RECORD NOS. 15-7135; 15-7136 XAP

ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

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

UNITED STATES OF AMERICA, EX REL. STEPHEN SHEA,

and

STEPHEN M. SHEA

Plaintiff – Appellant/Cross-Appellee,

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/Cross-Appellants.

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

RESPONSE AND REPLY BRIEF OF APPELLANT/CROSS-APPELLEE

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http://www.scotusblog.com/wp-content/uploads/2015/10/ATT-v.-U.S.-ex-rel-Heath-petition.pdf (last visited June 10, 2016) 18

STATEMENT OF ISSUES

1. As stated in the Opening Brief of Appellant/Cross-Appellee ("Relator's Opening Br."), the issue in No. 15-7135 is whether the district court erred in dismissing Relator's action without prejudice for failure to state a claim pursuant to the non-jurisdictional first-to-file bar in the False Claims Act ("FCA"), 31 U.S.C. § 3730(b)(5), when the first-filed action ceased to be pending more than 18 months before the district court authorized Relator to file the operative Second Amended Complaint.

The issues in Verizon's cross-appeal, No. 15-7136, are the following:

2. Whether the district court erred in denying Verizon's motion to dismiss the Second Amended Complaint with prejudice under the FCA's public disclosure bar, 31 U.S.C. § 3730(e)(4), when Relator utilized his expertise and experience as a telecommunications consultant and information from non-public documents to formulate his allegations of fraud and none of the documents Verizon publicly disclosed by themselves created an inference of fraud sufficient to trigger the bar.

3. Whether the district court abused its discretion in denying Verizon's motion to dismiss with prejudice under Fed. R. Civ. P. 9(b), when the Second Amended Complaint fully complied with this Court's standards for pleading FCA

violations and the district court concluded that Relator could cure any potential deficiencies with additional consistent factual allegations.

RELEVANT STATUTES

Relator incorporates the relevant statutes and rules that are set forth in his Opening Brief and in the Addendum to the Principal and Response Brief for Defendants-Appellees/Cross-Appellants. Additional statutory provisions relevant to this appeal are set forth in an addendum following this brief.

SUPPLEMENTAL STATEMENT OF FACTS

Relator Stephen Shea incorporates the statement of facts set forth in his opening brief with respect to the procedural history and facts relevant to the first-to-file issue. The following supplemental facts relate to the public disclosure and Fed. R. Civ. P. 9(b) arguments raised in Verizon's cross-appeal.

After *Verizon I* settled, the district court awarded Shea an enhanced relator's share because "it may well be that without this lawsuit, Verizon would have continued to overcharge the United States indefinitely, *i.e.*, as long as it could get away with it."[1] The district court noted that the General Services Administration ("GSA") possessed documents that were evidence of overcharging, but took no

[1] *United States ex rel. Shea v. Verizon Communications, Inc.*, 844 F. Supp. 2d 78, 82 (D.D.C. 2012). The quotations reflect the district court's post-publication order modifying its opinion. Order, Civil No. 1:07-cv-00111-GK (D.D.C. Mar. 29, 2012), ECF No. 74. Verizon did not appeal from the relator's share order.

action until Shea explained the fraud.[2] It rejected Verizon's argument that Shea was not an insider and contributed nothing more than assumptions to the case as "a profoundly unfair characterization of the nature and extent of the expertise, experience, knowledge, and just plain hard work that Shea, and his lawyers, contributed to this litigation."[3]

In *Verizon II*, the Second Amended Complaint and Shea's deposition testimony set forth his research and analytical contributions to the allegations of fraud. Shea became so familiar with Verizon's billing practices that Verizon asked his consulting company, TechCaliber, to train Verizon's employees:

> Q. Okay. In your position for TechCaliber, were you hired by Verizon to perform any services for Verizon?
>
> A. No, we specifically stayed away from – from working for them.
>
> Q. Okay. In your position –
>
> A. Even though they offered several times. We would get offers from – it was the most bizarre thing. Verizon actually would come to me and it would be some mid level manager or something that says, you know more about some of our billing stuff than we do, can you train us on how you do this? Or can you train our sales force how to better respond to our RFPs?[4]

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

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[2] *Id.* at 91.
[3] *Id.* at 90.
[4] Shea Deposition ("Shea Dep.") at 17:7-21, JA 154.

> most telecommunication carriers, including Worldcom, later named MCI Communications Corp., acquired by Verizon in 2006 (collectively "MCI/Verizon"), had a custom and practice of charging "Federal, State and local taxes," "fees," "surcharges," "tax-like surcharges" (and similar names), state and local 911 charges, state service universal service funds, public utility commission fees, Federal Regulatory Fees/Common Carrier Recovery Charges ("CCRC"), Federal Universal Service Charges, ad valorem/property taxes, and business, occupational, and franchise taxes. [Collectively "Non-Allowable Tax-Like Charges."] … Carriers then used misleading language to conceal these overcharges from their commercial customers. Shea also learned that surcharges passed on to the carriers' customers frequently had no correlation with the surcharges levied on the carriers. Shea found that sophisticated commercial customers did not realize they were being overbilled and recovered over $50 million for commercial customers due to his expertise in identifying overcharging.[5]

Based on Shea's direct and independent knowledge of improper billing practices, he discovered that MCI/Verizon overcharged the United States, just like its commercial customers. In 2004, Shea received an MCI document indicating that the company was charging the Government the same illegal surcharges it was charging commercial customers. He immediately recognized that MCI was creating "very small and minute" charges to recover its costs of doing business from its customers, while telling the customers the charges were "taxes."[6]

Shea testified that he learned through his consulting practice that it was difficult for Verizon/MCI to turn off these surcharges – and that the surcharges were levied on *all* customers: "But what we were being told by the tax department

[5] Second Amended Complaint ¶ 3, JA 47.
[6] Shea Dep. at 88:10-89:5, JA 172.

is, yeah, that tax module, that's not customer specific, it's – that just kind of tacks on and we don't waive the crap for anybody. We just – it just does its thing."[7] Accordingly, the Second Amended Complaint specifically alleges that:

> … Shea, through his extensive consulting experience, learned that Verizon had a custom and practice of charging its commercial customers Non-Allowable Tax-Like Charges. Upon investigation, Shea learned that Verizon also charged the United States these same Non-Allowable Tax-Like Charges. A former Verizon employee, who worked at the company for over 30 years and retired as a manager, senior staff consultant, confirmed that Verizon did not have a separate billing system for federal customers and commercial customers, and that Verizon's billing system did not have the capability to turn off the surcharges that were generally charged to all customers.[8]
>
> * * *
>
> Consistent with Verizon's strategy of "bill, but don't ask," Verizon also played word games with its modifications to the above contracts. Verizon knowingly failed to inform government contract officers that FUSC and other regulatory surcharges were not allowable under the contracts, and used confusing language in contract modifications to make the charges sound justified. Verizon changed the language over time as it realized it needed to be more explicit to provide better legal cover.[9]

As part of his investigation, Shea also reviewed an individual invoice issued to a Government employee under Verizon's Contract No. GS-35F-0119P with GSA.[10] Shea recalled that the invoice confirmed that Verizon was billing a Federal

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[7] *Id*. at 199:2-6, JA 200.
[8] Second Amended Complaint ¶ 27, JA 52.
[9] *Id.* ¶ 31, JA 55.
[10] Shea Dep. at 126:21-137:15, JA 182-84.

Universal Service Charge and a Regulatory Charge.[11] The Second Amended Complaint quotes extensively from the modifications to Contract No. GS-35F-0119P and alleges:

> Verizon's careful wordsmithing in the above modifications indicates that Verizon knew that FUSC, Regulatory charges, and similar surcharges were not allowable charges under the contract. Instead of filing a request for an economic price adjustment, which would have required full disclosure of these charges and would have allowed the government to deny the request, Verizon pursued a strategy of "bill, but don't ask." In an effort to provide some legal cover, Verizon filed its confusing and misleading modifications.[12]

Based on the above information, Shea reasonably inferred that Verizon was charging these illegal surcharges to United States. Shea also searched the internet and found chunks of contracts and modifications with misleading language that confirmed his suspicions of fraud.[13] As Shea explained at his deposition, this was not just speculation:

> Q. Based on your experience with commercial contracts, you're making an educated guess that these charges would appear on the government contracts at issue in your complaint?
>
> A. I would disagree with that and – and I'm not guessing….
> I know these things and I know them because I've been in the industry forever doing this type of stuff for commercial customers. And I take it and I marry it to what I see in the commercial – in the government contracts and the bits and pieces together. And when you combine that to – it's – you just know it's going to happen. You've seen it a million times.

[11] *Id.* at 133:18-134:4, JA 183-84.
[12] Second Amended Complaint, ¶ 41, JA 59.
[13] *Id.*, ¶¶ 29-41, JA 54-59.

> You've got to put those two together. And it's a lot of hard work to read these contracts, it's a lot of hard work to have all the experience, and without putting that – those two of them together, it – it tells you – tells you what I know. And we keep –

Q. You use –

A. – going over it and over it again.[14]

SUMMARY OF THE ARGUMENT

The central fact in this case is that Relator filed the Second Amended Complaint in *Verizon II* more than a year-and-a-half after *Verizon I* was settled and dismissed and the non-jurisdictional first-to-file bar ceased to apply. As the First Circuit recently held,[15] an FCA complaint – like any other civil complaint – can be supplemented to describe changed circumstances that would permit an initially-barred case to move forward without the pointless, wasteful, and potentially detrimental exercise of dismissal and refiling. This Court has ruled identically in applying other statutes.

Struggling to distinguish the First Circuit's endorsement of utilizing a supplemental complaint to remedy a first-to-file defect, Verizon virtually ignores *Mathews v. Diaz*, 426 U.S. 67 (1976), and subsequent cases that endorse using supplemental complaints to cure non-jurisdictional and jurisdictional defects in initial pleadings. Instead, Verizon invokes an inapplicable line of "express

[14] Shea Dep. at 190:20-192:4, JA 198.
[15] *United States ex rel. Gadbois v. Pharmerica Corp.*, 809 F.3d 1 (1st Cir. 2015), *pet. for cert. filed* (U.S. Apr. 22, 2016) (No. 15-1309).

prohibition" cases in which courts have held that certain statutory barriers, generally involving exhaustion requirements, cannot be cured with supplemental complaints. Verizon's position is flatly contrary to this Court's recent decision in *Brown v. Whole Foods Market Group, Inc.*, 789 F.3d 146, 153-54 (D.C. Cir. 2015) (per curiam), which permitted a plaintiff to cure defects in a prematurely-filed civil rights action despite a statutory mandate that "[n]o civil action may be brought" prior to thirty days after written notice to an administrative agency.

Verizon also invokes first-to-file decisions by district courts in circuits where the first-to-file bar is treated as jurisdictional. Those cases are irrelevant in this circuit, where the bar is non-jurisdictional. *United States ex rel. Heath v. AT&T, Inc.*, 791 F.3d 112 (2015), *petition for cert. filed*, No. 15-363 (U.S. Sept. 23, 2015) (No. 15-363). Verizon also improperly dismisses *Rockwell Int'l Corp. v. United States*, 549 U.S. 457 (2007), in which the Supreme Court endorsed analyzing the applicability of one of the FCA's procedural bars (public disclosure) in light of the posture of the case after amendment, rather than at the time of initial filing.

While an exhaustion requirement can never disappear, a first-filed case can cease to be pending. While a plaintiff knows or should know about an exhaustion requirement, an FCA relator may have no idea that a first-file but sealed case is pending. Regardless of knowledge, when the first-filed case is dismissed, the slate is wiped clean and no residual taint warrants overruling a relator's presumptive

right to amend or supplement a complaint to state a valid claim. Any lingering consequences of the first-filed action are addressed by claim preclusion and the public disclosure bar, not the first-to-file bar.

Although the district court erred in dismissing Relator's action without prejudice under the first-to-file bar, it properly denied Verizon's meritless request to dismiss with prejudice under the FCA's public disclosure bar. The district court properly applied this Court's test under *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994), because the mock-up invoices and other documents Verizon publicly disclosed did not by themselves create an inference of fraud sufficient to trigger the bar. Relator examined and relied on public information about Verizon's contracts and Federal Acquisition Regulation provisions, but the documents did not disclose that Verizon actually invoiced the government for impermissible charges.

To the contrary, the district court correctly held that Relator formulated the fraud allegations in the Second Amended Complaint only because he analyzed Verizon's mock-up invoices using (1) his extensive consulting experience *and* (2) non-public information from a former Verizon employee that Verizon lacked separate billing systems for federal and commercial customers and could not turn off the surcharges that were generally charged to all customers. The non-public expertise *and* non-public information that Relator used to formulate his fraud

allegations were not cumulative of Verizon's public disclosures or legally irrelevant merely because the government possessed the mock-up invoices and actual invoices.

Verizon's argument flies in the face of this Court's decision in *United States ex rel. Oliver v. Philip Morris USA Inc.*, 763 F.3d 36 (D.C. Cir. 2014), which reaffirmed that the mere presence of disclosures implying fraud somewhere in government files does not by itself constitute public disclosure. Quite simply, this case would not exist without the non-public expertise and information that Relator used to study public documents and figure out what no one else had – that Verizon was overbilling the federal government.

This Court's decision in *United States ex rel. Doe v. Staples, Inc.*, 773 F.3d 83 (D.C. Cir. 2014), undermines rather than advances Verizon's position. The unsuccessful relator in *Staples* alleged that defendants avoided anti-dumping tariffs by knowingly purchasing Chinese-made pencils from Asian suppliers and lying about their country of origin. The public disclosure bar applied, and that relator was not an original source, because detailed government reports already revealed that defendants' pencils came from China, and the relator obtained defendants' false country-of-origin representations from an online Customs database. The mock-up Verizon invoices are not reports disclosing a fraud. They disclosed nothing unless viewed through the prism of non-public information.

Verizon also moved to dismiss with prejudice under Fed. R. Civ. P. 8 and 9(b). Even a dismissal without prejudice would have been inconsistent with the Rule 9(b) pleading standards that this Court articulated in *Heath*. The Second Amended Complaint put Verizon on fair notice of the alleged fraud. It identified specific, affirmative misrepresentations to the government. Relator provided facts demonstrating that Verizon (through its billing platform that automatically billed non-allowed charges) was the actor that made false statements or representations. The complaint provided sufficient details of a scheme to submit false claims and reliable indicia that lead to a strong inference that claims were actually submitted. *Heath* held that exact dollar amounts, billing numbers, and dates are not necessary, and precludes a Rule 9(b) challenge to the Second Amended Complaint.

Verizon's argument that the district court should have dismissed with prejudice under 9(b) is an even greater stretch. Dismissal with prejudice was not warranted under *Firestone v. Firestone*, 76 F.3d 1205 (D.C. Cir. 1996), because Verizon failed to demonstrate that Relator could not cure by alleging other facts to satisfy any pleading deficiencies identified by the district court in an adverse 9(b) ruling.

ARGUMENT

I. THE DISTRICT COURT ERRED BY DISMISSING WITHOUT PREJUDICE AN AMENDED/SUPPLEMENTAL FALSE CLAIMS ACT COMPLAINT THAT FULLY SATISFIED THE NON-JURISDICTIONAL FIRST-TO-FILE BAR.

Shea filed the Second Amended Complaint more than a year-and-a-half after *Verizon I* settled. Verizon acknowledges that the amended complaint, not the original filing, is the operative pleading in civil cases,[16] and that defects in an initial complaint can be remedied by supplementing the complaint under Fed. R. Civ. P. 15(d).[17] Verizon does not dispute that in a remarkably similar case, the First Circuit endorsed permitting a second relator to proceed on a supplemental complaint where a first-filed case terminated while the second relator's case was on appeal. *United States ex rel. Gadbois v. Pharmerica Corp.*, 809 F.3d 1 (1st Cir. 2015), *pet. for cert. filed* (U.S. Apr. 22, 2016) (No. 15-1309).

Yet Verizon clings to its position that *Verizon II* was forever doomed because it began while *Verizon I* was pending, even though *Verizon I* was no longer pending long before Relator filed the Second Amended Complaint. Case law from the Supreme Court and numerous courts of appeals refutes that position.

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[16] Principal and Response Brief for Defendants-Appellees/Cross-Appellants ("Verizon Br.") at 45 n.6.
[17] *Id.* at 47.

A. The Non-Jurisdictional First-to-File Bar Is Not an Express Prohibition Statute That Would Override Relator's Presumptive Right to Amend or Supplement His Complaint.

Defects in a civil complaint can generally be cured by amendment or supplementation. Verizon argues that the general rule does not apply because the first-to-file defect in Relator's original *Verizon II* complaint was incurably "fatal" to the entire "action."[18] *Mathews v. Diaz*, 426 U.S. 67 (1976), and its progeny say otherwise.

1. Courts frequently permit curative supplemental complaints under Fed. R. Civ. P. 15(d).

In *Mathews v. Diaz* – which Verizon mentions just once, without discussion – plaintiff Espinosa had not applied for Medicare benefits when he joined a class action, but filed an application after the government moved to dismiss. *Id.* at 71-72. The Supreme Court held that Espinosa's application restored subject matter jurisdiction that had been lacking when he initially joined the suit:

> Although 42 U.S.C. § 405(g) establishes filing of an application as a nonwaivable condition of jurisdiction, Espinosa satisfied this condition while the case was pending in the District Court. A supplemental complaint in the District Court would have eliminated this jurisdictional issue; since the record discloses, both by affidavit and stipulation, that the jurisdictional condition was satisfied, it is not too late, even now, to supplement the complaint to allege this fact.

426 U.S. at 75 (internal citations omitted). Likewise, Relator's Second Amended Complaint demonstrated that the fact triggering the *non-jurisdictional* first-to-file

[18] *Id.*

bar (*Verizon I* being pending) no longer existed. Because *Verizon I* had ceased to be pending when the Relator filed the Second Amended Complaint, that complaint stated a claim and should not have been dismissed under Fed. R. Civ. P. 12(b)(6).

Verizon ridicules the First Circuit's decision in *Gadbois*, the only appellate decision to apply *Mathews v. Diaz* to the first-to-file bar, as "profoundly unpersuasive."[19] But *Gadbois* has plenty of company in permitting a case to go forward on a Rule 15(d) supplemental complaint where dismissal "would be a pointless formality" that "would needlessly expose the relator to the vagaries of filing a new action." 809 F.3d at 6. Applying *Mathews v. Diaz*, courts frequently permit curative Rule 15(d) supplemental complaints.

In *Wilson v. Westinghouse Electric Corp.*, 838 F.2d 286, 290 (8th Cir. 1988), plaintiff filed an age discrimination action without waiting the required 60 days after filing his administrative claim, then filed a supplemental complaint after 60 days had passed. Reversing a dismissal order, the Eighth Circuit rejected a "hypertechnical interpretation" which transformed premature assertion of a claim into an "irretrievable mistake that bars jurisdiction for the duration of th[e] lawsuit." *Id.* at 289. Regardless of the original jurisdictional defect, "the expiration of the 60-day waiting period was exactly the kind of event occurring after filing

[19] *Id.* at 46.

that Wilson should have been allowed to set forth in a supplementary pleading under Fed. R. Civ. P. 15(d).” *Id*. at 290.[20]

The Federal Circuit, which interprets a variety of jurisdictionally restrictive statutes, agrees. *Intrepid v. Pollack*, 907 F.2d 1125 (Fed. Cir. 1990), reversed the Court of International Trade’s denial of leave to file a supplemental complaint under that court’s identically-worded version of Rule 15(d). Even if a claim was premature when the case was first filed, “that the count could not have been made in the original complaint is not a ground for refusing an amended or supplemental complaint. Rule 15(d) unequivocally allows supplementing a complaint with a count based on later events.” *Id*. at 1129. In *Black v. Secretary of Health & Human Services*, 93 F.3d 781 (Fed. Cir. 1996), the court permitted a claimant who sued under a vaccine injury statute before incurring the required $1,000 in out-of-pocket expenses to supplement her complaint when post-filing expenses satisfied the statutory minimum. *Id.* at 790-91. And *Prasco, LLC v. Medicis Pharm. Corp.*, 537 F.3d 1329 (Fed. Cir. 2008), again held that “Rule 15(d) expressly allows for supplemental complaints to ‘cure’ defects in the initial complaint.” *Id.* at 1337.

The Fourth and Ninth Circuits concur. *Feldman v. Law Enforcement Associates Corp.*, 752 F.3d 339, 347 (4th Cir. 2014), permitted a whistleblower to

[20] Judge Friedman cited *Wilson* in *Judicial Watch v. United States*, 191 F. Supp. 2d 138, 139 (D.D.C. 2002), a FOIA case in which he permitted a supplemental pleading to cure an alleged jurisdictional defect rather than ensnare the plaintiff in a “procedural mousetrap.”

supplement an action under a Sarbanes-Oxley Act provision which imposed a 180-day waiting period after filing a complaint with the Labor Department. Plaintiff's first complaint was premature; his second was filed after the 180-day period had expired. The Fourth Circuit "construe[d] the present complaint as a supplemental pleading under Rule 15(d), thereby curing the defect which otherwise would have deprived the district court of jurisdiction under Rule 15(c)." *Id*. at 347.[21]

The Ninth Circuit ruled similarly in a securities action where plaintiff brought suit before it had obtained an assignment of claims from an investor in defendant's fund. In *Northstar Financial Advisors, Inc. v. Schwab Investments*, 779 F.3d 1036 (9th Cir.), *as amended on denial of reh'g and reh'g en banc*, 2015 U.S. App. LEXIS 7030 (Apr. 28, 2015), *cert. denied*, 136 S. Ct. 240 (2015), the court held that standing deficiencies may be remedied under Rule 15(d). It permitted the case to proceed on an amended/supplemental pleading filed "after a post-complaint assignment from a party that clearly had standing." 779 F.3d at 1048.

Here, Relator filed a valid amended/supplemental complaint after the first-to-file bar dissolved with the dismissal of *Verizon I*. By dismissing the Second

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[21] *Feldman* cited *Mathews v. Diaz*, *Wilson*, and two cases – *Security Insurance Co. v. United States ex rel. Haydis*, 338 F.2d 444, 449 (9th Cir. 1964), and *United States v. C.J. Electrical Contractors, Inc.*, 535 F.2d 1326, 1329 (1st Cir. 1976) – that approved the use of supplemental pleadings to remedy defects in prematurely-filed actions brought under the Miller Act, 40 U.S.C. § 270b(a).

Amended Complaint and requiring Relator to file an entirely new action more than six years after the case began, the district court erroneously deviated from the common sense interpretation of Rule 15(d) that *Mathews v. Diaz* and its progeny require.

2. The Supreme Court's decision in *Oscar Mayer Co. v. Evans* and this Court's Recent Decision in *Brown v. Whole Foods Market Group* are far more relevant to the first-to-file issue than the *McNeil/Hallstrom* "express prohibition" line of cases relied upon by Verizon.

Verizon relies on an alternate line of cases stemming from *McNeil v. United States*, 508 U.S. 106 (1993), and *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989), where courts invoked "express prohibition" statutes to bar prematurely-filed actions.[22] Those cases are readily distinguishable from this case and are far less relevant to the FCA's first-to-file bar than *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 764-65 & n. 13 (1979), and this Court's recent decision in *Brown v. Whole Foods Market Group, Inc.*, 789 F.3d 146, 153-54 (D.C. Cir. 2015) (per curiam).

First, many of Verizon's cases base their holdings on statutory prerequisites that are *jurisdictional*, while this Court has held that the FCA's first-to-file bar is non-jurisdictional. *United States ex rel. Heath v. AT&T, Inc.*, 791 F.3d 112 (2015),

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[22] Verizon Br. at 46-50.

petition for cert. filed (U.S. Sept. 23, 2015) (No. 15-363).[23] A telling omission from a quotation in Verizon's brief illustrates the importance of this jurisdictional versus non-jurisdictional distinction. Verizon's brief quotes from *Central Pines Land Co. v. United States*, 697 F.3d 1360 (Fed. Cir. 2012). In that case, the Federal Circuit wrote that 28 U.S.C. § 1500 – which "explicitly states that the Claims Court 'shall not have jurisdiction' over 'any claim' that a party has pending in another court" – fell within the category of cases where "if a statute contains an express prohibition against filing suit, then a supplemental complaint cannot cure the lack of *jurisdiction* existing at the onset." *Id.* Verizon's brief omits the word *jurisdiction* from this quote.[24] Here, where jurisdiction is not an issue, Rules 15(a) and 15(d) permit Relator to revise the complaint to avoid the potentially devastating consequences of filing an entirely new case.

Additionally, *McNeil* and *Hallstrom* involved different statutes and different procedural postures. In *McNeil*, plaintiff failed to satisfy the Federal Tort Claims Act provision requiring a final agency denial before filing suit. 508 U.S. at 110-11.

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[23] AT&T has sought review of *Heath*'s application of Fed. R. Civ. P. 9(b), but not its interpretation of the first-to-file bar. *See* Petition for Writ of Certiorari (No. 15-363), available at http://www.scotusblog.com/wp-content/uploads/2015/10/ATT-v.-U.S.-ex-rel-Heath-petition.pdf (last visited June 10, 2016). And while the Supreme Court's decision in *Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970 (2015), did not explicitly decide whether the first-to-file bar is jurisdictional, it addressed the statute of limitations issue first, implicitly suggesting that the bar is not jurisdictional.

[24] Verizon Br. at 48.

The court of appeals implicitly held that a supplemental complaint could have remedied the jurisdictional deficiency, *McNeil v. United States*, 964 F.2d 647, 649 (7th Cir. 1992), and the Supreme Court did not reverse that ruling. As one district court has noted, "[t]hat *McNeil* did hold that 'the FTCA bars claimants from bringing suit in federal court until they have exhausted their administrative remedies,' [508 U.S.] at 113, does not necessarily mean that it also held that a plaintiff may not file a supplemental complaint demonstrating these exhaustion requirements have been met, thereby properly vesting a federal district court with jurisdiction over the suit." *Tobin v. Troutman*, 2002 U.S. Dist. LEXIS 7105 at *19 (W.D. Ky. Apr. 19, 2002) (permitting tax refund claim to proceed on supplemental complaint because "to hold otherwise would produce unduly harsh results").

Hallstrom is also different. There, the Court barred plaintiff's action under a Resource Conservation and Recovery Act provision that "[n]o action may be commenced … prior to sixty days after the plaintiff has given notice of the violation" to the Environmental Protection Agency, relevant State, and alleged violator. 42 U.S.C. § 6972(b)(1) (1982 ed.).[25] The *Hallstrom* Court recognized, however, that in other statutory schemes, where dismissal "would serve no purpose other than the creation of an additional procedural technicality," a district court

[25] The Court did not decide whether this language was jurisdictional. *See* 493 U.S. at 31 ("In light of our literal interpretation of the statutory requirement, we need not determine whether [the notice and delay provision] is jurisdictional in the strict sense of the term.").

may enforce notice requirements by holding an action in abeyance during the pendency of a mandatory waiting period. Notably, *Hallstrom* cited *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 764-65 & n. 13 (1979), in support of that proposition. 493 U.S. at 31-32. *Oscar Mayer* is highly relevant to this case.

The age discrimination statute in *Oscar Mayer* provided that where a cause of action arose in a state with an applicable state statute and enforcement agency, "no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated." 29 U.S.C. § 633(b). That statute, with its "unless such proceedings have been earlier terminated" language, is analogous to the non-jurisdictional first-to-file bar in this case, where the first filed action was "earlier terminated." To give the plaintiff the opportunity to satisfy the statutory notice requirement, the Supreme Court ordered his suit held in abeyance rather than dismissed. 441 U.S. at 764.

Last year, this Court followed *Oscar Mayer* and reversed the dismissal of claims under the Civil Rights Act of 1964 ("CRA") where plaintiff failed to provide pre-filing notice to a District of Columbia agency. The Court held that a statute, 42 U.S.C. § 2000a-3(c), mandating that "[n]o civil action may be brought … before the expiration of thirty days after written notice" to the agency could be satisfied by instructing the district court to "hold Brown's CRA claim in

abeyance until he complies with the CRA notice provision." *Brown v. Whole Foods Market Group, Inc.*, 789 F.3d 146, 153-54 (D.C. Cir. 2015) (per curiam). Not only is the statutory language of the CRA similar to the text of the first-to-file bar, but in this case as well, dismissal and refiling would serve no purpose other than creating an additional – and detrimental – procedural technicality. Given that Relator came into full compliance with the first-to-file bar during the course of the action, *Brown* refutes Verizon's position and commands that Relator Shea, like plaintiff Brown and the relator in *Gadbois*, should be permitted to continue the existing action.

Relator's position is also bolstered by another case Verizon cites, the Federal Circuit's decision in *Black v. Secretary of Health & Human Services*. *Black* involved three consolidated appeals about claims brought under a statute that required documentation that persons allegedly injured by a vaccine "incurred unreimbursable expenses … in an amount greater than $1,000." 93 F.3d 784 (statutory citation omitted). The court affirmed the dismissal of claims by petitioners who could not show they incurred the required expenses before the statute of limitations expired. *Id.* at 787. Critically, however, it remanded to permit petitioner May – whose expenses totaled $892.82 when she filed her petition but soon exceeded $1,000 – to supplement her petition. *Id.* at 789-92.

In permitting May's claims to proceed, the Federal Circuit declined to apply the *McNeil/Hallstrom* line of cases involving statutes that contained "express

prohibitions against filing suit prior to the expiration of a waiting period or before exhausting administrative remedies." *Id.* at 790-91. Instead, the court "regard[ed] the $1000 requirement of the Vaccine Act as more akin to the statute at issue in *Mathews v. Diaz* than to the statutes at issue in *McNeil* and *Hallstrom.*" *Id.* at 791.

The final non-FCA case Verizon cites to counter *Gadbois* is even less relevant. *Harris v. Garner*, 216 F.3d 970 (11th Cir. 2000) (en banc), addressed a Prison Litigation Reform Act provision that "no Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e(e). Declining to apply the *Mathews v. Diaz* line of Rule 15(d) cases, a divided court held that the statute barred actions by plaintiffs who filed while imprisoned but amended complaints after release. *Id*. at 981-84. The court worried that the statutory purpose behind section 1997e(e) would "be defeated by treating subsequently occurring facts as though they had occurred before the complaint was filed," *id.* at 983, because that purpose "is to prevent prisoners from filing a certain type of claim, and to require that they shoulder the differential opportunity costs of filing that type of claim in the free world if they are released." *Id*. *Harris* thus resembles *McNeil* and *Hallstrom* in that plaintiff's original actions – suing before exhausting administrative remedies or

suing while a prisoner – possess a temporal quality that plaintiff may not be able to remedy later in the case.

The first-to-file bar is fundamentally different. An exhaustion requirement can never disappear, but a first-filed case can cease to be pending. Moreover, the bar is triggered by the actions of another person (the first filer), so the second relator is often unaware that a first-to-file issue exists, particularly where the first-filed case is still under seal. When the first-filed case is dismissed, the slate is wiped clean; there is no residual taint that would warrant overruling relator's presumptive right to amend or supplement a complaint. Consequently, an amended/supplemental complaint filed after the first-filed case is no longer pending states a claim under the FCA and is not subject to dismissal under Fed. R. Civ. P. 12(b)(6).

The district court placed some emphasis on *Ciralsky v. CIA*, 355 F.3d 661 (D.C. Cir 2004). Verizon concedes that *Ciralsky* does not compel a contrary result because it cited the case only "for the limited and straightforward proposition that dismissing an action is different from dismissing a complaint…."[26] What really matters in *Ciralsky* is this Court's restatement of its "jurisprudential preference for adjudication of cases on their merits rather than on the basis of formalities." *Id.* at 379 (citation omitted).

[26] Verizon Br. at 42 n.5.

B. First-to-File Cases Decided by District Courts in Circuits Where the First-to-File Bar Is Jurisdictional Are Irrelevant.

Verizon also relies on a number of district court cases, most of them unpublished, which refused to permit relators to remedy first-to-file defects by filing amended or supplemental complaints. Each case was decided in a circuit where the first-to-file bar is jurisdictional. *Heath* makes those cases irrelevant in this Circuit.

Specifically, Verizon cites three opinions from the Eastern District of Virginia, all of which emphasized the jurisdictional rule that does not apply in this Circuit. Two of those opinions are from the lengthy litigation in *United States ex rel. Carter v. Halliburton Co.*, 710 F.3d 171 (4th Cir. 2013), *aff'd in part, rev'd in part sub nom. Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970 (2015). There, the Fourth Circuit held that the first-to-file bar is jurisdictional. 710 F.3d at 182. In subsequent proceedings, the district court held that "the timing of the filing carries the weight of jurisdictional relevance" and that "the relevant point of jurisdictional focus for first-to-file remains the time the initial complaint is filed." *United States ex rel. Carter v. Halliburton Co.*, 2015 U.S. Dist. LEXIS 153541 at *33-34 (E.D. Va. Nov. 12, 2015), *later opinion*, *United States ex rel. Carter v. Halliburton Co.*, 2016 U.S. Dist. LEXIS 19198 at *6-7 (E.D. Va. Feb. 17, 2016), *appeal docketed*, No. 16-1262 (4th Cir. Mar. 14, 2016).

In the third Eastern District opinion, the court repeatedly referred to the "jurisdictional bar" and "a jurisdictionally barred action" before holding that "[b]ecause an amendment cannot cure the jurisdictional fact that this action commenced during the pendency of a factually related case, leave to amend must be denied as futile." *United States ex rel. Soodavar v. Unisys Corp.*, 2016 U.S. Dist. LEXIS 46319 at *33-34 (E.D. Va. Apr. 5, 2016).

The remaining cases Verizon cites come from the Fifth and Sixth Circuits, which also treat the bar as jurisdictional.[27] *See United States ex rel. Branch Consultants, LLC v. Allstate Ins. Co.*, 782 F. Supp. 2d 248, 259 (E.D. La. 2011) ("The first-to-file bar … refer[s] specifically to jurisdictional facts that must exist when an 'action,' not a complaint, is filed."); *United States ex rel. Moore v. Pennrose Properties, LLC*, 2015 U.S. Dist. LEXIS 37373 (S.D. Ohio Mar. 24, 2015).

In this Court, jurisdiction is not the issue. The district court possessed jurisdiction when *Verizon II* was filed and throughout the case. The issue is simply whether the Second Amended Complaint, filed with Verizon's consent and the

[27] *See United States ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 376 (5th Cir. 2009); *United States ex rel. Poteet v. Medtronic*, 552 F.3d 503, 516 (6th Cir. 2009).

district court's endorsement after *Verizon I* was dismissed, stated a claim. It did.[28]

In any event, Verizon's district court cases obviously do not control here, and contrary district court opinions are more persuasive. *United States ex rel. Palmieri v. Alpharma, Inc.*, 928 F. Supp. 2d 840, 851-52 (D. Md. 2013)[29]; *United States ex rel. Kurnik v. PharMerica Corp.*, 2015 U.S. Dist. LEXIS 43378 at *10-17 (D.S.C. Apr. 2, 2015); *United States ex rel. Boise v. Cephalon, Inc.*, 2016 U.S. Dist. LEXIS 12331 at *13 (E.D. Pa. Feb. 2, 2016).

C. *Rockwell* Supports Permitting Relator to Proceed on an Amended/Supplemental Complaint Rather Than Requiring Him to File a New Action.

In *Rockwell Int'l Corp. v. United States*, 549 U.S. 457 (2007), the Supreme Court analyzed the FCA's then-jurisdictional public disclosure bar and held that the viability of relator's action should be measured by "the allegations in the original complaint as *amended*." *Id.* at 473 (emphasis in original). Hard on the

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[28] Contrary to Verizon's implicit suggestion (Verizon Br. at 44), the panel in *Heath* did not opine that relator Shea's action *should have been* dismissed under Fed. R. Civ. P. 12(b)(6). Rather, *Heath* held that because the previous panel opinion in this case did not address the jurisdictional issue, the district court's now-vacated 2012 dismissal of the *Verizon II* Second Amended Complaint *should be treated* as having been entered under that rule. *See Heath*, 791 F.3d at 119.

[29] Relator notes the *Palmieri* court later dismissed a subsequent amended complaint for failure to comply with Fed. R. Civ. P. 9(b), and the Fourth Circuit has now vacated that ruling and remanded the case for further consideration of public disclosure and first-to-file issues. *United States ex rel. Palmieri v. Alpharma, Inc.*, 2016 U.S. App. LEXIS 7525 (4th Cir. Apr. 26, 2016), *rev'g United States ex rel. Palmieri v. Alpharma, Inc.*, 2014 U.S. Dist. LEXIS 37172 (D. Md. Mar. 21, 2014).

heels of urging the court to follow cases from circuits where the first-to-file bar is jurisdictional, Verizon flip-flops and urges this Court to disregard *Rockwell* because in this Circuit the bar is non-jurisdictional.[30] Verizon misses the relevance of *Rockwell*: that the Supreme Court, in analyzing another subsection of 31 U.S.C. § 3730(b), endorsed analyzing the applicability of one of the FCA's bars in light of the posture of the case after amendment, rather than at the time of initial filing.[31]

Verizon also contends that *Rockwell* "simply recognized that a relator, like any other plaintiff, may plead himself *out* of jurisdiction by amending his complaint."[32] Even if that is all *Rockwell* stands for, there is no claim that Shea's Second Amended Complaint pled his case out of court here.

D. The District Court's Holding Frustrates the Purposes of the First-to-File Bar.

Relator's opening brief recited the well-known dual purposes of the first-to-file bar: it encourages whistleblowers to disclose fraud promptly, while barring parasitic lawsuits that would reduce the original relator's share.[33] Verizon ignores the former goal and urges an interpretation of the bar that would provide extraordinary prophylactic protection for entities that commit fraud against the United States.

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[30] Verizon Br. at 45.
[31] *See* Relator's Opening Br. at 12 n.26 (collecting cases).
[32] Verizon Br. at 46 (emphasis in original).
[33] Relator's Opening Br. at 17-18 (collecting cases).

In Verizon's own words, it "would require follow-on relators to wait to file their actions *after* the first-filed action has been dismissed."[34] Such a requirement would profoundly undermine the purposes of the FCA. Actions brought under the FCA usually stay sealed for years while the Government investigates. Receiving allegations from subsequently-filed complaints often materially assists the Government's ongoing investigation, and the Department of Justice sometimes encourages first-filers (or takes steps itself) to reward later-filing relators for providing additional information. Regardless of whether the United States intervenes, pretrial motions can consume years.

Verizon contends that whenever a second relator files while a first case is pending, the subsequent complaint is doomed at the outset and cannot be cured by amendment or supplementation. The consequences of Verizon's position can be illustrated using the hypothetical posited by Judge Srinivasan in his dissent from the previous panel opinion:

> … Suppose, for example, that an action filed by Relator A alerts the government to an actual and important instance of fraud but is dismissed for reasons having nothing to do with the merits; and suppose, further, that the government elects not to intervene due to lack of resources. The original source exception would permit a related action by Relator B, an original source with independent information about the fraud, notwithstanding the public-disclosure bar. But the majority nevertheless would read the first-to-file bar to prohibit Relator B's action in perpetuity. There is no reason to think that Congress carefully and specifically opened the door to Relator

[34] Verizon Br. at 52.

> B's action via the original-source exception, only to slam the door shut via the first-to-file bar. By contrast, if the first-to-file bar is understood to apply only while the initial action is "pending," Relator B could thereafter bring an original-source action, as Congress presumably intended she be free to do.

United States ex rel. Shea v. Cellco Partnership, 748 F.3d 338, 350 (D.C. Cir. 2014) ("*Shea I*") (Srinivasan, J. dissenting), *cert. granted, judgment vacated*, 135 S. Ct. 2376 (2015).

By adopting Judge Srinivasan's definition of "pending" in *Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970 (2015), the Supreme Court eliminated the possibility that Relator B's action would be barred because Relator A's case is deemed to be "pending" in perpetuity. But, contrary to the Supreme Court's holding, Verizon and the Chamber of Commerce would continue to use the first-to-file bar to quash meritorious claims by Relator B. Assume that Relator A commences an FCA action by filing the sealed complaint required by statute. The following day, without knowledge of Relator A's action, Relator B files a sealed complaint. As in the hypothetical, the government elects not to intervene in Relator A's case, which is then dismissed six years after filing for reasons unrelated to the merits.

At that point, under *Kellogg Brown and Root Services*, the first-to-file bar dissolves and Relator B should be allowed to pursue her case. Under Verizon's interpretation, however, Relator B could not amend or supplement her original

complaint and could only proceed by filing a new action. But defendants would doubtless assert that the six-year statute of limitations for non-intervened cases under the FCA, 31 U.S.C. § 3731(b)(1), bars all of Relator B's claims. If those arguments prevailed, defendants would never have to answer for their fraud.

Nothing in the text, history, or case law supports such a draconian interpretation of the first-to-file bar. Far from "enabling meritorious actions to proceed," Verizon's interpretation of the statute would cripple them. On the other hand, if Relator A prevails on the merits or the case is settled, the ordinary protections of claim preclusion would bar amended or supplemental complaints by Relator B and any other "follow-on relators" who file "wait-and-see actions,"[35] putting to rest Verizon's concerns about "parasitic lawsuits and inefficiency."[36] Permitting Rules 15(a) and 15(d) to play the same role in FCA cases that they do in other civil litigation would permit the first-to-file bar to eliminate parasitic plaintiffs *and* reward relators whose claims emerge as legitimate after other cases cease to be pending, however long that takes.

For its part, the Chamber of Commerce of the United States, as *amicus curiae*, sweepingly asserts that Relator's position would render "the first-to-file bar a nullity once an earlier-filed case is dismissed or reduced to judgment, such that

[35] *Id.*
[36] *Id.* at 53.

copycat complaints can move forward either automatically or by amendment."[37] That's not just Relator's position, it's the Supreme Court's: *Kellogg Brown & Root Services* explicitly held that once the first-filed case is dismissed, the first-to-file bar is indeed a nullity. 135 S. Ct. at 1978-79.

The Chamber's concerns about copycat complaints are addressed not by the first-to-file bar but by claim preclusion and the public disclosure bar. If the initial suit is resolved and a judgment entered on the merits or by settlement, "claim preclusion principles may preclude a subsequent suit involving the same transaction brought by any relator suing on the United States' behalf." *Shea I*, 748 F.3d at 349 (Srinivasan, J., dissenting)(citing *United States ex rel. Chovanec v. Apria Healthcare Group Inc.*, 606 F.3d 361, 362 (7th Cir. 2010)). "Additionally, to the extent a follow-on action sidesteps claim preclusion (for instance, if the initial action was dismissed without prejudice), the False Claims Act's public-disclosure bar … exists to weed out copycat actions. The provision of the Act with the chief responsibility for that function is the public-disclosure bar, not the first-to-file bar." *Id.*[38]

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[37] Brief *Amicus Curiae* of the Chamber of Commerce of the United States ("Amicus Br.") at 12.

[38] The Chamber of Commerce also spins out hypotheticals involving interplay among statutes of limitation and repose and relation-back doctrine under Fed. R. Civ. P. 15(c). Amicus Br. at 14-20. None of those issues are presented in the appeal. What is before this Court is a dismissal order that would require Relator to file a new case more than six years after *Verizon II* was commenced, guaranteeing rather than averting litigation concerning the statute of limitations.

The first-to-file rule was "crafted in the interest of judicial economy." *AmerisourceBergen Corp. v. Roden*, 495 F.3d 1143, 1156 (9th Cir. 2007). Judicial economy means that only one relator gets to pursue the same FCA claim. Judicial economy also requires courts to "avoid construing the statute in a way that imposes extra-textual burdens 'serv[ing] no purpose other than the creation of an additional procedural technicality.'" *Schuler v. Pricewaterhousecoopers, LLP*, 514 F.3d 1365, 1376 (D.C. Cir. 2008) (quoting *Love v. Pullman Co.*, 404 U.S. 522, 526 (1972)). There is nothing economical about a rule that mandates unnecessary dismissals, pointless re-filings, and potentially unjust adverse consequences to the United States' ability to recover from entities that defraud the government.

For these reasons, the district court erred by dismissing this action without prejudice under the first-to-file bar.

II. THE DISTRICT COURT CORRECTLY DENIED VERIZON'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT WITH PREJUDICE UNDER THE FCA'S PUBLIC DISCLOSURE BAR.

The Second Amended Complaint alleges that Relator, through his extensive consulting experience, learned that Verizon charged commercial customers various Non-Allowable Tax-Like Charges. Through investigation, he found that Verizon billed the United States for these same illegitimate charges. A former Verizon employee confirmed that Verizon did not have a separate tax module for federal customers or any ability to turn off the surcharges. Relator also discovered that

Verizon played word games with contract modifications, failed to inform government contract officers that certain charges were not allowable, and used confusing language to disguise the charges.

Verizon moved to dismiss under the FCA's public disclosure bar, alleging that mock-up invoices posted on the Internet fully disclosed its allegedly fraudulent conduct. The district court applied the *Springfield Terminal* test, correctly concluding that Relator's non-public expertise and information were critical to the case, and that none of the publicly-available documents, standing alone, created an inference of fraud sufficient to trigger the bar.

A. The Pre-Amendment Jurisdictional Version of the Public Disclosure Bar Governs Claims Arising Prior to March 23, 2010; the Post-Amendment Non-Jurisdictional Version Governs Claims Arising on or After That Date.

The Second Amended Complaint alleges continuing FCA violations by Verizon that occurred both before and after the March 23, 2010 amendment to the public disclosure bar. At all times, 31 U.S.C. § 3730(e)(4) prohibited private parties from alleging fraud that had already been publicly disclosed in certain

specified sources, unless the relator qualified as an "original source." The amendment transformed the bar from a jurisdictional to a non-jurisdictional bar.[39]

Verizon briefly contends that only the pre-2010 statute should be considered because the alleged public disclosures all took place before 2010, then states that the previous statute applies to all claims before March 23, 2010, and then asserts that both statutes would apply identically.[40] The district court correctly concluded that the pre-amendment jurisdictional version of § 3730(e)(4)(A) applies to claims arising from Verizon's conduct before March 23, 2010, while the amended non-jurisdictional version applies to subsequent conduct.[41] As the district court observed, the change in public disclosure language from jurisdictional to non-jurisdictional requires that for claims submitted on or after the effective date of the amendment, the court must limit itself to the pleadings or convert the motion to

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[39] From 1986 until March 23, 2010, the public disclosure bar provided in pertinent part that in non-intervened cases, "[n]o court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in [specified sources] …, unless … the person bringing the action is an original source of the information. 31 U.S.C. § 3730(e)(4)(A)(2009). The amended version provides in pertinent part that "[t]he 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 [in specified sources] … unless … the person bringing the action is an original source of the information." 31 U.S.C. § 3730(e)(4)(A)(2010).

[40] Verizon Br. at 19.

[41] JA 341.

one seeking summary judgment.[42] JA 341-42. Multiple decisions from the courts of appeals agree.[43]

B. Verizon's Public Documents Did Not by Themselves Create an Inference of Fraud That Triggered the Public Disclosure Bar.

In *Springfield Terminal Ry. v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994), this Court held that the False Claims Act "bars suits based on publicly disclosed 'allegations or transactions' not information." 14 F.3d at 653. This Circuit has followed *Springfield Terminal*'s algebraic formula to evaluate public disclosure bar issues for two decades:

> [I]f X + Y = Z, Z represents the allegation of fraud and X and Y represent its essential elements. In order to disclose the fraudulent transaction publicly, the combination of X and Y must be revealed, from which readers or listeners may infer Z, *i.e.*, the conclusion that fraud has been committed.

14 F.3d at 654. The disclosure must reveal both essential elements of fraud, which are: (1) a misrepresented state of facts (X) and (2) a true state of facts (Y). *Id*.

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[42] JA 341-42.

[43] *See United States ex rel. Goldberg v. Rush University Medical Center.*, 680 F.3d 933, 934 (7th Cir. 2012) (citation omitted); *United States ex rel. Antoon v. Cleveland Clinic Foundation*, 788 F.3d 605, 614-15 (6th Cir. 2015) (applying the pre-2010 version of section 3730(e)(4) to events that took place in 2007 and 2008); *United States ex rel. May v. Purdue Pharma L.P.*, 737 F.3d 908, 915 (4th Cir. 2013) (declining to give retroactive effect to the post-amendment public disclosure bar because "the significant revisions to the statute 'change[] the substance of the existing cause of action'") (citation omitted).

1. Verizon incorrectly defined the "X" element of Relator's allegations.

As the district court observed, Verizon framed the "X" and "Y" in Shea's allegations as an argument "that '[t]he claims in [Plaintiff's] Second Amended Complaint rest on 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.'"[44] Noting that the Second Amended Complaint quoted publicly-available contract language, contract modifications, and regulations to allege that Verizon was fraudulently billing for non-allowable charges, the district court held that the "X" element "has quite clearly been publicly disclosed,"[45] before denying Verizon's motion because the "Y" element had not been.[46]

Although the district court's ultimate ruling was correct, its adoption of Verizon's formulation of "X" overstated the scope of Verizon's public disclosures. Verizon's argument glosses over a critical, foundational fact: to know whether the publicly-available contractual language and regulations forbade Verizon for billing the surcharges, a person needed to know non-public information – what those surcharges really *were.* Paragraphs 1 and 3 of the Second Amended Complaint allege that Shea learned through his consulting experience that Verizon used

[44] JA 344-45 (quoting Verizon's motion).
[45] JA 346.
[46] JA 346-51.

misleading language to suggest that it was required by law to charge its customers for certain "Non-Allowable Tax-Like Charges." Those paragraphs allege that "[t]hese charges were not taxes – they were a cost of doing business imposed on Verizon, not its customers, by regulatory agencies and states,"[47] and that "surcharges passed on to the carriers' customers frequently had no correlation with the surcharges levied on the carriers."[48]

In this case, the X is more than that the contracts and regulations did not allow certain charges. The X is also that Verizon used misleading language to conceal the true nature of those charges. Verizon never publicly disclosed the critical fact that Shea knew from long experience: what the non-allowable tax-like charges really were.

2. Verizon's reliance on "mock-up invoices" not described in the Second Amended Complaint applies only to the pre-amendment counts, and the district court correctly held that those mock-ups did not publicly disclose Verizon's fraudulent billing.

The district court correctly held that it could not consider Shea's deposition testimony and publicly-available mock-up invoices in considering the post-amendment, non-jurisdictional public disclosure bar for the counts in Relator's Second Amended Complaint alleging conduct after March 23, 2010.[49] The district

[47] Second Amended Complaint ¶ 1, JA 46.
[48] *Id.* ¶ 3, JA 47.
[49] JA 345.

court held that, in any event, the testimony and mock-up invoices were not sufficient to trigger the public disclosure bar.[50]

Verizon presented mock-up and training invoices that included a section for a category of "taxes and surcharges" without the actual billing detail.[51] Verizon argues that these headings for a category of taxes and surcharges publicly disclosed the "Y" – that Verizon actually billed the government for the non-allowable tax-like charges on the 20 contracts in question.[52] But an inference that Verizon billed a category of charges is different than an inference that Verizon actually billed non-allowable charges within that category as part of a fraudulent pattern of conduct. And, as discussed above, a description of a category of charges is not sufficient to disclose what those charges really were.

The district court recognized that Verizon's public disclosures did not need to "irrefutably prove a case of fraud." *United States ex rel. Settlemire v. District of Columbia*, 198 F.3d 913, 919 (D.C. Cir. 1999) (internal quotation marks and citations omitted).[53] The district court even wrote that under *Settlemire*, "[i]t is sufficient that the publicly disclosed transaction is sufficient to raise the inference

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[50] JA 346-51.
[51] JA 346-47.
[52] Verizon Br. at 23-25.
[53] JA 347.

of fraud."[54] Applying this standard, the district court correctly held that Verizon's public disclosure defense failed:

> … [T]he mock-up invoices do not meet this standard. One cannot infer that the Defendants actually submitted unlawful charges to the Government simply because mock-up invoices available on the internet include a "section on taxes and surcharges[.]" … Put differently, a complaint that alleged (X) that the Government contracts prohibited certain charges and (Y) that mock-up invoices available on-line contained a field for those prohibited charges would fail to state a claim (Z) that the contractor actually billed the Government for the type of charges prohibited in the contracts and reflected on the mock-up invoices.[55]

The district court observed that Shea read the mock up invoices based on his extensive personal experience with Verizon's pattern of overcharging. Relator also confirmed through a former Verizon employee that Verizon did not have separate billing systems for federal and commercial customers and did not have the capability to turn off the surcharges that were generally charged to all customers. As the district court correctly concluded, "[w]ithout these allegations, the mock-up invoices alone would probably not give rise to an inference that the Government was actually billed."[56]

Verizon and the Chamber of Commerce attempt to push the disclosure bar beyond congressional intent. They suggest that public information sufficient to put the government on the trail of fraud, or information already in government files

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[54] JA 347.
[55] JA 347-48.
[56] JA 348 (citing Second Amended Complaint, ¶¶ 27, 4).

(such as the mock-up invoices and Verizon's actual invoices) is enough to trigger the bar.[57] The 1986 amendments to the FCA recognized that the government did not have the resources to recognize or follow all trails leading to fraud, or to act upon all evidence contained somewhere in its vast files.

This Court rejected the "government files" interpretation of the public disclosure bar in *United States ex rel. Oliver v. Philip Morris USA Inc.*, 763 F.3d 36 (D.C. Cir. 2014). There, the relator alleged that Philip Morris failed to provide the government with "Most Favored Customer" pricing. Philip Morris contended that the alleged fraud was disclosed in a document referred to as the "Iceland Memo." The panel opinion restated

> … Oliver's allegations using the *Springfield Terminal* formulation: the fact that Philip Morris was not providing the Exchanges with the best price for cigarettes (X) plus the fact that Philip Morris certified that it complied with the Most Favored Customer Provisions (Y) gives rise to the conclusion that Philip Morris committed fraud (Z). The court lacks jurisdiction over Oliver's suit only if X and Y, *i.e.*, *both* the pricing disparities *and* Philip Morris's false certifications of compliance with the Most Favored Customer provisions, were in the public domain.
>
> We need not resolve whether the pricing disparities were disclosed in the Iceland Memo, because we conclude that the "Y" of Oliver's suit was not publicly disclosed. Philip Morris has made no attempt to show that its allegedly false certifications of compliance

[57] Verizon Br. at 26-27.

> with the Most Favored Customer Provisions were in the public domain….

763 F.3d at 41 (emphasis in the original).The court added that

> a "public disclosure" required that there be some act of disclosure to the public outside of the government. *The mere fact that the disclosures are contained in government files someplace, or even that the government is conducting an investigation behind the scenes, does not itself constitute public disclosure*.

Id. at 42 (citation omitted; emphasis added).

Verizon quotes *Springfield Terminal* to argue that Shea's expertise would not be enough, *standing alone*, to avoid the public disclosure bar: "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." *Springfield Terminal*, 14 F.3d at 655. But the *Springfield Terminal* opinion then went on to describe the situation that applies here: "where only one element of the fraudulent transaction is in the public domain (*e.g.*, X), the qui tam plaintiff may mount a case by coming forward with either the additional elements necessary to state a case of fraud (*e.g.*, Y) or allegations of fraud itself (*e.g.*, Z)." *Id.*

In other words, if, and only if, all of the critical elements of fraud are publicly disclosed, then a Relator may not use expertise to avoid the public disclosure bar. For the reasons above, the Second Amended Complaint's public

contract language and regulations, even when coupled with the mock-up invoices, did not disclose all the critical elements of fraud.[58]

C. This Court's *Staples* Decision Does Not Support Verizon's Position.

Verizon and amicus curiae place great weight on this Court's opinion in *United States ex rel. Doe v. Staples, Inc.*, 773 F.3d 83 (D.C. Cir. 2014). That reliance is misplaced. The relator in *Staples* called himself a pencil industry insider and alleged that to avoid anti-dumping tariffs, defendants knowingly purchased Chinese-made pencils from Asian suppliers, then falsely declared to U.S. Customs that the country of origin was other than China. Relator alleged that (1) he found the false representations in the PIERS online database, which includes required data about country of origin and importer of record; (2) Chinese pencils possessed telltale characteristics; and (3) he confirmed the pencils' Chinese origin through his own investigation. *Id.* at 85-86.

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[58] The Chamber of Commerce asserts that the district court's decision "effectively limit[s] the public disclosure bar to situations in which a fully developed, proven fraud case exists in the public domain." Amicus Br. at 21. That overstatement is demonstrably unfair to the district court's opinion. The district court required only an inference of fraud to trigger the bar, but found Verizon's arguments wanting under that standard, writing: "[o]ne cannot *infer* that the Defendants actually submitted unlawful charges to the Government simply because mock-up invoices available on the internet include a 'section on taxes and surcharges[.]'" JA 347. The district court simply disagreed on the facts: "Plaintiff's allegations are derived from non-public information learned, *inter alia*, in the course of his consulting for Verizon's commercial clients and private conversations with a former Verizon employee." JA 349.

The math was easy in *Staples.* The X was that defendants made representations the pencils weren't imported from China. Relator got those representations from the publicly-available PIERS database. The Y was that the pencils actually came from China. This Court affirmed dismissal because International Trade Commission ("ITC") reports in the public domain disclosed that the pencils were made in China. *Id.* at 86-88. The ITC reports also identified several of the unique physical features of Chinese pencils.

The *Staples* court concluded:

> … Under Relator's theory, … anyone armed with the information in the ITC reports could troll the aisles of any office-supply store for pencils with loose ferrules or off-center leads. The would-be plaintiff could then determine whether the retailer had paid the required antidumping duties by reference to other public information, and if it had not, then voilà, the plaintiff would be entitled to millions of dollars in *qui tam* compensation. But these sorts of lawsuits, brought by "opportunistic plaintiffs who have no significant information to contribute of their own," are precisely the kind the public disclosure bar seeks to prevent. *Springfield Terminal*, 14 F.3d at 649.

Id. at 89.

Here, Shea's personal, non-public experience with Verizon's repeated overcharging, not publicly-available investigative reports, allowed him to search the internet and find otherwise innocuous documents that demonstrated Verizon was doing the same overcharging on specific Government contracts. The invoices meant nothing without the non-public information that Relator applied to them. Verizon makes no effort to demonstrate how any person lacking Relator's

non-public expertise and information could or should have connected the dots to infer the likelihood of wrongdoing.

In sum, the Second Amended Complaint synthesized public contract language and regulations with non-public information: Verizon's pattern of fraudulent billing, its billing software that automatically charged the government for the same non-allowable charges, its misleading description of tax-like charges, and Relator's knowledge of what those charges really were. These characteristics decisively distinguish this case from *Staples*.[59]

As a result, the district court correctly denied Verizon's motion to dismiss the Second Amended Complaint under the public disclosure bar.

D. There Is No Need for This Court to Determine Whether Relator Is an Original Source, But He Clearly Is.

Verizon argues that if the public disclosure bar applies, Relator should not be permitted to proceed as an "original source" of that information. The district court did not reach this question, because it found Verizon's public disclosure argument wanting.[60] If this Court determines that the public disclosure bar does not apply, it need not address the issue, either. In the event the Court believes the public disclosure bar does apply, remand would

[59] Verizon also argues that the *Verizon I* complaint qualifies as a preclusive public disclosure, but concedes that this Court's decision in *Philip Morris USA Inc.* forecloses such a contention. Verizon Br. at 22 (citing *Philip Morris USA Inc.*, 763 F.3d at 42).
[60] JA 351.

appropriately allow the district court to address the original source issue in the first instance. *See Singleton v. Wulff*, 438 U.S. 106, 120 (1976); *Liberty Property Trust v. Republic Properties Corp.*, 577 F.3d 335, 341 (D.C. Cir. 2009).

On the merits, it is clear the Relator is an original source. Again, there is a distinction between the statutory definitions of "original source" for counts alleging conduct before and after the March 23, 2010 amendments to the FCA. The pre-amendment version defined original source as "an individual who has direct and independent knowledge of the information on which the allegations are based." The post-amendment version defines original source as someone "who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions." 31 U.S.C. § 3730(e)(4)(B).

Relator is an original source under even the more restrictive pre-amendment "direct and independent" definition. "'Direct' signifies marked by absence of an intervening agency" and "'[i]ndependent knowledge' is knowledge that is not itself dependent on public disclosure." *Springfield Terminal*, 14 F.3d at 656. "[T]he 'original source' provision requires the relator to possess direct and independent knowledge of the 'information' underlying the allegation, rather than direct and independent knowledge of the 'transaction' itself... We think it clear, in light of the aims of the statute, that 'direct and independent knowledge of information on

which the allegations are based' refers to direct and independent knowledge of *any* essential element of the underlying fraud transaction." *Id.* at 656-57 (emphasis in the original).

Applying these principles, *Springfield Terminal* held:

> Springfield had direct and independent knowledge of essential information underlying the conclusion that fraud had been committed. Because, as stated above, the pay vouchers and phone records did not themselves suffice to indicate fraud, Springfield had to have bridged the gap by its own efforts and experience, which in this case included personal knowledge of the arbitration proceedings and interviews with individuals and businesses identified in the telephone records. Springfield started with innocuous public information; it completed the equation with information independent of any preexisting public disclosure. As such, Springfield is an original source….

14 F.3d at 657.

Springfield Terminal is directly on point. Like the pay vouchers and phone records in that case, the publicly available Verizon contract information did not, standing alone, indicate fraud. Only Shea's personal knowledge of Verizon's fraudulent billing practices allowed him to understand the significance of the publicly available contract information and use that to confirm that Verizon was fraudulently overcharging the United States. As the Third Circuit has recognized, "[s]ome reliance on public records or information is acceptable and, indeed, it is hard to imagine that a non-insider could ever obtain original source status without at least some consultation of publicly available information." *United States ex rel. Atkinson v. Pa. Shipbuilding Co*., 473 F.3d 506, 522-523 (3d Cir. 2007) (finding

relator not an original source where it "was *only* from review of information in the public domain that Atkinson learned of the failure to record.") (emphasis in the original).

Springfield Terminal also demonstrates the fallacy in Verizon's argument that because Relator obtained information about Verizon's government contracts from the internet, he lacks "direct and independent knowledge.[61] Verizon is arguing that, to be an original source, Shea must have "direct and independent knowledge" of the "transactions" between the United States and Verizon. That is not the law. *See Springfield Terminal*, 14 F.3d at 656 ("original source" does not require "direct and independent knowledge of the 'transaction' itself").

In a case even more factually indistinguishable than *Springfield Terminal*, the Tenth Circuit held that relators like Shea, who rely in part on publicly available information, are original sources. In *Kennard v. Comstock Resources, Inc.*, 363 F.3d 1039 (10th Cir. 2004), relators owned the right to royalty payments from gas wells. An Indian Tribe owned the rights to royalty payments from nearby wells. When defendants began working the gas wells for both relators and the Tribe, relators noticed a dramatic drop in royalty payments. Based on this drop, relators "speculated" that defendant was underpaying them and the Tribe. *Id.* at 1040-41. They reviewed publicly available Indian Tribe leases, used their extensive oil and

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[61] Verizon Br. at 29-30.

gas experience to conclude that Comstock was knowingly underpaying royalties to the Tribe, and then filed a *qui tam* complaint alleging that defendants were defrauding the United States by underpaying royalties to the Indian Tribe. *Id.*

The district court dismissed the complaint under the public disclosure bar, and concluded that relators were not original sources. *Id.* Like Verizon, defendant claimed "that Relators were not an original source because: (1) Relators did not possess substantive information about the particular fraud, (2) they were not insiders of Comstock or the Tribe, and (3) they relied on public records. Thus, Comstock asserts that Relators merely conducted background research and relied on their own expertise to speculate that Comstock had defrauded the Government." *Id.* at 1044.

The Tenth Circuit rejected these arguments and reinstated the action, noting that "complete and thorough investigation of a fraud on the Government will likely necessarily involve some review of contracts, documents, or other information in the public domain. It is the character of the relator's discovery and investigation that controls this inquiry." *Id.* at 1045. The court concluded:

> … There must be some consideration to the availability of the information and the amount of labor and deduction required to construct the claim. Relators sorted through relatively obscure public documents and, together with personal royalty records, used these documents to discover and support their claim of the alleged fraud. It is important to note that none of the public documents disclosed the alleged fraud. It was only through independent investigation, deduction, and effort that Relators discovered the alleged fraud.

> Relators had direct and independent knowledge of the fraud allegedly committed [since they are] the [people] responsible for ferreting it out in the first place…. Relators were not just assemblers of information. This case would not exist but for Relators sniffing it out. Through discovery and deduction, Relators ferreted out the alleged fraud in this case and must, therefore, qualify as an original source.

Id. at 1046 (internal citations and quotations omitted).

That describes exactly what Shea did here. Through Shea's consulting practice, he learned that Verizon/MCI had a custom and practice of imposing illegal surcharges on large customers, then deduced that Verizon/MCI was likely doing the same thing to the United States. Shea confirmed this fraud through independent review of publicly available, but obscure and difficult to understand, contract and billing information. Under *Kennard*, Shea is an original source. *See also Cooper v. Blue Cross & Blue Shield*, 19 F.3d 562, 568 (11th Cir. 1994) (per curiam) (relator an original source where he "acquired his knowledge of BCBSF's alleged wrongdoing through three years of his own claims processing, research, and correspondence with members of Congress and HCFA").

Under the less restrictive post-amendment definition of original source, this same information clearly is also "independent of and materially adds to the publicly disclosed allegations or transactions."

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DENYING VERIZON'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT WITH PREJUDICE UNDER FED. R. CIV. P. 8 AND 9(b).

After arguing that publicly-available information in the Second Amended Complaint created sufficient inferences of fraud to trigger the public disclosure bar, Verizon turns around and argues that the complaint does not plead enough facts to satisfy Fed. R. Civ. P. 9(b). In light of its ruling on the first-to-file issue, the district court did not decide whether Relator's complaint met the Rule 9(b) pleading standards articulated by this Court in *Heath*.[62] The district court determined only that dismissal *with prejudice* was not warranted under *Firestone v. Firestone*, 76 F.3d 1205 (D.C. Cir. 1996), which held that leave to amend to cure pleading deficiencies is freely granted and "[a] dismissal *with prejudice* is warranted only when a trial court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." *Id.* at 1209. As discussed below, Verizon presented no justification for any form of dismissal, and the district court did not abuse its discretion by denying the motion to dismiss with prejudice.

[62] JA 357.

A. The Second Amended Complaint Complied with the *Heath* Standards for Pleading a False Claims Act Violation.

While the Second Amended Complaint was filed three years before this Court decided *Heath*, it satisfies the Rule 9(b) pleading standards mandated by that decision. The relator in *Heath* alleged that from 1997 to 2009, defendant AT&T and its named subsidiaries fraudulently overbilled the Universal Service Fund. The Fund's administrator, the Universal Service Administrative Company, collects funds from interstate telecommunications carriers and uses the funds to support low-cost telecommunications services to specified customers. 791 F.3d at 116. The complaint alleged that:

> … AT&T knowingly failed to enforce institutional compliance with the lowest-corresponding-price requirement…. That behavior continued even after the 2004 consent decree obligated AT&T to standardize billing practices and to train its employees…. Because AT&T "continued to ignore the Company's responsibility to offer" the lowest corresponding price, AT&T's employees remained ignorant of the requirement and consistently overcharged E-Rate eligible schools and libraries…. As a result, AT&T "knowingly has caused school districts and libraries to submit false claims for payment to [the Universal Service Administrative Company], knowing that such false claims would be submitted *** for reimbursement" from the federal program….

Id. at 123-24 (citations omitted).

This Court rejected AT&T's challenge to the complaint under Rule 9(b):

> In short, Rule 9(b)'s requirements of particularity as to who (AT&T), what (detailed identification of a centralized and institutionalized failure to comply with the lowest-corresponding-price requirement, which resulted in massive overbilling of a governmental

> program), where (through nineteen subsidiaries and their interactions with E-Rate schools and libraries across the Country), and when (1997 to 2009) have been satisfied. The complaint thus put AT&T on fair notice of the fraud of which it is accused: That, even in the wake of a consent decree pertaining to pervasive E-Rate problems, AT&T persisted in knowingly or recklessly failing to comply with the lowest-corresponding-price requirement, which it knew was a material condition for E-Rate reimbursement, which caused false claims to be submitted and their payment later concealed.

Id. at 124.

The *Heath* court rejected AT&T's claim that the complaint failed to identify specific, affirmative misrepresentations to the government, holding that

> fraud could be proven even without explicit certifications of compliant rates. A fraud case can rest on "implied" certifications if the defendant knowingly "withheld information about its noncompliance with material contractual requirements."

Id. (citation omitted).

Heath also rejected AT&T's claim that the complaint failed to identify the specific actors who made false statements or representations:

> … But unlike cases in which relators have vaguely alleged that 'some managers' perpetuated fraud, Heath *does* identify a specific actor – AT&T itself.…
>
> For a fraud like that, alleging with specificity how the company itself institutionalized and enforced its fraudulent scheme, and how it was manifested in corporate training materials and audit reports, sufficiently identifies who committed the fraud for the purposes of Rule 9(b). The complaint makes clear, in other words, that corporate levers were pulled; identifying precisely who pulled them is not an inexorable requirement of Rule 9(b) in all cases.…

Id. at 125 (additional citations omitted).

Finally, *Heath* rejected AT&T's argument that the complaint lacked "representative samples" of claims that specify the time, place and content of the bills. *Heath* held that an FCA complaint does not require such samples, so long as it alleges "particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted." *Id*. at 126 (citation omitted). Holding otherwise "would require relators, before discovery, to prove more than the law requires to be established at trial…. To win his case, a relator does not need to identify 'exact dollar amounts, billing numbers, or dates to prove to a preponderance that fraudulent bills were actually submitted.'" *Id*. (citation omitted).

Heath precludes a successful Rule 9(b) challenge to the Second Amended Complaint. Verizon argues that the complaint fails to demonstrate that the 20 contracts identified in the complaint prohibited Verizon from charging federal surcharges to the federal government.[63] Not so. The complaint alleges in pertinent part that Relator learned from his consulting career that Verizon routinely charged its commercial customers Non-Allowable Tax-Like Charges. Relator learned from investigation that Verizon imposed the same charges on the United States. A former Verizon employee confirmed that Verizon did not have separate tax

[63] Verizon Br. at 33-34.

modules for federal and commercial customers and could not turn off the surcharges when it billed the government.

Against this background, Relator alleged that, "on information and belief, Verizon improperly billed for Non-Allowable Tax-Like Charges on the following federal telecommunication contracts…[64] *Heath* requires no more.

Verizon also argues that Relator cannot allege with certainty whether any particular contracts permitted the improper surcharges.[65] But Relator has more than adequately alleged that Verizon had a practice of billing such surcharges to large commercial customers and to the United States, and that the available documents he reviewed are consistent with that practice. The specific contractual clauses cited in the Second Amended Complaint indicate that Verizon did not have a practice of getting contractual approval from the Government to bill all of its non-allowable charges. Verizon has access to all the contracts and invoices at issue, while Relator has only limited access. This Court "provides an avenue for plaintiffs unable to meet the particularity standard because defendants control the relevant documents – plaintiffs in such straits may allege lack of access in the complaint." *Williams v. Martin-Baker Aircraft Co.*, 389 F.3d 1251, 1258 (D.C. Cir. 2004).

Verizon also argues that the Second Amended Complaint insufficiently demonstrates that specific surcharges were imposed on the government under

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[64] Second Amended Complaint ¶¶ 27-28, JA 52-53.
[65] Verizon Br. at 34.

specific contracts, or when and by whom the false statements were made.[66] Again, *Heath* makes clear that the complaint need not identify exact dollar amounts, billing numbers, or dates as long as it sets forth "particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted." 791 F.3d at 126. Shea's complaint generates an overwhelming inference that Verizon submitted false claims. Relator alleges his own long experience with Verizon overcharging his corporate clients. The Second Amended Complaint alleges the lack of a separate tax module for Verizon's government contracts. It also details misleading language used in the contracts and modifications to provide legal cover for non-allowable charges. All this demonstrates that Verizon was in fact billing the United States for illegal surcharges.

For these reasons, the operative Second Amended Complaint satisfied the standards of Rule 9(b) and the lesser pleading requirements of Rule 8.

B. There Were No Grounds for Dismissal of the Second Amended Complaint With Prejudice.

Even if the Second Amended Complaint fell short of what *Heath* requires, the district court did not abuse its discretion by refusing to dismiss with prejudice, a drastic remedy that is warranted only when "the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency."

[66] Verizon Br. at 34-35.

Firestone, 76 F.3d at 1209. The court properly declined to consider Relator's deposition testimony in resolving a Rule 12(b)(6) facial challenge to the sufficiency of a complaint.[67] It continued:

> Defendants also point to Plaintiff's renewed request for preliminary discovery to suggest that Plaintiff must not be able to articulate sufficient allegations based on facts known by or available to him. However, the fact that Plaintiff has requested discovery does not demonstrate that, in the event Plaintiff's SAC was insufficient, he would be unable to cure the deficiency with additional consistent allegations. It is entirely possible that three years after filing his SAC, Shea will be able to add additional consistent allegations if and when he re-files his action. Because Shea could cure any deficiency in the SAC's factual allegations with additional consistent allegations, dismissal with prejudice is inappropriate.[68]

Verizon challenges this conclusion by referencing Relator's request for discovery.[69] Not only does this position improperly seek to introduce extrinsic materials into the review of the facial validity of a complaint, it also misconstrues Relator's discovery request. The fact that Relator could have drafted an even more detailed complaint if Verizon had not stonewalled his requests for information does not mean that the pending complaint is defective. Nor does it mean that Relator could not update the Second Amended Complaint if the district court later finds the present allegations to be insufficient under *Heath.*

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[67] JA 359.
[68] JA 359.
[69] Verizon Br. at 38-40.

CONCLUSION

For these reasons, this Court should reverse the dismissal of the Second Amended Complaint without prejudice under the first-to-file bar and remand for further proceedings on the merits. It should affirm the district court's denial of Verizon's motion to dismiss the Second Amended Complaint with prejudice under the public disclosure bar and Fed. R. Civ. P. 8 and 9(b).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because:

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2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

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Dated: June 10, 2016

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 10th day of June, 2016, I caused this Response and Reply Brief of Appellant/Cross-Appellee to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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28 U.S.C. § 1500

The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

29 U.S.C. § 633(b)

(b) Limitation of Federal action upon commencement of State proceedings. In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 7 of this Act [29 U.S.C. § 626] before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: *Provided,* That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

31 U.S.C. § 3731(b)

(b) A civil action under section 3730 may not be brought—

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,

whichever occurs last.

42 U.S.C. § 1997e(e)

No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act (as defined in section 2246 of title 18).

42 U.S.C. § 2000a-3(c)

(c) State or local enforcement proceedings; notification of State or local authority; stay of Federal proceedings. In the case of an alleged act or practice prohibited by this title [42 U.S.C. §§ 2000a-2000a-6] which occurs in a State, or political subdivision of a State, which has a State or local law prohibiting such act or practice and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no civil action may be brought under subsection (a) before the expiration of thirty days after written notice of such alleged act or practice has been given to the appropriate State or local authority by registered mail or in person, provided that the court may stay proceedings in such civil action pending the termination of State or local enforcement proceedings.

42 U.S.C. § 6972(b)(1)(1982)

(b) Actions prohibited

(1) No action may be commenced under subsection (a)(1)(A) of this section—

(A) prior to 60 days after the plaintiff has given notice of the violation to—

(i) the Administrator;

(ii) the State in which the alleged violation occurs; and

(iii) to any alleged violator of such permit, standard, regulation, condition, requirement, prohibition, or order,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subchapter III of this chapter; or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance with such permit, standard, regulation, condition, requirement, prohibition, or order.

In any action under subsection (a)(1)(A) of this section in a court of the United States, any person may intervene as a matter of right….