for Verizon." The D.C. Circuit made clear in *Williams*, however, that Rule 9(b) "require[s] pleaders to identify individuals allegedly involved in the fraud." 389 F.3d at 1256. As this Court has since recognized: "FCA cases in this circuit reveal that specificity regarding the identities of individual actors is required. . . . [I]t is not enough for a complaint to refer generally to 'management' while providing a list of names without explaining the role these individual defendants played in the alleged fraud." *U.S. ex rel. Bender v. North Am. Telecomms., Inc.*, 686 F. Supp. 2d 46, 53-54 (D.D.C. 2010); *see Digital Healthcare, Inc.*, 778 F. Supp. 2d at 53. And courts that have excused the identification requirement have only done so in the case of an "otherwise detailed complaint." *U.S. ex rel. Westrick v. Second Chance Body Armor*, 685 F. Supp. 2d 129, 139 (D.D.C. 2010); *see also* Opp. 43 (quoting *Synnex*, 798 F. Supp. 2d at 80).

6. Finally, Relator suggests that he should be relieved of complying with Rules 8 and 9(b) because his counsel "wrote to Verizon's counsel" before filing the SAC and, recognizing "that Verizon may possess information that would rebut Relator's allegations," invited Verizon "to respond if you think we're wrong." Opp. 37 (quoting Ex. 3). That argument, however, stands pleading law on its head. The fact that Relator filed a complaint alleging fraud under 20 contracts about which he lacked complete information is not a reason to relax the Federal Rules and to "unlock the doors of discovery," *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009), based on nothing more than Relator's hope that it might reveal the factual basis Relator was supposed to already have.

IV. DISMISSAL SHOULD BE WITH PREJUDICE

Dismissal of Relator's SAC should be with prejudice. Relator concedes (at 44) that leave to amend need not be afforded where it would be futile. Here, none of the deficiencies of Relator's SAC can be repaired in an amended complaint. As explained above, the first-to-file bar must be satisfied at the time of filing of the initial complaint. Compliance cannot be achieved through amendment. *See supra* at pp. 10-12. Similarly, Relator would be unable to avoid the public disclosure bar absent adoption of an entirely new theory of fraud. *See, e.g., U.S. ex rel. Poteet v. Bahler Med., Inc.*, 619 F.3d 104 (1st Cir. 2010) (dismissing with prejudice based on public disclosure bar). Finally, Relator would be unable to address the pleading deficiencies in the SAC because, three years after filing this suit, Relator still lacks a basis to plead a claim and cannot rely on discovery to attempt to fill that gap. *See* Defs. Mem. 40; *see also Klein v. Toupin*, No. 05-647, 2006 WL 997959, at *2 (D.D.C. Apr. 14, 2006) (leave to amend "is improper where the amendment would be futile").[22]

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court dismiss the SAC with prejudice.

[22] Relator contends that any dismissal under the first-to-file bar should be without prejudice to his filing a new complaint "the next day." This issue need not be addressed in this case. It can be litigated when and if such a new suit is filed. Although some courts (outside of this circuit) have adopted Relator's view, the better view is that the first-to-file bar cannot simply be evaded by waiting out the first-filed suit. *See, e.g., U.S. ex rel. Powell v. Am. InterContinental Univ., Inc.*, No. 1:08-CV-2277, 2012 WL 2885356, at *4 (N.D. Ga. July 12, 2012); Boese, *Civil False Claims and Qui Tam Actions* § 4.03[C][2][b]; *see also U.S. ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1188 (9th Cir. 2001) ("Dismissed or not," a first-filed action "alerted the government to the essential facts of a fraudulent scheme."). The Court also need not address in this action whether dismissal of the SAC under Rule 9(b) is binding on the United States. *See U.S. ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849, 853 (7th Cir. 2009) (finding the district court had erred when it "entered an order stating that the dismissal, though with prejudice to [the relator], is without prejudice to the United States").

Dated: October 9, 2012

Respectfully submitted,

/s/ Randolph D. Moss

Randolph D. Moss (D.C. Bar No. 417749)
Jennifer M. O'Connor (D.C. Bar No. 460352)
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Tel.: (202) 663-6000
Fax: (202) 663-6363
randolph.moss@wilmerhale.com

Attorneys for Defendants

EXHIBIT A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA
ex rel. BEN BANE,

Plaintiffs,

v. **Case No. 8:06-CV-467-T-30EAJ**

LINCARE HOLDINGS, INC., et al.,

Defendants.
_____/

ORDER

THIS CAUSE comes before the Court upon Defendants Lincare Holdings Inc. and Lincare Inc.'s (hereinafter collectively "Lincare") Dispositive Motion to Dismiss Plaintiff's First Amended Complaint and Incorporated Memorandum of Law (Dkt. 32), Bane's response in opposition to Lincare's motion (Dkt. 36), and Lincare's Motion for Leave to File A Reply to Relator's Response in Opposition to Motion to Dismiss (Dkt. 37). The Court, having considered the motions, responses, memoranda, and the complaint and being otherwise advised in the premises, finds that Lincare's motion should be granted.

Background

On March 16, 2006, relator Ben Bane filed a *qui tam* complaint under the False Claims Act ("FCA"), 31 U.S.C. § 3729 *et seq.*, against Lincare and Life Care Diagnostics

(Dkt. 1).[1] On February 6, 2007, the United States filed a Notice of Election to Decline Intervention (Dkt. 2). On February 8, 2007, the Court ordered the seal lifted on the Complaint and directed Bane to serve the Complaint upon the Defendants (Dkt. 3). See 31 U.S.C. 3730(b)(2). Lincare was served on May 22, 2007 (Dkts. 19 & 20).

In his First Amended Complaint, filed June 20, 2007, Bane asserts that Lincare conspired with Life Care and other independent testing laboratories[2] around the United States to submit and cause to be submitted fraudulent claims for payment to Medicare for (1) medically unnecessary and redundant additional services performed in conjunction with pulse oximetry testing and (2) services obtained in violation of the Anti-Kickback Act, 42 U.S.C. § 1320a-7b.

Lincare seeks dismissal of this cause of action pursuant to Fed. R. Civ. P. 12(b)(1) on grounds that it is barred by the first-to-file provisions of 31 U.S.C. § 3730(b)(5). Alternatively, Lincare asserts that the First Amended Complaint is subject to dismissal because it does not meet the particularity requirements of Fed. R. Civ. P. 9. Finally, Lincare moves under Fed. R. Civ. P. 12(b)(6) for dismissal of the claim brought pursuant to the Anti-Kickback Act.

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[1]Section 3730(b)(2) provides that a *qui tam* complaint shall (1) be served on the Government; (2) be "filed in camera"; and (3) "remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders." 31 U.S.C. § 3730(b)(2).

[2]Bane names seven other oximetry companies as Lincare's co-conspirators: Breathe Easy, N2Air of Louisville, Kentucky, B&M Oximetry Lab, Inc. of Plantation, Florida, Healthy Choice of Memphis, Tennessee, Respiratory Outreach of Chico/ Sacramento, California, Oximetry Trendy of Toledo, Ohio, and Peterson Oximetry of Southern California (Dkt. 24 ¶ 27). None are parties to this action; however, Bane, as relator, has brought a separate, but similar, *qui tam* action in this division against Lincare and Breathe Easy. See United States ex rel. Ben Bane v. Breathe Easy Pulmonary Services, Inc., et al., Case No. 8:06-CV-040-T-24MAP.

Discussion

Rule 12(b)(1) of the Federal Rules of Civil Procedure allows for dismissal based on a lack of subject matter jurisdiction. A party may make either a facial or factual challenge to a court's subject matter jurisdiction. See McElmurray v. Consolidated Government of Augusta-Richmond County, 501 F.3d 1244, 1251-52 (11th Cir. 2007). Because "factual attacks" challenge "the existence of subject matter jurisdiction in fact, irrespective of the pleadings, matters outside the pleadings, such as testimony and affidavits, are considered." McElmurray, 501 F.3d at 1251 (citation omitted). In resolving a challenge to its subject matter jurisdiction, the court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. No presumptive truthfulness attaches to the plaintiff's allegations, and the existence of disputed material facts does not preclude the court from evaluating for itself the merits of jurisdictional claims. Id. "The district court has the power to dismiss for lack of subject matter jurisdiction on any of three separate bases: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." Williamson v. Tucker, 645 F.2d 404, 413 (5th Cir. 1981).[3]

In this case, Lincare's argument that Bane's claims are barred under the FCA's first-to-file provisions presents a factual challenge to the Court's subject matter jurisdiction. Specifically, Lincare contends that Bane's complaint is duplicative of the claims he has raised

[3]See Bonner v. Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (adopting as binding precedent in the Eleventh Circuit all decisions of the former Fifth Circuit announced prior to October 1, 1981).

in a separate, but similar, *qui tam* action in this division against Lincare and Breathe Easy. See United States ex rel. Ben Bane v. Breathe Easy Pulmonary Services, Inc., et al., Case No. 8:06-CV-040-T-24MAP ("Breathe Easy"), and is therefore barred by the FCA's provisions for *qui tam* actions by private persons, 31 U.S.C. § 3730(b)(5) (2000), which provides that "[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." A jurisdictional limit on the courts' power to hear certain duplicative *qui tam* suits, see United States ex rel. Lujan v. Hughes Aircraft Co., 243 F.3d 1181, 1183 (9th Cir. 2001), this provision prevents a relator from filing claims that are the subject of existing suits. Lincare relies, *inter alia,* on Untied Stated ex rel. Cooper v. Blue Cross and Blue Shield of Florida, Inc., to support its position. 19 F.3d 562, 565 and n.4 (11th Cir. 1994) ("[O]nce one suit has been filed by a relator or by the government, all other suits against the same defendant based on the same kind of conduct would be barred" (citation omitted).).

The Court must judge whether § 3730(b)(5) bars Bane's *qui tam* action by looking at the facts as they existed at the time this action was brought – March 16, 2006. See Smith v. Sperling, 354 U.S. 91, 93 n. 1 (1957) ("[T]he jurisdiction of the Court depends upon the state of things at the time of the action brought." (quotation omitted)). At that time, Bane's suit against Lincare and Breathe Easy, filed January 6, 2006, was pending. Thus, if Bane's suit is a "related action" based on the facts underlying the Breathe Easy complaint, then it was barred from its inception by § 3730(b)(5). See United States ex rel. LaCorte v. SmithKline Beecham Clinical Labs., Inc., 149 F.3d 227, 234-35 n. 6 (3d Cir. 1998) ("[W]e may decide

whether the later complaints allege the same material elements as claims in the original lawsuits simply by comparing the original and later complaints.").

Since § 3730(b)(5) speaks of "related" qui tam actions, its first-to-file bar is not limited to situations in which the original and subsequent complaints rely on identical facts. See Lujan, 243 F.3d at 1189. Once the relator has put the government on notice of its potential fraud claim, the purpose behind allowing *qui tam* litigation is satisfied. See LaCorte, 149 F.3d at 234 ("[D]uplicative claims do not help reduce fraud or return funds to the federal fisc, since once the government knows the essential facts of a fraudulent scheme, it has enough information to discover related frauds."). Moreover, if they had to share in their recovery with third parties who do no more than tack on additional factual allegations to the same essential claim, original *qui tam* relators would be less likely to act on the government's behalf. See id.

Bane acknowledges that this case and Breathe Easy are "related cases" under the Local Rules, but contends that they are not "related actions" for purposes of the first-to-file bar because this case seeks to recover for false claims submitted by Life Care Diagnostics, while the Breathe Easy case seeks to recover for false claims submitted by Breathe Easy.

Citing United States ex rel. Ortega v. Columbia Healthcare, Inc., 240 F.Supp.2d 8, 14 (D.D.C. 2003) in opposition to Lincare's first-to-file argument, Bane contends that § 3730(b)(5) does not "prohibit an amendment to a complaint that adds an allegation made in an earlier-filed suit." Bane's reliance on Ortega is misplaced. In Ortega, the relator argued that her amended complaint should relate back to the date of her original complaint, which

would make her the first-to-file, emphasizing that § 3730(b)(5) states that "no person may 'bring' an action, but does not prohibit an amendment to a complaint that adds an allegation made in an earlier-filed suit." The district court acknowledged that the realtor was "literally correct that the language of § 3730(b)(5) makes no reference to amendment," but found that "it is clearly outside the intent and purpose of § 3730(b)(5) to permit relation back." Id. at 14. This case is clearly distinguishable. Even if there were an earlier filed complaint in this case that could be used as a vehicle to avoid the first-to-file provision under the relation back rule, which there is not, this Court agrees with the Ortega court's finding that relation back to circumvent the provisions of § 3730(b)(5) would be contrary to the "intent and purpose" of the statute. To the extent that Bane may be arguing that once the initial complaint is filed, amendments to the complaint are not subject to the first-to-file rule, the argument is likewise rejected.

Bane argues that § 3730(b)(5)'s first-to-file bar is not applicable to a complaint filed by a relater based on an earlier complaint filed by the same relator. Bane asserts that the first-to-file bar does not prevent a relator from filing multiple suits against a defendant based on the same fradulent scheme. According to Bane, the first-to-file bar simply means that a relator "is precluded from collecting a bounty [under the FCA] if *someone else* has filed the claim first." United States ex rel. Taxpayers Against Fraud v. General Electric Co., 41 F.3d 1032, 1035 (7th Cir. 1994) (emphasis added). Similarly, Bane relies on a statement by the Sixth Circuit Court of Appeals that the courts must dismiss a relator's claim under §

3730(b)(5) 'if the claim had already been filed *by another*," Walburn v. Lockheed Martin Corp, 431 F.3d 966, 970 (6th Cir. 2005) (emphasis added).

Bane fails to cite, and the Court is unaware of, any case in which a relator was allowed to proceed in a second cause of action brought under the FCA against a defendant based on the same fraudulent scheme that formed the basis for claims against that defendant in a pending cause of action filed under the FCA by the same realtor.

A comparison of the original complaints filed in each case reveals that the crux of each of Bane's complaints is that Lincare, as the oxygen provider, allegedly schemed with the laboratory to circumvent the Medicare framework by bundling[4] a medically unnecessary procedure with a procedure certified by the patient's physician as medically necessary, causing Medicare to pay for medically unnecessary and redundant services (Dkt. 1 ¶ 2; Case No. 8:06-CV-40-T-24MAP, Dkt. 1 ¶ 2). In fact, as Lincare points out, the causes of action are so closely related that when Bane amended his complaint in the instant matter, he referenced Lincare's alleged conspiracy with Breathe Easy 22 times in the 15-page document, see Dkt. 24, ¶¶ 2, 17, 18, 22, 24, 25, 27, 28, 30, 46, 47, 59. Notably, in Breathe Easy, Bane stated in his motion to file a second amended complaint that it "alleges a national conspiracy between Lincare and a variety of oximetry testing companies around the United states, including Defendant Breathe Easy, Defendant Premier, and a local company named

[4]The fraudulent "bundling" of laboratory tests, as mixing unnecessary ones with reasonably necessary tests, has been the subject of criminal prosecutions and *qui tam* actions under the False Claims Act. See United States v. Thurston, 358 F.3d 51, 54 (1st Cir. 2004) (affirming conspiracy to defraud Medicare), judgment vacated, 543 U.S. 1097 (2005) (sentencing guideline issues) ; United States ex rel. Merena v. SmithKline Beecham Corp., 205 F.3d 97, 98-99 (3d Cir. 2000); United States v. Shaw, 113 F. Supp. 2d 152, 157 (D. Mass. 2000) (mail fraud and conspiracy to defraud Medicare and Anti-Kickback Act).

Life Care Diagnostics" (Case No. 8:06-CV-40-T-24MAP, Dkt. 32 at 1). Bane did not, however, move to consolidate these matters or amend the Breathe Easy complaint to add the alleged conspiracy between Life Care and Lincare. Had Bane shown that he sought to amend the Breathe Easy complaint to include the claims against Lincare and Life Care and his efforts to do so were rejected, this Court might consider the bar too harsh. A review of the record reveals, however, that no such attempt was made.

Bane contends that the first-to-file bar "of protecting the Government by preventing double recovery from parasitic lawsuits" would not be served by granting Lincare's motion to dismiss. Bane posits that the risk of letting this matter go forward does not pose a risk of double recovery because this case seeks recovery for false claims submitted by Life Care Diagnostics, while the Breathe Easy case seeks recovery for false claims submitted by Breathe Easy. According to Bane, granting Lincare's motion to dismiss "will prevent the government from obtaining any recovery in this case." The Court finds this argument unpersuasive.

Conclusion

Having compared the complaints in the instant case and Breathe Easy, the Court finds that Lincare's argument has merit. Here, Bane's claims are based in significant measure on the general conduct relied upon in the Breathe Easy *qui tam* action. The pendency of the initial *qui tam* action blocks other suits that do no more than assert the same material elements of fraud, regardless of whether those later complaints are able to marshal additional factual support for the claim. Bane's complaint is, therefore, subject to dismissal pursuant

to § 3730(b)(5)'s first-to-file bar. In view of the foregoing, the Court need not address the other issues briefed by the parties.

It is therefore **ORDERED** and **ADJUDGED** that:

1. Lincare's Motion for Leave to File A Reply to Relator's Response in Opposition to Motion to Dismiss (Dkt. 37) is **DENIED**.

2. Bane shall, not later than 5:00 p.m., March 24, 2008, inform the Court whether he will go forward against only Life Care in these proceedings; move to amend the complaint in United States ex rel. Ben Bane v. Breathe Easy Pulmonary Services, Inc., et al., Case No. 8:06-CV-040-T-24MAP; or agree to transfer this matter to the Honorable Susan C. Bucklew for potential consolidation with the Breathe Easy case. Failure to comply with this order within the allotted time will result in **dismissal** of the counts against Lincare without further notice.

DONE and **ORDERED** in Tampa, Florida on March 14, 2008.

JAMES S. MOODY, JR.
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel/Parties of Record

S:\Odd\2006\06-cv-467 Lincare MTD New.wpd

CERTIFICATE OF SERVICE

On this 9th day of October, 2012, I electronically filed the Defendants' Reply Memorandum in Support of Motion to Dismiss the Second Amended Complaint with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following:

Christopher B. Mead
Lance A. Robinson
LONDON & MEAD
1225 19th St., NW
Suite 320
Washington, DC 20036
Attorneys for Relator Stephen Shea

Doris Denise Coles-Huff
U.S. ATTORNEY'S OFFICE FOR D.C.
555 4th St., NW
Washington, DC 20530
Attorney for the United States

And on the 10th of October, 2012, the following will be served by First-Class Mail:

Arnold Mark Auerhan
U.S. DEPARTMENT OF JUSTICE
Civil Division
Ben Franklin Station
P.O. Box 261
Washington, DC 20044
Attorney for the United States

/s/ Randolph D. Moss

Randolph D. Moss
WILMER CUTLER PICKERING
HALE AND DORR LLP
Attorney for Defendants

EXHIBIT 4

ORAL ARGUMENT NOT YET SCHEDULED

No. 12-7133

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, No. 09-cv-1050 (Kessler, J.)

BRIEF FOR DEFENDANTS-APPELLEES

RANDOLPH D. MOSS
BRIAN M. BOYNTON
BRIAN H. FLETCHER
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 663-6000
(202) 663-6363 (fax)
randolph.moss@wilmerhale.com

August 12, 2013

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Defendants-Appellees make the following certificate of counsel:

A. Parties And Amici

Plaintiff-Appellant Stephen M. Shea appeared in the district court and is a party in this Court.

Defendants-Appellees Verizon Business Network Services Inc., Verizon Federal Inc., MCI Communications Services, Inc. d/b/a Verizon Business Services, and Cellco Partnership d/b/a Verizon Wireless appeared in the district court and are parties in this Court.

The United States of America did not intervene in the district court, *see* JA34-35, but did file a Statement of Interest "request[ing] that if the Court dismisses this action, that such dismissal be without prejudice to the United States," JA302. The United States is not a party in this Court.

No amici appeared in the district court. On July 11, 2013, this Court granted the Chamber of Commerce of the United States leave to participate in this appeal as an amicus curiae supporting Defendants-Appellees.

B. Rulings Under Review

References to the rulings at issue in this appeal appear in the Brief for Plaintiff-Appellant Shea.

C. Related Cases

This case has not previously been before this Court or any other court other than the district court below.

A related case brought by Plaintiff-Appellant Shea under the False Claims Act against Verizon Communications Inc. asserting the same theory of recovery at issue here was previously before the district court. *See United States ex rel. Shea v. Verizon Commc'ns Inc.*, No. 07-cv-111 (D.D.C. filed Jan. 17, 2007). The United States intervened in that case, and the parties reached a settlement agreement in 2011 that did not include any admission of liability. The United States filed a notice of appeal to this Court of the district court's final judgment allocating settlement proceeds, but later voluntarily dismissed the appeal. *See* Order, *United States ex rel. Shea v. Verizon Commc'ns Inc.*, No. 12-5215 (D.C. Cir. July 13, 2012).

/s/ Randolph D. Moss
RANDOLPH D. MOSS

August 12, 2013

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Defendants-Appellees provide the following corporate disclosure statement:

Cellco Partnership is a general partnership formed under Delaware law in which Verizon Communications Inc. and Vodafone Group Plc indirectly hold 55 percent and 45 percent partnership interests, respectively. Both Verizon Communications Inc. and Vodafone Group Plc are publicly traded companies.

Verizon Business Network Services Inc. is owned by MCI Communications Corporation, which is owned by Verizon Business Global LLC, which is owned by Verizon Communications Inc.

MCI Communications Services, Inc. is owned by MCI Broadband Solutions, Inc., which is owned by Terremark Worldwide, Inc., which is owned by Verizon Business Network Services Inc., which is owned by Verizon Communications Inc.

Verizon Federal Inc. is owned by Verizon Investments LLC, which is owned by Verizon Communications Inc.

As relevant to the litigation, Cellco Partnership, Verizon Business Network Services Inc., MCI Communications Services, Inc., and Verizon Federal Inc. are telecommunications service providers.

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* Authorities upon which we chiefly rely are marked with asterisks.

STATUTES, LEGISLATIVE MATERIALS, AND RULES

OTHER AUTHORITIES

GLOSSARY

FAR	Federal Acquisition Regulations
FCA	The False Claims Act, 31 U.S.C. §§3729 *et seq.*
GSA	General Services Administration
PPACA	The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010)
SAC	Plaintiff-Appellant Shea's Second Amended Complaint in this action
Verizon I	Shea's first *qui tam* suit against Verizon, *United States ex rel. Shea v. Verizon Communications Inc.*, No. 07-cv-111 (D.D.C. filed Jan. 17, 2007)
Verizon II	The action giving rise to this appeal, *United States ex rel. Shea v. Verizon Business Network Services, Inc.*, No. 09-cv-1050 (D.D.C. filed June 5, 2009)

INTRODUCTION

The False Claims Act authorizes whistleblowers with inside information about fraud against the Government to bring suit on behalf of the United States and, if successful, to retain a share of the recovery. The sizeable "cash bounties" available under the FCA can "supplement government enforcement," but they also create "the danger of parasitic exploitation of the public coffers." *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994). The FCA's first-to-file and public-disclosure bars guard against such parasitic suits. The first-to-file bar provides that "[w]hen a person brings an [FCA action], no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." By precluding actions based on information already presented to the Government in an earlier case, the bar "'reject[s] suits which the government is capable of pursuing itself.'" *United States ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204, 1208 (D.C. Cir. 2011). Similarly, the public-disclosure bar prevents a relator from bringing an action "based upon" information that was already "publicly disclos[ed]"—and thus available to the Government—unless the relator is the "original source" of the information.

This case exemplifies the sort of parasitic suit the first-to-file and public-disclosure bars were intended to prohibit. In 2007, Plaintiff-Appellant Stephen

Shea filed *Verizon I*, an FCA action claiming that Verizon and its predecessor MCI had been billing the Government for taxes and surcharges in violation of two telecommunications contracts—knowledge Shea claimed to have gained in part from an MCI document he obtained in 2004. The United States intervened, and the parties negotiated a settlement (without an admission of liability). Shea received a bounty of nearly $20 million for his role.

After filing *Verizon I*, Shea speculated that Verizon might be billing the same or similar taxes and surcharges contrary to the terms of other government contracts. Although he did not acquire any new nonpublic information, he identified more Verizon contracts by searching the Internet. In most instances, he found nothing beyond the contract's name and number; in others, he also found excerpts of the contract or "mock-up" invoices. Relying on this skeletal public information, Shea filed this action, *Verizon II*, which alleges "on information and belief" that the Verizon defendants are improperly billing taxes and surcharges on twenty additional contracts. Shea freely admits that he has not reviewed any of the contracts in their entirety and that he does not know what charges are actually being billed, much less whether any of them actually violate the applicable contract. The Government has not intervened in this case.

The district court (Kessler, J.) correctly held that this suit is foreclosed by the first-to-file bar. Shea's complaint in *Verizon I* was more than sufficient to put

the Government on notice of his allegations regarding Verizon's billing practices. This suit merely seeks to extend the same theory of fraud to additional contracts that he speculates *might* support a similar claim. Because Shea's claims involve no new revelation, and, indeed, are precisely the sort of claims "'which the government is capable of pursuing itself,'" *Batiste*, 659 F.3d at 1208, they cannot proceed. Moreover, contrary to Shea's arguments on appeal, he cannot avoid the first-to-file bar on the ground that he was the relator in both *Verizon I* and *Verizon II* or because *Verizon I* is no longer pending. The statute clearly states that once a relator files suit, "*no person* other than the Government" may bring a related action. It makes no exception for new actions filed by the original relator. The text, purpose, and history of the first-to-file bar also make clear that it prohibits follow-on suits even after the original action has been resolved.

Even if there were some uncertainty about the district court's application of the first-to-file bar, this Court should still affirm the dismissal of Shea's suit on either of two alternative grounds:

First, Shea's action is prohibited by the public-disclosure bar. Shea has admitted that *all* of his information about the contracts and charges at issue came from the Internet. That concession is fatal: Shea has not disputed that information found online is "publicly disclos[ed]" for purposes of the bar, and he plainly

cannot qualify as an "original source" of information he learned from public websites.

Second, Shea cannot satisfy the ordinary pleading requirements of Federal Rule of Civil Procedure 8(a), let alone Rule 9(b)'s heightened standards. His complaint does not identify a single specific surcharge that was imposed without authorization, much less the circumstances of the allegedly fraudulent charges. Instead, as Shea acknowledged, he hopes to fill in those details through discovery. Rule 9(b) prohibits such fishing expeditions, which are particularly inappropriate in FCA suits. To allow a relator to bring suit in the hopes of finding a billing error through burdensome discovery (often at a cost of millions to the defendant) would impermissibly transform the role of relator from "whistleblower" to "auditor."

For all of these reasons, this Court should affirm the dismissal of Shea's suit. Shea's role under the FCA was complete when *Verizon I* settled and he obtained a generous reward for notifying the Government of Verizon's allegedly improper billing. The decision whether to pursue a related action like this one is for the Government alone, and Shea cannot step into the Government's shoes and secure another *qui tam* bounty without identifying any new theory of fraud or offering any new nonpublic information.

JURISDICTIONAL STATEMENT

Shea attempted to invoke the district court's jurisdiction under 28 U.S.C. §§1331 & 1345 and 31 U.S.C. §3732(a). JA18-19, 56. The district court correctly concluded it lacked jurisdiction because of the first-to-file bar, 31 U.S.C. §3730(b)(5). JA321-322. The district court also lacked jurisdiction because of the public-disclosure bar, 31 U.S.C. §3730(e)(4). Absent these statutory bars, jurisdiction would have been proper under §1331 and §3732(a).

The district court entered a final judgment on December 27, 2012. JA324. Shea filed a timely amended notice of appeal on January 11, 2013. JA11. This Court has jurisdiction to review the dismissal of Shea's suit under 28 U.S.C. §1291, but lacks jurisdiction over the merits for the same reasons jurisdiction was absent in the district court.

STATEMENT OF ISSUES

1. Whether the FCA's first-to-file bar, 31 U.S.C. §3730(b)(5):
   (a) precludes an action that merely extends the same theory of fraud alleged in an earlier FCA action to additional government contracts;
   (b) applies where the related actions were filed by the same person;
   (c) continues to preclude related actions after the first-filed suit has been resolved.

2. Whether an FCA action claiming that a contractor has improperly billed the Government is barred by the Act's public-disclosure bar, §3730(e)(4), when the relator concedes that all of his information about the contracts and bills at issue came from public websites.

3. Whether an FCA complaint satisfies Rules 8(a) and 9(b) when it fails to identify with particularity—among other things—any allegedly unauthorized charges or any specific contractual provision that was allegedly violated.

RELEVANT STATUTES

The relevant statutes and rules are in an addendum to this brief.

STATEMENT OF FACTS

A. Shea Files *Verizon I*

Shea filed his first *qui tam* action against Verizon in January 2007. JA138-157. The complaint in *Verizon I* asserted that it "concern[ed] the knowing submission to the United States of certain prohibited surcharges under contracts to provide telecommunications services" to the General Services Administration (GSA). JA139. The two contracts directly addressed in the complaint were known as the FTS2001 Contract and the FTS2001 Bridge Contract. *Id.*

The complaint alleged that, based on his experience as "a private telecommunications consultant to Fortune 100 companies … Shea became aware of the practice of [Verizon's predecessor] MCI billing corporate clients not only

for federal, state and local taxes levied on the customer but also for surcharges (often labeled as, or lumped together with, taxes)." JA141. Shea never worked for MCI, Verizon, or the Federal Government, and he had no direct involvement in any federal telecommunications contracts. JA80-81. But he alleged that "[o]n or about August 13, 2004, [he] received an MCI document that purported to show 'the taxes and surcharges that the Federal Government is responsible for'" under the two contracts at issue in *Verizon I*. JA152. Shea asserted that "MCI appear[ed] to have been invoicing the United States in the same way it invoiced many of its commercial clients notwithstanding the terms of the FTS2001 Contract and governing FAR regulations" and that "MCI used the same billing platform that it used for enterprise [or corporate] customers to bill the United States without modifying its systems to reflect the terms of the FTS2001 Contract." JA153. Shea claimed that Verizon continued these practices after the two companies merged in 2006. JA152, 154.

The United States intervened in Shea's suit, and in February 2011 the parties settled the case without any admission of liability. JA306. Shea received approximately $18.9 million for his role.[1]

[1] *See* Judgment, *Verizon I*, No. 07-cv-111 (D.D.C. May 1, 2012) (Doc. 77).

B. Shea Files *Verizon II*

Shea received no new inside information about Verizon's contracts or alleged billing practices after filing *Verizon I*. But by searching the Internet, he found the names and numbers of additional Verizon contracts, as well as excerpts from a few of the contracts and certain limited billing information, such as "mock-up" invoices used for training purposes. JA81-82, 85, 88. Although *Verizon I* remained pending, Shea did not seek to amend his complaint to add allegations relating to these additional contracts. Instead, he filed a new complaint under seal on June 5, 2009. *See* JA12-31.[2]

Shea designated *Verizon II* as "related" to *Verizon I* under the district court's rules. JA33. And beginning with its description of the suit, the 2009 complaint was strikingly similar to his 2007 filing. In language lifted nearly verbatim from the earlier complaint, it alleged that Verizon "knowingly submits claims to the United States for payment of illegal surcharges under contracts to provide telecommunication services." JA12-13; *cf.* JA139. Like the 2007 complaint, the 2009 complaint claimed that Shea discovered the alleged fraud "through his extensive work as a private telecommunications consultant to Fortune 100 companies." JA17; *cf.* JA141. The 2009 complaint also repeated the 2007 allegation that Shea learned that MCI and Verizon were "billing corporate clients

[2] Verizon only learned that Shea had filed this action very shortly before the *Verizon I* settlement was to be finalized in February 2011.

not only for federal, state and local taxes levied on the customer but also for surcharges (often labeled as, or lumped together with, taxes)." JA17-18; *cf.* JA141. Once again, the 2009 complaint claimed that "[o]n or about August 13, 2004, Relator Shea received an MCI document that purported to show 'the taxes and surcharges that the Federal Government is responsible for.'" JA22; *cf.* JA152. And the 2009 complaint again alleged that "Verizon is invoicing the United States in the same way that it invoices many of its business customers notwithstanding the governing FARs or applicable contracts," and that "Verizon uses the same billing systems that it uses for its business customers to bill the United States without modifying these systems to reflect the terms of the contracts with the United States or the FARs." JA28; *see* JA22-23; *cf.* JA152-154.

Shea made no attempt to suggest that *Verizon II* raised a new theory of fraud. To the contrary, he framed it as a continuation of *Verizon I*, alleging that "Verizon's pattern and practice of submitting false claims extends beyond" the two contracts directly at issue in that case. JA15. Shea asserted that the fraud alleged in *Verizon II* applied to "multiple contracts including, but not limited to" two additional contracts administered by the GSA and other, unspecified contracts with other federal agencies. *Id.*

In November 2011, the United States informed the district court that it was "not intervening at this time" in *Verizon II*. JA34-35. The suit was unsealed on March 29, 2012. JA4.

C. Shea Amends His Complaint In *Verizon II*

On July 26, 2012, Shea filed a First Amended Complaint in *Verizon II*. JA5. On September 12, 2012, he filed a Second Amended Complaint (SAC) that was substantively identical, but substituted three Verizon operating subsidiaries as defendants. JA52-71. Like the 2009 complaint, the SAC acknowledges that *Verizon II* is "related" to *Verizon I*, JA55, and extends the allegations from that suit to additional contracts and Verizon affiliates. As in the prior complaints, Shea alleges that he discovered the purported fraud while "consulting with large commercial telecommunications customers." JA54; *cf.* JA17-18 (2009); JA141 (2007). The SAC claims that as a consultant, Shea learned that MCI and Verizon "had a custom and practice of charging" certain taxes and surcharges to its commercial clients. JA54; *cf.* JA17-18 (2009); JA141 (2007). The SAC then alleges that "MCI/Verizon overcharged the United States, just like its commercial customers." JA54; *see* JA59; *cf.* JA18 (2009); JA141-142 (2007).

The SAC—like the prior complaints—traces Shea's purported insider knowledge to his 2004 receipt of the same "MCI document indicating that the company was charging the Government for regulatory fee surcharges, and various

state taxes." JA54; *cf.* JA22-23 (2009); JA152 (2007). The SAC further alleges—again like the prior complaints, but this time referencing an unnamed "former Verizon employee"—that "Verizon did not have a separate billing system for federal customers and commercial customers." JA59; *cf.* JA28 (2009); JA153-154 (2007). The SAC then asserts that Shea's allegations apply not only to the contracts directly at issue in *Verizon I*, but also to twenty additional contracts between Verizon and several federal agencies. In his deposition, however, Shea acknowledged that the only material information he has about these contracts or the relevant Verizon billing practices is publicly available on "various websites." JA81-82; *see also, e.g.*, JA82 ("off the internet"); JA86 ("from the internet"; "on the internet"); JA88 ("you just stick [the contract numbers] in Google"); JA88-92 ("online" seventeen times); JA101 ("online"); JA102 ("from the web"); JA103 ("on the internet"; "online"); JA104 ("[o]n the internet"; "on Verizon's website"); JA106, 107, 110, 112, 113 ("online").

The SAC provides no details to support Shea's general allegation that Verizon committed fraud with respect to the listed contracts. It does not contain specific allegations that any particular contract barred Verizon from imposing any particular surcharge. And although Shea himself acknowledged that "different contracts have different surcharge provisions," JA87, the SAC provides no detail at all about seventeen of the twenty contracts, merely identifying them by name and

number. Indeed, Shea conceded in his deposition that he does not "have a hundred percent of *any* [of the] contracts," JA107 (emphasis added); instead, he has reviewed only "bits and pieces" of some of the contracts that he obtained on the Internet, JA83. *See also*, *e.g.*, JA86 ("chunks" of a contract); JA89, 101 (same); JA102 (Shea does not "have a copy of that contract"); JA105 ("I have not read every single one of these contracts in their entirety because I don't have them.").

Nor does the SAC provide any specific allegations about Verizon's allegedly improper billing. It does not identify the purportedly false claims, much less their amounts, the circumstances of their submission, or the people involved in submitting them. In fact, Shea acknowledged at his deposition that there is much he does not know at this stage and that he hopes to rely on discovery to construct his case. *See*, *e.g.*, JA124 ("I don't know what I don't know. But … when we see the documents and the invoicing we're going to know."); *see also* JA83 ("I don't know if I've reviewed the actual contract. I think that's the—one of the documents that we've asked for, for you guys to give us to see."); JA85 ("I haven't read and seen every—every single full whole contract. And I'm—I'm anticipating to see that."); JA103 ("I'm looking forward to reading them.").

D. The District Court Dismisses Shea's Suit

Verizon moved to dismiss Shea's suit based on the first-to-file bar, the public-disclosure bar, and Rules 8(a) and 9(b). The United States did not intervene

in the case and took no position on the viability of Shea's claims, requesting only that any dismissal "be without prejudice to the United States." JA302.

The district court dismissed Shea's suit under the first-to-file bar. JA303-322. The court first rejected Shea's claim that the bar is inapplicable when the same relator files multiple related suits, noting that "[t]he plain language of §3730(b)(5) is clear: Once '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.'" JA314. By its terms, this prohibition applies "'equally to the original relator as any other person.'" *Id.*

The district court also rejected Shea's contention that the first-to-file bar no longer precludes this suit because *Verizon I* was not "pending" when Shea filed the SAC. JA316. "Turning again to the plain language of the statute," the court explained that "it is clear that the first-to-file bar refers specifically to jurisdictional facts that exist when an 'action' is brought," not when the complaint is later amended. *Id.*

Finally, the district court held that *Verizon I* and *Verizon II* are "related" under the first-to-file bar. It noted that §3730(b)(5) prohibits subsequent actions "'alleging *the same material elements of fraud*'" as an earlier suit, even if they "'incorporate somewhat different details.'" JA318. Quoting *United States ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204 (D.C. Cir. 2011), the court explained that the

question is whether the later-filed complaint "'alleges a fraudulent scheme the government already would be equipped to investigate based on the [earlier-filed] [c]omplaint.'" JA319 (alterations in original).

Applying this test, the court held that the manifest similarities described above "clearly demonstrate[] that the allegations in *Verizon II* are based on the same material facts alleged in *Verizon I*." JA319. The court also found "no merit" in Shea's assertion that the two lawsuits cannot be related because they involve different contracts and agencies. JA320. Again quoting *Batiste*, it concluded that the complaint in *Verizon I* "'suffices to put the U.S. government on notice' as to Verizon's allegedly fraudulent billing practices" with regard to its government contracts in general, including those at issue in *Verizon II*. JA321.

Shea had argued that any dismissal under the first-to-file bar should be without prejudice because *Verizon I* was no longer "pending" and thus—Shea asserted—he should be free to "re-file his complaint the next day" if this case were dismissed. Doc. 54 at 44. The district court's order, however, specified that the dismissal was "without prejudice as to the United States" and omitted any such limitation as to Shea. JA321-322. Shea filed a motion to clarify or amend the order to provide that the dismissal was without prejudice. JA9; *see* Doc. 60-1. The district court denied the motion and entered a judgment expressly dismissing the case "with prejudice" as to Shea. JA323-324.

Because the court concluded that the first-to-file bar foreclosed this action, it did not address whether dismissal was also appropriate under the public-disclosure bar or Rules 8(a) and 9(b). JA321.

SUMMARY OF ARGUMENT

The district court correctly dismissed this action with prejudice under the first-to-file bar. Shea's contrary arguments are foreclosed by that provision's text, purpose, and history, and by this Court's precedent.

This Court has held that two actions are "related" under §3730(b)(5) if the first complaint put the Government on notice of the fraud alleged in the second action. Here, Shea asserts that the same improper billing scheme alleged in *Verizon I* extends to additional contracts. This action cannot proceed because *Verizon I* already provided the Government all that it needed to investigate and discover any improper billing on those additional contracts. *See infra* Part I.A.

Moreover, contrary to Shea's claim, there is no exception to the first-to-file bar when the same person files multiple related suits. The statute is unambiguous and exception-free: Once an FCA suit is filed, "no person other than the Government"—including the original relator—may bring a related action. *See infra* Part I.B.

It is also irrelevant that *Verizon I* has now been resolved. Shea assumes without analyzing the statutory text that §3730(b)(5) ceases to bar follow-on

actions once the original suit is no longer pending. But that is not what the statute says: Congress used the word "pending" *only* to describe the first-filed action, not to limit the period during which the bar applies. This reading is confirmed both by the legislative history, which makes no mention of a temporal limitation on the first-to-file bar, and by the bar's central purpose of rejecting suits that the Government is capable of pursuing itself. When the Government has been put on notice by an earlier-filed suit, a related action adds nothing—and is thus precluded—regardless of whether the first-filed suit has been finally resolved. *See infra* Part I.C.1. In any event, even if Shea were correct that a related suit may be filed once the first-filed action is no longer pending, *this* suit would still have to be dismissed. The fact that Shea amended his complaint after *Verizon I* was settled is irrelevant, because jurisdiction is measured at the time a relator first "bring[s]" an action by filing suit. *See infra* Part I.C.2.

The dismissal of Shea's suit with prejudice is also supported by two alternative grounds:

First, this is an unusually clear case for the application of the public-disclosure bar because Shea himself has conceded that *all* of his relevant information about the contracts and billing practices at issue was publicly known because it came from the Internet. Shea does not dispute that information found

online qualifies as "publicly disclos[ed]," and he obviously cannot be the "original source" of information he learned using Google. *See infra* Part II.

Second, Shea cannot satisfy Rules 8(a) and 9(b). Shea has failed to allege with particularity *any* of the elements of his fraud claim, including which specific surcharges were improper and which contractual provisions they purportedly violated. Instead, Shea hopes to fill in these essential details by using discovery to conduct a burdensome audit of Verizon's billing. But Rules 8(a) and 9(b) do not permit this sort of fishing expedition. *See infra* Part III.

STANDARD OF REVIEW

This Court "review[s] *de novo* the dismissal of a complaint for lack of jurisdiction." *United States ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204, 1208 (D.C. Cir. 2011) (first-to-file bar); *see United States ex rel. Davis v. District of Columbia*, 413 F. App'x 308, 309 (D.C. Cir. 2011) (public-disclosure bar). As the plaintiff, Shea "bears the burden of demonstrating subject matter jurisdiction." *Shuler v. United States*, 531 F.3d 930, 932 (D.C. Cir. 2008). This Court also reviews *de novo* the sufficiency of a complaint under Rules 8(a) and 9(b). *See United States ex rel. Williams v. Martin-Baker Aircraft Co.*, 389 F.3d 1251, 1256 (D.C. Cir. 2004).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DISMISSED SHEA'S SUIT WITH PREJUDICE UNDER THE FIRST-TO-FILE BAR

A. This Suit Is "Related" To *Verizon I*

As the district court explained, this case is "related" to *Verizon I*—and thus precluded by the first-to-file bar—because a comparison of *Verizon I* and Shea's complaints here "clearly demonstrates" that the two cases are "based on the same material facts." JA319. Indeed, Shea has simply taken the theory of fraud asserted in *Verizon I* and speculated that it might apply to additional contracts, none of which he has seen in full. This action is thus a paradigmatic example of a successive suit that brings no new material information to the Government's attention and therefore provides no basis for a second *qui tam* bounty.

Although Shea himself has repeatedly characterized *Verizon II* as "related" to *Verizon I*, JA13, 33, 48, 55, he now insists (at 24-34) that the cases are not "related" for purposes of the first-to-file bar. He devotes most of his effort to arguing that the district court erroneously applied a "notice-based standard." But as the district court explained, that is precisely the standard this Court adopted in *Batiste*. And in any event, the two suits at issue here are "related" under any reasonable interpretation of §3730(b)(5).

1. The district court correctly applied a "notice-based" standard to the first-to-file bar

"[T]wo complaints need not allege identical facts for the first-filed complaint to bar the later-filed complaint." *United States ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204, 1208 (D.C. Cir. 2011). Instead, the statute bars any *qui tam* action "incorporating the same material elements of fraud as an action filed earlier," even if the two suits "'incorporate somewhat different details.'" *United States ex rel. Hampton v. Columbia/HCA Healthcare Corp.*, 318 F.3d 214, 217 (D.C. Cir. 2003); *accord Batiste*, 659 F.3d at 1208. In *Batiste*, this Court explained that the "same material elements" standard must be applied in light of the purpose of the first-to-file bar, which seeks to promote the "'twin goals of rejecting suits which the government is capable of pursuing itself, while promoting those which the government is not equipped to pursue on its own.'" 659 F.3d at 1208. *Batiste* thus held that two FCA actions contain the "same material elements" if the earlier complaint "suffice[d] to put the U.S. government on notice" of the fraud alleged in the second action. *Id.* at 1209.

Shea admits (at 28 n.34) that this language "suggests that this Court adopted a notice-based standard" for the first-to-file bar. Yet he nonetheless maintains that *Batiste* did not actually adopt that approach and argues that this Court should instead follow the Tenth Circuit's decision in *In re Natural Gas Royalties Qui Tam Litigation*, 566 F.3d 956 (10th Cir. 2009), which criticized reliance on the scope of

the notice provided by the first action. But Shea's reading of *Batiste* is untenable. This Court could not have been clearer in holding that the governing "same material elements" test requires an inquiry into the notice provided by the first complaint. That is how the Court framed its inquiry at the outset:

> [W]e must consider whether [the two complaints] allege the "same material elements of fraud." *In other words*, we must determine whether the [later-filed] Batiste complaint *alleges a fraudulent scheme the government already would be equipped to investigate* based on the [earlier-filed] Zahara complaint.

659 F.3d at 1209 (emphases added). And it is also how the Court stated its conclusion:

> Under the … material facts test, these complaints allege essentially the same corporation-wide scheme. The Zahara Complaint *would suffice to equip the government to investigate* SLM's allegedly fraudulent forbearance practices nationwide. Batiste's additional details would not give rise to a different investigation or recovery.

Id. at 1209-1210 (emphasis added).

Shea seizes (at 28 n.34) on the single sentence stating that the additional details in the later-filed complaint "would not give rise to a different investigation or recovery." According to Shea, this statement would be "irrelevant" under a notice-based approach. But asking whether the subsequent complaint would lead to "a different investigation or recovery" simply helps to determine whether the Government was already on notice of the alleged misconduct. The question is not whether the second complaint seeks a recovery different from that sought in the

first complaint, but whether the second complaint would give rise to a recovery different from that which would have resulted from a *Government investigation* prompted by the first complaint. In *Batiste*, for example, the first complaint alleged one form of a student-loan fraud in the defendant's New Jersey offices, while the second complaint sought to recover for a different form of student-loan fraud allegedly committed in its Nevada offices. *See* 659 F.3d at 1209. The complaints themselves thus sought different recoveries, but the Court still concluded that the bar applied because "the allegations of the first complaint give the government grounds to investigate all that is in the second." *Id.*

As *Batiste* explained, this notice-based approach is consistent with the statutory purpose of "rejecting suits which the government is capable of pursuing itself." 659 F.3d at 1209. Accordingly, other courts of appeals have also looked to the scope of the notice provided by the first suit to determine whether two cases are related. *See, e.g.*, *United States ex rel. Heineman-Guta v. Guidant Corp.*, 718 F.3d 28, 34-37 (1st Cir. 2013) (citing *Batiste*); *United States ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 378, 380 (5th Cir. 2009); *United States ex rel. LaCorte v. SmithKline Beecham Clinical Labs., Inc.*, 149 F.3d 227, 234 (3d Cir.

1998). To the extent the Tenth Circuit departed from this approach in *Natural Gas Royalties*, its decision does not control here.[3]

Implicitly conceding (at 32) that he himself is not "a Verizon insider, with direct knowledge that Verizon was illegally charging the United States," Shea argues that a notice-based standard should be rejected because it would bar even a hypothetical suit brought by such a genuine whistleblower. But by definition, a notice-based standard precludes a subsequent suit only when "the allegations of the first complaint give the government grounds to investigate all that is in the second." *Batiste*, 659 F.3d at 1209. If a suit by an actual "insider" alleged a genuinely new fraud, the first-to-file bar would pose no obstacle. And if, in contrast, the Government had notice of the claimed fraud and was already able to pursue it, there would be no reason to offer another *qui tam* bounty, regardless of the source of the subsequent relator's knowledge.

2. *Verizon I* and *Verizon II* are related under any standard

In any event, Shea's complaints in *Verizon I* and *Verizon II* are "related" under any plausible understanding of the "same material elements" test. The

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[3] Indeed, *Batiste* itself rejected an argument based on *Natural Gas Royalties*. In *Batiste*, the United States filed an amicus brief relying on the Tenth Circuit's decision to argue that the district court had erred by "adopt[ing]" a "notice-based standard." U.S. Br. at 20-21, *Batiste*, 659 F.3d 1204 (No. 10-7140), 2011 WL 2095674. Yet this Court declined to follow *Natural Gas Royalties*, instead affirming the decision below and adopting the same notice-based standard used by the district court.

required "side-by-side comparison" of the two complaints, *Batiste*, 659 F.3d at 1209, demonstrates that the material elements of the alleged fraud, as well as the alleged facts supporting those elements, are strikingly similar in all relevant respects:

Allegation	***Verizon I***	***Verizon II* (SAC)**
Type of Fraud	"This action concerns the knowing submission to the United States of certain prohibited surcharges." JA139.	"This lawsuit is based on a scheme by Defendants … to defraud the United States by knowingly billing the government for non-allowable surcharges." JA52-53.
Specific Allegations	Verizon improperly submitted surcharges "that reflected [its] cost of doing business." JA151-152.	Verizon "billed the government for Non-Allowable Tax-Like Charges" and concealed that such "charges are imposed not on the United States, but on the carrier, as a cost of doing business." JA59.
Legal Arguments	Verizon was prohibited from charging for the surcharges under FAR 52.229-04 and the provisions of the contracts. JA139, 143.	Verizon was prohibited from charging for the surcharges under FAR 52.229-04 and the provisions of the contracts. JA58, 61.
Circum-stances of Discovery	Shea discovered fraud "through his extensive work as a private telecommunications consultant" and "became aware of the practice of MCI billing corporate clients … for surcharges." JA141.	Shea discovered fraud "[b]ased on his experience consulting with large commercial telecommunications customers" and learned "that most telecommunication carriers, including [MCI/Verizon], had a custom and practice of charging [surcharges.]" JA54.

Allegation	***Verizon I***	***Verizon II* (SAC)**
Specific Source of Knowledge	"On or about August 13, 2004, Relator Shea received an MCI document that purported to show 'the taxes and surcharges that the Federal Government is responsible for.'" JA152.	"In 2004, Shea received an MCI document indicating that the company was charging the government for regulatory fee surcharges, and various state taxes, including utility taxes, ad valorem/property taxes, and business, occupational, and franchise taxes." JA54.
Allegations About Verizon's General Billing Practices	Verizon "use[d] the same billing platform that it uses for its business customers to bill the United States without modifying its systems." JA153-154.	"A former Verizon employee … confirmed that Verizon did not have a separate billing system for federal customers and commercial customers, and that Verizon's billing system did not have the capability to turn off the surcharges that were generally charged to all customers." JA59.

Whether or not a notice-based standard applies, these two actions plainly contain the same material elements. Indeed, Shea himself represented that *Verizon I* was a "related" case when he filed his 2009 complaint. JA33. Under the only relevant provisions of the local rule governing related cases, this was a certification that the two cases "involve common issues of fact" or "grow out of the same event or transaction." D.C. Dist. Ct. R. 40.5(3). And Shea's two actions are much more closely "related" than the actions deemed related in *Batiste*. That case involved two *qui tam* actions against federal student loan servicer Sallie Mae and held that the second case was barred even though the first case focused on "the

fabrication of oral forbearance requests" in Nevada while the second "focused on the offering of forbearances to unqualified borrowers" in New Jersey. 659 F.3d at 1209. Similarly, Shea's actions are at least as closely related as the ones in *Hampton*, which barred a subsequent suit naming different defendants and alleging that the fraud at issue occurred independently at different subsidiaries, including subsidiaries not at issue in the prior complaint. *See* 318 F.3d at 218-219.

Shea argues (at 26-27) that his suits are not "related" because *Verizon I* involved two contracts with the GSA while this action involves twenty different contracts, some of which involve other federal agencies. But as three district court judges in this Circuit have now concluded, a relator cannot avoid the first-to-file bar by simply alleging that a similar fraud extends to additional contracts with different agencies. *See* JA320; *United States ex rel. Folliard v. Synnex Corp.*, 798 F. Supp. 2d 66, 73 (D.D.C. 2011); *United States ex rel. Folliard v. CDW Tech. Servs., Inc.*, 722 F. Supp. 2d 37, 41 (D.D.C. 2010). The FCA prohibits frauds against *the United States*, and §3730(a) provides that "[t]he Attorney General diligently shall investigate" any violation of its terms. This requirement "suggests that the primary function of a *qui tam* complaint is to notify the *investigating* agency, i.e., the Department of Justice," of the alleged fraud. *CDW Tech.*, 722 F. Supp. 2d at 42. Because the Department has both the authority and the duty to "diligently … investigate" fraud against any federal agency, an allegation that the

same fraudulent scheme by the same corporate family extends to additional contracts involving other agencies is not a "material" difference.

Application of the first-to-file bar here is also consistent with *Natural Gas Royalties*, the out-of-circuit case on which Shea chiefly relies. The Tenth Circuit there concluded that a complaint alleging misconduct against some defendants did not bar a subsequent complaint alleging similar misconduct against other, unrelated defendants. *See* 566 F.3d at 962 ("The defendant's identity is a material element of the fraud claim."). But the court acknowledged that a different rule is likely appropriate where, as in this case and *Hampton*, the two suits involve different "members of the same corporate family." *Id.* at 962.

Under this Court's notice-based approach, the outcome is even clearer. Shea's original complaint was unquestionably sufficient to put the Government on notice of the fraud alleged here: Shea claimed that Verizon had a "practice" of billing its commercial clients for certain taxes and surcharges, JA141-142, and asserted that it used the same system to bill the Federal Government, JA150-152. As in *Batiste*, "[i]f the government investigated the facts alleged in [*Verizon I*] … , it would discover [the fraud alleged here], if such fraud existed." 659 F.3d at 1209. Shea himself conceded as much when he sought an increased share of the *Verizon I* settlement, arguing that his first suit gave the Government "increased knowledge about the carriers' practices of imposing surcharges" and would put the GSA in "a

better position to enforce its contract[s], including [a new contract not at issue in *Verizon I*], going forward." JA234; *see also* JA216. And even now, Shea appears to recognize (at 34) that his allegations in the first case *should* have led the Government to "examine[] every telecommunications contract with MCI/Verizon to determine if Verizon was charging illegal surcharges under those contracts." Thus, under any reading of the "same material elements" test, this action is "related" to *Verizon I*.

B. The First-To-File Bar Applies To Actions Brought By The Same Relator

Shea seeks to escape the first-to-file bar by asserting (at 17-24) that it does not apply "to subsequent related actions filed by the same relator." But §3730(b)(5) unambiguously provides that "[w]hen a person brings an action under this subsection, *no person other than the Government* may intervene or bring a related action." (Emphasis added.) The original relator is unquestionably a "person other than the government" and is therefore barred from bringing related actions. Even Shea acknowledges (at 18) that this result is compelled by a "literal interpretation" of the text. That should end the matter. *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999).

The courts that have squarely considered whether §3730(b)(5) prohibits subsequent related actions by the same relator have held that it does, noting that "the statutory language is unambiguous." *United States ex rel. Smith v. Yale-New*

Haven Hospital, Inc., 411 F. Supp. 2d 64, 75 (D. Conn. 2005), *aff'd on reconsideration*, 2006 WL 387297 (D. Conn. 2006).[4] More generally, courts have held that §3730(b)(5) is "exception-free." *United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1187 (9th Cir. 2001); *accord, e.g.*, *Heineman-Guta*, 718 F.3d at 35 ("contains no exceptions"); *United States ex rel. Carter v. Halliburton Co.*, 710 F.3d 171, 181 (4th Cir. 2013) ("an absolute, unambiguous exception-free rule").

Shea argues (at 17-18) that applying the plain meaning of the words "no person other than the government" "makes no sense" because the first-to-file bar prohibits both the filing of a related action and intervention in the original action, and relators obviously "cannot intervene in their own suits." But there is nothing unusual—let alone nonsensical—about a literal reading of §3730(b)(5). It is of course true that the original relator could not intervene in his own action even in the absence of the first-to-file bar, just as other potential relators might be precluded from intervening or bringing related actions by independent legal rules. *Cf.* 31 U.S.C. §3730(e)(1) (barring certain FCA suits "by a former or present member of the armed forces"). But that is no reason to ignore the plain language

[4] *See also United States ex rel. Carter v. Halliburton Co.*, 2011 WL 2118227, at *4 (E.D. Va. May 24, 2011); *United States ex rel. Bane v. LifeCare Diagnostics*, 2008 WL 4853599, at *4 (M.D. Fla. Nov. 10, 2008); *cf. Her v. Regions Fin. Corp.*, 2008 WL 5381321 (W.D. Ark. Dec. 22, 2008) (applying §3730(b)(5) to dismiss an action brought by two of the relators who had filed the prior action).

of the statute, which makes clear that "no person" may intervene *or* bring a related action. As this case illustrates, application of this bar to original relators is not superfluous: It prohibits them from filing successive suits. And the fact that some prohibited actions are doubly foreclosed is no reason to read the statute to mean something other than what it says. Indeed, 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.

Aside from this strained textual argument, Shea appeals (at 19-24) to legislative history, out-of-circuit precedent, and "the FCA's goals." None of them supports his position.

First, Shea is simply wrong to claim (at 19) that the Senate Report accompanying the first-to-file bar endorses his reading. The Report explains that:

> [T]he Committee wishes to clarify in the statute that private enforcement under the civil False Claims Act is not meant to produce class actions *or multiple separate suits based on identical facts and circumstances*.

S. Rep. No. 99-345, at 25 (1986) (emphasis added). The italicized language—which is the portion directed at the prohibition on "related actions" at issue here—makes clear that Congress meant to prevent "multiple separate suits based on identical facts and circumstances." That is exactly what Shea seeks to permit: "multiple separate suits" filed by the same relator.

Second, Shea asserts (at 19-22) that the district court's decision contradicts *Bailey v. Shell Western E&P, Inc.*, 609 F.3d 710 (5th Cir. 2010). To the extent *Bailey* can be read to disregard the plain language of the statute, this Court should decline to follow its error. Moreover, *Bailey* provides no support for Shea's position because—as the district court explained—the Fifth Circuit rendered a narrow decision based on the highly unusual facts of that case. In *Bailey*, the relators brought *qui tam* claims in federal court in Colorado and then filed "virtual[ly] identi[cal]" counterclaims in long-running and earlier-filed Texas state litigation in order to remove that litigation to federal court. *United States v. Kinder Morgan CO2 Co.*, 2005 WL 3157998, at *1-3 (D. Colo. Nov. 21, 2005); *see Bailey*, 609 F.3d at 717-718. The Colorado district court transferred its case to the district court in Texas over the relators' protest that the Texas court lacked jurisdiction under the first-to-file bar. The Texas court consolidated the cases and entered judgment for the defendant. On appeal, the Fifth Circuit rejected the relators' argument that the case should have proceeded in Colorado because the Texas court lacked jurisdiction to hear the *qui tam* counterclaims that *the relators themselves* had filed and used as a basis for removal. 609 F.3d at 720.

The issue in *Bailey* thus was not whether a single person may litigate serial *related* FCA claims, as Shea seeks to do here. Instead, it was whether the first-to-file bar determines the venue in which a consolidated action should be litigated

when the same person brings *exactly the same* claim in multiple jurisdictions. The Fifth Circuit believed that allowing the first-to-file bar to supersede the principles of judicial economy that ordinarily govern in such situations would have permitted "opportunistic" "forum shopping." 609 F.3d at 721 n.3. *Bailey* thus did *not* authorize a relator to prosecute multiple related actions. It permitted only a single consolidated action and articulated a narrow rule based on the facts before it, stating that the first-to-file bar "does not apply when the same plaintiff … files *the same* claim in a different jurisdiction." *Id.* at 720 (emphasis added).[5]

Third, Shea claims (at 22-24) that precluding successive claims by the same relator does not further the purposes of the first-to-file bar. But he fails to mention the purpose this Court has recognized as the provision's central objective: "'rejecting suits which the government is capable of pursuing itself.'" *Batiste*, 659 F.3d at 1208. That goal requires barring any follow-on suit, whether it is brought by the same or a different relator. If the second suit qualifies as "related," then by definition the Government is already on notice of the claimed fraud and there is no

[5] Shea relies (at 21-22) on *Kinder Morgan*, the Colorado district court decision transferring the claims at issue in *Bailey*. But that case involved exactly the same unusual facts as *Bailey*. He also quotes statements by the Fifth and Tenth Circuits that the first-to-file bar applies to claims filed by "other private relators," *United States ex rel. Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1279 (10th Cir. 2004), or "by another," *Branch Consultants*, 560 F.3d at 376. But this language is, at best, unconsidered dicta—neither case involved multiple suits filed by the same relator or purported to address the question at issue here.

justification for awarding another *qui tam* bounty, regardless of the relator's identity.

Shea focuses instead on the first-to-file bar's secondary goals of encouraging whistleblowers to race to the courthouse and eliminating competing suits that could reduce the original relator's award. But Shea does not identify any way in which a plain reading of the first-to-file bar hinders these objectives. He also ignores the fundamental bargain struck by the FCA: In exchange for a share of any recovery, the relator must hand over to the Government—as soon as he files his complaint—"substantially *all* material evidence and information" in his possession. 31 U.S.C. §3730(b)(2) (emphasis added). It is only fair to enforce that bargain by demanding that the relator "come[] forward with all the information he or she has in the first suit, rather than file piecemeal lawsuits." *Smith*, 411 F. Supp. 2d at 75. A relator who seeks a bounty in a second case based on information that he knew or could reasonably have known at the time of his initial complaint, yet failed to disclose, is not holding up his end of the deal.[6]

[6] Shea claims (at 24) that applying the bar to suits brought by the same relator "creates a perverse incentive for a relator to file the broadest, speculative claims" in his or her first suit. But as this Court explained in rejecting a similar argument in another context, this concern is unrealistic: "the first plaintiff's complaint is still subject to the Rule 9(b) pleading requirements," and "if the first relator did not plead fraud with particularity, his complaint would be dismissed and he would lose his own shot at a monetary award." *Batiste*, 659 F.3d at 1210-1211.

C. The Bar Applies Even Though *Verizon I* Is No Longer Pending

Shea also asserts (at 9-12) that even if the first-to-file bar applies, the district court should have dismissed this action without prejudice because *Verizon I* is no longer "pending" and thus—he claims—the first-to-file bar would not prevent him from re-filing the same claims in a new action. He further argues (at 12-17) that the district court should not have dismissed this action at all because *Verizon I* was no longer pending when he filed the SAC. Both arguments are meritless.

1. The first-to-file bar continues to prohibit related suits even after the original action is no longer pending

The text, purpose, and legislative history of the first-to-file bar all make clear that the bar continues to preclude follow-on suits even after the original action is no longer pending. The leading treatise on the FCA agrees. *See* Boese, *Civil False Claims and Qui Tam Actions* §4.03[C][2][b] (4th ed. Supp. 2013). And neither Shea nor the cases on which he relies provide any sound reason to hold that the first-to-file bar permits an indefinite number of related actions so long as they are filed seriatim.

Shea treats §3730(b)(5) as though it provided: "When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action *while the first action remains pending*." But that is not what the statute says. Instead, it 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*." In other words, the statute specifies the time when the bar commences—"[w]hen a person brings an action"—and provides that from that time forward, no person other than the Government may bring an action related to the one that is "pending" when the bar attaches. The statute does not use the word "pending," as Shea suggests, to limit the period during which the bar applies. Rather, the word "pending" serves to distinguish between the two actions referenced in the statute—the first-filed action (which, by definition, is "pending" "when" it is filed) and any subsequent action (which is not). As another court has explained in rejecting Shea's reading, the word "pending" is "used as a short-hand for the first-filed action." *United States ex rel. Powell v. American InterContinental Univ., Inc.*, 2012 WL 2885356, at *4 (N.D. Ga. July 12, 2012).

The role of the word "pending" is confirmed by its placement in the statute. As this Court has recognized, the phrase "'based on the facts underlying the pending action' merely clarifies 'related action.'" *Batiste*, 659 F.3d at 1208. Shea's reading would clearly be incorrect if the statute simply provided: "When a person brings an action under this subsection, no person other than the government may intervene or bring a related action." And it is equally implausible to claim, as Shea must, that Congress imposed a significant limit on the bar—and drained it of much of its ability to prevent *qui tam* actions that the Government could pursue

itself—in a phrase that simply clarifies when an "action" is "related" to the first-filed action. "As the Supreme Court has repeatedly reminded us, Congress 'does not … hide elephants in mouseholes.'" *Miller v. Clinton*, 687 F.3d 1332, 1352 (D.C. Cir. 2012).

Had Congress actually intended to bar suits only while the first-filed action remained pending, it could easily have said so. In fact, it has done just that in other contexts. For example, 28 U.S.C. §1500 bars suits in the Court of Federal Claims only while the plaintiff "*has pending* in any other court any suit or process against the United States" based on the same claim. (Emphasis added.) Similarly, 42 U.S.C. §300aa-11(a)(5)(B) precludes a person from bringing a vaccine-related claim in the Court of Federal Claims if he or she "*has pending* a civil action for damages for a vaccine-related injury or death." (Emphasis added.) By ignoring Congress's choice to use different language in §3730(b)(5), it is Shea—and not the district court—who violates the principle that "'[s]tatutory construction must begin with the language employed by Congress,'" *NetCoalition v. SEC*, 715 F.3d 342, 348 (D.C. Cir. 2013).

Nor can Shea's reading be reconciled with the legislative history of the first-to-file bar, which makes *no* mention of the significant limit on the bar's duration that Shea would read into a clarifying phrase. The House Report accompanying the False Claims Amendments Act of 1986 explained the first-to-file bar in

precisely the manner applied by the district court: "When an action is brought by a person, no person other than the Government may intervene or bring a related action." H.R. Rep. No. 99-660, at 30 (1986). The Report omits any reference to a requirement that the initial action remain pending or to a purported exception for cases filed after the initial suit is resolved—indeed, its discussion of §3730(b)(5) does not include the word "pending" at all. Neither does the Senate Report, which simply states that *qui tam* "enforcement … is not meant to produce … multiple separate suits based on identical facts and circumstances." S. Rep. No. 99-345, at 25 (1986). Had the word "pending" been meant as a substantive limit on the bar—rather than as a mere reference to the first-filed action—the House and Senate Reports surely would have mentioned it.

The bar's goal of "'rejecting suits which the government is capable of pursuing itself'" confirms this interpretation. *Batiste*, 659 F.3d at 1208. "Once the government is put on notice of its potential fraud claim"—which happens as soon as the first action is filed—then "the purpose behind allowing qui tam litigation is satisfied." *United States ex rel. Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1279 (10th Cir. 2004). And because the Government continues to be on notice even after the first-filed action is settled or adjudicated, the bar's primary purpose bears no connection to whether or when the first-filed action is resolved. As the Ninth Circuit explained, "[d]ismissed or not, [the first-filed] action

promptly alerted the Government to the essential facts of a fraudulent scheme—thereby fulfilling a goal behind the first-to-file rule." *Lujan*, 243 F.3d at 1188. Notably, the leading treatise on the FCA concludes that the bar should apply even after the original suit is no longer pending because its rationale "applies with equal force to earlier-filed cases that are already dismissed by the time a subsequent *qui tam* suit is filed." Boese, *Civil False Claims and Qui Tam Actions* §4.03[C][2][b].

Shea's view of the first-to-file bar would lead to haphazard and bizarre results. It would have the bar turn on the fortuity of when the first-filed case is resolved, but in this context it makes no sense to bar a suit one day and allow it to be filed the next. Shea's approach would permit relators to bring case after related case, collecting a new bounty with each imitative suit so long as they queued up to file their cases one after another. This would not only impose substantial burdens on defendants, but also hamper the Government's anti-fraud efforts by encouraging relators to disclose their information in piecemeal fashion rather than presenting everything at once, as required by the statute. *See* 31 U.S.C. §3730(b)(2).

Shea claims that his reading is supported by decisions of the Fourth, Seventh, and Tenth Circuits.[7] But the Fifth Circuit has assumed that an earlier-

[7] As Shea recognizes (at 11), this Court has not spoken to the issue. Shea asserts that *Batiste* "suggested" that this Court would endorse his view, but he acknowledges that *Batiste* had no need to decide the issue because it had been waived. And in an earlier case, the Court suggested the opposite, stating in dicta that "§3730(b)(5) bars any action incorporating the same material elements of

filed action continues to bar related suits even after it is resolved. *See Branch Consultants*, 560 F.3d at 379 (reserving the question whether the bar would still apply if the first-filed complaint were resolved through a dismissal under Rule 9(b) rather than on some other basis).[8] Moreover, the cases on which Shea relies simply concluded without analysis that the first-to-file bar ceases to apply once the first-filed action is no longer pending. None of them addressed the way the statute uses the word "pending" or considered a different reading. Nor did they acknowledge the contrary legislative history or the ways in which their interpretation undermines the purpose of the first-to-file bar. The earliest of the three cases, the Tenth Circuit's decision in *Natural Gas Royalties*, did not even present the question—instead, the court addressed the issue only in dicta, in the course of explaining its view of when two actions are "related." *See* 566 F.3d at 964. And in so doing, the court actually recognized that applying the bar only while the first-filed case

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fraud as an action filed earlier," with no mention of any requirement that the first-filed action remain "pending." *Hampton*, 318 F.3d at 217.

[8] Many other cases have dismissed *qui tam* actions with prejudice under the first-to-file bar, something that would never be permitted under Shea's interpretation. *See, e.g., United States ex rel. Ortega v. Columbia Healthcare*, 240 F. Supp. 2d 8, 20-21 (D.D.C. 2003); *United States ex rel. Pfeiffer v. Ela Med., Inc.*, 2010 WL 1380167, at *15 (D. Colo. Mar. 31, 2010); *United States ex rel. Becker v. Tools & Metals, Inc.*, 2009 WL 855651, at *14 (N.D. Tex. Mar. 31, 2009); *Her*, 2008 WL 5381321, at *3; *United States ex rel. Harris v. Alan Ritchey, Inc.*, 2006 WL 3761339, at *7 (W.D. Wash. Dec. 20, 2006); *United States ex rel. Friedman v. Eckerd Corp.*, 183 F. Supp. 2d 724, 725-726 (E.D. Pa. 2001); *United States ex rel. Wilson v. Emergency Med. Assocs. of Ill., Inc.*, 2000 WL 34026709, at *2-3 (N.D. Ill. Sept. 24, 2000).

remains pending is inconsistent with the notice-based interpretation this Court adopted in *Batiste*:

> The fact that §3730(b)(5) applies only when another qui tam action is "pending" makes a notice-based standard even more dubious.… 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.

Id. The Tenth Circuit's erroneous assumption about the bar's temporal limits thus contributed to its mistaken conclusion that a "notice-based standard" should not determine the bar's substantive scope. This Court has already rejected the Tenth Circuit's conclusion, holding that the bar applies where the earlier complaint "suffices to put the U.S. government on notice" of the fraud alleged in the subsequent action. *Batiste*, 649 F.3d at 1209. It should likewise reject the faulty assumption on which that conclusion was based.

The other decisions on which Shea relies provide no more support for his position. In *Chovanec*, as in *Natural Gas Royalties*, the Seventh Circuit simply stated without analysis that the first-to-file bar ceases to apply once the original suit is resolved. *See United States ex rel. Chovanec v. Apria Healthcare Group, Inc.*, 606 F.3d 361, 365 (7th Cir. 2010). And the Fourth Circuit's decision in *Carter* merely cited *Natural Gas Royalties* and *Chovanec*. *See* 710 F.3d at 183.[9]

[9] The additional district court cases cited by Shea (at 11 n.22) simply followed *Natural Gas Royalties*, *Chovanec*, and *Carter*.

This Court should decline Shea's invitation to follow the unconsidered and erroneous path taken in these cases.

2. Jurisdiction under the first-to-file bar is determined when an action is brought

Shea also claims (at 12-17) that the first-to-file bar no longer forecloses this action because *Verizon I* had been resolved by the time he amended his complaint. That argument fails for the reasons given above: The first-to-file bar applies to all actions commenced after the first-filed action, whether or not that action remains pending. It also fails for an additional reason. As the district court explained, Shea's interpretation is foreclosed by the statutory text, which provides that "no person other than the Government may … *bring a related action*." 31 U.S.C. §3730(b)(5) (emphasis added). One "bring[s] [an] action" by commencing a lawsuit with the filing of an initial complaint. *See Black's Law Dictionary* 219 (9th ed. 2009) (defining "bring an action" as "[t]o sue" or "institute legal proceedings"). Accordingly, "the Court should look to the jurisdictional facts that existed at the time the action was filed, as opposed to facts that existed when the relator later filed an amended complaint." *United States ex rel. Branch Consultants, L.L.C. v. Allstate Ins. Co.*, 782 F. Supp. 2d 248, 259 (E.D. La. 2011). Here, there is no dispute that *Verizon I* was still pending when Shea brought this action.

This interpretation is confirmed by *Keene Corp. v. United States*, 508 U.S. 200 (1993). The statute at issue there, 28 U.S.C. §1500, provides that the Court of Federal Claims "shall not have jurisdiction" over a claim if the plaintiff "has pending in any other court any suit or process against the United States" based on the same claim. *Keene* invoked the "longstanding principle that 'the jurisdiction of the court depends upon the state of things at the time of the action brought.'" 508 U.S. at 207. It thus held that jurisdiction under §1500 "turns on the facts upon filing," and that the subsequent dismissal of the related action could not retroactively confer jurisdiction that was lacking when the case was filed. *Id.* at 208-209. In so doing, the Court noted that this result was even more clearly compelled by the prior version of §1500, which provided—in terms paralleling §3730(b)(5)—that "'*[n]o person shall file* or prosecute … any claim for or in respect to which he … has pending in any other court any suit or process.'" 508 U.S. at 208 (emphasis added).

The presence of an amended complaint does not alter this result. To the contrary, the "amendment process cannot 'be used to create jurisdiction retroactively where it did not previously exist.'" *United States ex rel. Jamison v. McKesson Corp.*, 649 F.3d 322, 328 (5th Cir. 2011). If Shea's "complaint did not establish jurisdiction," therefore, "his amendments cannot save it." *Id.*; *accord, e.g.*, *Morongo Band of Mission Indians v. California St. Bd. of Equalization*, 858

F.2d 1376, 1380 (9th Cir. 1988). As the Federal Circuit recently explained in a §1500 case, this result follows directly from the time-of-filing rule: "It would defeat the purpose of the prohibition [in §1500] to permit a plaintiff to file his complaint during the prohibited period and then, after the prohibited period expired, rely on a supplemental complaint to cure the jurisdictional defect." *Central Pines Land Co. v. United States*, 697 F.3d 1360, 1367 (Fed. Cir. 2012).

Shea acknowledges (at 14) the "general rule" that jurisdiction depends on the facts when the action was brought rather than when the complaint was amended, but he seeks an exception to that rule here for three reasons. None is persuasive.

First, Shea contends (at 13-14) that this Court should follow *United States ex rel. Palmieri v. Alpharma, Inc.*, 2013 WL 821965, at *10 (D. Md. Mar. 5, 2013), which reasoned that "[i]t would elevate form over substance" to dismiss the action before it and require the relator to re-file a new suit once the related action was no longer pending. But courts have no license to disregard jurisdictional limits they believe to be overly formalistic. The Court of Claims followed that erroneous path in *Brown v. United States*, 358 F.2d 1002, 1005 (Ct. Cl. 1966), reinstating an action dismissed under §1500 on the ground that the earlier-filed suit was no longer pending. Like *Palmieri* and Shea, *Brown* reasoned that "[t]he plaintiffs could undoubtedly file a new petition" and that "it does not seem fair or

make sense to insist that that must be done." *Id.* But in *Keene*, the Supreme Court specifically disapproved of this substance-over-form approach to jurisdictional limits, explaining that *Brown* had improperly "ignored the time-of-filing rule." 508 U.S. at 216-217 & n.12.

Second, Shea notes (at 14-15) that under 28 U.S.C. §1653, "[d]efective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." But Shea waived any argument based on §1653 by failing to raise it below. *See Trout v. Secretary of the Navy*, 540 F.3d 442, 448 (D.C. Cir. 2008). In any event, §1653 "speaks of amending '*allegations* of jurisdiction,'" which means that it "addresses only incorrect statements about jurisdiction that actually exists, and not defects in the jurisdictional facts themselves." *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 831 (1989); *see* 3 *Moore's Federal Practice* §15.14[3] (3d ed. Supp. 2013). Accordingly, in the precedents of this Court on which Shea relies, the parties were allowed to invoke the "narrow parameters" of §1653 only where "an amendment merely correct[ed] a flawed statement of jurisdiction, not a flaw in the jurisdictional facts." *Commercial Union Ins. Co. v. United States*, 999 F.2d 581, 585-586 (D.C. Cir. 1993); *see also Goble v. Marsh*, 684 F.2d 12, 17 (D.C. Cir. 1982) (allowing plaintiffs to waive claims over $10,000 to establish jurisdiction under the Tucker Act). Here, in contrast, Shea does not seek to correct a defective *allegation* about the jurisdictional facts that existed

when he brought this action; rather, he seeks to do precisely what the Supreme Court held §1653 does not allow—to correct "defects in the jurisdictional facts themselves" as they existed at the time of filing. *Newman-Green*, 490 U.S. at 831.[10]

Third, Shea is wrong to claim (at 16-17) that the district court's decision is inconsistent with *United States ex rel. Ortega v. Columbia Healthcare*, 240 F. Supp. 2d 8 (D.D.C. 2003). In that case, the relator had filed suit in 1995 and then amended her complaint in 1997 to allege a kickback scheme entirely distinct from the misconduct initially alleged. *Id.* at 11. When the defendant moved to dismiss the newly added kickback claims under §3730(b)(5) based on a related suit filed after the 1995 complaint but before the 1997 amendment, the relator argued that the new claims should relate back to the filing of her original complaint. The court sensibly disagreed, recognizing that the relator's approach would "provide a back door" to avoid the first-to-file bar. *Id.* at 14. Instead, the Court held, ordinary principles of relation-back under Federal Rule of Civil Procedure 15 also apply to §3730(b)(5): A claim asserted in an amended complaint will relate back for first-

[10] *Mathews v. Diaz*, 426 U.S. 67 (1976), is not to the contrary. *Diaz* cited §1653 in passing, but did not actually apply the statute, much less consider its textual limitation to curing "[d]efective *allegations* of jurisdiction." *See id.* at 75 n.9. Shea's reading of *Diaz* (at 15 n.28) is also foreclosed by the Supreme Court's more recent decision in *Newman-Green*, discussed above. *See* 490 U.S. at 830-832; *see also Central Pines*, 697 F.3d at 1366 (distinguishing *Diaz*).

to-file purposes if, and only if, it "'arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.'" *Id.* at 14-15 (quoting Rule 15(c)(2)). Because the relator's kickback claims did not satisfy this test, they "d[id] not relate back to the filing date of the original complaint." *Id.* at 15. Here, in contrast, Shea's amended complaints continue to assert the same basic claim presented in his original complaint.

Moreover, the contrary rule that Shea advocates would lead to bizarre results: If, as Shea claims, jurisdiction were measured at the time of the filing of an amended complaint even if the complaint continued to assert the same claims, a relator would lose his or her priority under the first-to-file bar if someone else brought a related action after the filing of the original complaint but before the amendment. That cannot be correct.

II. IN THE ALTERNATIVE, THIS COURT SHOULD AFFIRM THE DISMISSAL OF SHEA'S SUIT BASED ON THE FCA'S PUBLIC-DISCLOSURE BAR

Shea's claims are also foreclosed by the FCA's public-disclosure bar, which prevents a private relator from pursuing an action that is "based upon" allegations that were previously "publicly disclos[ed]" in specified sources unless the relator is the "original source" of the information. 31 U.S.C. §3730(e)(4)(A) (2009).[11] This

[11] Congress amended the public-disclosure bar in the Patient Protection and Affordable Care Act (PPACA), which was signed into law on March 23, 2010. *See Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 130 S. Ct. 1396, 1400 n.1 (2010). This case is governed by the pre-

provision seeks to discourage "opportunistic plaintiffs who have no significant information to contribute of their own." *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994). Shea's claims are subject to the bar because, to the extent he has any information supporting his allegations of fraud, he found it on the Internet.

A. The Material Elements Of Shea's Allegations Were Publicly Disclosed

The public-disclosure bar applies "when either the allegation of fraud or the critical elements of the fraudulent transaction themselves were in the public domain." *Springfield*, 14 F.3d at 654. "[W]here all of the material elements of the fraudulent transaction are already in the public domain," a relator cannot pursue an FCA claim merely by "com[ing] forward with additional evidence." *Id.* at 655. Nor can a relator overcome the bar simply by using his "expertise" to piece together elements of a fraud that have been disclosed "in a form not accessible to most people." *Id.*

Shea alleges that Verizon billed taxes and surcharges to the Government in violation of its contracts. *See* JA59-61. This allegation comprises two material elements: (1) that twenty contracts between Verizon and various government

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PPACA statute because the amendments do not apply retroactively to cases that were pending when PPACA was enacted. *See id.*; *Schindler Elevator Corp. v. United States ex rel. Kirk*, 131 S. Ct. 1885, 1889 n.1 (2011). In any event, as explained below, the outcome would be the same under either version of the bar.

entities allegedly disallowed certain surcharges, and (2) that Verizon allegedly invoiced the Government for these surcharges. As discussed in Part III, *infra*, Shea's allegations as to both of these elements are wholly conclusory. But to the extent he has *any* information about the named contracts and the relevant invoices, he got it from public sources on the Internet.[12]

First, Shea has not disputed that the limited information he has about the contracts at issue is available on the Internet. *See* Doc. 54 at 26-37. Shea's allegations about the contracts consist almost entirely of a list of the contract names and numbers. *See* JA59-61. Shea admitted that he compiled his list from public websites. *See* JA81-83; JA114.[13] And as for the three contracts for which Shea sets forth any detail other than the contract name and number, that information also can be found on the Internet—as he also admitted.[14]

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[12] Verizon demonstrated below that information available on the Internet falls within the public-disclosure bar's prohibition on suits based on information disclosed in the "news media," 31 U.S.C. §3730(e)(4)(A). *See* Doc. 51-2 at 26 (citing cases). Shea did not dispute this point below. *See* Doc. 54 at 26-37.

[13] *See, e.g.*, JA158-190 (online Verizon document identifying the contracts named in SAC ¶28(a), 28(b), 28(c), 28(f), 28(h), 28(i), 28(j), 28(k), 28(l), and 28(m)); JA239 (Department of Defense website identifying the contract named in ¶28(e)); JA241 (website identifying the contract named in ¶28(g)); JA246 (online Verizon document identifying the contract named in ¶28(d)).

[14] JA104 ("I found this one, that contract number [for the FEMA contract described in SAC ¶29], on a description kind of a—on Verizon's website"); JA106 ("Q. Where did you get [the WITS 3 contract quoted in ¶30]? A. Most likely online."); JA108, 110, 112 (discussing the modifications to the Verizon Wireless Federal Supply Schedule contract referenced in ¶¶32-40).

Second, Shea has not disputed that any relevant facts he knows about the particular surcharges that were actually billed were also gleaned from the Internet. *See* Doc. 54 at 26-37. For many of the contracts at issue, Shea does not have any information about the surcharges imposed. *See, e.g.*, JA85 ("Q. … How did Verizon bill on this contract? A. Yeah, have—having not seen the billing for this contract, I don't know."). For some contracts, Shea was able to find what he described as "mock-up invoicing," "training" invoices, or other billing-related documents, *see, e.g.*, JA88-89, but Shea does not dispute that he found all of these documents on the Internet, *see* JA88-92, 102-104.[15]

The only specific pieces of information Shea has identified as grounds for his current suit that he does not admit he found on the Internet are (1) an MCI document Shea says he received in 2004, *see* JA54, and (2) the contention that Verizon does not have a separate billing system for federal and commercial customers and that its "billing system do[es] not have the capability to turn off the surcharges that were generally charged to all customers," JA59. To the extent this

[15] In his deposition, Shea stated that he obtained a sample bill under the Verizon Wireless Federal Supply Schedule (SAC ¶28(d)) "from someone on the Judiciary Committee" in 2008 or 2009. JA108. But Shea conceded that the only surcharges shown on this bill—the Federal Universal Service Charge and Regulatory Charge—were the very ones that the contract modification language quoted in the SAC indicates were permitted to be charged under the contract through 2010. JA108-110; *see* JA62-66 (quoting modifications). Accordingly, this invoice is irrelevant to the public-disclosure analysis because it does not support the allegations in the SAC.

information is at all relevant, it is merely "additional evidence" in support of Shea's claim and thus is insufficient to avoid the bar. *Springfield*, 14 F.3d at 655. Shea admitted that the MCI document was specifically related to the FTS2001 and FTS2001 Bridge Contracts, which were the subject of his first *qui tam* suit, but are not at issue here. JA93-94, 97, 115 (referring to the MCI document as the "CDRL"). He also admitted that Verizon has a variety of billing systems and that he does not know whether his information about those systems applied to any particular contract, let alone the contracts at issue here. *See* JA125-127, 129-130.

B. Shea Does Not Qualify As An Original Source

Because Shea's allegations are "based upon" publicly disclosed materials found on the Internet, his lawsuit can proceed only if he is an "original source." 31 U.S.C. §3730(e)(4)(A) (2009). Shea, however, is not an "original source" of either the contract information or the billing information that he found on the Internet because he lacks "direct and independent knowledge." *Id.* §3730(e)(4)(B). "'Direct' signifies 'marked by absence of an intervening agency,'" and "'[i]ndependent knowledge' is knowledge that is not itself dependent on the public disclosure." *Springfield*, 14 F.3d at 656. Knowledge derived from "Google," JA88, is neither.

Shea also would not be an "original source" even if PPACA's amended definition of that term applied here. *See supra* n.11. After the PPACA amendments, a person qualifies as an original source only if he has "voluntarily

disclosed to the Government" the relevant information "prior to a public disclosure" or if he "has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions." 31 U.S.C. §3730(e)(4)(B) (2013). Shea could not have disclosed the information that he has about the contracts or invoices to the Government "prior to" the "public disclosure" of that information on the Internet, because he admitted he found it on the Internet. Further, Shea offers no additional information that is "independent of and materially adds to the publicly disclosed allegations or transactions," *id.*, because—as discussed above—the only other information on which Shea bases his lawsuit is irrelevant or cumulative. Shea has never been an employee of Verizon or a consultant to a federal agency with respect to a Verizon contract, JA80-81, and he does not claim to have had direct access to Verizon's contracts or invoices.

In the district court, Shea's primary argument was that he qualifies as an original source because his background allowed him to understand the significance of obscure information he found on the Internet. *See* Doc. 54 at 34. But this Court has rejected precisely this argument, explaining that "[i]f a relator merely uses his or her unique expertise or training to conclude that the material elements already in the public domain constitute a false claim, then a *qui tam* action cannot proceed." *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 688 (D.C. Cir. 1997); *accord Springfield*, 14 F.3d at 655. In the court below, Shea

relied on *Kennard v. Comstock Resources, Inc.*, 363 F.3d 1039 (10th Cir. 2004), but that case specifically noted that "[a] mere compilation of documents or reports already in the public domain will not allow a relator to qualify as an original source." *Id.* at 1045. Moreover, unlike Shea, the relators in *Kennard* relied on "personal, private royalty records," not just public information. *Id.* at 1046; *see also id.* ("Relators were not just assemblers of information."). Finally, even if *Kennard* could be read to support Shea's position, such a reading would be squarely in conflict with the law of this circuit.[16]

* * *

The public-disclosure bar thus provides an independently sufficient basis for dismissing Shea's suit. Moreover, if this Court were to conclude that the first-to-file bar precludes the present action but would not prevent Shea from re-filing the same claims in a new suit, *see supra* Part I.C, the public-disclosure bar would provide an alternative basis for affirming the district court's dismissal with prejudice whether or not the public-disclosure bar precludes this action. If Shea

[16] In the district court, Shea did not attempt to rely upon the 2004 MCI document or his alleged knowledge of Verizon's billing systems to support his claim of being an "original source." Shea admitted that he obtained this information second- or third-hand, thus failing to satisfy the "direct" prong of the original source inquiry. *See* JA93, 96 (MCI document was obtained "from a guy that used to do some subcontracting work for me" who got it from an unnamed Verizon employee); JA128-129 (information regarding billing systems came from former Verizon employee interviewed by a private investigator).

were to re-file his claims in yet another suit, not only would the material elements of those claims have been disclosed on the Internet, but Shea's actual allegations of fraud would have been disclosed in this suit. And because any future action would thus be even more plainly foreclosed by the public-disclosure bar, dismissal with prejudice is appropriate. *Cf. Rollins v. Wackenhut Servs.*, 703 F.3d 122, 131 (D.C. Cir. 2012) (affirming dismissal with prejudice because any future suit would fail as a matter of law).

III. SHEA'S CLAIMS CANNOT SATISFY RULES 8(a) AND 9(b)

This action also cannot proceed because Shea cannot satisfy the basic pleading requirements of Rules 8(a) and 9(b). This is not simply inartful pleading that might be cured in a new complaint. To the contrary, Shea has conceded that he does not know the fundamental elements of his claims—what each contract says and what Verizon included in its invoices—and that he hopes to obtain this information in discovery. But that stands Rule 9(b) on its head. And it is particularly inappropriate in the context of the FCA, which is intended to reward those who *already have* inside information, not to create a mechanism for a private party to investigate whether a fraud may have occurred.

Rule 8(a) requires a plaintiff to allege sufficient facts "to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation

of the elements of a cause of action will not do.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). FCA claims must also meet the more stringent requirements of Rule 9(b), which requires a complaint to "state with particularity the circumstances constituting fraud." *See United States ex rel. Totten v. Bombardier Corp.*, 286 F.3d 542, 551-552 (D.C. Cir. 2002). Under Rule 9(b), a complaint must "'state the time, place and content of the false misrepresentations, the fact misrepresented and what was retained or given up as a consequence of the fraud,'" and "identify individuals allegedly involved in the fraud." *United States ex rel. Williams v. Martin-Baker Aircraft Co.*, 389 F.3d 1251, 1256 (D.C. Cir. 2004).

The SAC cannot satisfy the ordinary pleading requirements of Rule 8(a) , much less the heightened pleading requirements of Rule 9(b). It simply lists twenty contracts and asserts "on information and belief" that Verizon improperly billed under those contracts. JA59-61. It does not offer any particularized allegations regarding the purportedly fraudulent charges Verizon submitted, such as what they were for, when they were made, by whom they were submitted, or what contract provision they purportedly violated. Nor does the SAC allege facts indicating that Verizon acted with scienter. *See, e.g., United States v. Science Applications Int'l Corp.*, 626 F.3d 1257, 1274 (D.C. Cir. 2010) (the FCA does not cover "'honest mistakes or incorrect claims submitted through mere negligence'").

At bottom, the SAC consists of nothing more than generalized speculation that Verizon may have billed *unspecified* non-allowed surcharges to the Government under *some* contracts over an *unspecified* period of time in an *unknown* amount. As explained above (*see supra* pp.11-12), Shea has no actual knowledge of any fraud. Indeed, in district court Shea conceded that he "cannot allege with certainty whether any particular contracts at issue permitted" the allegedly improper surcharges, Doc. 54 at 41, and that he "lacks access to [the] documents" showing "which surcharges [Verizon] charged the government under each of the contracts," *id.* at 42.

Shea's inability to plead the basic "who, what, when, where, and how" mandates dismissal. Under the FCA and Rule 9(b), a relator is required to possess nonpublic information about a fraud on the Government *when he brings suit*—he cannot simply wait for discovery in the hope of finding information that might make out a claim. *See United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 231 (1st Cir. 2004), *abrogated on other grounds by United States ex rel. Gagne v. City of Worcester*, 565 F.3d 40 (1st Cir. 2009); *see also United States ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 379 (4th Cir. 2008); *United States ex rel. Joshi v. St. Luke's Hosp., Inc.*, 441 F.3d 552, 559 (8th Cir.

2006); *United States ex rel. Clausen v. Laboratory Corp. of Am., Inc.*, 290 F.3d 1301, 1313-14 n.24 (11th Cir. 2002).[17]

Although in the ordinary course this Court might leave it to the district court to apply Rules 8(a) and 9(b) in the first instance, this is not an ordinary case. Here, Shea himself has effectively conceded that he *cannot* plead the required facts because he does not know what the contracts actually say nor what was included in the relevant bills. Instead, he hopes to learn this essential information in discovery. If permitted, that approach would transform the FCA from a statute that rewards genuine whistleblowers into one that permits opportunistic relators to use the courts to conduct burdensome private audits of government contracts. That is not what Congress intended, and it should not be allowed here. Rather than prolonging

[17] Nor can Shea avoid Rule 9(b) by pleading "on information and belief" and asserting that "'the necessary information lies within defendants' control.'" *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271,1279 n.3 (D.C. Cir. 1994). To the contrary, "standards for pleading on information and belief must be construed consistent with the purposes of Rule 9(b), which attempts in part to prevent the filing of a complaint as a pretext for the discovery of unknown wrongs." *Id.* (brackets and internal quotation marks omitted); *cf. United States ex rel. Bender v. North Am. Telecomm.*, 499 F. App'x 44, 45 (D.C. Cir. 2013) (holding that a relator could not plead "on information and belief" because his complaint failed to "provide[] the factual basis for the charges"). Indeed, other courts of appeals have explained that it is particularly inappropriate to "further relax Rule 9(b) in the context of *qui tam* suits" because the FCA "grants a right of action to private citizens only if they have independently obtained knowledge of fraud." *United States ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304, 308 (5th Cir. 1999), *abrogated on other grounds by United States ex rel. Eisenstein v. City of N.Y.*, 556 U.S. 928 (2009); *accord Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 999 (9th Cir. 2010); *Clausen*, 290 F.3d at 1314 n.25.

this litigation with a remand to reach this inevitable conclusion, this Court can and should simply affirm the dismissal of Shea's suit on this additional ground.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

/s/ Randolph D. Moss
RANDOLPH D. MOSS
BRIAN M. BOYNTON
BRIAN H. FLETCHER
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 663-6000
(202) 663-6363 (fax)
randolph.moss@wilmerhale.com

August 12, 2013

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7) and D.C. Circuit Rule 32(a)(1), the undersigned hereby certifies that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B).

1. Exclusive of the exempted portions of the brief, as provided in Federal Rule of Appellate Procedure 32(a)(7)(B), the brief contains 13,772 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font. As permitted by Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Randolph D. Moss
RANDOLPH D. MOSS

August 12, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of August, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Randolph D. Moss
RANDOLPH D. MOSS

STATUTORY ADDENDUM

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31 U.S.C. §3730(b)

(b) Actions by private persons.—

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) 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.

31 U.S.C. §3730(e)(4) (2009)

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. §3730(e)(4) (2013)

(4)(A) The court shall dismiss an action or claim under this section, unless opposed by the Government, 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 action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.

Federal Rule of Civil Procedure 8(a)

(a) Claim for Relief. A pleading that states a claim for relief must contain:

(1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

(3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

Federal Rule of Civil Procedure 9(b)

(b) Fraud or Mistake; Conditions of Mind. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.