No. 23-55361

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAM JONES COMPANY, LLC, *PLAINTIFF-APPELLANT,*
AND
UNITED STATES OF AMERICA, ET AL., EX REL., *PLAINTIFFS,*
V.
BIOTRONIK INC.; CEDARS-SINAI MEDICAL CENTER;
and DR. JEFFREY GOODMAN, *DEFENDANTS-APPELLEES.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
CIVIL CASE NO. 2:17-CV-01391 PSG-KS (HONORABLE PHILIP S. GUTIERREZ)

AMICUS CURIAE BRIEF OF THE ANTI-FRAUD COALITION SUPPORTING APPELLANT AND REVERSAL

Jacklyn DeMar
THE ANTI-FRAUD COALITION
1220 19th Street, N.W., Suite 501
Washington, DC 20036
202.296.4826
jdemar@taf.org

Shauna Itri
SEEGER WEISS LLP
1515 Market St., Suite 1380
Philadelphia, PA 19102
T: 215.553.7981
F: 215.851.8029
sitri@seegerweiss.com

Justin M. Smigelsky
(Application for Admission Simultaneously Submitted)
SEEGER WEISS LLP
55 Challenger Road, 6th Floor
Ridgefield Park, NJ 07660
T: 973.639.9100
F: 973.679.8656
jsmigelsky@seegerweiss.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, The Anti-Fraud Coalition ("TAF Coalition") states that it is a corporation organized under Section 501(c)(3) of the Internal Revenue Code. It has no parent corporation and no stock owned by a publicly owned company. TAF Coalition represents no parties in this matter and has no pecuniary interest in its outcome. However, TAF Coalition has an institutional interest in the effectiveness and correct interpretation of the federal False Claims Act.

INTEREST OF *AMICUS CURIAE*

TAF Coalition is a nonprofit, public interest organization dedicated to combating fraud against the Government and protecting public resources through public-private partnerships. TAF Coalition is committed to preserving effective anti-fraud legislation at the federal and state levels. The organization has worked to publicize the *qui tam* provisions of the federal False Claims Act ("FCA"), has participated in litigation as a *qui tam* relator and as an *amicus curiae*, including on the foundational issues presented in this case, and has provided testimony to Congress about ways to improve the FCA. TAF Coalition is supported by whistleblowers and their counsel, by membership dues and fees, and by private donations. TAF Coalition is the 501(c)(3) sister organization of Taxpayers Against Fraud, which was founded in 1986. TAF Coalition has a strong interest in defending the FCA and ensuring its proper interpretation and application.

SUMMARY OF ARGUMENT

The district court erred in its interpretation of the False Claims Act's ("FCA's") public disclosure bar,[1] 31 U.S.C. § 3730(e)(4)(A), by interpreting the bar expansively rather than narrowly as intended by Congress, and by misinterpreting the "original source" exception by holding that a relator cannot possess "independent" knowledge merely because it learned of an alleged fraud scheme after the purported public disclosure. Further, the court erred in denying Relator's request for leave to amend its complaint to clarify when and how it voluntarily provided the information to the Government before filing suit.

Where a disclosure provides only general intimations of a scheme, such as the May 31, 2011 *New York Times* article (the "article") at issue here, provides no detail about specific actors in the scheme or any evidence of a false claim, and only loosely describes accusations of a fraud scheme somewhat similar to the scheme alleged by

[1] The so-called "public disclosure bar" states that the court shall dismiss a *qui tam* action under the FCA if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party; in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or from the news media. 31 U.S.C. § 3730(e)(4)(A). One exception to the bar is where the relator is "an original source of the information," meaning that the individual either (1) voluntarily disclosed to the Government the information on which the allegations or transactions in a claim are based prior to the public disclosure, or (2) has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing the action. 31 U.S.C. § 3730(e)(4)(B).

Relator with particularity, the public disclosure bar is not implicated. No "allegations or transactions" were disclosed in the article, nor was Relator's complaint "substantially similar" to the disclosure as required by Ninth Circuit precedent.

The district court erroneously concluded that Relator cannot qualify as an original source, finding that Relator did not establish that it had knowledge of the purported fraud prior to the publication of the article and, therefore, Relator's knowledge cannot be "independent." The court's conclusion is plainly incorrect in that it either fails to apply or misreads the post-2010 definition of original source set forth in 31 U.S.C. § 3730(e)(4)(B)(2), which contains no requirement that a relator acquire knowledge of a fraud scheme before a public disclosure.

Further, courts should freely grant leave to amend a complaint absent undue delay or prejudice to the opposing party. The district court abused its discretion in denying Relator leave to amend its complaint to establish that Relator provided the information to the Government before filing its complaint and, thus, qualifies as an original source under 31 U.S.C. § 3730(e)(4)(B)(2).

The district court's decision undermines the FCA and public policy. The text and legislative history of the FCA require a narrow reading of the public disclosure bar and broad construction of the original source exception. Notwithstanding, the district court interpreted the public disclosure bar expansively, contrary to Ninth Circuit precedent, and inconsistent with the intent of Congress which—as

exemplified in the 1986, 2009, and 2010 amendments to the FCA[2]—has been to encourage whistleblower filings to enable recovery of more ill-gotten taxpayer dollars. Moreover, the district court's interpretation of the public disclosure bar undermines the FCA's purpose of deterring fraud. The public disclosure bar is designed to prevent truly parasitic claims, not claims by insider relators who, based on independent knowledge, illuminate and "piece together" with significant specificity the details of ongoing fraudulent schemes. Barring such *qui tam* actions will deter whistleblowers from reporting information to the Government and, in turn, the Government will be deprived of valuable (sometimes lifesaving) whistleblower information about ongoing, avertable fraud schemes.

Accordingly, this Court should reverse the district court's decision. This Court should also use this opportunity to clarify the definition of "independent knowledge" in the context of the original source exception to preserve the status of relators with otherwise meritorious claims who independently learn about earlier, partially disclosed frauds.

[2] These amendments were intended to encourage additional *qui tam* suits to be filed and move forward by legislatively overruling decisions in which courts took an improperly narrow view of the original source exception.

ARGUMENT

I. The District Court's Holding is Not Harmonious with the Text or Purpose of the Public Disclosure Bar

The False Claims Act, 31 U.S.C. §§ 3729-3731, was enacted in 1863, with President Lincoln's support, to combat procurement fraud during the Civil War. S. Rep. No. 99-345 at 8 (1986), reprinted in 1986 U.S.C.C.A.N. 5266. Since that time, Congress has sought the right balance between encouraging people with knowledge of fraud against the United States to come forward in order to fight that fraud on the Government's behalf, while precluding opportunistic litigants who seek to profit from the knowledge and effort of others, or the public reporting of misconduct.

In that vein, the public disclosure bar seeks to prevent so-called "parasitic" suits by a relator whose fraud allegations have already been publicly disclosed in certain ways and do not contribute new information to the Government's fraud prevention efforts. However, the bar is very narrow, restricting only certain types of information disclosed in limited ways. Further, the bar contains an "original source" exception that allows certain relators to proceed even when their allegations of fraud have been publicly disclosed. This is a broad exception, in keeping with the intent of Congress to encourage whistleblowers to come forward with allegations of fraud. The history of the amendments to the FCA, particularly with respect to the public disclosure bar, is instructive as to the intent of Congress and demonstrates Congress's desire to encourage more *qui tam* suits to be filed and pursued.

As previously mentioned, the FCA was passed during the Civil War in order to fight military procurement fraud. During World War II, the FCA was amended to address a perceived problem with parasitic relators who copied publicly available information and then filed suit to collect a reward. *Id*. Congress amended the FCA to preclude such parasitic suits and barred *qui tam* lawsuits "whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought." Act of Dec. 23, 1943, ch. 377, § 1, 57 Stat. 608, 609.

Known as the "government knowledge bar," this provision unwittingly had the consequence of nullifying the FCA as a viable tool to combat fraud perpetrated against the Government. *See* S. Rep. No. 110-507 (2008), at 3 (noting that the government knowledge bar "significantly limited the number of FCA cases that were filed" and that "[b]y the 1980s, the FCA was no longer a viable tool for combating fraud against the Government"). *See also Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 294 (2010) ("In the years that followed the 1943 amendment [to the FCA], the volume and efficacy of qui tam litigation dwindled"); *United States ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries, LLC*, 812 F.3d 294, 297 (3d Cir. 2016) (observing that the government knowledge bar "did not just eradicate the parasitic lawsuits; it eliminated most FCA lawsuits" because of courts' strict interpretation that the provision "barr[ed] FCA

actions even when the government knew of the fraud only because the relator had reported it"); *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 680 (D.C. Cir. 1997) (noting that enactment of the government knowledge bar "killed the goose that laid the golden egg and eliminated the financial incentive to expose frauds against the government").

In order to correct courts' heavy-handed use of the government knowledge bar, Congress amended the FCA in 1986 to remove the government knowledge bar and replace it with the public disclosure bar. The 1986 amendments, including the addition of the public disclosure bar, were intended to encourage whistleblowers to report fraud to the Government without the fear that their cases will be improperly dismissed, and to reinforce the immense value it places on relator-driven cases. *See* 145 Cong. Rec. E1546 (daily ed. July 14, 1999) (statement of Rep. Berman) (with the 1986 amendments, "Congress wanted to encourage those with knowledge of fraud to come forward…[and] we wanted relators and their counsel to contribute additional resources to the government's battle against fraud"). Recognizing a "severe" problem of fraud on the Government, Congress determined that "only a coordinated effort of both the Government and the citizenry" could solve the problem. S. Rep. No. 99-345, at 2 (1986). The amendments were designed to "encourage any individual knowing of Government fraud to bring that information forward." *Id.* Congress stated that "[t]he Committee's overall intent in amending the

qui tam section of the False Claims Act is to encourage more private enforcement suits." S. Rep. No. 99-345 at 23-24.

The 1986 version of the public disclosure bar precluded a *qui tam* relator from proceeding with a lawsuit alleging fraud that had been publicly disclosed in certain specified ways, including in "the news media." However, the provision contained an "original source" exception, which permitted relators to proceed notwithstanding public disclosure of the allegations if the relator had "direct and independent" knowledge of the fraud scheme and the relator's information "materially added" to the allegations that had been disclosed. False Claims Amendments Act of 1986, Pub. L. No. 99-562, § 3, 100 Stat. 3153, 3157.

The public disclosure bar sought "to strike a balance between encouraging private persons to root out fraud and stifling parasitic lawsuits." *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 413 (2011); *See* S. Rep. No. 110-507, at 5, 22 (seeking "to ensure that any individual *qui tam* relator who came forward with legitimate information that started the Government looking into an area it would otherwise not have looked, could proceed with an FCA case" and explaining that the creation of the public disclosure bar and the original source exception "was intended to only bar truly 'parasitic' lawsuits, such as those brought by individuals who did nothing more than copy a criminal indictment filed by the Government").

Unfortunately, despite the 1986 Amendments, courts continued to interpret the public disclosure bar and the original source exception in a manner that led to the dismissal of meritorious FCA suits. As Senator Charles Grassley and Representative Howard Berman (the sponsors of the 1986 Amendments) noted, the public disclosure bar had "been converted by several circuit courts into a powerful sword by which defendants [were] able to defeat worthy relators and their claims" and threatened to undermine the purpose of the 1986 Amendments, which was to encourage more private FCA suits. 145 Cong. Rec. E1546-01 (daily ed. July 14, 1999), 1999 WL 495861, at *E1546. Of particular concern were cases holding that FCA suits "are barred if the relator obtains some, or even all, of the information necessary to prove fraud from publicly available documents," *Id*. at *E1547, as well as judicial interpretation of the provision to "require[] the relator to be an eyewitness to the fraudulent conduct as it occurs." *Id.*

Consequently, in 2010, Congress amended the FCA's public disclosure bar as part of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010). The amendment "radically changed" the statute to "lower the bar for relators," *See United States. ex rel. Moore & Co., P.A.*, 812 F.3d at 298–99, narrowing the types of disclosures that triggered the bar to only information disclosed in hearings in which the federal government was a party, reports and audits issued by the federal government, and the news media. 31 U.S.C. 3730(e)(4) (2010).

The amendment also broadened the scope of the original source exception, specifically removing the reference to "direct" knowledge and merely requiring a relator to have "independent" knowledge that "materially adds to" the public disclosures. 31 U.S.C. § 3730(e)(4)(B).

The amendments to the FCA have done their job, and the FCA has become the "premier tool for recovering money lost to fraud against the Government," responsible for recovering almost $72 billion wrongfully taken from the federal Treasury, with over $2 billion recovered each year since 2010 under the *qui tam* provisions. *See* Sen. Chuck Grassley, Prepared Statement at the False Claims Act hearing, Feb. 27, 2008, *available at* https://www.grassley.senate.gov/news/news-releases/prepared-statement-senatorchuck-grassley-false-claims-act-hearing; *see* U.S. Dep't of Justice, Fraud Statistics, *available at* https://www.justice.gov/media/1273591/dl?inline=.

Congress has recognized the financial and personal risks whistleblowers take to make those recoveries possible. *See e.g.*, S. Rep. No. 345 at 28 (acknowledging the "risks and sacrifices of the private relator"); Testimony of Tina M. Gonter, Hearing on the False Claims Act Correction Act (S. 2041): Strengthening the Government's Most Effective Tool Against Fraud for the 21st Century, Before the Comm. of the Judiciary, 110th Cong. 167-85 (2008) (detailing risks to career, income, savings, family, friendship, and personal safety). Nonetheless, courageous

whistleblowers continue to step forward and report misconduct. Such reports are critical in cases like the instant matter, where Relator has exposed a nationwide nepotistic hiring scheme which was not detected by the government.

II. When Viewed at an Appropriate Level of Generality, Non-Specific Intimations of Wrongdoing Contained Within a News Article Do Not Constitute a Public Disclosure.

The district court erred when it found that the article constituted a public disclosure of Relator Sam Jones Company's allegations. Non-specific intimations of wrongdoing contained within a news article are neither an allegation nor a transaction of fraud to constitute a public disclosure. Further, Relator's allegations are not substantially similar to the purported allegations or transactions.

The public disclosure bar is only triggered if the relator's allegations are "substantially similar" or "based upon"[3] publicly disclosed allegations or transactions. *See United States ex rel. Silbersher v. Valeant Pharm.,* 76 F.4th 843, 855 (9th Cir. 2022); *United States ex rel. Mateski v. Raytheon Co.*, 816 F.3d 565, 570 (9th Cir. 2016) (citing *Malhotra v. Steinberg*, 770 F.3d 853, 858 (9th Cir. 2014)). It is beyond dispute that the article is "news media," one of the channels specified in

[3] Although the phrase "substantially similar to" was substituted for the phrase "based upon" in the 2010 amendment to the FCA, as the district court correctly notes, this change "does not materially alter the elements required to meet the public disclosure bar." *United States v. Allergan, Inc.,* 46 F.4th 991, 996 n.5 (9th Cir. 2022).

the statute, and that the disclosure was "public." Thus, the issues presented in this matter are:

(1) Did the article contain an allegation or transaction of fraud?

(2) If so, are Relator's claims substantially the same as the allegation or transaction in that it disclosed?

A. No "Allegation or Transaction" Was Disclosed in the Article.

The Ninth Circuit recognizes the important distinction between an "allegation," which refers to a prior "direct claim of fraud" (i.e., an explicit accusation of wrongdoing), and a "transaction," which refers to the disclosure "of facts from which fraud can be inferred." *Silbersher,* 76 F.4th at 856. The district court determined that "the 'transaction' gleaned from the article is substantially similar to the allegations in the SAC." Dkt. 128 pg. 11. Accordingly, for the public disclosure bar to apply, the qualifying disclosure must have disclosed facts from which fraud can be inferred.

To determine whether a qualifying disclosure reveals facts from which fraud can be inferred, the Court reiterated in *Silbersher*:

> If X + Y = Z, Z represents the allegation of fraud and X and Y represent its essential elements. In order to disclose a 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.

Id. at 856 (citing *Mateski*, 816 F.3d at 571 (citations omitted)); *United States ex rel. Found. Aiding the Elderly v. Horizon West, Inc.*, 265 F.3d 1011 (9th Cir. 2001).

Per Ninth Circuit precedent, if the disclosures each reveal "a piece of the puzzle, but none shows the full picture," the fraud has not been publicly disclosed and the relator's claims are viable where she "fill[s] in the gaps by putting together the material elements of the allegedly fraudulent scheme." *Silbersher*, 76 F.4th at 857 (highlighting the important distinction between a "transaction" and an "allegation" in finding that "the public disclosure bar is not triggered here," and finding that "[i]t is the combination of disclosures and conduct alleged in [the relator's] complaint that bring together the constituent elements of fraud."); *see also United States v. Vandewater Int'l Inc.*, 2019 U.S. Dist. LEXIS 222655, *18 (C.D. Cal. Sept. 3, 2019) (It is not sufficient that available information merely "hint" at fraud; there must be "enough information … in the public domain to expose the fraudulent transaction.").

Ninth Circuit precedent in this regard is consistent with and supported by the law of other Circuits. *See United States v. Omnicare, Inc.,* 903 F.3d 78, 86 (3d Cir. 2018) (where a disclosure fails to identify a specific fraudulent transaction directly attributable to a defendant, a "transaction" has not been disclosed to implicate the public disclosure bar); *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 654 (D. C. Cir. 1994) (in evaluating 1986 amendments to FCA, finding

that "*qui tam* actions are barred only when enough information exists in the public domain to expose the fraudulent transaction or the allegation of fraud").

A *qui tam* complaint that contains sufficient details to meet the requirements of Federal Rule of Civil Procedure 9(b)[4] and contains the "who, what, where, when, and how" of the fraud scheme, such as Relator's complaint here, cannot be considered substantially similar to a public disclosure that merely contains broad outlines of potentially fraudulent behavior. *Silbersher,* 76 F.4th at 857 (finding that the public disclosure bar did not preclude the relator's suit, because while the public disclosures contained "a piece of the puzzle, but none show[ed] the full picture," and explaining that the relator "filled the gaps by putting together the material elements of the allegedly fraudulent scheme."); *Omnicare, Inc.,* 903 F.3d at 86 (where public documents merely indicate the possibility that such a fraud could be perpetrated in an industry, the public allegation is insufficient to state a claim for fraud under the FCA and Rule 9(b); the FCA's public disclosure bar is not implicated "where a relator's non-public information permits an inference of fraud that could not have been supported by the public disclosures alone" and it was necessary for a relator to "piece together" the fraud).

[4] Rule 9(b) requires that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."

In the instant matter, the article did not contain the material elements of the fraud scheme; rather, the article made a single statement that some unidentified Biotronik officials suggested that family members of an unidentified implant specialist worked for a competitor, and that the specialist might be wooed if Biotronik offered him concessions "such as studies or even the hiring of his son." The article contains only allegedly "true" facts with respect to potentially nepotistic hiring of a single sales representative; there is no indication when any misrepresentations were made, what the misrepresentations were, or to whom they were made. No hiring or actual compensation arrangement was suggested or disclosed.

The article did not disclose the essential elements of Relator's claims—the article did not reveal facts from which fraud could be inferred, revealed only "a piece of the puzzle," and, in any event, Relator "filled in the gaps" with all of the material elements of the scheme. The vague, anonymous claims in the article fail to provide any description whatsoever of the "who, what, when, where, and how of the misconduct charged" as required by Rule 9(b). *See Ebeid v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010) (quoting *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003)). At best, the article disclosed merely an unrealized plan to drive sales by hiring a physician's family members, and a single sales representative whose sales might have been derived from his late father. NYT Article at 2-3. The

purported transaction contained in the article was anonymous, and did not proffer into the public domain any information to enable a government agent to truly investigate the scheme. The allegations pertaining to the fraud scheme exist solely by virtue of Relator's information.

Accordingly, because the article does not contain an "allegation or transaction" of a nepotistic hiring scheme to constitute a public disclosure, this Court should reverse.

B. Relator's Allegations Are Not "Based Upon" the Content of the Article

Even if an "allegation or transaction" has been disclosed in a public medium to trigger the public disclosure bar, the FCA also requires that the relator's allegations or transactions be substantially similar to the publicly disclosed allegation or transaction of fraud. 31 U.S.C. § 3070(e)(4)(B).

In making this determination, courts should not view FCA claims "at the highest level of generality" to "wipe out" *qui tam* suits that rest on genuinely new and material information. *Mateski*, 816 F.3d at 577; *Leveski v. ITT Educational Serv.*, 719 F.3d 818, 832-35 (7th Cir. 2013) (in evaluating pre-2010 language, finding the district court's dismissal on public disclosure grounds to be "another instance of…dismissing an FCA suit after viewing the allegations at too high a level of generality," and determining that relator's allegations "rest on genuinely new and material information, and as a result [the relator's] allegations are not 'substantially

similar to publicly disclosed allegations.'"). Instead, where a relator's complaint alleges fraud that is different in kind or degree to, or contains allegations that "are vastly more precise" than, general previously disclosed information, the complaint is not "based upon" a disclosed allegation or transaction. *Mateski*, 816 F.3d at 578-79. Also, the Court can engage in the "allegation or transaction" and "based upon" or "substantially similar" analyses in parallel to determine whether the information in the public disclosure overlaps with the relator's claims. *Id.* at 573 (bypassing the question of whether publicly disclosed information constituted a transaction because the relator's complaint was not based upon the public disclosure).

A close reading of *Mateski* is instructive. There, an insider relator filed a *qui tam* action under the FCA, alleging fraud in a government contract on which he personally worked and providing exhaustive detail about components of the fraud ranging from faked signoffs to subpar materials. 816 F.3d at 578-79. Prior to the filing of the relator's suit, cost overruns and mismanagement had been reported in the press and by the Government Accountability Office (GAO). *Id* at 567-68. Nonetheless, the Ninth Circuit concluded that the relator's complaint was not based upon or substantially similar to the public disclosures, finding it unnecessary to determine if the GAO report contained a "transaction" of fraud, because the relator's complaint contained highly specific allegations of fraud different from those in the public disclosure. *Id.* at 573, 578-79. The Ninth Circuit also recognized in *Mateski*

that an individual defendant can potentially engage in multiple fraudulent schemes, and the revelation of one scheme should not automatically bar *qui tam* claims related to the others. The Court should do the same here.

Viewed at the appropriate level of generality, Relator's claims are clearly distinct from those contained in the article. The subject article merely identified general problems with fraudulent sales practices in the medical device industry and the Justice Department's investigation into Biotronik, noted that Biotronik's sales had risen significantly, recounted detailed allegations of direct payments to physicians and the sharply increased sales of Biotronik devices and, in passing, discussed a hypothetical nepotistic hiring plan and single anonymous instance of potential nepotistic hiring. Conversely, Relator's complaint focused on allegations of nepotistic hiring, and provided with particularity the details of Biotronik's unlawful compensation arrangements, including the participation in the scheme by Defendants Dr. Jeffrey Goodman and Cedars-Sinai Medical Center, which resulted in false claims bring submitted to government healthcare programs and, pursuant to the California Insurance Frauds Prevention Act and the Illinois Insurance Claims Fraud Prevention Act, private insurance carriers in the States of California and Illinois.

Because Relator's allegations are not "based upon" or "substantially similar to" those contained in the article, this Court should reverse.

III. A Relator Need Not Possess Information Prior to a Public Disclosure to Qualify as "Independent" for Purposes of the Original Source Exception.

The district court adopted a strict and idiosyncratic definition of "independent" in dismissing Relator's second amended complaint. The district court incorrectly reasoned that, solely because the complaint did not allege that Relator had knowledge of the purported fraud prior to the public disclosure, Relator's knowledge could not be independent and, consequently, Relator could not qualify as an original source. Dkt. 128 at pg. 13; Dkt. 137 at pg. 3. The district court's conclusion is plainly incorrect in that it either fails to apply or misreads the post-2010 definition of original source set forth in 31 U.S.C. § 3730(e)(4)(B)(2).

The post-2010 version of "original source" is defined as follows:

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

The post-2010 provision has two prongs, only one of which must be satisfied for a relator to be an original source. The first prong, not applicable to the instant matter, is met if the relator disclosed information to the Government before the public disclosure. The second prong is met if the relator has "independent"

knowledge that "materially adds" to the disclosed allegations, and has "voluntarily provided" the information to the Government before filing the action. While the "voluntarily disclosed" requirement in the first prong expressly requires disclosure of the information to the government "prior to a public disclosure," the "voluntary provided" requirement in the second prong—an alternative to the first—does not include this explicit timing requirement. This district court missed this critical distinction.

The salient question is no longer whether the relator has "direct and independent knowledge" of the information on which the allegations in the complaint are based. Rather, original source status now turns on whether the relator has "knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions." Significantly, a relator no longer must possess "direct…knowledge" of the fraud to qualify as an original source, and the statute does not limit the type of "knowledge" that qualifies. The focus now is on what independent knowledge the relator has added to what was publicly disclosed.

A relator's knowledge of material information prior in time to a public disclosure can support the independence of a relator's information, *see, e.g., Devlin*, 84 F.3d at n.5 (applying the pre-2010 original source exception and finding that "[t]he fact that the relators had evidence of the fraud prior to the public disclosure of

the allegations establishes that their knowledge was "independent.") but is neither necessary to establish independence nor the only method to establish independence.

Nothing in the FCA text requires a relator to have knowledge of a fraud prior to a public disclosure or to provide information to the Government prior to the disclosure to qualify as an original source under 31 U.S.C. § 3730(e)(4)(B)(2). Additionally, the congressional purpose of preventing parasitic lawsuits is served even if the public disclosure bar "does not bar actions based on old news, in which the relator independently discovers information already known to the public." *Minn. Ass'n of Nurse Anesthetists v. Allina Health System Corp.*, 276 F.3d 1032, 1048 (8th Cir. 2002).

Consequently, this Court should reverse.

IV. A Relator Must Be Granted Leave to Amend to Explain its Voluntarily Provision of Information to the Government Under 31 U.S.C. § 3730(e)(4)(B)(2)

A trial court shall freely grant leave to amend "when justice so requires." *Fed. R. Civ. P.* 15(a)(2). Per the Supreme Court, "this mandate is to be heeded." *Forman v. Davis*, 371 U.S. 178, 182 (1962). Without a strong showing of undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice, or futility of amendment, "there exists a presumption under Rule 15(a) in favor of granting leave to amend." *Eminence Cap., LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). Additionally, the trial

court should not base such a decision on pleadings and technicalities. Rather, when exercising its discretion, a trial court must follow the underlying purpose of Rule 15 which, with "extreme liberality," favors amendments to pleadings. *Rosenberg Bros. & Co. v. Arnold*, 283 F.2d 406 (9th Cir. 1960).

A relator's obligation to demonstrate that he made voluntary disclosure of information prior to the filing of his complaint is not a difficult burden to meet. *See, e.g., United States v. Sanford-Brown, Ltd.*, No. 12-CV-775-JPS, 2014 U.S. Dist. LEXIS 40871, *13-14 (E.D. Wis. Mar 27, 2014) *aff'd,* 788 F.3d 696 (7th Cir. 2015) (A relator must show only "(1) that [he] made the disclosure voluntarily; (2) that [he] made the disclosure to the Government; (3) that [he] made his disclosure prior to filing his complaint; and (4) that [his] disclosure provided all of the information on which his claim is based."). A relator may satisfy this obligation by "notifying the United States Attorney, the FBI, or other suitable law enforcement office," *United States v. Bank of Farmington*, 166 F.3d at 866. (7th Cir. 1999); *United States ex rel. Godecke v. Kinetic Concepts, Inc*., No. CV086403GHKAGRX, 2016 WL 11673222, at *12 (C.D. Cal. Nov. 16, 2016), and by simply identifying himself, the defendant, and the nature of the claim, *Id.* at *11, as little as "one minute" before the complaint is filed, *Sanford-Brown*, 2014 U.S. Dist. LEXIS 40871, at *22.

In the instant matter, Relator sought to correct his complaint in regard to a technical aspect of the public disclosure bar, and evidenced to the district court that

the amended pleading would establish its original source status under the FCA. Specifically, Relator submitted a proposed Third Amended Complaint containing abundant details of communication between Relator's counsel and the Government months prior to filing the original complaint. Dkt. 130 ex. 3 pg. 9-12. Where a relator has simply failed to allege voluntary notification of the Government, the court should grant leave to amend. *See e.g. United States ex rel. Westerfield v. Univ. of San Francisco*, No. C 04-03440 JSW, 2006 U.S. Dist. LEXIS 15276, *16 (N.D. Cal. Feb. 14, 2006).

Here, the district court's denial to the relator of leave to amend unequivocally constitutes a manifest injustice. Accordingly, this Court should reverse.

CONCLUSION

In light of the above, *Amicus Curiae*, The Anti-Fraud Coalition, respectfully requests that the Court reverse the District Court's Order Granting Motions to Dismiss without leave to amend.

Dated: November 6, 2023

Respectfully submitted,

s/ *Shauna Itri*

Jacklyn DeMar
THE ANTI-FRAUD COALITION
1220 19th Street, N.W., Suite 501
Washington, DC 20036
202.296.4826

SEEGER WEISS LLP
1515 Market St., Suite 1380
Philadelphia, PA 19102
T: 215.553.7981
F: 215.851.8029

jdemar@taf.org

sitri@seegerweiss.com

Justin M. Smigelsky
(Application for Admission Simultaneously Submitted)
SEEGER WEISS LLP
55 Challenger Road, 6th Floor
Ridgefield Park, NJ 07660
T: 973.639.9100
F: 973.679.8656
jsmigelsky@seegerweiss.com

CERTIFICATE OF COMPLIANCE

The undersigned, counsel for the Anti-Fraud Coalition, *Amicus Curiae*, hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Cir. R. 32-1(a) because it contains _____words as reported by the word count function of Microsoft Word, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief also 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 it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman font, 14-point type for both text and footnotes.

Dated: November 6, 2023 _____