

No. 23-55645

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA, ex rel. 3729, LLC,
Plaintiff-Relator-Appellant,

v.

EVERNORTH HEALTH, INC., and EXPRESS SCRIPTS, INC.
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of California
Case No. 3:19-cv-01199-TWR-WVG
The Honorable Todd W. Robinson, District Court Judge

**BRIEF OF AMICUS CURIAE THE ANTI-FRAUD COALITION
IN SUPPORT OF APPELLANT**

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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 False Claims Act.

Pursuant to Federal Rule of Appellate Procedure 29, The Anti-Fraud Coalition (TAF Coalition) submits this brief in support of the Appellant, 3729, LLC. All parties have consented to the filing of this brief.¹

INTEREST OF AMICUS CURIAE

TAF Coalition (formerly Taxpayers Against Fraud Education Fund) is a non-profit 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 educate the public and the legal community about the *qui tam* provisions of the False Claims Act (FCA), 31 U.S.C. §§ 3729-3733, and provided testimony to Congress about ways to improve the FCA. It regularly participates in litigation as *amicus curiae*. TAF Coalition is supported by *qui tam* relators and their counsel, by membership dues and fees, and by private donations. TAF Coalition is the 501(c)(3) arm of Taxpayers Against Fraud, which was founded in 1986.

¹ No party's counsel authored this brief in whole or in part. No person other than *amicus* and its counsel contributed any money intended to fund preparing or submitting this brief.

SUMMARY OF THE ARGUMENT

The text and legislative history of the FCA require a narrow reading of the public disclosure bar and a broad construction of the original source exception. The district court's analysis of the public disclosure bar and original source exception is inconsistent with the intent of Congress in amending the FCA in 1986 and 2010, which was to encourage additional whistleblowers to report fraud and for more cases to move forward in order to recover taxpayer dollars.

In amending the FCA, Congress has sought the right balance between encouraging people with knowledge of fraud against the government to come forward in order to fight that fraud on the its behalf, while precluding “opportunistic” litigants who seek to profit from the knowledge and effort of others, or the public reporting of misconduct. If properly interpreted, the public disclosure bar and original source exception do exactly that.

Appellants have extensively discussed the facts of this case and the addressed arguments relating to the specific statutory interpretation questions present before the Court. This brief will discuss the history and intent of the FCA and the public disclosure bar and original source exception, and address the district court's erroneous reading of the post-2010 original source exception.

With government spending at an all-time high and drug prices soaring, whistleblowers are imperative to rooting out fraud involving government spending. The district court's decision undermines the FCA's purpose of deterring fraud. The public disclosure bar is not designed to preclude claims by insider relators who allege previously unknown fraudulent schemes with significant specificity based on their independent knowledge. If *qui tam* actions raising such claims are barred, the government will be deprived of information obtained by potential whistleblowers about ongoing fraud schemes, and efforts to end fraud and recover government funds will be extremely hampered.

ARGUMENT

I. The Amendments to the FCA Were Designed to Encourage Additional Whistleblowers to Come Forward and Should Be Interpreted as Such.

The FCA is 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=>. The FCA has been used to redress and deter fraud in programs as diverse as military procurement, crop subsidies, disaster relief, government-backed loan programs, and healthcare. *See* S. Rep. No. 110-507, at 7 (2008). Since its inception the FCA has been consistently amended to expand the type and range of *qui tam* actions that may be brought and allowed to proceed. S. Rep. No. 99-345, at 2 (1986), reprinted in 1986 U.S.C.C.A.N. 5266; *United States ex rel. Green v. Northrop*, 59 F.3d 953, 963 (9th Cir. 1995). With respect to the public disclosure bar and original source exception, the amendments aimed find the balance between encouraging whistleblowers with knowledge of fraud on the government to report that fraud and be rewarded and preventing relators who seek to use information about fraud that is readily apparent to the public from receiving an undeserved bounty.

Whistleblowers are integral to fighting fraud on the government, and from 1986 forward, each time the FCA has been amended, it has been to correct misinterpretations of the law which discouraged whistleblowers from reporting fraud to the government. *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”). In 1986, after extensive study and hearings, Congress

determined that the FCA should be amended to address courts' interpretations of the statute's provisions and to reinvigorate the FCA after decades of dormancy. 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.

Among the changes adopted in 1986 was the addition of the public disclosure bar, which precluded a *qui tam* relator from proceeding with a lawsuit alleging fraud that had been publicly disclosed in certain specified ways. However, the provision contained an "original source" exception, which permitted relators to proceed notwithstanding public disclosure of the allegations if, among other requirements, 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 initially interpreted 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,” narrowing the types of disclosures that triggered the bar and expanding the scope of the original source exception. *United States ex rel. Moore v. Majestic Blue Fisheries, LLC*, 812 F.3d 294, 298-99 (3d Cir. 2016); *United States ex rel. Silbersher v. Valeant Pharmaceuticals Int’l, Inc.*, 76 F.4th 843, 849 (9th Cir. 2023) (explaining that the 2010 amendments “narrowed the requirements for triggering the public disclosure bar in several important respects.”).

Significantly, instead of requiring an original source to have “direct and independent knowledge,” the amendment eliminated the term “direct,” and the current FCA merely requires a relator to have “independent” knowledge that “materially adds to” the public disclosures. 31 U.S.C. § 3730(e)(4)(B). Congress squarely clarified that a relator whose knowledge was different from that already possessed by the government qualified as an original source, so long as the information was provided to the government before filing.

Congress has recognized the financial and personal risks associated with coming forward with allegations of fraud. *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 the individuals making up the LLC were insiders with independent, direct knowledge of the defendants' fraud, and exposed a systemwide scheme to massively overbill the government for prescription drugs for military members and their families, which had not been previously detected or investigated by the government.

Both the Government and taxpayers reap an extraordinary reward from the risks borne by relators. It is vital to encourage and empower whistleblowers to come forward with allegations of fraud. The public disclosure bar was included in the FCA to discourage parasitic and opportunistic whistleblowers who do not bring any new material to the attention of the government, but merely seek to piggyback on media reports or other disclosures. *See, e.g., United States ex rel. Devlin v. California*, 84 F.3d 358, 362 (9th Cir. 1996) (discussing the purpose of the *qui tam* provisions, the public disclosure bar, and the original source exception). This concern does not exist, however, when a relator brings specific allegations of a fraud scheme, including detailed evidence of scienter, that is distinct from publicly

disclosed information or, alternatively, the relator is the original source of the information with independent knowledge of the disclosed scheme.

II. The District Court Failed to Properly Analyze Whether the Relator Was an Original Source Under the 2010 Amendments to the FCA.

The district court held that the relator was not an original source under the 2010 amendments because the complaint did not “materially add” to the disclosures made in the *Army Times* article and DoD final rule. But the standard the court used for qualification as an original source is essentially impossible to meet and conflates the analysis of whether a public disclosure has occurred with whether the relator qualifies as an original source.

A. A Relator “Materially Adds” to the Publicly Disclosed Allegations When the Information They Bring Helps Prove Any Element of FCA Liability or Negate Likely Defenses.

The query regarding whether the relator materially added to the publicly disclosed information is a different query than whether the relator’s allegations were publicly disclosed in the first place. In order to qualify as an original source, the relator must bring information that is “independent of” the publicly disclosed information and “materially adds” to it. Without much analysis, the district court held that “the additional allegations in Relator’s Complaint do not add materially to what already had been disclosed by the *Army Times* article and DoD final rule— [a]t most, [Relator’s] allegations add detail about the precise methodology [ESI]

used’ to perpetuate the alleged auto-refilling fraud.” Order at 30. Further, the district court found “persuasive Defendants’ argument that Relator’s ‘allegations regarding ESI’s efforts to cover up the alleged fraud scheme . . .’ d[id] not materially add to the core fraud allegations themselves, which already were publicly disclosed.” *Id.* at 30-1.

As explained in one law review article, “[t]he ‘materially adds’ requirement looks to the value of the information and whether the whistleblower is providing useful information not appearing in a qualifying public disclosure. At the same time, however, it is not meant to block out relators simply because there had been a qualifying public disclosure that contains similar allegations. After all, this is designed to be an exception to the public disclosure bar, which only kicks in if ‘substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed’” Restating the “Original Source Exception” to the False Claims Act’s “Public Disclosure Bar” in Light of the 2010 Amendments, 51 U. Rich. L. Rev. 991, 1016 (2017).

Thus, the test for whether the relator qualifies as an original source is necessarily a separate one from whether there has been a public disclosure in the first place. Here, the court essentially held that because it found that similar allegations were publicly disclosed, the relator could not qualify as an original source, and did not take into account the value or type of information that the

relator brought to the table, including information vital to the success of the FCA claims, particularly with respect to the scienter element, as well as allegations that would assist in meeting the requirements of Rule 9(b).

The court explained in *Moore* that the pleading requirements of Rule 9(b) are instructive in deciphering whether a relator provided information that materially added to the information that was publicly disclosed, explaining that “a relator materially adds to the publicly disclosed allegation or transaction of fraud when it contributes information—distinct from what was publicly disclosed—that adds in a significant way to the essential factual background: ‘the who, what, when, where and how of the events at issue.’” 812 F.3d at 307. Even if the allegations are substantially the same as those in the public disclosure, a relator still qualifies as an original source if they bring allegations that add value.

Relying on this analysis, the court in *Moore* determined that the relator qualified as an original source where she alleged details about how the fraud scheme was hatched and carried out and who was involved in the scheme that were not included in the public disclosures. *Id.* at 306-07. This is precisely the kind of information provided by the relator here.

Further, “material” is defined elsewhere in the statute as “having a natural tendency to influence, or be capable of influencing, the payment or receipt of

money or property.” 31 U.S.C. §3729(b)(4). The Supreme Court in *Universal Health Services, Inc. v. United States ex rel. Escobar*, analyzed materiality under a “reasonable person” standard, explaining that in tort and contract law, something is “material” if a reasonable person would attach importance to it in determining their choice of action. *See* 579 U.S. 176, 193 (2016) (explaining that in tort law, a matter is material if “a reasonable man would attach importance to [it] in determining his choice of action in the transaction” and in contract law, a “misrepresentation is material only if it would ‘likely ... induce a reasonable person to manifest his assent...’”). If one applies this materiality analysis to “materially adds” in the original source context, a relator brings information that materially adds to the publicly disclosed information if a reasonable person would believe the information was important. Information that can be used to prove elements of FCA liability, such as scienter, or information that can be used to negate likely defenses, is all information that a reasonable person would rely on, and should qualify a relator as an original source.

B. Evidence of Scienter Is Likely Material.

Several Circuit Courts have noted that evidence of scienter is extremely difficult to gather, and it is extremely unlikely that it will be known to the public or to the government. *See United States ex rel. Reed v. KeyPoint Gov’t Sols.*, 923 F.3d 729, 760 (10th Cir. 2019) (explaining that many cases hinge on scienter

evidence and that “the government is never in a good position to have evidence of guilty knowledge.”). While scienter can sometimes be inferred from the actions of the defendant or information that has been publicly disclosed, direct evidence of scienter delivered by insiders at a company will almost always materially add to any publicly available information. *See United States ex rel. Winkelman v. CVS Caremark Corp.*, 827 F.3d 201, 213 (1st Cir. 2016) (explaining that providing information about scienter could “suffice as a material addition.”).

This makes sense, as the purpose of the public-private partnership envisioned by the FCA, particularly in a quintessential FCA cases such as this one, is that individuals with inside information about not just overcharging the government or waste, but intentional fraud, bring that information to the attention of the government. The public disclosure bar simply was not intended to bar such relators from pursuing their cases on behalf of the taxpayers.

CONCLUSION

For these reasons and the reasons set forth in Appellant’s Opening Brief, the district court’s order granting the motion to dismiss should be reversed and the case should be remanded.

Dated: November 6, 2023

Respectfully submitted,

By: /s/ Jacklyn DeMar

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CERTIFICATE OF SERVICE

Attorney Jacklyn DeMar certifies that on November 6, 2023, Amicus Curiae The Anti-Fraud Coalition was filed electronically with the Ninth Circuit Court of Appeals which in turn will electronically serve notification of such filing to all counsel of record.

Dated: November 6, 2023

/s/ Jacklyn DeMar
Jacklyn DeMar, counsel for The Anti-Fraud Coalition