No. 05-1272

IN THE

Supreme Court of the United States

ROCKWELL INTERNATIONAL CORP. AND BOEING NORTH AMERICAN, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA AND UNITED STATES OF AMERICA EX REL. JAMES S. STONE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND PHARMACEUTICAL CARE MANAGEMENT ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE* [1]

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest federation

[1] Pursuant to Sup. Ct. R. 37.6, *amici curiae* state that no counsel for a party has written this brief in whole or in part, and that no person or entity, other than *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

Pursuant to Sup. Ct. R. 37.3(a), written consent to the filing of this brief has been obtained from counsel for Respondents, and the documents confirming consent have been submitted to the Clerk's office. Counsel for Petitioners has submitted a blanket letter of consent to the Clerk's office.

of business organizations. It represents an underlying membership of more than three million businesses of every size, in every business sector, and from every geographic region of the country. One of the Chamber's primary missions is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of national importance to American business. This is such a case. The proliferation of parasitic, vexatious, or otherwise unmeritorious *qui tam* suits filed under the 1986 False Claims Act ("FCA") in the name of the United States by opportunistic *qui tam* relators threatens the legitimate business activities of every federal government contractor, health care provider and administrator, and federal grant recipient in the nation.

The **Pharmaceutical Care Management Association** ("PCMA") is the national association representing pharmacy benefit managers ("PBMs"), which administer prescription drug benefits for more than 200 million Americans with health care coverage. That coverage is provided through small businesses, Fortune 500 employers, health insurers, and labor unions, as well as government programs like Medicare. PBMs work to drive down the cost of prescription drugs through proven cost-containment tools. Those tools include negotiating with drug manufacturers to obtain rebates on plan members' drug purchases; establishing networks of both retail and mail-order pharmacies to allow consumers access to discount drugs; working with plan sponsors and insurers to design formularies of preferred drug products as well as benefit packages; and administering "drug utilization review" programs designed to monitor and deter purchases of dangerous drug combinations and questionable doses. Like other components of the nation's health care system, PBMs have been subjected to unwarranted *qui tam* suits.

The Chamber and PCMA are submitting this *amicus curiae* brief because they believe that strict construction and proper application of the "original source" exception of 31 U.S.C.

§ 3730(e)(4)(A) & (B) is crucial to achieving the objectives underlying the FCA's jurisdictional bar against *qui tam* suits that otherwise are based upon publicly disclosed information.[2]

SUMMARY OF ARGUMENT

Congress has struggled with the False Claims Act's *qui tam* provisions throughout much of their troubled 143-year history. The statute's goal of encouraging and enabling private citizens to aid in recovery of funds fraudulently obtained from the Federal Government has remained more or less unchanged. But in failed efforts to accomplish that objective, Congress has repeatedly rewritten the statute, primarily in response to this Court's decisions, either by closing the court house doors too tightly, or opening them too widely, to *qui tam* relators who seek financial rewards for pursuing alleged fraudulent activity against the United States. Congress' most recent overhaul of the FCA, the 1986 False Claims Amendments Act, and specifically the amended jurisdictional requirements for filing and maintaining *qui tam* suits, are the subject of this appeal.

Attempting to achieve, at last, the correct balance between encouraging *qui tam* suits by bona fide whistleblowers and sparing the courts, the Executive Branch, and industry of parasitic, vindictive, or unwarranted false claims litigation, the 1986 amendments expressly bar *qui tam* actions that are based upon publicly disclosed information, except where the relator is "an original source of the information." 31 U.S.C.

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[2] In support of the petition for certiorari, the Chamber filed an *amicus* brief urging the Court to address the question, reserved in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 778 n.8 (2000), of whether the 1986 *qui tam* provisions violate the Appointments and Take Care clauses of Article II of the Constitution. Although the Court has indicated that it will not be deciding that question here, the Chamber continues to believe that the Article II question is an important issue that the Court should resolve in a future case.

§ 3730(e)(4)(A). As the petition for certiorari explained, however, Congress' convoluted and imprecise effort to exempt and define an "original source," *id.* § 3730(e)(4)(A) & (B), has resulted in sharp disagreements among the lower courts regarding the exact meaning and proper application of the original source exception to the statute's public disclosure jurisdictional bar.

Unfortunately, some lower courts have erred on the side of construing the meaning of original source too liberally. Coupled with the absence of bright line rules in the vague, ambiguous, poorly structured language of the 1986 *qui tam* provisions, the lack of clear, uniform guidance from the lower courts regarding the precise circumstances under which an individual may or may not file and pursue a *qui tam* suit has hindered rather than facilitated congressional intent. This lack of clarity has skewed instead of achieved the balance that Congress sought to establish and maintain. Indeed, the 1986 amendments and permissive lower court interpretations of the original source exception have fostered development of a seemingly unbridled *qui tam* litigation industry whose opportunistic bounty hunter relators file suits, for and in the name of the United States, against virtually any potentially lucrative health care provider or federal government contractor that they choose to target.

By resolving the following two questions arising under the statutory definition of original source, 31 U.S.C. § 3730(e)(4)(B), the Court can provide an interpretation that is consistent with the goal of permitting suits brought only by true (i.e., legitimate) whistleblowers: (i) What constitutes "direct and independent knowledge of the information on which the allegations are based?" and (ii) What constitutes a sufficient and timely voluntary disclosure of the information by the relator?

As to the first question, *amici* maintain that the test for determining the sufficiency of the relator's "direct" knowl-

edge should be based upon Federal Rule of Civil Procedure 9(b), which establishes the applicable standard of particularity for pleading any fraud claim. The standard derived from Rule 9(b), as it has been applied to *qui tam* complaints, would require the relator to have first-hand knowledge of the facts that are required to be pleaded concerning the alleged wrongdoing—the "who, what, when, where and how" of the fraud. This rule also would effectively preclude the all-too-frequent practice of a relator amending his *qui tam* complaint by adding entirely new allegations that are based upon information which the Government uncovered during its investigation of the relator's original complaint.

Regarding the second question—the disclosure requirements—*amici* urge the Court to require that the relator be the source to the entity that made the public disclosure. The lower courts which have adopted this rule correctly have found, based upon congressional intent as well as a common sense application of the term "original source," that only the person who brings the alleged wrongdoing to light should qualify as an original source. In addition, the statute requires that the relator have "voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. § 3730(e)(4)(B). While a few courts have held that a relator can satisfy this requirement by submitting his disclosure statement to the Government concurrently with filing of his *qui tam* action, the Court should confirm the rule adopted by most courts, which requires the relator to demonstrate that he notified the Government of the alleged wrongdoing promptly upon learning about it.

ARGUMENT

I. THE ORIGINAL SOURCE EXCEPTION SHOULD BE INTERPRETED CONSISTENTLY WITH THE PURPOSE OF THE FALSE CLAIMS ACT'S PUBLIC DISCLOSURE JURISDICTIONAL BAR, WHICH IS TO RESTRICT *QUI TAM* SUITS TO TRUE WHISTLEBLOWERS

The issue in this appeal—the meaning and proper application of the "original source" jurisdictional requirement—is an important threshold question in virtually every FCA *qui tam* action based upon publicly disclosed information. As amended in 1986, the FCA expressly bars "an action . . . based upon the public disclosure of allegations or transactions . . . *unless* the action is brought by the Attorney General or the person bringing the action is an original source of the information." 31 U.S.C. § 3730(e)(4)(A) (emphasis added); *see Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 946 (1997) ("Congress amended the FCA in 1986 . . . to permit *qui tam* suits based on information in the Government's possession, except where the suit was based on information that had been publicly disclosed and was not brought by an original source."). Thus, the statutory provision at the heart of this case is not only a jurisdictional requirement; it actually functions as "the 'original source' *exception* to the public disclosure bar." *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 683 (D.C. Cir. 1997) (emphasis added). That exception defines an "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing [a *qui tam* action] which is based on the information." 31 U.S.C. § 3730(e)(4)(B).

The link between the original source exception and the public disclosure jurisdictional bar is far more than textual.

By enacting the 1986 amendments, and specifically the public disclosure bar and its original source exception, "Congress . . . sought to achieve 'the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute on their own.'" *Findley*, 105 F.3d at 680 (quoting *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994)). The Court should interpret the original source exception in a manner that helps to achieve and maintain the critical balance that Congress sought. Indeed, the lower courts' difficulties interpreting and applying the confusingly structured, ambiguously worded original source exception and definition is all the more reason why the Court should use congressional intent as a guidepost.

"The history of the FCA *qui tam* provisions demonstrates repeated congressional efforts to walk a fine line between encouraging whistle-blowing and discouraging opportunistic behavior." *Springfield Terminal Ry.*, 14 F.3d at 651. Originally enacted in 1863 to counter Civil War contractor fraud, the FCA "contained a broad *qui tam* provision allowing any person to prosecute a claim on behalf of the United States against any person who knowingly submitted a false claim to the Government." *United States ex rel. Stinson v. Prudential Ins. Co.*, 944 F.2d 1149, 1153 (3d Cir. 1991). Eighty years later, during World War II, "[*q*]*ui tam* litigation surged as opportunistic private litigants chased after generous cash bounties and, unhindered by any effective restrictions under the Act, often brought parasitic lawsuits copied from preexisting indictments or based upon congressional investigations." *Findley*, 105 F.3d at 679-80. The Supreme Court's decision in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), holding that a *qui tam* relator could bring an action simply by copying information from a government criminal indictment, "spotlighted the pitfalls of the overly generous *qui tam* provisions then in effect." *Springfield Terminal Ry.*, 14 F.3d

at 649. Congress promptly reacted to *Marcus* by amending the FCA "to prevent such piggy-back lawsuits." *Findley*, 105 F.3d at 680.

Shifting to the opposite extreme, the FCA, as amended in 1943, "required a district court to 'dismiss [a *qui tam*] action . . . based on evidence or information the Government had when the action was brought.'" *Hughes*, 520 U.S. at 945 (quoting 31 U.S.C. § 3730(b)(4) (1982 ed.) (superseded)). "This language was broadly construed by courts to bar jurisdiction whenever the Government possessed the information on which the claim was brought, even when the information had been provided to the Government by the *qui tam* plaintiff before the filing of the claim." *Stinson*, 944 F.2d at 1153-54; *see Hughes*, 520 U.S. at 951 ("disclosure of information about the claim to the Government constituted a full defense to a *qui tam* action"). According to the D.C. Circuit, "[t]he case of *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984) [holding that the 1943 version of the FCA barred the State of Wisconsin from pursuing a *qui tam* civil suit for Medicaid fraud because the State already had reported the fraud to the Federal Government] marked the nadir of the *qui tam* action." *Springfield Terminal Ry*, 14 F.3d at 650. After the National Association of Attorneys General "adopted a resolution strongly urging Congress 'to rectify the unfortunate result' of [the *Dean*] decision," *Stinson*, 944 F.3d at 1154 (quoting S. Rep. No. 345, 99th Cong., 2d Sess. 13, *reprinted in* 1986 U.S.C.A.A.N. 5278), Congress enacted the False Claims Amendments Act of 1986.

The 1986 amendments, which include both the § 3730(e)(4) public disclosure jurisdictional bar and original source exception, represent a "congressional effort to reconcile avoidance of parasitism and encouragement of legitimate citizen enforcement actions." *Springfield Terminal Ry*, 14 F.3d at 651; *see also Findley*, 105 F.3d at 680 ("After ricocheting

between the extreme permissiveness that preceded the 1943 amendments and the extreme restrictiveness that followed, Congress again sought to achieve 'the golden mean.'") (quoting *Springfield Terminal Ry*, 14 F.3d at 649); *Stinson*, 944 F.2d at 1154 (Congress' "principal intent . . . was to have the *qui tam* suit provision operate somewhere between the almost unrestrained permissiveness represented by the *Marcus* decision . . . and the restrictiveness of the post-1943 cases, which precluded suit even by original sources."); *ibid.* (quoting *False Claims Act Implementation: Hearing Before the Subcomm. on Admin. Law and Gov. Relations of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 3 (1990) (the 1986 FCA amendments "sought to resolve the tension between . . . encouraging people to come forward with information and . . . preventing parasitic lawsuits" (statement of Sen. Grassley)).

As amended, the FCA requires a *qui tam* relator to "be a true 'whistleblower'; therefore, he is precluded from collecting a bounty if the case is brought on the basis of information that has already been publicly disclosed." *United Stated ex rel. Taxpayers Against Fraud v. General Elec. Co.*, 41 F.3d 1032, 1035 (6th Cir. 1994); *see* Pet. App. 13a (acknowledging "the False Claims Act's goal of preventing parasitic lawsuits based on information discovered by others") (internal quotation marks omitted). In other words, unlike Respondent Stone, "[a] 'whistleblower' sounds the alarm; he does not echo it." *Wang v. FMC Corp.*, 975 F.2d 1412, 1419 (9th Cir. 1992). Thus, "the public disclosure bar . . . limits *qui tam* jurisdiction to those cases in which the relator played a role in exposing a fraud of which the public was previously unaware." *Findley*, 105 F.3d at 678; *see also United States v. Bank of Farmington*, 166 F.3d 853, 858 (7th Cir. 1999) ("Congress intended that the courts not be troubled by persons who wish to capitalize on others' discovery of frauds to the exposure of which they themselves have in no way contributed.").

But Congress failed to express its intent with sufficient clarity and precision in the text of 31 U.S.C. § 3730(3)(4)(A) & (B). *See Mistick PBT v. Housing Auth. of the City of Pittsburg*, 186 F.3d 376, 387 (3d Cir. 1999) (then Circuit Judge Alito explaining that "[s]ection 3730(e)(4)(A) does not reflect careful drafting or a precise use of language"). These textual deficiencies have led to loose judicial interpretations of the original source exception, such as the Tenth Circuit's skewed opinion below, which have interfered with accomplishment of the 1986 amendments' dual objective of both encouraging and limiting *qui tam* suits to actions filed by true whistleblowers.[3]

Indeed, the 1986 amendments, fueled by the temptation of a 15%–30% share of any recovery, have engendered a still booming *qui tam* litigation industry for voracious bounty hunters (including disgruntled former employees) and their counsel. *See generally* Memorandum Opinion For The

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[3] The original source exception comes into play, where, as here, the relator's action is "based upon" the public disclosure. 31 U.S.C. § 3730(e)(4)(A). The majority of circuits have correctly held that "based upon" simply means "supported by" or "substantially similar to" the public disclosure. *See Mistick*, 186 F.3d at 386 (collecting cases). The Fourth Circuit has held, however, that "a relator's action is 'based upon' a public disclosure of allegations only where the relator has actually derived from that disclosure the allegations upon which his *qui tam* action is based." *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1348 (4th Cir. 1994); *see also Bank of Farmington*, 166 F.3d at 863-64 (Seventh Circuit opinion adopting *Siller*). Under this minority view, a relator can avoid having to demonstrate that he is an original source merely by showing that he did not derive his allegations from the public disclosure. In *Mistick*, Judge Alito, noting that lack of precision in the term "based upon," agreed with the rationale expressed by the majority of the circuits that if "based upon" meant "derived from," "it would render the 'original source' exception largely superfluous." *Mistick*, 186 F.3d at 386 (citing *Findley*, 105 F.3d at 683). Thus *amici* urge the Court to resolve the issue by endorsing the view of the majority of the circuits.

Attorney General, *Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 U.S. Op. Off. Legal Counsel 207, 209 (1989), 1989 WL 595854 (prepared by Assistant Attorney General William P. Barr, Office of Legal Counsel) ("Barr Mem.") ("The 1986 Amendments have . . . spawned the formation of full-time 'bounty-hunting' groups — ersatz departments of justice — that go about prosecuting civil fraud actions in the name of the United States."). This *qui tam* feeding frenzy, which continues unabated against both the health care industry and government contractors, is not surprising in view of the Court's observation in *Hughes* that "[a]s a class of plaintiffs, *qui tam* relators are different in kind than the Government. They are motivated primarily by prospects of monetary reward rather than the public good." *Hughes*, 520 U.S. at 949. *See also* Transcript of Oral Argument at 29, *Cook County v. United States ex rel. Chandler*, No. 01-1572, 2003 WL 145399 (U.S. Jan. 14, 2003) (Justice Scalia observing that *qui tam* actions "are an invitation to shakedowns").

The facts compiled by the Government speak for themselves. Between Fiscal Years 1987 and 2005, more than 5,100 *qui tam* actions were filed, and the number of *qui tam* cases has continued to increase as a proportion of total FCA cases. *See* U.S. Gov. Accountability Office, *Information on False Claims Act Litigation* 25 (2006). Following investigation, however, the Department of Justice has elected to pursue only a small percentage of these *qui tam* suits, *id.* at 29, and sums recovered in cases where the Department has declined to intervene represent less than 5% of recoveries from all *qui tam* suits and less than 3% of total FCA recoveries, *id.* at 1, 5, 35. Thus, any notion that strictly construing the original source jurisdictional requirement "would result in the disablement of an effective law enforcement tool is utterly without support." *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 767 n.24 (5th Cir. 2001) (Smith, J., dissenting) (commenting on *qui tam* statistics and the lack of impact on

FCA enforcement if the *qui tam* provisions were declared unconstitutional in cases where the Government does not intervene).

In reality, unmeritorious *qui tam* actions "waste defendants' and the courts' resources," as well as those of the Justice Department and supposedly defrauded federal agencies. Statement of Stuart M. Gerson, Assistant Attorney General, Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 102d Cong. 20 (1992). *See, e.g., Hughes*, 520 U.S. at 943 n.1 (noting that the Government ultimately reversed its preliminary determination that it had been improperly charged and concluded that the defense contractor defendant "actually benefited" the Government financially); *United States ex rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402 (9th Cir. 1995) (affirming dismissal of *qui tam* suit against defense contractor where, based in part on trial testimony of numerous Air Force witnesses, the quality of defendant's drawings met its contractual obligations and the Air Force's expectations). But the *qui tam* industry continues undeterred. *See generally* William E. Kovacic, *The Civil False Claims Act As A Deterrent To Participation In Government Procurement Markets*, 6 Sup. Ct. Econ. Rev. 201, 232 (1998) ("That the purchasing agencies or the Department of Justice regard such a suit as ill-conceived does not impede the initiation and prosecution of such cases by relators."). Because "[r]elators who have no interest in the smooth execution of the Government's work have a strong dollar stake in alleging fraud whether or not it exists," Barr Mem. at 220, unwarranted *qui tam* actions also can have a chilling effect on the working relationships between government agencies and their contractors. *See* Kovacic, *supra* at 239 (*qui tam* provisions are "a serious impediment").

The fact that "[i]n many instances, the costs of defending against unsuccessful *qui tam* suits are recoverable against

the government" under various contract clauses further diminishes whatever economic benefit the Government derives from the majority of *qui tam* suits. *Id.* at 201; *see* 48 C.F.R. § 31.205-47(c)(2) (providing for reimbursement by the Government of defendant's legal costs); *id.* § 31.205-33 (allowability of legal and consultant fees). Yet, the filing of *qui tam* suits, including parasitic, abusive, or otherwise unmeritorious suits that defendants settle to avoid harassment, adverse publicity, strained relations with the Government, and litigation burdens and costs, remains a particularly lucrative business: Between 1986 and 2005, more than $1.6 billion was awarded to *qui tam* relators and their attorneys. GAO at 5.

The foregoing realities of contemporary *qui tam* litigation underscore the need for the Court to rein in unwarranted *qui tam* actions by strictly construing the original source exception in a manner consistent with congressional intent. More specifically, prospective *qui tam* litigants (and their counsel), as well as the lower courts, would substantially benefit from bright line rules that are consistent with Congress' goal of limiting *qui tam* actions to suits filed by true whistleblowers who genuinely aid in the enforcement of the FCA. *See generally United States ex rel. Merena v. Smithkline Beecham Corp.*, 114 F.Supp.2d 352, 372 (E.D. Pa. 2000) (urging federal appellate courts to "answer at least some of the knotty questions that will continue to crop up [because] [i]t is unfair to litigants, both the government, defendants and qui tam relators to be needlessly unsure of the applicable law").

II. TO QUALIFY AS AN "ORIGINAL SOURCE," A *QUI TAM* RELATOR MUST HAVE FIRST-HAND KNOWLEDGE OF ALL FACTS THAT MUST BE PLEADED TO SATISFY THE PARTICULARITY REQUIREMENT OF FEDERAL RULE OF CIVIL PROCEDURE RULE 9(b)

Under the first part of the original source definition, courts must determine whether a relator has "direct and independent knowledge of the information on which the allegations are based." 31 U.S.C. § 3730(e)(4)(B). "Direct" means that the relator's knowledge is first-hand, *i.e.*, that "he sees it with his own eyes." *United States ex rel. Kinney v. Stoltz*, 327 F.3d 671, 674 (8th Cir. 2003); *United States ex rel. Devlin v. California*, 84 F.3d 358, 362 (9th Cir. 1996) ("a person who learns secondhand of allegations of fraud does not have 'direct' knowledge"). "Independent" knowledge means "knowledge not derived from the public disclosure." *Minnesota Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1048 (8th Cir. 2002); *Mistick*, 186 F.3d at 389 ("a relator who would not have learned of the information absent public disclosure [does] not have 'independent' information").

The primary question at hand is how much information must the relator possess. As noted in the petition for certiorari, lower courts have applied different standards as to the nature and quantum of knowledge a relator must have to qualify as an original source. The Tenth Circuit's decision below, holding that a relator need only possess one piece of background information underlying a speculative fraud claim, represents the loosest interpretation. Affording original source status to a relator who did not possess the particular information necessary to state a fraud cause of action until he obtained additional information from someone else's public disclosure significantly diminishes the goal of barring para-

sitic *qui tam* actions. Accordingly, in measuring the extent of the relator's knowledge of the allegations in the complaint, the Court should require the relator to prove knowledge of all of the particular facts which must be pleaded in order for the complaint to satisfy the requirements of Federal Rule of Civil Procedure 9(b) ("In all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity.").[4]

Use of the Rule 9(b) standard is consistent with the goal of barring parasitic actions. This standard would preclude a relator from filing an initial complaint based upon a slim thread of mere suspicion and then filing an amended complaint containing entirely new allegations that were derived from the Government's investigation of the relator's initial complaint. This common practice enables a relator to piggyback onto allegations uncovered by the Government merely because the relator "triggered" an unrelated investigation. This Court should articulate a rule that finally puts an end to this type of classic parasitic action. Along the same

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[4] Courts also are divided on the meaning of the phrase "the information on which the allegations are based" in the original source definition, 31 U.S.C. § 3730(e)(4)(B). Some courts assess the extent of the relator's knowledge merely as to the publicly disclosed information, while others look to the relator's knowledge of the allegations in the complaint. *See United States ex rel. Laird v. Lockheed Martin Eng'g & Sci. Serv. Co.*, 336 F.3d 346, 353-54 (5th Cir. 2003) (noting the various circuit splits). For the reasons discussed in this brief, *amici* maintain that a plain reading of the phrase, as well as the underlying purpose of the original source provision, supports the view expressed by the Tenth Circuit in *United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1162 (10th Cir. 1999), that the relator must have sufficient knowledge of the fraudulent acts *alleged in the complaint*. *See also Mistick*, 186 F.3d at 388-89 (discussing relator's insufficient knowledge of the allegedly fraudulent statements set forth in the complaint). While the court of appeals below looked to the relator's complaint, it applied the wrong standard in assessing the relator's degree of knowledge as to the allegations in the complaint.

lines, reliance upon Rule 9(b) to measure the nature and quantum of the relator's knowledge would prohibit the relator from doing what Rule 9(b) also precludes a complainant from doing—using the discovery rules to make out a case that complies with Rule 9(b).

A. Rule 9(b) Requires Relators To Plead The Details Of The Alleged False Claim

Amici urge the Court to hold that the sufficiency of the relator's information for purposes of qualifying as an "original source" must be assessed by utilizing the "particularity" standard of Rule 9(b), under which all fraud pleadings are measured. It is well established that because the FCA is an anti-fraud statute, all *qui tam* complaints must comply with Rule 9(b). *See, e.g., United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 227-28 (1st Cir. 2004) (citing decisions of eight other circuit courts); *Corsello v. Lincare, Inc.*, 428 F.3d 1008, 1013 (11th Cir. 2005), *cert. denied*, 75 U.S.L.W. 3163 (U.S. Oct. 2, 2006) (No. 05-1288). Thus, Rule 9(b) requires that a *qui tam* complaint set forth "such facts as the time, place, and content of the defendant's false representations, as well as the details of the defendant's fraudulent acts, including when the acts occurred, who engaged in them, and what was obtained as a result." *United States ex rel. Joshi v. St. Luke's Hosp., Inc*., 441 F.3d 552, 556 (8th Cir. 2006), *cert. denied*, 75 U.S.L.W. 3169 (U.S. Oct. 2, 2006) (No. 06-12); *see also United States ex rel. Thompson v. Columbia/HCA Healthcare Corp*., 125 F.3d 899, 903 (5th Cir. 1997) (summarizing the pleading requirements as the "who, what, when, where, and how of the alleged fraud").

While not purporting to state a checklist of required details, the First Circuit's decision in *Karvelas* provides a good overview of the kinds of details required in a *qui tam* complaint alleging fraudulent Medicare charges.

> In a case such as this, details concerning the dates of the claims, the content of the forms or bills submitted, their identification numbers, the amount of money charged to the government, the particular goods or services for which the government was billed, the individuals involved in the billing, and the length of time between the alleged fraudulent practices and the submission of claims based on those practices are the types of information that may help a relator to state his or her claims with particularity.

Karvelas, 360 F.3d at 233. Karvelas' 93-page complaint attempted to describe over a dozen fraudulent Medicare reimbursement "schemes," but was dismissed because it "failed to 'provide reference to actual documentation' of the false claims that allegedly had been filed with the government." *Id.* at 232. *Qui tam* complaints which fail to pass muster under Rule 9(b) are dismissed under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. *See, e.g., Yuhasz v. Brush Wellman, Inc.*, 341 F.3d 559, 564-65 (6th Cir. 2003) (allegation that manufacturer engaged in improper testing procedures was dismissed for failure to identify false acts, statements made, persons involved, specific contracts or invoices); *United States ex rel. Gross v. AIDS Research Alliance-Chicago*, 415 F.3d 601, 602 (7th Cir. 2005) (allegations that federal grantee performing medical research submitted false certifications of compliance with "Good Clinical Practices" failed to identify false statements on the submitted forms or how the forms related to or caused the Government to pay money which was not owed); *Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001) (relator's "broad allegations [which] included no particularized supporting detail" were insufficient to state a claim).

Courts have further clarified that relators cannot file a complaint and then rely upon the civil discovery process to supply the required particularity. *See, e.g., United States ex*

rel. Clausen v. Laboratory Corp. of Am., Inc., 290 F.3d 1301, 1313 n.24 (11th Cir. 2002) (permitting relator "to learn the complaint's bare essentials through discovery . . . may needlessly harm a defendant's goodwill and reputation by bringing a suit that is, at best, missing some of its core underpinnings, and, at worst, [contains] baseless allegations used to extract settlements"); *see also Karvelas*, 360 F.3d at 231 (relator may not present general allegations in lieu of details of actual false claims in hope that such details will emerge through subsequent discovery). Thus, the sufficiency of the relator's claim must be measured at the outset of the case based upon the information contained in the complaint. That same information set forth in the complaint also should be the basis for measuring the relator's qualifications as an original source.[5]

B. Rule 9(b) And The Original Source Requirement Share The Same Goals

The Ninth Circuit has drawn an appropriate connection between Rule 9(b)'s particularity requirement and the purpose of the False Claims Act's original source provision:

> "[Q]ui tam suits are meant to encourage insiders privy to a fraud on the government to blow the whistle on the crime." . . . Because "insiders" . . . should have adequate knowledge of the wrongdoing at issue, such insiders should be able to comply with Rule 9(b).

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[5] If a relator seeks to add new allegations, either by formally amending the complaint or simply by raising different allegations at trial, those new allegations also are subject to the original source jurisdictional requirement. *See United States ex rel. Merena v. Smithkline Beecham Corp*., 205 F.3d 97, 102 (3d Cir. 2000) (determination of jurisdiction is made on a claim-by-claim basis). As discussed in point II.C. below, a relator who has been qualified as an original source with regard to his initial allegations, but subsequently presents new allegations derived from the Government's disclosure of its investigation of those initial allegations, would not qualify as an original source of those new allegations.

Bly-Magee v. California, 236 F.3d at 1019. The converse proposition also follows logically: Because the relator is required to file a complaint that complies with the particularity requirements of Rule 9(b), if the original source provision is triggered, fairness, consistency and sound policy considerations justify a rule requiring the relator to prove that his direct and independent knowledge extends to the details of what must be pleaded to satisfy Rule 9(b).[6]

This Rule 9(b) requirement for qualification as an original source was precisely the holding in *United States ex rel. Detrick v. Daniel F. Young, Inc.*, 909 F. Supp. 1010, 1021 (E.D. Va. 1995), which explained its rationale as follows:

> [W]here a putative relator files a *qui tam* action without reliance on any public disclosure, Rules 9 and 11[7] supply the standards by which to assess the viability of the fraud allegations. No reason in logic or principle suggests that different standards should come into play in the event a prior disclosure triggers the operation of the jurisdictional "original source" provisions of § 3730(e)(4). . . .
>
> [A] person seeking relator status [must] have a core of knowledge about the fraud, which core the statute implicitly requires but does not explicitly define.

Id. at 1018-19, 1020. The court further explained that its holding was consistent with Congress' dual goals of encouraging *qui tam* prosecution while precluding parasitic suits. *See id*. at 1021. Applying the standard from Rule 9(b), the court found that the relator did not qualify as an original

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[6] Indeed, the Ninth Circuit, without expressly relying upon the Rule 9(b) standard, held that a relator's allegations which were "pure speculation" did not qualify the relator as an original source. *United States ex rel. Aflatooni v. Kitsap Physicians Servs*., 163 F.3d 516, 526 (9th Cir. 1999).

[7] Federal Rule of Civil Procedure 11 requires that a civil complaint be based upon allegations and other factual contentions which have evidentiary support. *Amici* believe that in this context Rule 11 is subsumed within the requirements of Rule 9(b).

source because his knowledge amounted to nothing "beyond a suspicion or hunch that [defendants] were engaging in fraud. . . ." *Id*. at 1022. The record in the instant case reflects the same inadequate basis underlying the relator's allegation.

In *Kinney v. Stoltz*, 327 F.3d at 675, the Eighth Circuit applied this same standard in measuring the sufficiency of the relator's knowledge under the original source exception. The relator, a paramedic, had brought suit against the hospital for which he worked, alleging that it had falsely certified ambulance services as medically necessary. Before his initial complaint was dismissed on summary judgment, he deposed four hospital employees and learned for the first time during those depositions that they had authorized the subject certifications. *Id.* at 672. After the dismissal of his initial complaint, he filed a second action against those employees. The court affirmed the dismissal of the second suit on the grounds that the information about the four employees' alleged wrongdoing had been publicly disclosed during the deposition in the first suit. *Id.* at 673. It measured the relator's knowledge under the Rule 9(b) standard and concluded that while the relator may well have had direct knowledge of the fact that some patients were not eligible for transport under Medicare, he had no direct knowledge of the four employees' alleged wrongdoings. *Ibid*.

Requiring a relator to have direct and independent knowledge of *all* of the particular allegations underlying his or her fraud claim is not an unduly restrictive approach.[8] For the most part, courts have shown appropriate flexibility in

[8] Some courts have held that a relator can be an original source simply by having personal knowledge of *any* essential element of the underlying fraud transaction. *See, e.g., Nurse Anesthetists*, 276 F.3d at 1050; *Springfield Terminal Ry.*, 14 F.3d at 656-57. The inquiry into the relator's knowledge of *all* of the essential elements required to be set forth in the complaint is a more stringent requirement, but one with which a true whistleblower should have little difficulty complying.

assessing relators' compliance with Rule 9(b). *See, e.g.*, *Karvelas*, 360 F.3d at 233 (noting that where the allegations concern the defendant's long-term practices, the complaint need not identify every single false claim that was submitted); *Corsello*, 428 F.3d at 1013 (allegations must contain "some indicia of reliability," including some first-hand accounts of wrongful practices leading directly to the submission of fraudulent claims). Under the case law, a relator need not include in his complaint every piece of evidence on which he intends to rely. It follows, therefore, that the relator need not have direct and independent knowledge of every piece of evidence that he will rely upon during the course of the litigation. *See Detrick*, 909 F. Supp at 1021. The core details of the fraud, however, along with at least some examples of the claims and statements submitted to the Government which are at issue in the case, must be identified in the complaint, and the relator must have direct and independent knowledge of those details in order to qualify as an original source. *See Mistick*, 186 F.3d at 388 (relator must know of the actual misrepresentation itself in order to qualify as an original source). Given Congress' intent to reward true whistle-blowers, it is reasonable to require a whistleblower to have direct and independent know-ledge of the information that he is required to plead in the complaint.

C. A Relator Cannot Escape The Original Source Requirement By Amending The Complaint

Relators occasionally resort to filing amended complaints in an effort either to demonstrate direct and independent knowledge of additional facts or to add entirely new allegations based upon information learned from the Government's investigation or from their own civil discovery. This tactic, employed here by Respondent Stone, is a flagrant abuse of

the *qui tam* provisions.[9] The Court's decision in this case should put an end to the use of amended complaints as a means of circumventing the original source requirement.

In *Kinney, supra*, the relator argued that he was an original source of the allegations about the wrongdoing committed by the four employees, allegations which he included in his second lawsuit. He gained the requisite knowledge about the four employees during depositions relating to his initial complaint against the hospital. The Eighth Circuit looked to the *initial* complaint and held that if the relator had possessed knowledge of the fraud by the four employees, "he was obligated to identify them in his initial complaint." 327 F.3d at 675. The court in *United States ex rel. Ackley v. International Business Machines Corp.*, 76 F.Supp.2d 654, 659 (D. Md. 1999), reached the same conclusion, holding that the relator's two amended complaints "may well contain information obtained by way of [civil] discovery that skews the picture of what information [the relator] actually derived from public disclosures and what he may be the original source of."

Assessing the relator's knowledge as to the allegations contained in his initial complaint is a simple and straightforward way of ensuring that the relator does not rely upon subsequent publicly disclosed information, such as information obtained by the Government in its investigation and then

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[9] According to the certiorari petition, Stone and the Government together filed an amended complaint which, for the first time, identified the alleged false claims stemming from the pondcrete allegations. But the amended complaint set forth an entirely different theory than the one in Stone's original complaint as to the cause of the pondcrete defects. At trial, none of the information of which Stone had direct and independent knowledge was presented to the jury. Pet. at 7-8. The tortuous history of Stone's "bait and switch" maneuvers in this action, which commenced following a newspaper report, reflects the classic parasitic *qui tam* case.

revealed to the relator by the Government.[10] Two Ninth Circuit cases illustrate the problem of relators amending their complaints to add entirely new allegations derived from the Government's investigation of the initial allegations. In *United States ex rel. Barajas v. Northrop Corp.*, 5 F.3d 407 (9th Cir. 1993), the relator's initial *qui tam* complaint alleged falsification of test results on flight data transmitters. The Government investigation of the transmitters uncovered an additional allegation that defendant had used inadequate damping fluid in the transmitters. When the Government subsequently dropped the damping fluid allegations, the relator amended his complaint to add that allegation. *Id*. at 409. As to whether the relator qualified as an original source with respect to the damping fluid allegations, the court of appeals dispensed entirely with any analysis of the relator's knowledge. Instead, the court asked only whether the relator's initial complaint "triggered" the Government's investigation that led to the disclosure of the new allegations. *Id*. at 411. While the court may have been inclined to permit the relator to be rewarded for triggering the investigation, original source status must be determined by the statutory language requiring direct and independent knowledge of the information underlying the allegations.

Similarly in *Seal 1*, 255 F.3d 1154, the relator filed a *qui tam* action against his former employer, Packard-Bell, alleging it had sold the Government used instead of new computers. As part of its investigation of the relator's

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[10] Several courts have correctly held that any disclosure of a government investigation, even to one person outside the Government, is a "public disclosure" under § 3730(e)(4)(A). *See, e.g.*, *Seal 1 v. Seal A*, 255 F.3d 1154, 1162 (9th Cir. 2001) (Government's disclosure of its investigation to the relator is a public disclosure); *United States ex rel. John Doe v. John Doe Corp.*, 960 F.2d 318, 323 (2d Cir. 1992) (Government's disclosure of the scope of its investigation of defendant to innocent employees of defendant is a public disclosure).

allegations, the Government also investigated the computer sales practices of Zenith, one of Packard-Bell's competitors. In the course of its investigation, the Government disclosed to the relator evidence that Zenith had committed a similar fraud. Before the Government took any action against Zenith, the relator filed a *qui tam* action against Zenith on the sole basis of the information provided by the Government. *Id.* at 1156-58.

In *Seal 1*, the Ninth Circuit acknowledged that the relator had no knowledge of the allegations against Zenith before the Government discovered them. *Id*. at 1162. The court applied and slightly refined the "triggering" test from *Barajas*. The court inquired as to:

> (1) the degree to which the relator's information helped uncover the later allegations; (2) the degree to which other private actors helped uncover those allegations; (3) the degree to which the government played a role in uncovering those allegations; and (4) whether the later allegations are brought against the same entity as the earlier allegations.

Id. at 1163. Although the court found that the relator did not qualify as an original source because he did not provide sufficient assistance to the government in its investigation, *ibid.*, the standard applied by the court represents a significant departure from the statutory language and an open invitation for relators to capitalize on the fruits of the Government's investigation.

There is no better example of a parasitic *qui tam* suit than one that is derived solely from the disclosure of a Government investigation. Regardless of how this Court construes the phrase "direct and independent knowledge of the information on which the allegations are based," *amici* urge the Court to articulate a standard, consistent with Rule 9(b), which requires inquiry into the quantum and nature of the relator's knowledge. Such a standard should expressly reject

the notion that a relator can be an original source of allegations derived solely from a Government investigation, even if the investigation was triggered by the relator's initial complaint.

III. AN "ORIGINAL SOURCE" MUST HAVE BEEN THE SOURCE OF THE PUBLIC DISCLOSURE AND MUST HAVE PROMPTLY NOTIFIED THE GOVERNMENT BEFORE FILING SUIT

Following a limited remand, the Tenth Circuit held that Respondent Stone satisfied the "jurisdictional disclosure requirement" of the original source definition, 31 U.S.C. § 3730(e)(4)(B). Pet. App. 53a. Because the lower courts differ as to the disclosure requirements of the original source exception, however, this Court should resolve those differences. Most courts have held that there are two parts to the disclosure requirement. The first part examines the connection between the public disclosure and the relator's disclosure. The second part involves the timeliness of the relator's voluntary disclosure directly to the Government.

In *Wang v. FMC Corp.*, 975 F.2d at 1418, the Ninth Circuit held that to be an original source, the relator must have been an *actual source* to whoever made the public disclosure. The court of appeals agreed that the relator, an engineer employed by defendant, had direct and independent knowledge of the alleged engineering deficiencies in the defendant's development of the Bradley Fighting Vehicle, but he waited until one year after his employment was terminated before notifying the Government. *Id*. at 1416-17. In the meantime, someone else publicly disclosed the alleged deficiencies to the news media. *Id*. at 1417. The court held:

> Anyone who helped to report the allegation to either the government or the media would have "indirectly" helped to publicly disclose it. If, however, someone *republishes* an allegation that already has been publicly disclosed,

> he cannot bring a *qui tam* suit, even if he had "direct and independent knowledge of the fraud. He is no "whistleblower." A "whistleblower" sounds the alarm; he does not echo it. The Act rewards those brave enough to speak in the face of a "conspiracy of silence," and not their mimics.

Id. at 1419. Accordingly, the court held that "[t]o bring a *qui tam* suit, one must have had a hand in the public disclosure," or put another way, the relator "must have directly or indirectly been a source to the entity that publicly disclosed the allegations on which a suit is based." *Id*. at 1418 (citing *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 16 (2d Cir. 1990)).

Although the requirement to "have a hand in the public disclosure" has been criticized by some circuits as lacking a textual basis, *see, e.g., Bank of Farmington*, 166 F.3d at 865, the Ninth Circuit found the statutory text to be ambiguous and relied upon the legislative history of the jurisdictional bar, which "make[s] clear that *qui tam* jurisdiction was meant to extend only to those who had played a part in publicly disclosing the allegations and information on which their suits were based." *Wang*, 975 F.2d at 1418-19. *Amici* maintain that in view of imprecise use of language in the original source provision, as noted by Judge Alito in *Mistick*, 186 F.3d at 387, the bright-line rule articulated by the Ninth Circuit in *Wang* and Second Circuit in *Dick* achieves Congress' goal of ensuring that only a true whistleblower can bring a *qui tam* suit.

With regard to the relator's statutory obligation under § 3730(e)(4)(B) to "voluntarily provid[e] the information to the Government before filing an action," some relators have confused this disclosure requirement with a different statutory obligation, the requirement to serve the Government with a "written disclosure of substantially all material evidence and information the person possesses" at the same time the

complaint is filed. 31 U.S.C. § 3730(b)(2). Each of the circuit court decisions addressing these requirements has held that "compliance with the disclosure requirements of § 3730(b)(2) at the time of filing does not satisfy the pre-filing disclosure requirement of § 3730(e)(4)." *See, e.g.*, *United States ex rel. King v. Hillcrest Health Ctr., Inc*., 264 F.3d 1271, 1280 (10th Cir. 2001).

The key question arising in most cases is how soon before filing must the relator's disclosure to the Government occur. The Seventh Circuit, while not providing a bright-line test, correctly articulated Congress' purpose in enacting this requirement:

> Where the statute makes jurisdiction depend on events which occur at determinable times, such as a public disclosure of information or its voluntary provision to the government before filing a lawsuit, a plaintiff is encouraged not to dawdle. Just as one can lose a right to sue by the running of a statute of limitations, so a court can be denied jurisdiction by such an accident of timing. But the policy rationale is clear: The "intent of the Act . . . is to encourage private individuals who are aware of fraud against the government to bring such information forward at the *earliest possible time* and to discourage persons with relevant information from remaining silent." These goals are promoted by a jurisdictional rule requiring early divulgence of allegations of fraud.

Farmington, 166 F.3d at 866 (citations omitted) (emphasis in original).

How prompt must the relator's disclosure to the Government be? *Amici* contend that the disclosure must occur close to the time that the relator first observes the alleged wrongdoing. Where the relator is employed by the alleged wrongdoer, it would be reasonable for the court to permit enough time for the relator to attempt to correct the situation internally before informing the Government. A lower level employee may be given more time to effect such a change

than a manager who can exert more control within the company. But an employee who waits years after first learning of the wrongdoing and then notifies the Government only after he believes he has been a victim of some adverse employment action (which, unfortunately, is typical of many relators), would not satisfy the prompt disclosure requirement. Similarly, relators who, in the hope of enhancing their bounty, wait until the Government's damages have mounted would not qualify.

The D.C. and Sixth Circuits have imposed one clear limitation upon the timing of the relator's disclosure to the Government: It must occur before the public disclosure. *See Findley*, 105 F.3d at 690; *United States ex rel. McKenzie v. BellSouth Telecomm., Inc.*, 123 F.3d 935, 942 (6th Cir. 1997). The D.C. Circuit appropriately focused on the practical fact that "[o]nce the information has been publicly disclosed . . . there is little need for the incentive provided by a *qui tam* action." *Findley* at 691. Similarly, the Sixth Circuit found it "difficult to understand how one can be a 'true whistleblower' unless she is responsible for alerting the government to the alleged fraud before such information is in the public domain." *McKenzie* at 942.

The lower courts have articulated different standards as to the timing of the relator's disclosure. *Findley* and *McKenzie* reject the Ninth Circuit's requirement in *Wang* that the relator be the source to the entity that made the public disclosure.[11] The requirement in *Findley* that the relator disclose the information to the Government before the public disclosure appears to represent a compromise between the Ninth Circuit's approach in *Wang* and the holding of the Fourth

[11] The Ninth Circuit recently rejected the requirement in *Findley* and *McKenzie* that the relator notify *the Government* prior to the public disclosure, but reasserted its earlier holding in *Wang* that the relator be the source to whoever made the public disclosure. *See United States v. Johnson Controls, Inc*., 457 F.3d 1009, 1014-16 (9th Cir. 2006).

Circuit in *Siller*, which does not obligate the relator to make any disclosure prior to someone else's public disclosure. *See Siller*, 21 F.3d at 1351-55.

Amici do not believe that the disclosure requirements articulated in *Wang* and *Findley* conflict. The requirement in *Wang* that the relator be the source of the public disclosure is consistent with Congress' goal of permitting suits only by true whistleblowers. And the requirement in *Findley* that the mandatory disclosure to the Government occur promptly after the relator learns of the wrongdoing and no later than the time of the public disclosure is a reasonable interpretation of that prong of the original source definition. A true whistleblower acting in the best interests of the Government can and should be required to comply with *both* of these disclosure obligations.

CONCLUSION

After strictly construing the original source exception, the Court should reverse the Tenth Circuit's judgment and hold that the district court lacked jurisdiction over Respondent Stone's claims.

Respectfully submitted,

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