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MISGUIDED MEANDERS: THE "TRAIL OF FRAUD" UNDER THE PUBLIC DISCLOSURE BAR OF THE FALSE CLAIMS ACT

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Scores of cases over the past thirty years have described the inquiry of whether there has been a disabling public disclosure under the False Claims Act ("FCA")[1] with reference to whether the disclosure "put the government on the trail of fraud."[2] The prevalence and persistence of the "trail of fraud"

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[1] *See* 31 U.S.C. § 3729 (2009).

[2] *See, e.g.*, United States *ex rel.* Solomon v. Lockheed Martin Corp., 878 F.3d 139, 144 (5th Cir. 2017) ("The public disclosures must therefore provide specific details about the fraudulent scheme and the types of actors involved in it sufficient to set the government on the trail of the fraud.") (internal quotation marks and alteration omitted); United States *ex rel.* Lager v. CSL Behring, L.L.C., 855 F.3d 935, 944 (8th Cir. 2017) ("[T]he public disclosures must set the government squarely on the trail of a specific and identifiable defendant's participation in the fraud") (internal quotation marks omitted); *In re* Nat. Gas Royalties Qui Tam Litig., 562 F.3d 1032, 1042-43 (10th Cir. 2009) ("Although the reports had not named all the defendants, they made it easy for the government to examine its royalty contracts to discover which drillers were using fraudulent measurement techniques. The public disclosures provided specific details about the fraudulent scheme and the types of actors involved in it sufficient to set the government on the trail of the fraud."), *cert. denied*, 558 U.S. 880 (2009); United States v. Medco Health Sols., Inc., 2017 WL 63006, at *6 (D. Del. Jan. 5, 2017) ("The public disclosure bar applies when publicly disclosed information has already, or reasonably can be expected to have, set the government 'on the trail' of fraud."); United States *ex rel.* Silver v. Omnicare, Inc., 222 F. Supp. 3d 391, 401 (D.N.J. 2016) ("This information, considered cumulatively, was sufficient to put the government on the trail of the fraud.") (internal quotation

language throughout this period is notable because the 1986 amendments to the FCA[3] eliminated the so-called government knowledge bar.[4] Congress specifically rejected the standard that had reigned since 1943, under which the government's knowledge of the fraud was an automatic bar to a private relator's pursuit of a case.[5] Private relator suits were foreclosed even if that

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marks omitted); United States *ex rel.* Freedom Unlimited, Inc. v. City of Pittsburgh, Pennsylvania, 2016 WL 1255294, at *18 (W.D. Pa. Mar. 31, 2016) ("set Government investigators on the trail of fraud"); United States *ex rel.* Gohil v. Sanofi-Aventis U.S. Inc., 96 F. Supp. 3d 504, 514 (E.D. Pa. 2015) ("set Government investigators on the trail of fraud"); United States *ex rel.* King v. Solvay S.A., 2015 WL 925612, at *8 (S.D. Tex. Mar. 3, 2015) ("It is not necessary for the disclosure to connect all the dots or reach legal conclusions, it just has to set the government on the trail of fraud. Being on the trail of fraud is not the same as highlighting exactly how the alleged wrongdoing resulted in defrauding the government."); United States *ex rel.* Kester v. Novartis Pharm. Corp., 43 F. Supp. 3d 332, 349-50 (S.D.N.Y. 2014) ("set the government squarely on the trail"); Ping Chen *ex rel.* United States v. EMSL Analytical, Inc., 966 F. Supp. 2d 282, 298 (S.D.N.Y. 2013) ("sufficient to set the government squarely upon the trail of the alleged fraud"); United States *ex rel.*, 2013 WL 300745, at *7 (E.D. Pa. Jan. 25, 2013) ("[T]he public disclosures were sufficient to put the government on the trail of this fraud."); United States *ex rel.* Green v. Serv. Contract Educ. & Training Tr. Fund, 843 F. Supp. 2d 20, 33 (D.D.C. 2012) ("website was more than sufficient ... to set government investigators on the trail of fraud") (internal quotation marks omitted); United States *ex rel.* Kester v. Novartis Pharm. Corp., 43 F. Supp. 3d 332, 347 (S.D.N.Y. 2014) ("[T]he public disclosures must 'set the government squarely on the trail' of a specific defendant's participation in the fraud.") (internal quotation marks omitted); Grayson v. AT & T Corp., 980 A.2d 1137, 1149 (D.C. 2009) (explaining that "the public disclosure bar is triggered where the public disclosure raises the inference of fraud so as 'to set the government squarely upon the trail of the alleged fraud'"), *reh'g en banc granted, opinion vacated on other grounds*, 989 A.2d 709 (D.C. 2010). Other courts use similar language, focusing on whether the government could have been on notice by virtue of the public disclosures. *See, e.g.*, United States *ex rel.* Solid v. Millennium Pharmaceuticals, 2018 WL 1320766, at *3 (9th Cir. Mar. 15, 2018) (concluding that a relator's claims "are close enough in kind and degree [to public disclosures] to have put the government on notice to investigate the alleged fraud before [the relator] filed his complaint"); United States *ex rel.* Advocates for Basic Leg. Equal., Inc. v. U.S. Bank, N.A., 816 F.3d 428, 431 (6th Cir. 2016) ("If the disclosure 'puts the government on notice of the "possibility of fraud" surrounding the . . . transaction, the prior disclosure is sufficient'") (*citing United States ex rel. Gilligan v. Medtronic, Inc.*, 403 F.3d 386, 390–91 (6th Cir. 2005)) *petition for cert. denied*, 137 S. Ct. 2180 (2017); United States *ex rel.* Mateski v. Raytheon Co., 816 F.3d 565, 574 (9th Cir. 2016) ("[W]e sometimes have asked whether the Government was on notice to investigate the fraud before the relator filed his complaint"); United States *ex rel.* Antoon v. Cleveland Clinic Found., 788 F.3d 605, 615 (6th Cir. 2015) ("There is enough information in the public domain if the information is sufficient to put the government on notice of the likelihood of related fraudulent activity.") (internal quotation marks omitted); United States *ex rel.* Heath v. Wisconsin Bell, Inc., 760 F.3d 688, 691 (7th Cir. 2014) (asking whether the disclosures were "sufficient to put the Federal Government on notice of a potential fraud"); United States *ex rel.* Jamison v. McKesson Corp., 649 F.3d 322, 330 (5th Cir. 2011) (similar); *United States ex rel. Poteet v. Medtronic, Inc.*, 552 F.3d 503, 512 (6th Cir. 2009) ("[A] public disclosure reveals fraud if the information is sufficient to put the government on notice of the likelihood of related fraudulent activity.") (internal quotation marks omitted); Dingle v. Bioport Corp., 388 F.3d 209, 214–15 (6th Cir. 2004) ("So long as the government is put on notice to the potential presence of fraud, even if the fraud is slightly different than the one alleged in the complaint, the *qui tam* action is not needed.").

[3] *See* False Claims Amendments Act of 1986, Pub. L. No. 99–562,100 Stat. 3153 (1986) (amending the relevant sections of the False Claims Act).

[4] *See* Graham Cty. Soil & Water Conservation Dist. v. United States *ex rel.* Wilson, 559 U.S. 280, 294–95 (2010) ("Congress apparently concluded that a total bar on *qui tam* actions based on information already in the Government's possession thwarted a significant number of potentially valuable claims. Rather than simply repeal the Government knowledge bar, however, Congress replaced it with the public disclosure bar in an effort to strike a balance between encouraging private persons to root out fraud and stifling parasitic lawsuits.").

[5] In all instances in this Article, discussion as to whether a case can be pursued refers to the pursuit by a private individual, not by the government itself. None of the public disclosure issues have any application to the government investigating or pursuing its own litigation under the FCA. *See* 31 U.S.C. § 3730(e)(4)(A) (providing that actions shall be dismissed based on public disclosure "unless the action is brought by the Attorney General"). Although the government certainly files FCA cases on its own, the majority of cases are initiated by private relators. DEP'T OF JUSTICE, *Justice Department Recovers Over*

knowledge was uselessly dwelling in a virtual comatose state in the file drawer of some unconcerned, unaware, or even deceased government bureaucrat. This was so even if the government's knowledge had indisputably come from the relator.[6] The government knowledge bar essentially required the court to dismiss an action filed by a whistleblower if any government employee knew anything about the fraud.[7]

$3.5 Billion From False Claims Act Cases in Fiscal Year 2015 (Dec. 3, 2015), *available at* https://www.justice.gov/opa/pr/justice-department-recovers-over-35-billion-false-claims-act-cases-fiscal-year-2015 ("Most false claims actions are filed under the Act's whistleblower, or qui tam, provisions that allow individuals to file lawsuits alleging false claims on behalf of the government."). And while the government is able to pursue a relator-filed case even if the relator has been dismissed, in actuality, the government only occasionally pursues a case on its own if the matter had initially been filed by a relator. *See, e.g.*, City of Chicago *ex rel.* Rosenberg v. Redflex Traffic Sys., *Inc.*, 2016 WL 4203835 (N.D. Ill. Aug. 8, 2016).

[6] *See, e.g.*, Wang v. FMC Corp., 975 F.2d 1412, 1419 (9th Cir. 1992) (recounting history of the FCA and determinations under government knowledge bar that suits were barred "even where the relator had independently uncovered fraud against the government and the government knew of that fraud only because the relator had been decent enough to tell the government about it"); *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100, 1103 (7th Cir. 1984) (explaining that a *qui tam* suit is barred "whenever the government has knowledge of the essential information upon which the suit is predicated before the suit is filed, even when the plaintiff is the source of that knowledge") (internal quotation marks omitted). In addition to the "trail of fraud" language discussed herein, another vestige of the old government knowledge bar has been the inaptly named "government knowledge defense." *See* United States v. Bollinger Shipyards, Inc., 775 F.3d 255, 263 (5th Cir. 2014) ("The inaptly-named 'government knowledge defense' is the principle that under some circumstances, the government's knowledge of the falsity of a statement or claim can defeat FCA liability on the ground that the claimant did not act 'knowingly,' because the claimant knew that the government knew of the falsity of the statement and was willing to pay anyway. This defense is inaptly named because it is not a statutory defense to FCA liability but a means by which the defendant can rebut the government's assertion of the 'knowing' presentation of a false claim.") (internal quotation marks and footnote omitted); United States *ex rel.* Gudur v. Deloitte Consulting LLP, 512 F. Supp. 2d 920, 932 (S.D. Tex. 2007) (similar); David S. Torborg, *The Dark Side of the Boom: The Peculiar Dilemma of Government Spoliation in Modern False Claims Act Litigation*, 26 J.L. & Health 181, 187 (2013) (similar). This "defense" is really an amalgam of arguments to the effect that knowledge of the alleged misstatements on the part of relevant government officials can demonstrate, *e.g.*, that defendants' conduct did not entail scienter or that the alleged misrepresentations were not actually false or material. *See, e.g.*, United States *ex rel.* Costner v. United States, 317 F.3d 883, 887 (8th Cir. 2003) ("[The government's] knowledge ... bears on whether the defendants had the requisite intent under the [FCA]."); United States *ex rel.* Stone v. Rockwell Int'l Corp., 282 F.3d 787, 811 (10th Cir. 2002) ("cast doubt on whether he 'knowingly' submitted a false claim"), *rev'd in part on other grounds*, 549 U.S. 457 (2007); Massachusetts v. Mylan, 608 F. Supp. 2d 127, 148 (D. Mass. 2008) ("Government knowledge could conceivably be relevant to two elements of the [FCA]: the falsity of the claim and the defendant's state of mind."); Liquidating Tr. Ester Du Val of KI Liquidation, Inc. v. United States, 116 Fed. Cl. 338, 380 (2014) (explaining that the "government must have full knowledge of the particular fraud, which can, in some circumstances, show that the claimant did not submit its claim in deliberate ignorance or reckless disregard of the truth") (internal quotation marks omitted).

[7] According to a well-respected expert on the history and development of the FCA, the government knowledge defense was so effective that the Justice Department's Civil Fraud Division only assigned one lawyer part time to monitor all *qui tam* cases and move for their dismissal. Thus, there are virtually no reported decisions on *qui tam* cases between 1943 and the onset of the 1986 amendments. That DOJ lawyer never tried a case but successfully managed to have every relator-brought FCA case dismissed. Somewhat inexplicably, the main conference room at the Department of Justice's Civil Fraud unit is said to have been named in his honor. Kitts, Z., *A Happy Belated Birthday for the federal False Claims Act!*, VIRGINIA QUI TAM LAW.COM (Mar. 12, 2013), *available at* http://vaquitamlaw.com/a-happy-belated-birthday-for-the-federal-false-claims-act/ (citing information provided by Jim Helmer, Esq.). As another commentator described the situation, "[q]ui tam actions under the FCA had gone in 40 years from unrestrained profiteering to a flaccid enforcement tool." Tammy Hinshaw, *Construction and application of "public disclosure" and "original source" jurisdictional bars under 31 U.S.C.A. § 3730(e)(4) (Civil Actions for False Claims*, 117 A.L.R. FED. 263, *2 (1994).

By virtue of the 1986 amendments, however, actual evidence of fraud, residing openly or randomly in the possession of the government, was rejected as a statutory barrier to a whistleblower's pursuit of a *qui tam* suit. Instead, the 1986 amendments introduced what is known as the Public Disclosure Bar ("PDB"), which stripped a court of jurisdiction to hear a *qui tam* suit brought by a private relator where the allegations or transactions of fraud had been previously disclosed in the public domain through certain defined sources.[8] Following more recent amendments to the FCA, the PDB is no longer jurisdictional, but it remains a basis for dismissal that is raised in a substantial number of FCA lawsuits.[9]

Government knowledge is neither required nor sufficient to invoke the PDB. Whether the government knows of fraud is not the trigger as to whether the PDB applies – instead, the critical question is whether the fraud has been publicly disclosed. This is not by chance. As discussed herein, Congress intentionally substituted the PDB for the government knowledge bar upon concluding that the government knowledge bar was foreclosing too many legitimate *qui tam* lawsuits under the FCA.

Accordingly, it is illogical, statutorily incorrect, and somewhat ironic that a very common articulation of the PDB focuses on whether there is sufficient public information to "set the government on the trail of fraud." Since the government's *actual* knowledge is not a bar, it is hard to see the logic in having the standard for excluding a private relator turn on whether the information in the public domain could conceivably have put the government on the "trail of fraud." By its terms, the statutory PDB provides that a private relator's suit is barred if "allegations or transactions" of fraud have been publicly disclosed.[10] There is no reference to some constructive knowledge of the government or an ability of the government to have

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[8] *See* False Claims Amendments Act, *supra* note 3. As added to the False Claims Act in 1986 (and before more recent amendments) the PDB provided:
(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
(B) For purposes of this paragraph, 'original source' means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

[9] Patient Protection and Affordable Care Act, Public L. No. 111-148, 124 Stat. 119 (amending 31 U.S.C. § 3730(e)(4) (2009) to change the language of the PDB from "[n]o court shall have jurisdiction" to "[t]he court shall dismiss"). *See generally False Claims Act: 2016 Year-in-Review*, WILMERHALE at 10, (Jan. 31, 2017), https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/Publications/WH_Publications/Client_Alert_PDFs/2017-01-31-false-claims-act-year-in-review.pdf (describing PDB as " one of the most frequently litigated defenses in qui tam actions"); Brett W. Barnett and Jason S. Greis, *False Claims Act Litigation under the Affordable Care Act*, 32 GPSOLO 2 (2015), *available at* http://www.americanbar.org/publications/gp_solo/2015/march-april/false_claims_act_litigation_under_affordable_care_act.html ("Prior to the [2010 amendments, pursuant to the] ACA, the public disclosure bar served as one of the strongest and quickest ways to dismiss a false claims action.").

[10] 31 U.S.C. § 3730(e)(4) (2010).

uncovered fraud in some different fashion. Since the PDB is a primary vehicle for dismissal of relators' filings, and typically tanks a potential government fraud action, the carelessness and misdirection of the courts' use of the "trail of fraud" language is a boon for cheating corporate defendants and a bust for the public-treasury.[11]

This Article briefly recounts the history and purpose of the PDB and then discusses more extensively the origins and underpinnings of the "trail of fraud" language that courts have adopted. Because the "trail of fraud" so clearly begins in the long-abandoned government knowledge milieu, this Article contends that it takes the courts in the wrong direction and that FCA jurisprudence needs a course correction. This Article also explains how focusing directly on the statutory language of publicly disclosed allegations and transactions of fraud will better serve the statutory intent and the public interest in ferreting out fraud, while avoiding the undesirable collateral consequences of rewarding parasitic relators or encouraging frivolous suits.

I. OVERVIEW OF THE QUI TAM PROVISIONS OF THE FALSE CLAIMS ACT

Understanding the basic structure of the *qui tam* mechanism is crucial to examining the PDB. In a rather drastic rejection of typical rules of standing

[11] In the same vein, although beyond the scope of this Article, one wonders why a defendant is even permitted to raise the PDB, rather than only the government being permitted to assert that defense. There seems to be little justification for empowering companies that cheat the United States to avoid actual detection and prosecution because a whistleblower might not have uncovered the fraud on her own. Although it is true that the government could proceed with a case even if the whistleblower is dismissed, the fact is that rarely happens. Further, since it has been well-known that the PDB will be strictly applied, many potential relators are discouraged from filing suit where there is a public disclosure concern and therefore the information never even comes to the government's attention. *See generally* United States ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries, LLC, 812 F.3d 294, 298 (3rd Cir. 2016) ("Indeed, given its broad language, as well as different courts' varying interpretations of that language, relators faced a formidable hurdle[.]"). Nonetheless, it is routinely assumed that defendants have standing to raise a PDB challenge. *See generally* Peter B. Hutt II, *False Claims Act: Weakening The Public Disclosure Defense*, CCBJ (June 2, 2010), *available* at http://www.metrocorpcounsel.com/articles/12603/false-claims-act-weakening-public-disclosure-defense ("Some earlier proposals would have stripped defendants of the ability to raise the public disclosure defense at all. But [the Patient Protection and Affordable Care Act of 2010] as enacted did not strip defendants of their ability to raise the public disclosure defense, and they can probably raise this defense at any point during a proceeding as long as it is preserved as an affirmative defense."). Since the purpose of the public disclosure bar is simply to foreclose so-called opportunistic relators from claiming a share of any government recovery, this should be an interest for the government to defend and not a "get out of jail free" card for a cheating defendant to play. This does not seem to be an issue for the courts to wrestle with, however, since the 2010 statutory amendment that allows the government to veto a PDB challenge clearly indicates that Congress was intending that parties other than the government could make the challenge in the first place. *See* 31 U.S.C. § 3730(e)(4)(A) (providing that a court "shall dismiss" an FCA action if the PDB applies "unless opposed by the Government"). Notably, under the prior government knowledge restriction also, the statute was interpreted to permit defendants to assert that defense. *See, e.g.*, United States *ex rel.* Leslie v. Potomac Elec. Power Co., 208 F.2d 39, 41 (D.C. Cir. 1953) ("Relator contends that this jurisdictional attack is not available to the person sued but only to the Attorney General upon intervention of the United States. We cannot agree. The argument that the Attorney General is in the 'best position to know' what information was in the possession of the United States provides no valid basis, in our opinion, for restricting the person sued from making that showing if he can. No such restriction is imposed by the terms of the statute and it is at odds with the statutory scheme and purpose.").

under which an individual can only sue to redress his or her own injury,[12] the *qui tam* structure permits an individual with knowledge of alleged fraudulent conduct perpetrated against a government entity to bring claims on the government's behalf to recover the wayward funds.[13] The FCA is one "of a handful of extant laws creating a form of civil action known as qui tam."[14] A *qui tam* relator who successfully pursues an FCA action receives a substantial portion of any money recovered on the government's behalf.[15]

In part, as a result of this rather extraordinary remedy and procedure having been created – where any lone individual can step forward to assert claims on behalf of the United States government and recoup a significant share of any recovery to the government – Congress recognized that there would need to be some significant checks and balances built into the statutory structure.[16] Among these restrictions is the PDB.

A. The Road to the Modern Public Disclosure Bar: The 1943 and 1986 Amendments

In 1943, the Supreme Court determined that a relator could pursue FCA claims and take a share of the government's recovery even if the relator did nothing more than copy and paste (or the 1940's equivalent) information from the government's criminal indictment into the relator's civil complaint on behalf of the government.[17] It is probably not surprising that Congress felt the balance was too heavily weighted in favor of rewarding a *qui tam* relator, given the Supreme Court's reminder of just how skewed that balance had become: "Even the district attorney, who is required to be vigilant in the prosecution of such cases, may be also the informer, and entitle himself to one half the forfeiture under the *qui tam* clause, and to one half of the double damages which may be recovered against the persons committing the act."[18] In response to that decision, Congress immediately amended the FCA to add the so-called "government knowledge" defense, which provided in its original

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[12] *In response to* arguments that the private party did not have a cognizable interest in the dispute, the Supreme Court affirmed the constitutionality of the *qui tam* provisions. Vermont Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 768 (2000). The Supreme Court held that both the relator's interest in a share of the recovery and the congressional assignment of the right to bring a suit satisfied the Constitutional standing requirement. *Id.*

[13] Rockwell Int'l Corp. v. United States, 549 U.S. 457 n. 2 (2007) ("*Qui tam* is short for '*qui tam pro domino rege quam pro se ipso in hac parte sequitur,*' which means 'who pursues this action on our Lord the King's behalf as well as his own.'").

[14] *Vermont Agency*, 529 U.S. at 768.

[15] 31 U.S.C. § 3730(d) (2012).

[16] *See, e.g.*, United States v. Walgreen Co., 846 F.3d 879, 880 (6th Cir. 2017) ("At the same time that the statute encourages whistleblowers, it discourages 'opportunistic' plaintiffs who 'merely feed off a previous disclosure of fraud.'") (quoting United States *ex rel.* Poteet v. Medtronic, Inc., 552 F.3d 503, 507 (6th Cir. 2009)); United States *ex rel.* Boothe v. Sun Healthcare Grp., Inc., 496 F.3d 1169, 1172 (10th Cir. 2007) (FCA authorizes private individuals to bring *qui tam* suits on behalf of the government — "but only under certain heavily specified and well-familiar circumstances" and "a gamut of procedural prerequisites").

[17] *See generally* United States *ex rel.* Marcus v. Hess, 317 U.S. 537 (1943).

[18] *Id.* at 546 (quoting CONG. GLOBE, 37th Cong., 3d Sess., 955–56 (1863)).

form:

> The court shall have no jurisdiction to proceed with any such suit brought . . . or pending suit . . . 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.[19]

As one court explained, "[t]his 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."[20] Although the Senate version of the amended FCA provision included an exception when a relator was an original source of the information that triggered the government knowledge bar, that exception was dropped in conference and the government knowledge bar became essentially absolute.[21] This resulted in an "over-correction" and substantially eliminated relators' ability to pursue any actions, regardless of the merits.[22]

Accordingly, in 1986, Congress again amended the FCA to correct the problems caused by the government knowledge bar.[23] Congress eliminated the government knowledge bar and instead substituted what is now known as the PDB, which in its current form provides:

> The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action

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[19] An Act to limit private suits for penalties and damages arising out of frauds against the United States, 78 Pub. L. No. 213, 78 Cong. Ch. 377, 57 Stat. 608 (Dec. 23, 1943) (amending the False Claims Act to include the government knowledge bar, which at the time was codified at 31 U.S.C. § 232(C) (Supp. III 1943)); *see* United States *ex rel.* Oliver v. Philip Morris USA Inc., 763 F.3d 36, 42 (D.C. Cir. 2014) (recounting history of government knowledge bar); United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co., 944 F.2d 1149, 1163 (3d Cir. 1991) (explaining that "Congress reacted immediately to the *Marcus* decision by amending the FCA in 1943.").

[20] *Stinson*, 944 F.2d at 1153–54.

[21] *See generally* United States *ex rel.* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 650 (D.C. Cir. 1994) (recounting history of the government knowledge and public disclosure bars); *Stinson*, 944 F.2d at 1154.

[22] Cause of Action v. Chicago Transit Auth., 815 F.3d 267, 273 (7th Cir.) ("This broadly worded 'government-knowledge' bar, however, overcorrected for its predecessor, stymying the *qui tam* provision's enforcement by depriving courts of jurisdiction over otherwise meritorious suits."); *cert. denied sub nom.* United States *ex rel.* Cause of Action v. Chicago Transit Auth., 137 S. Ct. 205 (2016). Indeed, the pivotal case that caused Congress to revisit the government knowledge bar was in a situation where a State had supplied the information of fraud to the United States government, but was then found unable to pursue an FCA case because it had already supplied the information prior to filing its suit. *See* United States *ex rel.* Wisconsin v. Dean, 729 F.2d 1100, 1106 (7th Cir. 1984).

[23] *See Chicago Transit Auth.*, 815 F.3d at 273 ("On the whole, the 1986 reforms were meant to broaden the *qui tam* provisions in order to encourage private individuals to disclose fraudulent conduct."); *Stinson*, 944 F.2d at 1154 ("In reaction to these restrictive interpretations and in light of the belief that the Government lacked the resources to adequately address the growing problem of fraud upon the Government, Congress amended the FCA in 1986 in order to encourage more private enforcement suits.") (internal quotation marks omitted).

or claim were publicly disclosed--

> (i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;
>
> (ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or
>
> (iii) from the news media,
>
> unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.[24]

As has been oft-recounted, the 1986 amendments to the FCA were an attempt to find the golden compromise between thwarting merely opportunistic relators and encouraging those with valuable information of likely fraud to step forward and report it to the government.[25] A legislative report to the 1986 amendments explains:

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[24] 31 U.S.C. § 3730(e)(4) (2012).

[25] *See, e.g.*, Graham Cty. Soil & Water Conservation Dist. v. United States *ex rel.* Wilson, 559 U.S. 280, 295 (2010) (explaining that the purpose of the PDB is "to strike a balance between encouraging private persons to root out fraud and stifling parasitic lawsuits"); Glaser v. Wound Care Consultants, Inc., 570 F.3d 907, 913 (7th Cir. 2009) ("The bar is designed to deter parasitic *qui tam* actions"); United States *ex rel.* Fowler v. Caremark RX, L.L.C., 496 F.3d 730, 739 (7th Cir. 2007) ("Congress does not want self-serving opportunists, who do not possess their own insider information, to get in on the action and try to collect on parasitic claims when the allegations have already been publicly disclosed and the opportunists have nothing new to add.") *overruled on other grounds by* Glaser v. Wound Care Consultants, Inc., 570 F.3d 907 (7th Cir. 2009); United States *ex rel.* Reagan v. E. Texas Med. Ctr. Reg'l Healthcare Sys., 384 F.3d 168, 174 (5th Cir. 2004) ("The purpose of this jurisdictional bar is to accommodate the primary goals of the False Claims Act: (1) promoting private citizen involvement in exposing fraud against the government and (2) preventing parasitic suits by opportunistic late-comers who add nothing to the exposure of fraud.") (internal quotation marks omitted); United States *ex rel.* Laird v. Lockheed Martin Eng'g & Sci. Servs. Corp., 336 F.3d 346, 351 (5th Cir. 2003) ("The central purpose of the public disclosure provisions of the False Claims Act is to accommodate 'both of the FCA's goals of promoting private citizen involvement in exposing fraud against the government and preventing parasitic suits by opportunistic late-comers who add nothing to the exposure of fraud'"); *United States ex rel. Barth v. Ridgedale Elec.*, 44 F.3d 699, 704 (8th Cir. 1995) (explaining that the PDB balances the dual objectives of "encourag[ing] private individuals who are aware of fraud against the government to bring such information forward at the earliest possible time"); United States *ex rel.* Rabushka v. Crane Co., 40 F.3d 1509, 1511 (8th Cir. 1994) (similar); *United States ex rel. Kreindler & Kreindler v. United Tech. Corp.*, 985 F.2d 1148, 1157 (2d Cir. 1993) ("bar 'parasitic lawsuits' based upon publicly-disclosed information in which would-be relators 'seek remuneration although they contributed nothing to the exposure of the fraud.'") (*citing* United States *ex rel.* Doe v. John Doe Corp., 960 F.2d 318, 319 (2d Cir. 1992)); United States *ex rel.* Precision Co. v. Koch Indus., 971 F.2d 548, 552 (10th Cir. 1992) (explaining that the PDB "has two basic goals: 1) to encourage private citizens with first-hand knowledge to expose fraud; and 2) to avoid civil actions by opportunists attempting to capitalize on public information without seriously contributing to the disclosure of the fraud"); United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co., 944 F.2d 1149, 1154 (3d Cir. 1991) (amendments designed to operate somewhere between the almost unrestrained permissiveness that existed before 1943 and the stifling restrictiveness that followed after those amendments); *False Claims Act Implementation: Hearing Before the Subcomm. on Admin. Law and Gov. Relations of the House Comm. on the Judiciary*, 101st Cong. 2 (1990) (statement of Sen. Grassley) (1986 amendment "sought to resolve the tension between ... encouraging people to come forward with information and ... preventing parasitic lawsuits").

> The jurisdictional bar prohibiting suits based on information in the possession of the Government has been invoked several times over the past four decades. Once a qui tam litigant has been found an improper relator due to this jurisdictional bar, he is no longer a part of the litigation and is precluded not only from receiving a portion of the proceeds . . . Courts have also found the jurisdictional bar to apply even if the Government makes no effort to investigate or take action after the original allegations were received.[26]

In a number of cases following the 1986 amendments, courts have expressly acknowledged that evidence of a potential fraud in the government's possession does not bar a private relator's suit.[27] Even circumstances where the government is actively investigating a fraud, or has already resolved the issues, have not been deemed a barrier, absent actual public disclosure of the investigation or information.[28] This has not been a particularly controversial proposition, and indeed, squares with the very

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[26] S. REP. No. 99-345, at 12 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5277, 1986 WL 31937.

[27] *See Graham Cnty.*, 559 U.S. at 309 ("By replacing the Government knowledge bar with the current text of § 3730(e)(4)(A) and including an exception for 'original source[s], Congress allowed private parties to sue even based on information already in the Government's possession") (internal quotation marks omitted); United States v. Chattanooga-Hamilton Cty. Hosp. Auth., 782 F.3d 260, 269 (6th Cir. 2015) (concluding that "disclosure of information to the government in the administrative audit and investigation did not constitute a public disclosure that would trigger the public-disclosure bar"); *United States ex rel. Oliver v. Philip Morris USA Inc.*, 763 F.3d 36, 42 (D.C. Cir. 2014) ("three channels through which information can be made public for purposes of invoking the bar" do not include "[t]he government's own, internal awareness of the information"); United States *ex rel.* Meyer v. Horizon Health Corp., 565 F.3d 1195, 1200–01 (9th Cir. 2009) (non-public government investigation is not a public disclosure, nor is the knowledge of wrongdoing by innocent employees of the defendant a public disclosure); *United States ex rel. Rost v. Pfizer, Inc.*, 507 F.3d 720, 728 (1st Cir. 2007) ("The mere fact that the disclosures are contained in government files someplace, or even that the government is conducting an investigation behind the scenes, does not itself constitute public disclosure."); *Kennard v. Comstock Res., Inc.*, 363 F.3d 1039, 1043 (10th Cir. 2004) (explaining that the PDB "clearly contemplates that the information be in the public domain in some capacity and the Government is not the equivalent of the public domain"); United States *ex rel.* Cantekin v. Univ. of Pittsburgh, 192 F.3d 402, 408 (3d Cir. 1999) ("Information that the government 'has,' but that was never publicly disclosed, does not bar a *qui tam* suit."); United States *ex rel.* Schumer v. Hughes Aircraft Co., 63 F.3d 1512, 1518-19 (9th Cir. 1995) (similar); United States *ex rel.* Wood v. Allergan, Inc., 246 F. Supp. 3d 772, 789-90 (S.D.N.Y. Mar. 31, 2017), *motion to certify appeal granted*, 2017 WL 1843288 (S.D.N.Y. May 4, 2017) (rejecting argument that disclosure of fraud to the government itself constitutes a *public* disclosure); *United States ex rel. Cox v. Smith & Nephew, Inc.*, 749 F. Supp. 2d 773, 782–84 (W.D. Tenn. 2010) (holding that defendant's voluntary disclosure of information to government officials was not "public disclosure"); Michael J. Davidson, *The Government Knowledge Defense to the Civil False Claims Act: A Misnomer by Any Other Name Does Not Sound As Sweet*, 45 IDAHO L. REV. 41, 47 (2008) ("[T]o the extent that the possession of information forming the basis of a relator's FCA lawsuit served as a jurisdictional bar, that form of government knowledge defense no longer exists."); *cf. United States ex rel. Mathews v. Bank of Farmington*, 166 F.3d 853, 861 (7th Cir. 1999) (disclosure to a government official "authorized to act for or to represent the community on behalf of government can be understood as public disclosure."), *overruled on other grounds by Glaser*, 570 F.3d. at 907 (7th Cir. 2009).

[28] *See, e.g., Berg v. Honeywell Int'l, Inc.*, 502 F. App'x 674, 677 (9th Cir. 2012) (holding that the government's dissemination of audit report to private company hired by the government to audit the contract did not constitute public disclosure); United States *ex rel.* Maxwell v. Kerr-McGee Oil & Gas Corp., 540 F.3d 1180, 1184-87 (10th Cir. 2008) (holding communication between federal and state officials in an active investigation under a duty of confidentiality with respect to that information is not a public disclosure insofar as the information is not released into the public domain).

reason that Congress eliminated the government knowledge bar through the 1986 amendments. Whether the investigation emanated from government oversight or even self-reporting by the alleged wrongdoer, the fact that the government was actually aware of an alleged fraud is not an appropriate basis for dismissal of a whistleblower's allegations.[29]

If such *actual* knowledge or evidence, in the government's *actual* possession, has been expressly rejected as a bar to a relator's suit, why would information that is merely somehow in the public domain, and that is merely sufficient to put the government on "the trail of fraud," possibly sink a whistleblower's filing? Although the "trail of fraud" language is unfortunate and misguided, it is useful to understand how the courts came to wander down that treacherous trail.

B. Purpose and Interpretation of the Public Disclosure Bar

The PDB directly replaced the prior government knowledge bar discussed above, in that it was enacted as a substitute provision, but it has a somewhat different focus.[30] In general terms, the PDB provides that private relators cannot bring cases where "substantially the same allegations or transactions" of fraud have been publicly disclosed in one of the statutorily enumerated ways.[31] If there are one or more disclosures that are sufficiently related to the information that forms the basis for the lawsuit[32] and those disclosures were made public through one of the statutorily-enumerated categories,[33] then the inquiry proceeds to evaluate whether the relator's allegations were "based upon" or "substantially similar" to the information that was disclosed.[34] Procedurally, "defendants must first point to documents

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[29] *See supra* notes 27–28 and accompanying text.

[30] *See supra* notes 17–29 and accompanying text.

[31] 31 U.S.C. § 3730(e)(4) (2012).

[32] Case law is virtually uniform in holding that it is irrelevant if the disabling information was disclosed piecemeal in multiple different publications or formats. *See, e.g., Chattanooga-Hamilton Cty.*, 782 F.3d at 266 ("[I]nformation may come from more than one source, as long as the information leads to an inference of fraud."), *cert. denied sub nom.* Chattanooga-Hamilton Cty. Hosp. Auth. v. United States *ex rel.* Whipple, 136 S. Ct. 218 (2015); United States *ex rel.* Poteet v. Medtronic, Inc., 552 F.3d 503, 512 (6th Cir. 2009) ("[T]he information suggesting fraud need not even come from the same source as long as the different sources 'together provide information that leads to a conclusion of fraud.'") (internal quotation marks omitted); United States *ex rel.* Ondis v. City of Woonsocket, 587 F.3d 49, 54 (1st Cir. 2009) ("The two states of facts may come from different sources, as long as the disclosures together lead to a plausible inference of fraud"); United States *ex rel.* Reagan v. E. Texas Med. Ctr. Reg'l Healthcare Sys., 384 F.3d 168, 174 (5th Cir. 2004) (all cited disclosures are considered as a whole).

[33] The FCA is quite specific in its listing of what types of sources can constitute a disabling public disclosure, and the courts have been fairly strict in requiring disclosures to be of an enumerated type. *See* Schindler Elevator Corp. v. United States. *ex rel.* Kirk, 563 U.S. 401, 414 (2011) ("By its plain terms, the public disclosure bar applies to some methods of public disclosure and not to others."). Somewhat contradictorily, however, the prevailing jurisprudence is that the definitions of the categories of publications is very broadly construed. *See infra* note 49 and accompanying text.

[34] Under relatively recent amendments to the FCA in 2010, the scope of this element of the public disclosure bar has been elaborated upon. An earlier version of the PDB provided that "[n]o court shall have jurisdiction over an action under this section *based upon* the public disclosure." 31 U.S.C. § 3730(e)(4)(A) (2006) (emphasis added). Following the vast majority of courts that had interpreted the "based upon" language to mean only that the publicly disclosed allegations or transactions needed to be

plausibly containing allegations or transactions on which [a relator's] complaint is based."[35] Courts then engage in what is often described as a three-step process: (1) determining whether the documents fall within the statutorily-enumerated categories, (2) evaluating whether the relator's claims were substantially similar to the information that was publicly disclosed, and (3) if so, and if the relator so contends, whether the relator can nonetheless proceed with the case under what is called the original source exception.[36] For simplicity's sake, one or more public disclosures that suffice to bar a private relator's suit will be referred to herein as a disabling public disclosure.

Conceptually, one might assume that the "trail of fraud" language comes into use in the second step, where courts must determine whether a relator's claims are based upon or substantially similar to the public disclosures, which would translate to an inquiry whether the public disclosures put the government on the "trail of fraud" that essentially led to the complaint's allegations. Instead, courts frequently rely too heavily on the "trail of fraud" as the test for evaluating whether transactions and allegations were sufficiently disclosed, analyzing whether the cited disclosures were in an enumerated source and simultaneously whether the disclosures involved the same subject matter as the relator's claims,[37] sometimes failing, in the

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substantially similar to those that supported the lawsuit, this interpretation was codified in 2010. *See* Ping Chen *ex rel.* United States. v. EMSL Analytical, Inc., 966 F. Supp. 2d 282, 297 (S.D.N.Y. 2013) ("A majority of circuit courts . . . adopted the view that 'based upon' meant that a relator's allegations would be barred if they were 'substantially similar to' pre-complaint public disclosures."). Congress amended 31 U.S.C. § 3730(e)(4) to provide that *qui tam* actions may be dismissed only if they involve "substantially the same allegations or transactions as alleged" in a prior public disclosure. 31 U.S.C. § 3730(e)(4)(A) (2012).

[35] United States *ex rel.* Jamison v. McKesson Corp., 649 F.3d 322, 327 (5th Cir. 2011); United States ex rel. Johnson v. Shell Oil Co., 26 F. Supp. 2d 923, 928 (E.D. Tex. 1998) ("It is the burden of the movant ..., to show that the allegations or transactions which form the basis of the False Claims Act suit are the same as those which are [publicly disclosed].").

[36] *See, e.g.,* United States *ex rel.* Saldivar v. Fresenius Med. Care Holdings, Inc., 841 F.3d 927, 932-33 (11th Cir. 2016) (applying a three-step process to determine whether the PDB applies "'(1) have the allegations made by the plaintiff been publicly disclosed; (2) if so, is the disclosed information the basis of the plaintiff's suit; (3) if yes, is the plaintiff an 'original source' of that information.'") (*quoting* Cooper v. Blue Cross & Blue Shield of Fla., Inc., 19 F.3d 562, 565 n. 4 (11th Cir.1994)); United States *ex rel.* Branch Consultants, L.L.C. v. Allstate Ins. Co., 668 F. Supp. 2d 780, 788 (E.D. La. 2009) ("When analyzing whether a suit is barred under this section, the Court engages in a three-part inquiry. First, it must ask whether there has been a 'public disclosure' of the allegations or transactions. Second, it finds whether the *qui tam* action is 'based upon' the publicly disclosed allegations. Third and finally, it inquires into whether the relator is an 'original source' of the information."); *see also* United States *ex rel.* Bahrani v. Conagra, Inc., 465 F.3d 1189, 1207 (10th Cir. 2006) (describing application of the PDB as a four step process: "(1) whether the alleged 'public disclosure' contains allegations or transactions from one of the listed sources; (2) whether the alleged disclosure has been made 'public' within the meaning of the False Claims Act; (3) whether the relator's complaint is 'based upon' this public disclosure; and, if so, (4) whether the relator qualifies as an 'original source'").

[37] United States *ex rel.* Gohil v. Sanofi-Aventis U.S. Inc., 96 F. Supp. 3d 504, 512 (E.D. Pa. 2015) (considering disclosure of allegations and transactions together with "based upon" prong); United States *ex rel.* Kester v. Novartis Pharm. Corp., 43 F. Supp. 3d 332, 346 (S.D.N.Y. 2014) (two-prong test for determining whether the public disclosure bar applies: (1) whether the allegations in the complaint are "substantially similar" to allegations contained in prior "public disclosures," and, if so, (2) whether the suit may nonetheless go forward because the relator is an "original source" of the information underlying his allegations of fraud"); United States. v. Dialysis Clinic, Inc., 2011 WL 167246, at *6 (N.D.N.Y. Jan. 19, 2011); United States *ex rel.* Alexander v. Dyncorp, Inc., 924 F. Supp. 292, 299 (D.D.C. 1996) (referring

midst of this multi-pronged inquiry, to adequately focus on whether the public disclosures truly revealed allegations and transactions. Yet, other times the initial public disclosure prong and the "substantially similar" prongs simply run together.[38] Either way, wandering down the "trail of fraud" is not appropriate and courts should stick to their statutory mandate of finding actual markers along the path – the allegations or transactions that the statute defines as the disabling disclosures under the PDB.

C. Embarking Upon the "Trail of Fraud"

The judiciary's first walk on the "trail of fraud" in a *qui tam* case (at least in a published opinion) appears to have come fairly soon after the 1986 amendments, in the D.C. Circuit's 1994 decision in *United States ex rel. Springfield Terminal Railway Company v. Quinn*.[39] As the court explained, "[f]raud requires recognition of two elements: a misrepresented state of facts [termed 'x'] and a true state of facts ['y']. The presence of one or the other in the public domain, but not both, cannot be expected to set government investigators on the *trail of fraud*."[40] Perhaps because there was little precedent at that time relating to the meaning of the 1986 amendment that became known as the PDB, the *Springfield Terminal* court relied on two cases that had interpreted the then-recently abandoned government knowledge bar. Using its newly-minted "x plus y = z" formulation, the court opined:

> When X and Y surface publicly, or when Z [actual allegations of fraud] is broadcast ... there is little need for *qui tam* actions, which would tend to be suits that the government presumably has chosen not to pursue or which might decrease the government's recovery in suits it has chosen to pursue. The cogent analysis in *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 999, 102 S. Ct. 1630, 71 L.Ed.2d 865 (1982), construing the pre-1986 qui tam provisions, is instructive in illuminating this tension . . .[41]

The court proceeded to quote at length from the D.C. Circuit's 1981

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to two-part test – whether claims were based upon transactions or allegations that were publicly disclosed, and, if so, whether plaintiff fits within original source exception).

[38] *See, e.g., Kester*, 43 F. Supp. 3d at 346 ("two-prong test for determining whether the public disclosure bar applies: (1) whether the allegations in the complaint are 'substantially similar' to allegations contained in prior 'public disclosures,' and, if so, (2) whether the suit may nonetheless go forward because the relator is an 'original source' of the information underlying his allegations of fraud."); *Dialysis Clinic*, 2011 WL 167246, at *6; Dyncorp, Inc., 924 F. Supp. at 299 (referring to two-part test – whether claims were based upon transactions or allegations that were publicly disclosed, and, if so, whether plaintiff fits within original source exception).

[39] 14 F.3d 645 (D.C. Cir. 1994). As practitioners in the FCA area are well aware, *Springfield Terminal* is better known for the other half of its standard, the widely adopted "x plus y = z" formulation of the public disclosure test.

[40] *Id.* at 655 (emphasis added).

[41] *Id.* at 654 (footnote omitted).

decision in *Cannon*, and the case on which it relied, the Ninth Circuit's 1978 decision in *Pettis ex rel. United States v. Morrison-Knudsen Co.*[42] – both of which obviously predated the 1986 amendments. The *Springfield Terminal* court quoted extensively from *Cannon*, which itself quoted heavily from *Pettis*:

> To require that the evidence and information possessed by the United States be a mirror image of that in the hands of the *qui tam* plaintiff would virtually eliminate the bar. On the other hand, to permit the bar to be invoked when the United States possesses only rumors while the *qui tam* plaintiff has evidence and information would be to permit the bar to repeal effectively much of the False Claims Act. Between these extremes lies the answer.
>
> More precisely, the answer rests in that area where it is possible to say that the evidence and information in the possession of the United States at the time the False Claims Act suit was brought was sufficient to enable it adequately to investigate the case and to make a decision whether to prosecute. The question, properly, then, is whether the information conveyed [to the government] could have formed the basis for a governmental decision on prosecution, or could at least have alerted law-enforcement authorities to the likelihood of wrongdoing . . .[43]

Cannon, which construed the government knowledge bar, fleshed out the extent of information that would have been required to be in the government's possession in order to bar a private relator suit. Somewhat ironically, the language that the *Springfield Terminal* court quoted from *Cannon* explained that there were *limitations* on the scope of the broad government knowledge bar, but the same language appears to have unwittingly served as the intellectual underpinning of the *Springfield Terminal* court's minting of the phrase "trail of fraud." It is easy to draw a direct line between (1) *Cannon*'s description of whether sufficient information was disclosed to the government to permit the government to make a prosecutorial decision with respect to the government knowledge bar and (2) *Springfield Terminal*'s "trail of fraud" language with respect to the PDB.

Thus, *Springfield Terminal*'s "trail of fraud" analysis expressly rested on pre-1986 amendment cases under the abandoned government knowledge bar, which attempted to reach a balance between enough information already in the government's possession versus needing more from a whistleblower.

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[42] 577 F.2d 668, 674 (9th Cir. 1978).
[43] 14 F.3d at 654 (quoting *Cannon*, 642 F.2d at 1377) (citation omitted).

The government knowledge analysis in those cases reflected Congress's focus at that time, almost a hang-up about whether the putative relator had essentially "stolen" information from the government and then tried to sell it back through recovery of a relator share.[44]

II. MISFIT BETWEEN GOVERNMENT KNOWLEDGE STANDARDS AND THE PDB

The indiscriminate application of a standard developed under the repealed government knowledge bar to the PDB is problematic for many reasons. Under the PDB, for example, there is a more pronounced view that attempts to encourage true insiders or knowledgeable relators, while discouraging entrepreneurs who are simply attempting to use a publicly available commodity for their personal benefit. Likewise, the focus of the PDB is not on whether the relator's lawsuit reveals new information to the government, since the government's actual possession of knowledge of fraud is not a bar.[45]

Additionally, since the foundation for the "trail of fraud" language emanated under the government knowledge bar, the earlier analyses were not concerned with the anomaly of prohibiting relator suits where the government was set on the "trail of fraud" even while recognizing that the government's *actual knowledge* of the fraud was not a bar. Nowhere did *Springfield Terminal* attempt to reconcile the government knowledge analysis with the new standard of public disclosure. Indicative of this failure to recognize the distinctions between a test focused on what the government knew versus a

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[44] *See, e.g.*, United States *ex rel.* Gohil v. Sanofi-Aventis U.S. Inc., 2015 WL 1456664 at *3 (E.D. Pa. 2015) (noting that allowing suits to proceed based on government's own information imposes "an additional drain on the public fisc"); United States *ex rel.* Lapin v. Int'l Bus. Machs. Corp., 490 F. Supp. 244, 247 (D. Haw. 1980) ("Congress was loathe to have plaintiff-relators receive compensation under § 232(E) for bringing suits based on information that already had been gathered by the Government in the course of law enforcement."); United States *ex rel.* Davis v. Long's Drugs, Inc., 411 F. Supp. 1144, 1151-52 (S.D. Cal. 1976) ("[A]s disclosed in the *Marcus* case and other incidents which were brought to light, it had become a fertile field for activities of racketeers who would copy indictments or material developed by a Senate Investigating Committee, bring an informer's suit and reap a bounteous harvest, the percentage at that time being fifty percent.").

[45] *See, e.g.*, United States *ex rel.* Ondis v. City of Woonsocket, 587 F.3d 49, 53 (1st Cir. 2009) (FCA seeks to prevent "*qui tam* actions in which a relator, instead of plowing new ground, attempts to free-ride by merely repastinating previously disclosed badges of fraud."); United States *ex rel.* Paranich v. Sorgnard, 396 F.3d 326, 332 (3rd Cir. 2005) (explaining that the PDB "operates to exclude *qui tam* actions 'based upon allegations of fraud or fraudulent transactions that have been publicly disclosed'" because such allegations would have been "equally available to strangers to the fraud transaction had they chosen to look for it as it was to the relator") (*citing* United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co., 944 F.2d 1149, 1155 (3d Cir. 1991)); *Springfield Terminal*, 14 F.3d at 653 ("If discovery materials are not filed with the court, they are only potentially in the public eye. If they are not yet in the public eye, no rational purpose is served – and no "parasitism" deterred – by preventing a *qui tam* plaintiff from bringing suit based on their contents."); *id.* at 654 n.9 (despite recognizing that even parasitic lawsuits could serve some public good in instances where the government had not chosen to act, "Congress ... amended the statute *to avert the greater evil of freeloading behavior*") (emphasis added); *Stinson*, 944 F.2d at 1155–56 ("We read section 3730(e)(4) as designed to preclude *qui tam* suits based on information that would have been equally available to strangers to the fraud transaction had they chosen to look for it as it was to the relator.").

test at least equally focused on avoiding merely opportunistic relators, the *Springfield Terminal* court simply assumed that the types of cases that would have been barred under the government knowledge standard would be essentially the same as those that the PDB would curtail. As the court stated:

> When X and Y surface publicly, or when Z [actual allegations of fraud] is broadcast, however, there is little need for qui tam actions, which would tend to be suits that the government presumably has chosen not to pursue or which might decrease the government's recovery in suits it has chosen to pursue.[46]

Tellingly, the court explained that the "cogent analysis" in Cannon "is instructive in illuminating this tension."[47] This incorporation of government knowledge doctrine into the PDB arena belies Congress's express purpose in adopting the 1986 Amendments to eliminate government knowledge as a barrier to *qui tam* claims.

Moreover, measuring application of the PDB with reference to government knowledge ignores the practicalities of how the PDB operates relative to the government knowledge bar. For example, it might have been true under the government knowledge bar that the cases that were likely to be barred were those where the government was already at least presumptively aware of the underlying facts given that the government knowledge bar was only implicated when the relevant information was in "the possession of the United States."[48] Accordingly, there was some justification to an implicit conclusion that the government deliberately declined to go after the defendant.

In the public disclosure arena, however, there is far less reason to assume that even a clear public disclosure will have, in fact, made its way into the government's consciousness. For example, "the news media" is one of the statutory categories of public disclosures,[49] and courts have expansively

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[46] 14 F.3d at 654 (emphasis added); *see generally* United States *ex rel.* J. Cooper & Associates, Inc. v. Bernard Hodes Group, Inc., 422 F. Supp. 2d 225, 235 (D.D.C. 2006) ("[B]ecause the information disclosed in the OIG Report and the numerous media reports on the defendants would suffice to 'set government investigators on the trail of fraud,' there is little need for a *qui tam* lawsuit based on this set of facts.") (*quoting Springfield Terminal,* 14 F.3d at 655).

[47] *Springfield Terminal*, 14 F.3d at 654 (*citing Cannon*, 642 F.2d at 1373).

[48] *See supra* notes 19–22 and accompanying text. Even under the government knowledge bar, imputing knowledge to the entire government because one government entity is aware of the underlying facts and thus concluding that the government had intentionally elected not to prosecute FCA claims was questionable. As one court recently explained in a different context: "[J]ust because one agency within the vast bureaucracy of the federal government has knowledge of a contractor's wrongdoing does not mean that the Defendants have a 'government knowledge' defense. The issue is whether the actors actually involved in the contractual relationship are aware of the alleged fraud." United States v. Pub. Warehousing Co. K.S.C., 2017 WL 1021745, at *6 (N.D. Ga. Mar. 16, 2017).

[49] 31 U.S.C. § 3730(e)(4)(A)(iii) (2006).

interpreted this term to include many publicly available websites.[50] Plainly, it is far less likely that the government has knowledge of information included on a random website than of information in its possession. Put differently, mere public disclosure of information on a website – unlike the presumed government knowledge required to implicate the government knowledge bar – provides no reason to believe that the government was, in fact, aware of the situation and "chose not to pursue" the claims. Accordingly, there is no legitimate basis for the assumption undergirding *Springfield Terminal* – that there is little need for *qui tam* suits if the true and false state of facts, or the allegations of fraud, were publicly disclosed – on the premise that those would be cases "that the government presumably has chosen not to pursue."[51]

Instead, the focus of the PDB is on the propriety of allowing a private person to step into the shoes of the government and, more significantly, to be entitled to a portion of the government's recovery when information related to fraud was already in the public domain. Whether prior public disclosures could have set the government on the "trail of fraud" is simply not a pertinent question. Nonetheless, while court after court has acknowledged that the government knowledge bar was deliberately dropped and is no longer the appropriate inquiry, courts persist in uncritically applying the "trail of fraud" language that evolved directly from the government knowledge bar.[52]

In addition to its problematic provenance, the "trail of fraud" language suffers from several false predicates. As noted above, it is meaningless to assume that a particular public disclosure or series of disclosures ever, in fact, permeated the government's "consciousness." Especially where the disabling disclosures occurred in many varied forms and over some period of time, this is simply an unjustified presumption. Courts may determine that there was a disabling public disclosure based on information that is generally available on a company's or trade group's website; a random individual lawsuit pertaining to product defects, employment retaliation or patent disputes that got picked up by local media;

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[50] *See, e.g.*, United States *ex rel.* Beauchamp v. Academi Training Ctr., 816 F.3d 37, 43 n. 6 (4th Cir. 2016) ("Courts have unanimously construed the term 'public disclosure' to include websites and online articles."); United States *ex rel.* Osheroff v. Humana Inc., 776 F.3d 805, 813 (11th Cir. 2015) ("Because the term 'news media' has a broad sweep, we conclude that the newspaper advertisements and the clinics' publicly available websites, which are intended to disseminate information about the clinics' programs, qualify as news media for purposes of the public disclosure provision."); United States *ex rel.* Green v. Serv. Contract Educ. & Training Trust Fund, 843 F. Supp. 2d 20, 32 (D.D.C. 2012) ("The FCA does not define 'news media,' and courts that have considered the issue have construed the term to include readily accessible websites.").

[51] *Springfield Terminal*, 14 F.3d at 654. Tellingly, courts have expressly disavowed any examination of whether the proffered public disclosures were "reasonably likely to be discovered." United States *ex rel.* Oliver v. Philip Morris USA Inc., 826 F.3d 466, 475 (D.C. Cir. 2016). As the court explained, "[t]his is not the standard. The [memo that was the claimed public disclosure] was in fact actually available on a court-ordered public website. Because they were made available on the website in a civil hearing, they were 'actually' made available in accordance with *Springfield Terminal*'s rationale." *Id.*

[52] *Supra* note 2.

or a little-noticed squib in an industry publication – or a combination of all of those.[53] There is simply no reason to believe that these disclosures come to the attention of any pertinent government official or agency.

For example, the Supreme Court has held that every written disclosure by a federal official in response to a Freedom of Information Act ("FOIA") request constitutes a government report that counts as a public disclosure under the FCA.[54] Whatever the merit of this decision, the notion that every written response to a FOIA request will rise to the attention of appropriate members of the prosecutorial branch (the Department of Justice) or even necessarily come to the attention of top-level members of the affected agency is not consistent with the reality of how the massive bureaucracy of the federal government actually operates. Indeed, even a cursory view of the structure of our government reveals that neither the prosecutorial branch nor the defrauded government entities themselves – generally, a particular department or agency that is tasked with spending or distributing public funds in some fashion – has an institutional inclination to seek out possible frauds.[55]

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[53] *See, e.g.*, Schindler Elevator Corp. v. United States *ex rel.* Kirk, 563 U.S. 401, 416 (2011) (holding that a written response to a Freedom of Information Act request constitutes a government report for purposes of the FCA); United States *ex rel.* Gross v. AIDS Research All.–Chi., 415 F.3d 601, 606 (7th Cir. 2005) (publicly disclosed when they appeared in a warning letter from an agency); *United States ex rel. Mistick v. Hous. Auth. of the City of Pittsburgh*, 186 F.3d 376, 383 (3rd Cir. 1999) (information disclosed in response to FOIA request constitutes public disclosure under FCA); *Oliver*, 101 F. Supp. 3d at 124 (D.D.C. 2015) ("By providing information, the webpages at issue fall within the plain meaning of the word 'report.'"); *see also* United States *ex rel.* Conrad v. Abbott Labs., *Inc.*, 2013 U.S. Dist. LEXIS 26048, at *18–21 (D. Mass. Feb. 25, 2013) (holding that files with "thousands of lines of unadorned data" published online by a government agency were administrative reports); United States *ex rel.* Colquitt v. Abbott Labs., 864 F. Supp. 2d 499, 518 (N.D. Tex. 2012) (holding that descriptions of new medical devices published by the FDA were administrative reports even though they were authored by the device manufacturers); United States *ex rel.* Rosner v. WB/Stellar IP Owner, L.L.C., 739 F. Supp. 2d 396, 407 (S.D.N.Y. 2010) (technical database on the DOF website is an administrative report). One limitation actually stemmed from Congress, overruling a contrary Supreme Court interpretation. *Graham County* found that a state administrative report could trigger the PDB, 559 U.S. at 295, but this holding has been superseded by statutory amendment. The PDB now clearly provides that only federal reports can implicate the PDB. *See* Patient Protection and Affordable Care Act, Pub. L. No. 111–148, 124 Stat. 119 (2010) (amending 31 U.S.C. § 3730(e)(4)(A)(i) to provide that "a congressional, Government Accountability Office, or other *Federal* report, hearing, audit, or investigation" can implicate the PDB) (emphasis added). Interestingly, some state or local false claims statutes have attempted to address these concerns by limiting the extent to which news media disclosures can bar *qui tam* actions. *See e.g.*, N.Y. State. Fin. Law § 190(9)(b)(iii) (barring actions publicly disclosed "in the news media, provided that such allegations or transactions are not "publicly disclosed" in the "news media" merely because information of allegations or transactions have been posted on the internet or on a computer network"); Phila. Mun. Code § 19-3603(3)(c) (barring actions "[d]erived from ... allegations or transactions disclosed by the news media and likely to be seen by the City officials responsible for addressing false claims"); N.Y.C. Admin. Code § 7-804(d)(3) (same).

[54] *Schindler Elevator*, 563 U.S. 401 at 407 n.4 (holding that a "written response to a [FOIA request] constitutes a 'report' within the meaning of the public disclosure bar.").

[55] While one might reasonably contend that the Offices of the Inspector General ("OIG"), and perhaps the Government Accountability Office ("GAO"), are tasked with such responsibility at the federal level, there are severe limitations of those agencies. Among other issues, the focus of the OIGs is often on internal government corruption; there is a limit to the funding available; and there are quite astounding instances of OIG or GAO reports that dramatically spotlight dubious practices among government contractors or others doing business with the government, but there is little or no follow up by prosecutors (or regulators). *Compare* Medicare Payments for Claims with Identification Numbers of Dead Doctors, 110th Cong. 12 (July 9, 2008) (testimony of Robert A. Vito, Regional Inspector General for Evaluation and Inspections) *with* Improvements Needed To Ensure Provider Enumeration And Medicare Enrollment

Another judicial misstep that stems from the trail of fraud and its progeny is a blurring of the distinction between the government having sufficient information to warrant further *investigation* versus the quantum of information that the government would need to actually commence *litigation*. Although the PDB is not intended to ascertain either of those endpoints, there is no doubt that the "golden means" that Congress attempted to achieve has usefulness of *qui tam* actions to the government as one of its balance points – with the other being avoiding opportunistic relators siphoning off part of the government's recovery without contributing non-public information. The "trail of fraud" simply leads to confusion for courts trying to apply the PDB in a manner that effectuates its purpose.

In essence, the "trail of fraud" analysis operates in many respects as a loose inquiry notice or constructive notice standard. It examines whether the publicly disclosed information was sufficient to warrant further investigation or to allow the government to actually commence litigation, without asking whether the government knew about the public disclosure in the first instance. An inquiry notice standard is only meaningful if the government has knowledge of the information that did or should have led it to discovering the fraud if it undertook further investigation. Put differently, it is not useful to inquire whether information should have triggered a government investigation if the government did not have the information.

In any case, the evaluation of whether there has been mere inquiry notice of potential fraud, in the sense of information that might suffice as notice for statute of limitations purposes, is a far cry from the statutory language of actual disclosure of allegations and transactions of fraud. But the "trail of fraud" has frequently led to courts stating the inquiry as an "either/or" proposition, holding that the government has been set on the "trail of fraud" so long as the public disclosures were sufficient to warrant further

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Data Are Accurate, Complete, And Consistent, OEI-07-09-00440 (May 2013) study again finding billing through provider numbers of deceased physicians). *See generally* Enforcing America's Trade Laws In The Face Of Customs Fraud And Duty Evasion, 112th Cong. 112–406 (2011), *available at* https://www.finance.senate.gov/imo/media/doc/74204.pdf (referring to statement by Commissioner of Customs and Border Patrol that antidumping and countervailing duty enforcement was "incomprehensible and disgraceful"); Antidumping And Countervailing Duties: CBP Action Needed to Reduce Duty Processing Errors and Mitigate Nonpayment Risk, GAO-16-542, (Jul 14, 2016), *available at* http://www.gao.gov/assets/680/678419.pdf; Antidumping And Countervailing Duties: CBP Action Needed to Reduce Duty Processing Errors and Mitigate Nonpayment Risk, GAO-16-542: Published: Jul 14, 2016 ("GAO estimates that about $2.3 billion in antidumping (AD) and countervailing (CV) duties owed to the U.S. government were uncollected as of mid-May 2015, based on its analysis of AD/CV duty bills for goods entering the United States in fiscal years 2001–2014. U.S. Customs and Border Protection (CBP) reported that it does not expect to collect most of that debt."). Notwithstanding these limitations, however, it is the authors' personal opinion that a subject that has been comprehensively addressed by an OIG or GAO report or series of reports might reasonably be put into the little-noticed provision of the FCA that limits whistleblower's recovery where the primary information was already in the public domain. 31 U.S.C. § 3730(d)(1) (2016). In a classic "over and under-inclusive" conundrum, however, whistleblowers get to argue that an OIG report is not a disabling public disclosure because the individual offenders are almost never identified, yet obviously the government investigation that undergirds the OIG report might well have identified the wrongdoers in great detail for the government.

investigation *or* to have given the government sufficient information to commence litigation.[56] Even if this inquiry avoids being a reincarnation of the old government knowledge bar, in that the "trail" appropriately starts from public disclosures, not the government's internal knowledge, the "trail" then juts in an inappropriate direction by finding that those public disclosures terminate a *qui tam* suit if the public information leads to a conclusion that is sufficient to constitute mere inquiry notice.

This does not follow the straightforward language of the PDB or serve its statutory intent. Linguistically, the PDB's reference to allegations or transactions does not suggest an inquiry notice standard. In terms of the intent of achieving the ideal balance, information that might put the government on the "trail of fraud" does not establish that the government would not benefit from particularized information from a relator. This is particularly true if the courts persist in holding that the "trail" has been illuminated for the government simply by virtue of the public disclosures providing mere inquiry notice sufficient to warrant further investigation. Why cut off a valuable source of specific information simply because the government might, if it thought to begin an investigation, uncover some of the same facts?

One possible solution would be to use the "trail of fraud" language with a more defined endpoint. In other words, rather than finding that the amorphous "trail of fraud" kills a *qui tam* case under some quasi-notice standard, courts would consider whether the "trail" that commenced from the publicly disclosed facts was sufficient to lead the government to the allegations made in the filed complaint, not merely sufficient to possibly warrant further investigation. Under these circumstances, there is a substantially stronger basis to presume that the government had knowledge of the fraud and elected not to proceed, (*i.e.* that the government has no need for a relator to vindicate its interests). As discussed above, while the government's knowledge of fraud is not the test with respect to application of the PDB, the PDB attempts to balance the competing concerns of encouraging meritorious relators while discouraging merely opportunistic relators who attempt to piggyback off of publicly-disclosed information. Determining whether the publicly-disclosed information should have led the government to the allegations made by a relator would better serve this interest than simply speculating as to whether the publicly-disclosed information – known or unknown to the government–could potentially have spurred a government investigation.

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[56] This stems straight from *Springfield Terminal*, which relied upon *Cannon* and *Pettis* for the following articulation of the standard: "whether the information conveyed [to the government] could have formed the basis for a governmental decision on prosecution, *or could at least have alerted law-enforcement authorities to the likelihood of wrongdoing*...." 14 F.3d 645, 650 (D.C. Cir. 1994) (*quoting* United States *ex rel.* Joseph v. Cannon, 642 F.2d 1373, 1377 (emphasis added).

III. COURSE CORRECTION: FIXING THE JUDICIAL COMPASS ON ALLEGATIONS AND TRANSACTIONS

The inquiry involved in deciding if actual public disclosures were sufficiently connected to a particular case is highly fact-specific and can involve questions such as the specificity of the information concerning a particular defendant; the timing of the information versus the time period at issue in the relator's complaint;[57] the significance of prior proceedings against particular defendants for similar conduct in an earlier time period;[58] the extent to which the disclosed information suggested fraud versus some other issue; or the extent to which disclosures limited to one product or geographical zone are sufficient to bar claims for other products or areas. This Article contends that the "trail of fraud" standard often leads the courts to reach the wrong conclusions in many of these circumstances, and that a straightforward analysis of whether the prior disclosures constituted allegations or transactions of fraud would function more appropriately.

Part of the puzzle for courts addressing public disclosure challenges has been to determine whether the information that was publicly disclosed is sufficiently tied to the allegations made by a whistleblower to warrant a determination that the whistleblower should not be permitted to pursue the claims and is not deserving of a portion of any eventual government recovery.

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[57] *See, e.g.*, United States *ex rel.* Boothe v. Sun Healthcare Grp., Inc., 496 F.3d 1169, 1174 (10th Cir. 2007) ("[W]e reject the contention that a 'time, place, and manner' distinction is sufficient to escape the force of the public disclosure bar"); United States v. SouthernCare, Inc., 2014 WL 4829279, at *4–7 (S.D. Ga. Sept. 29, 2014) (denying motion to dismiss based on public disclosure where allegations concern fraudulent acts involving different patients and explaining: "Defendant's theory would effectively allow any defendant in a FCA case to perpetually commit subsequent FCA violations with impunity so long as it limited its actions to the same general conduct for which it was first sued. Despite their similar legal nature, the material transactions that give rise to Relator's claims are distinct and separate from those revealed by the prior Rice and Romeo actions and subsequent settlement agreement."); United States *ex rel.* Newell v. City of St. Paul, Minn., 2012 WL 2979061, at *5 (D. Minn. July 20, 2012) (finding that allegations in 2012 complaint were "substantially similar" to allegations in three prior lawsuits filed between 1983 and 1994), *aff'd sub nom.*, 728 F.3d 791 (8th Cir. 2013); United States *ex rel.* Rosales v. San Francisco Hous. Auth., 173 F. Supp. 2d 987, 997 (N.D. Cal. 2001) (although specifics of publicly disclosed fraudulent transactions may differ, a publicly disclosed allegation "cannot be reanimated simply by complaining that defendants performed the same fraudulent acts in succeeding years.").

[58] As described by one district court:

> Few courts have addressed the proper application of the FCA's public disclosure provision to allegations of similar fraud perpetrated at different times. To be sure, a complaint that covers only somewhat different time periods than a prior complaint adds little value, particularly where a prior complaint allege[d] a broad scheme encompassing the time and location of the later filed[.] In such circumstances, the prior disclosure reveal[s] the same kind of fraudulent activity against the government as the later-filed complaint and is sufficient to put the government on notice of the likelihood of related fraudulent activity, and the public disclosure provision properly applies to bar the complaint.

United States *ex rel.* Booker v. Pfizer, Inc., 9 F. Supp. 3d 34, 44-45 (D. Mass. 2014) (internal quotation marks and citations omitted) (noting alternative analysis under original source analysis: "by disclosing fraud during an entirely different time frame, the Fifth Amended Complaint does reflect knowledge of the Relators that is 'independent of and materially adds' to the prior public disclosures of off-label Geodon promotions"); United States v. N. Am. Health Care, Inc., 173 F. Supp. 3d 943, 951 (N.D. Cal. 2016) ("Where the allegations are simply that the same fraud previously disclosed is ongoing, those allegations will be barred.").

Ascertaining initially what was disclosed – specifically, whether allegations or transactions of fraud, or an actual allegation of fraud, were publicly disclosed – focuses on the ostensible public disclosures themselves, both the content and the means of the disclosures. The question whether those disclosures are substantially similar to the whistleblower's claims entails a shift in focus to the filed complaint.

In essence, this is the analysis that is supposed to be performed under the "based upon" or "substantially similar" prong of the public disclosure evaluation – ascertaining whether the complaint is sufficiently related to the information that was previously disclosed.[59] Under a common sense understanding of the concept of substantial similarity, prior disclosures that only set the government on the "trail of fraud" can often lack substantial similarity to the quantum, depth, and specificity of information that must support an FCA complaint. At a minimum, to realistically evaluate whether certain disclosures were substantially similar to the allegations made in a complaint, the courts should abandon looking at the public disclosure to assess whether it could have set the government on the "trail of fraud" or provided inquiry notice to perhaps warrant further investigation, in some generic sense, and instead jump straight to the filed complaint to see if the "trail" actually led there. Although perhaps not a perfect fit, it is a fairly safe bet that initial public disclosures will often not have been sufficient to allow the government to commence prosecution.[60] As one court recently explained:

> [T]he SoF [the identified public disclosure document] does not state that any doctor ever submitted a claim to a federal insurer, false or otherwise. On these facts, it would be a fair inference that doctors submitted reimbursement claims to the Government tainted by price manipulation, but I am unaware of any precedent which would allow me to infer the disclosure of a fraudulent transaction that is not specifically "set out" in the qualifying

[59] As discussed above, prior to the amendments to the FCA in 2010, the PDB applied to cases "based upon" publicly disclosed allegations or transactions. Courts had different views of what "based upon" meant. The minority view was whether the relator had in fact based her complaint on the publicly disclosed information or perhaps had come across the information in a different fashion, while the prevailing view was whether the information was substantially similar to that contained in the complaint. *See supra* note 34. With the 2010 amendments, Congress sided with the courts that had interpreted "based upon" as meaning substantially similar, and that language was substituted into the statute. 31 U.S.C. § 3730(e)(4)(A) (2012) ("The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed."). Accordingly, this Article focuses on evaluating the PDB under the "substantially the same" standard, although practitioners should be careful in determining which standard applies to claims related to conduct that predates the 2010 amendments.

[60] *See supra* note 56. Where one articulation of the trail of fraud is whether it could have allowed the government to form a decision whether to commence a prosecution. Given the specificity that is required to support that decision, there would normally be a substantial similarity between what was contained in public disclosures and what supports a relator's complaint if that prosecutorial decision could have been made. *See id.*

document.[61]

Accordingly, rather than using the innately ambiguous assessment of whether the alleged public disclosures "*might have*" "*set*" the government on the "*trail*" of fraud, it would be a far more meaningful analysis to examine, as the plain language of the statue commands, whether the potentially disabling public disclosures in fact disclosed allegations or transactions of fraud, or made actual allegations of fraudulent conduct. Where those disclosures are in the public domain, the concern about rewarding an opportunistic relator is appropriate. Notably, the court in *Springfield Terminal* itself focused on whether the disclosed information constituted allegations or transactions of fraud, and set out a workable standard for what was sufficiently specific to constitute allegations or transitions. The court explained as follows:

> In dismissing Springfield's suit, the district court assumed without analysis that the pay vouchers and telephone records disclosed during discovery constituted "allegations or transactions" within the meaning of the jurisdictional bar. We disagree with that assumption. As the Ninth Circuit recently recognized, "Courts sometimes speak loosely of barring a qui tam suit because it is based on 'publicly disclosed information.' But the Act bars suits based on publicly disclosed 'allegations or transactions,' not information." We too find a distinction between "allegations or transactions" and ordinary "information" as a matter of common usage and sound interpretation of the FCA. The pay vouchers and telephone records disclosed during discovery – the only public information considered by the district court – were not in and of themselves sufficient to constitute "allegations or transactions" of fraudulent conduct within the meaning of the FCA jurisdictional bar . . . [I]in common parlance, the term "allegation" connotes a conclusory statement implying the existence of provable supporting facts. The term "transaction" suggests an exchange between two parties or things that reciprocally affect or influence one another.[62]

Ironically, the progenitor of the "trail of fraud" language that so many other courts have adopted was well aware that the determination of whether the public information was sufficient required a demanding standard based on the actual language in the statutory PDB, (*i.e.* whether "substantially the same

[61] United States *ex rel.* Gohil v. Sanofi-Aventis U.S. Inc., 96 F. Supp 3d 504, 514 (E.D. Pa. 2015).

[62] United States *ex. rel.* Springfield Terminal Ry v. Quinn, 14 F.3d 645, 653–54 (*quoting* Wang v. FMC Corp., 975 F.2d 1412, 1418 (9th Cir. 1992)) (some internal citations omitted).

allegations or transactions as alleged in the action or claim were publicly disclosed" in a statutorily-enumerated source or sources).[63]

Springfield Terminal's reference to "trail of fraud" was premised upon that understanding, but later courts were less careful in lifting the "trail of fraud" language from *Springfield Terminal* and simply ignoring the high predicate for the determination of whether "substantially the same allegations or transactions" had, in fact, been publicly disclosed. For example, in United States ex rel. Fine v. Sandia Corporation,64 the Tenth Circuit concluded that "[b]ecause the GAO report and the congressional hearing set the government squarely on the trail of the alleged fraud without [the relator's] assistance, we believe it would be contrary to the purposes of the FCA to exercise jurisdiction over his claim."[65] The *Sandia* court paid lip service to the statutory requirement of transactions or allegations, but held that allegations could disqualify a *qui tam* suit even if they were allegations of another type of wrongdoing that didn't identify the wrongdoer, or even if the disclosure merely set out material elements of a fraudulent transaction without alleging any wrongdoing and still without identifying a wrongdoer.[66]

Significantly, if the statutory language were more directly applied, and not distorted by the "trail of fraud" standard, many of the difficult issues that stymie courts today could be clarified. For example, one of the difficult questions that courts deal with is whether prior disclosures of a particular type of fraud, without identification of a specific wrongdoer, should bar a current relator from pursuing a suit. Courts have fashioned several different standards for that situation, ranging from requiring that the public disclosure identify a specific defendant, to attempting to ascertain whether the public disclosure pointed to a small enough group of actors as to disclose fraud by one or all of them, or even looking to see whether a public disclosure that pointed at the occurrence of fraud in a particular industry was pointing at a small enough group.[67]

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[63] 31 U.S.C. § 3730(4)(A) (2012).

[64] 70 F.3d 568, 571 (10th Cir. 1995).

[65] *Id.* Interestingly, although the *Sandia* court cited *United States ex rel. Rabushka v. Crane Co.* for the proposition that "*qui tam* suits [are] barred by public disclosures which "'set government investigators on the trail of fraud,'" in fact that case concluded that "the information put in the public domain ... did not present so clear or substantial an indication of foul play as to qualify as either an allegation of fraud or a fraudulent transaction." 40 F.3d 1509, 1514 (8th Cir. 1994).

[66] 70 F.3d at 572. Tellingly, the *Sandia* court cited *Springfield Terminal* for the proposition that it would "analyze [the relator's]'s claim in the context of Congress' 'twin goals of rejecting suits which the government is capable of pursuing itself, while promoting those which the government is not equipped to bring on its own.'" *Id.* at 571 (*citing Springfield Terminal*, 14 F.3d at 651).

[67] *See, e.g.*, United States *ex rel.* Jamison v. McKesson Corp., 649 F.3d 322, 330 (5th Cir. 2011) (general allegations of fraud in a large industry will not necessarily bar subsequent, specific fraud claims against a particular defendant); United States *ex rel.* Baltazar v. Warden, 635 F.3d 866, 868 (7th Cir. 2011) ("As far as we can tell, no court of appeals supports the view that a report documenting widespread false claims, but not attributing them to anyone in particular, blocks *qui tam* litigation against every member of the entire industry."); United States *ex rel.* Found. Aiding the Elderly v. Horizon West, 265 F.3d 1011, 1016 n.5 (9th Cir. 2001) (general allegations of fraud in nursing home industry do not relate to defendant

The plain language of the PDB, untainted by the "trail of fraud" test, strongly suggests that only allegations or transactions that identify a particular wrongdoer would be a bar, except perhaps in limited circumstances where the earlier disclosures clearly pointed to fraud by the current defendant even while not actually naming the entity.[68] Although the Supreme Court has interpreted the phrase "allegations or transactions" in the PDB to suggest a wide-reaching public disclosure bar and there is little case law or even legislative history discussing this phrase,[69] a common sense interpretation of "allegations" and "transactions" suggests the identification of the persons or entities involved. For example, "allegations" suggests that there must have been allegations against someone. Certainly, "transactions" connotes specific events with specific players.[70]

In terms of the balance between encouraging private relators while discouraging mere hangers-on, there is every reason to believe that a fairly bright line between prior disclosures that identify specific defendants and those that do not, will provide sufficient protection against opportunistic relators. One of the concerns articulated by those in favor of a broad PDB, which would derail *qui tam* suits once a type of fraud has been identified in a particular industry even if specific wrongdoers are not identified, is that opportunistic but otherwise uninformed relators could, for example, merely

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or any of its facilities, and therefore do not trigger jurisdictional bar), *opinion amended on other grounds on denial of reh'g* 275 F.3d 1189 (9th Cir. 2001); United States. *ex rel.* Kester v. Novartis Pharm. Corp., 43 F. Supp. 3d 332, 347 (S.D.N.Y. 2014) ("In other words, the public disclosures must "set the government squarely on the trail" of a *specific defendant's* participation in the fraud.") (emphasis added); Amicus Brief of the United States in Baltazar v. Warden, 2010 WL 4621545 (7th Cir. 2010).

[I]n larger markets that are not amenable to participant-by-participant scrutiny, such disclosures cannot narrow the government's investigative field so as to set the government squarely upon the trail of the alleged fraud. Suggestions of broad-based misconduct cannot identify a particular allegation or transaction in a market with 50,000 participants and 20 million transactions annually; in such a setting, relators play an essential role in identifying fraud for the government. The district court's suggestion that the disclosures in this suit could adequately identify any fraud to the United States, without a relator's participation, blinks reality. (internal quotation marks and citation omitted). *Cf.* United States *ex rel.* Silver v. Omnicare, Inc., 2016 WL 6997010, at *3 (D.N.J. Nov. 28, 2016) (where public disclosures discussed possible wrongdoing by long term care pharmacies, and there are three that dominate the market, the disclosure was sufficient to bar the relator's action).

[68] This might occur, for example, where a public disclosure references a particular drug or product as being involved in fraudulent claims, but the sole manufacturer of the product is not named. *See, e.g.,* United States *ex rel.* Lisitza v. Johnson & Johnson, 765 F. Supp. 2d 112, 122 n.15 (D. Mass. 2011) ("[F]or purposes of prior disclosure, specifying a formulaic drug as part of a kickback scheme is synonymous with naming the company that produces it."). Parent and subsidiary companies, or possibly successor entities, could be other examples where a specific company is not named, but its identity is clearly broadcast.

[69] Schindler Elevator Corp. v. United States *ex rel.* Kirk, 563 U.S. 401, 408 (2011) ("The phrase 'allegations or transactions' in § 3730(e)(4)(A) additionally suggests a wide-reaching public disclosure bar. Congress covered not only the disclosure of 'allegations' but also 'transactions,' a term that courts have recognized as having a broad meaning."); *see also* Moore v. New York Cotton Exch., 270 U.S. 593, 610 (1926) ("'Transaction' is a word of flexible meaning"); Hamilton v. United Healthcare of La., Inc., 310 F.3d 385, 391 (5th Cir. 2002) ("[T]he ordinary meaning of the term 'transaction' is a broad reference to many different types of business dealings between parties.").

[70] *See, e.g.,* United States *ex. rel.* Springfield Terminal Ry v. Quinn, 14 F.3d 645, 653–54 (explaining that an "allegation" is a "conclusory statement implying the existence of provable supporting facts," while a "transaction" is "an exchange between two parties or things that reciprocally affect or influence one another").

serve FOIA requests on the government and then march to the courthouse with the benefit of information that really emanated from the government.[71] To whatever extent this concern might have been legitimate at some point in time, it has been put to bed by the Supreme Court's determination that FOIA responses are considered disabling public disclosures. Since FOIA responses are considered public disclosures, potential whistleblowers who are only able to identify particular defendants by virtue of information provided by the government, cannot survive a public disclosure challenge and there seems little reason to believe that parasitic relators with no information of their own will be able to rip off a share of a government recovery. Hence, even the Supreme Court's concern that "anyone" could target FCA defendants simply by filing FOIA requests has already been mooted by making those FOIA responses public disclosures.

Similarly, where actual lawsuits were brought against certain companies, how would those constitute disclosures of allegations or transactions by a different defendant, again, with the possible caveat that some initial lawsuits against limited numbers of wrongdoers might be tantamount to allegations of fraud against similarly-situated entities? Just as a search and rescue dog is set by its handler on the trail of a missing person, the person does not get found without the input from the dog. Knowing where a "trail" begins will not, in many instances, lead the government to a particular wrongdoer, let alone all of the actual wrongdoers. Allowing the PDB to drop on would-be relators under the notice-type standard that is implicit in the "trail of fraud" language leads to a poor balance of the competing public interests.

A. A Straightforward Application of an "Allegations and Transactions" Standard Would Both Encourage Meritorious Relators and Adequately Stop Parasitic Relators, Particularly Given the Other Impediments to Recovery

As discussed above, one of the primary objectives of the PDB overall is to avoid forcing the government to share part of its recovery in an FCA action with a relator who simply piggy-backed on public information.[72] Notably, in terms of striking the best balance between preventing parasitic relators who should not be entitled to a piece of the government's recovery and encouraging knowledgeable people to step forward, the FCA already has

[71] *Schindler Elevator Corp.*, 563 U.S. at 413 ("Although Kirk alleges that he became suspicious from his own experiences as a veteran working at Schindler, anyone could have filed the same FOIA requests and then filed the same suit. Similarly, anyone could identify a few regulatory filing and certification requirements, submit FOIA requests until he discovers a federal contractor who is out of compliance, and potentially reap a windfall in a *qui tam* action under the FCA."); United States *ex rel.* Herbert v. Nat'l Acad. of Scis., 1992 U.S. Dist. Lexis 14063, at *16 D.D.C. Sept. 15, 1992) ("[I]t must be the case that information obtained pursuant to an FOIA request has been made public through the 'administrative' process and cannot form the basis of a *qui tam* action. If that were not the case then, like court records, public agency records would be flooded with citizens requesting information in order to bring *qui tam* suits. Congress did not intend the *qui tam* provision to transform FOIA from sunshine legislation into a search for the pot of gold at the end of the rainbow.").

[72] *Supra* note 16 and accompanying text.

numerous other safeguards against frivolous or undeserving relators. Accordingly, beyond the reality that applying the PDB through the lens of the "trail of fraud" is divorced from the statutory language and inconsistent with Congress's intent in replacing the government knowledge bar, it is simply unnecessary to serve the principal purpose of the PDB.

Interestingly, although the balance set out by the Supreme Court in *United States ex rel. Marcus v. Hess* was rather quickly reformulated by Congress with the 1943 government knowledge bar, the Court looked in part at the substantial risk that the *qui tam* plaintiff assumed when the Court held that even the copying of a criminal indictment was a sufficient basis for a private *qui tam* case – at a time when a private relator was entitled to half of the government's recovery.[73] The notion of balancing the societal interests in discouraging or remedying government fraud against the outcome for relators is a process that has persisted through all of the permutations of the *qui tam* provisions. In addition to efforts to contain the ability of a relator to share in the government's monetary recovery, courts have addressed the possible negative consequences stemming from being a whistleblower as part of the analysis of the relator side of the balance also.

There are various mechanisms built into the FCA to provide protection to the government and to dissuade unworthy relators from pursuing claims. For example, the first-to-file provision precludes relators from filing lawsuits that are "based on the facts underlying" a pending FCA lawsuit.[74] Given that FCA lawsuits remain under seal for a substantial period of time – and thus, relators have no way of knowing whether an earlier lawsuit based on similar misconduct was filed – there is a meaningful risk that a relator will lose out of his or her ability to pursue legitimate claims.[75]

Additionally, courts strictly apply Rule 9(b)'s heightened pleading standard – requiring that the underlying fraud be pled with particularity – to

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[73] 317 U.S. 537, 545–46 (1943) (noting that the government's "recovery was obtained at the risk of a considerable loss to the petitioner since s[ection] 3491 explicitly provides that the informer must bear the risk of having to pay the full cost of the litigation").

[74] 31 U.S.C. § 3730(b)(5) (2012) ("When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action."). Some courts have said that the first-to-file provision also directly protects against parasitic claims. *See, e.g.*, United States *ex rel.* Nowak v. Medtronic, Inc., 806 F. Supp. 2d 310, 334 (D. Mass. 2011) (explaining that the first-to-file provision "serves the dual purpose of preventing parasitic claims based on allegations already available to the government and of avoiding duplicative suits."). The FCA also contains a lesser utilized provision known as the government action bar, which provides that "[i]n no event may a person bring an action . . . which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party." 31 U.S.C. § 3730(e)(3). The government action bar serves as yet another barrier on a relator's pursuit of FCA claims.

[75] 31 U.S.C. § 3730(b)(2)-(3) (2012) (providing that a relator must file an FCA case under seal, that the complaint shall remainder under seal for 60 days, and that the government may request extensions of the 60 day seal period for good cause).

FCA actions.[76] The extent of detail required to sustain an FCA action past the motion to dismiss stage is generally very high, allowing little reason to think that anyone could just piggyback on some generalized government report or media coverage.[77] Some courts have noted that the particularity requirement under Rule 9(b) helps weed out parasitic relators.[78]

A further limitation provides for a possible compromise in those gray areas where there was a lot of information already in the public domain, and even known to the government, but where an individual can provide inside information to nail additional offenders. The FCA provides that a *qui tam* relator retains a portion of any recovery made under an FCA lawsuit, known as a relator's share.[79] If the government intervenes in an action, the relator's share is between fifteen and twenty percent of the recovery.[80] However, the FCA contains a special limitation on a relator's share that essentially tracks the language of the PDB:

> Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than [ten] percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation.[81]

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[76] Fed. R. Civ. P. 9(b). *See, e.g.*, United States *ex rel.* Grubbs v. Ravikumar Kanneganti, 565 F.3d 180, 185 (5th Cir. 2009) (explaining that Rule 9(b)'s heightened pleading standard applies to FCA cases); United States *ex rel.* Clausen v. Lab. Corp. of Am., 290 F.3d 1301, 1309 (11th Cir. 2002).

[77] *See, e.g.*, United States *ex rel.* Karvelas v. Melrose–Wakefield Hosp., 360 F.3d 220, 232–33 (1st Cir. 2004) ("As applied to the FCA, Rule 9(b)'s requirement that averments of fraud be stated with particularity—specifying the 'time, place, and content' of the alleged false or fraudulent representations, means that a relator must provide details that identify particular false claims for payment that were submitted to the government. 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.") (footnote omitted); Ping Chen *ex rel.* United States v. EMSL Analytical, Inc., 966 F. Supp. 2d 282, 301 (S.D.N.Y. 2013) ("allegations of violations of federal regulations are insufficient to establish a claim under the FCA if plaintiff cannot identify, with any particularity, the actual false claims submitted by the defendant.").

[78] *See, e.g.*, United States *ex rel.* Ge v. Takeda Pharm. Co., Ltd., 737 F.3d 116, 123 (1st Cir. 2013) (observing that Rule 9(b)'s particularity requirement is designed to ward off "parasitic relators who bring FCA damages claims based on information within the public domain or that the relator did not otherwise discover") (internal quotation marks omitted).

[79] 31 U.S.C. § 3730(d)(1) (2012).

[80] *Id.*

[81] *Id.*

This provision is designed for circumstances where a relator qualifies as an original source (so as to avoid application of the public disclosure bar and dismissal of his or her claims) but where the claims were still primarily based on publicly disclosed information.[82] This limitation serves as a further disincentive from relators pursuing FCA claims based on publicly-disclosed information.

Relators also expose themselves to significant legal and financial risk. Commentators have noted a growing trend toward companies asserting counterclaims against *qui tam* plaintiffs, including for breach of confidentiality agreements in employment contracts for acquiring documents to be used in connection with the pursuit of FCA claims[83] although, hopefully some enhanced statutory protections[84] and recent agency actions designed to prevent companies from requiring employees to waive their rights and agree to confidentiality will reverse that trend.[85] A potential whistleblower must also be aware that the FCA permits defendants to recover certain costs and

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[82] United States *ex rel.* Merena v. SmithKline Beecham Corp., 205 F.3d 97, 105 (3d Cir. 2000) ("The lesser range (up to 10% of the proceeds) is provided for the (presumably unusual) cases in which an 'original source' relator asserts a claim that is 'primarily based' on information that has been publicly disclosed and that the relator did not provide."); *cf.* United States *ex rel.* S. Prawer & Co. v. Fleet Bank of Maine, 63 F. Supp. 2d 59, 60 (D. Me. 1998) (rejecting the government's argument that 10% provision applied because the relator obtained documents through discovery in an earlier lawsuit given that the discovery documents were never publicly disclosed). At least one court has found the word "primarily" in this provision important in determining whether it applies. United States *ex rel.* Eitel v. Reagan, 35 F. Supp. 2d 1151, 1159 (D. Ariz. 1998) ("If the United States proceeds with the action then the award to the relator is less because the government's effort and expense is greater and the relator's contribution is less, and when a case is based *primarily* on publicly disclosed information the relator's contribution is even less significant, and the available award reflects that.") (emphasis in original), *aff'd sub nom.* Eitel v. United States, 242 F.3d 381 (9th Cir. 2000).

[83] *See, e.g.*, Scott R. Grubman et al., *Fighting Back: Asserting Counterclaims Against False Claims Act Relators*, 27 HEALTH LAWYER 4, 14 (2015) ("Until recently, FCA Relators seldom, if ever, faced repercussions for taking and sharing what might otherwise be considered proprietary and confidential information to support their *qui tam* complaint. Recently, however, as more FCA cases work their way through litigation (particularly where the government declines to intervene and the Relator is left to pursue the case on behalf of the government), healthcare providers and their attorneys have become more willing to assert counterclaims against FCA Relators who appropriate confidential information to support an FCA *qui tam*.").

[84] *See, e.g.*, Defend Trade Secrets Act of 2016, Pub. L. No. 114-153, 130 Stat. 376 (2016) (amending 18 U.S.C. § 1833(b) and providing immunity from civil and criminal liability for individuals who disclose a trade secret either to a government official or attorney in confidence to report a violation of law, or in a legal complaint filed under seal); An Act to enhance whistleblower protection for contractor and grantee employees, Pub. L. No. 114-261, 130 Stat. 1362 (2016) (extending protections from retaliation for employees of federal contractors, subcontractors, grantees, and sub-grantees who report a host of problems relating to federal contracts and funds); *see also* Press Release, Off. of Reps. Rice, Coffman, Speier and Blum Create House Whistleblower Protection Caucus, *Bipartisan collation will be dedicated to protecting whistleblowers' rights and combating whistleblower retaliation* (Apr. 26, 2016), *available at https://kathleenrice.house.gov/news/documentsingle.aspx?DocumentID=306* (House Whistleblower Protection Caucus "will work to build bipartisan support for strong whistleblower protections [and] raise awareness about retaliation against whistleblowers.").

[85] *See, e.g.*, 15 U.S.C. § 78u-6 (2012) (the statutory basis for the whistleblower program of the Securities & Exchange Commission); *see also* Stephen Hinton, *SEC Fines Companies for Anti-Whistleblower Language in Severance Agreements*, BRADLEY (Aug. 18, 2016), https://www.bradley.com/insights/publications/2016/08/sec-fines-companies-for-antiwhistleblower-language-in-severance-agreements.

fees from the relator in some instances.[86]

But the most substantial obstacle for many relators, many of whom are insiders who wish to continue working in their chosen industry, is the almost inevitable retaliation they will face for pursuing FCA claims. Retaliation is nearly a certainty for current employees. While the FCA creates a cause of action for retaliation,[87] the availability of a lawsuit for damages is by no means a strong deterrent to such conduct nor a reliably effective remedy. As described in a recent brief filed on behalf of a relator seeking his statutory relator share: "In return for his efforts in reporting matters internally to GE and even to federal DCMA inspectors, which was then followed by this suit, Mr. Adler's career has been ruined. He has been harassed, demoted, humiliated, constructively discharged, and sued by GE. GE even terminated his wife."[88] Even with the possibility of an eventual recovery by way of a retaliation claim, these consequences already discourage many would-be relators.[89] As the Supreme Court understood even back in the time of *Marcus* in 1943, the risks or disincentives for whistleblowers to pursue cases for the government should affect how high the barriers are placed against them being permitted to share in the government's recovery.[90]

As responsible *qui tam* lawyers inform potential whistleblowers, having a legal right to sue for retaliation does not necessarily provide reliable protection against a loss of salary or career opportunities and, of course, that right to sue does not pay the mortgage on an ongoing basis. Consequences to whistleblowers are often harsh, and the government routinely declines to keep their identities sealed even if a case is declined by the government and the relator determines not to pursue the case on her own.[91] Sometimes the relator's identity is publicized in the media – for declined cases that the relator has decided not to pursue – leaving only negative consequences for the

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[86] 31 U.S.C. § 3730(d)(4) (2012) ("If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment."); *see, e.g., In re* Nat. Gas Royalties Qui Tam Litig., 845 F.3d 1010, 1013 (10th Cir. 2017) (affirming district court's award of fees to defendants under § 3730(d)(4)).

[87] 31 U.S.C. § 3730(h).

[88] Relator Jeffrey W. Adler's Reply in Support of Motion to Determine 31 U.S.C. § 3730(d)(1) Relator's Share of Proceeds in United States of America *ex rel.* Jeffrey W. Adler v. GE Aviation Systems LLC, 2013 WL 3564439 (S.D. Ohio June 27, 2013).

[89] *See* Enhancing Whistleblower Protection for Contractor and Grantee Employees, 114 CONG. REC. H7147-7149 (Dec. 5, 2016), https://www.congress.gov/congressional-record/2016/12/5/house-section/article/h7147-5?r=6 (Statement of Rep. Cummings) (For example, Representative Elijah Cummings recently remarked: "Employees who work on Federal contracts and grants see firsthand when taxpayer money is being wasted. They risk their careers to challenge abuses of power and mismanagement of government resources. They must be protected against retaliation when they blow the whistle on wrongdoing. Just the other day, we had a witness come before our committee, and it was clear that she was very, very concerned about retaliation to the point of almost being shaken. You could actually see it.").

[90] *See supra* note 73 and accompanying text.

[91] *See, e.g.*, Am. Civil Liberties Union v. Holder, 673 F.3d 245, 257 (4th Cir. 2011) ("[I]n every FCA case, the *qui tam* complaint will be unsealed.").

relator.[92] Even on its face, it is not clear whether the FCA's anti-retaliation provision provides protection against an individual being fired from a subsequent job or blackballed in a particular industry, unable to find work at a suitable level.[93]

In sum, all of these mechanisms and limitations operate much more effectively than the ill-fitting "trail of fraud" test at striking a balance that truly serves the public interest in obtaining recompense from those who defraud the government while avoiding bonanzas for individuals who use public information to file *qui tam* claims. Accordingly, these substantial impediments to people coming forward to file FCA claims need to be considered in deciding how high to set the PDB, particularly where the standard being imposed is not supported by the statutory language.

B. Reorienting the "Trail of Fraud"

With its illogical predicates and its problematic fit as a standard for judging whether the PDB applies so as to preclude a relator from being

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[92] For example, a recent newspaper article provides: "It's not unusual for whistleblowers to fall on hard times, said Fred Alford, a professor of government at the University of Maryland who has written a book on whistleblowers. About half lose their jobs, and of those, many lose their homes, he said. 'When a would-be whistleblower calls me, I tell them: Check your bank account, check your mortgage, check your marriage, check your religion, because all of these will be put under a tremendous strain,' he said. 'You're not just going to blow the whistle and go find another job. It's going to become your life.'" Rick Rothacker, *Wachovia whistleblower now faces foreclosure from Wells Fargo,* CHARLOTTE OBSERVER (Apr. 29, 2015), http://www.charlotteobserver.com/news/business/banking/article19868253.html. *See also* Gretchen Morgenson, *'My Soul Feels Taller': A Whistle-Blower's $20 Million Vindication,* N.Y. TIMES (Nov. 25, 2016) http://www.nytimes.com/2016/11/25/business/my-soul-feels-taller-a-whistle-blowers-20-million-vindication.html (after being fired for reporting illegal practices, whistleblower started drinking, broke up from a long-term relationship, and couldn't find any reasonable employment).

[93] Under both the prior version of the anti-retaliation provision and following the 2010 amendment, courts have reached different decisions as to whether an employer could be liable for retaliation in a situation where the employee's conduct involved reports of wrongdoing by another entity. *Compare* United States *ex rel.* Sanchez v. Lymphatx, Inc., 596 F.3d 1300, 1304 (11th Cir. 2010) ("If an employee's actions, as alleged in the complaint, are sufficient to support a reasonable conclusion that the employer could have feared being reported to the government for fraud or sued in a *qui tam* action by the employee, then the complaint states a claim for retaliatory discharge under § 3730(h)."), *and* Sefen *ex rel.* United States v. Animas Corp., 2014 WL 2710957, at *9 (E.D. Pa. June 13, 2014) (dismissing plaintiff's retaliation case because he failed to allege any connection to a false claim for payment against his employer), *and* Mann v. Olsten Certified Healthcare Corp., 49 F. Supp. 2d 1307, 1314 (M.D. Ala. 1999) ("Whether the employee engaged in conduct from which a factfinder could reasonably conclude that the employer could have feared that the employee was contemplating filing a *qui-tam* action against it or reporting the employer to the government for fraud"), *with* Townsend v. Bayer Corp., 774 F.3d 446, 459 (8th Cir. 2014) (retaliating employer need not be accused of or involved in fraud for purposes of facing liability under § 3730(h)(1)), *and* Cestra v. Mylan, Inc., 2015 WL 2455420, at *13 (W.D. Pa. May 22, 2015) (report and recommendation) ("Contrary to Defendants assertion, § 3730(h)(1) does not provide that a plaintiff will only be covered by this provision if the terminating employer either (a) violated the FCA or (b) had a close relationship with or was influenced by the target of the investigation."), *and* United States *ex rel.* Lang v. Nw. Univ., 2005 WL 670612, at *4 (N.D. Ill. Mar. 22, 2005) ("statute ... contains no language requiring proof that the retaliation was for protected activity involving a false claim by that same employer."), *and* Nguyen v. City of Cleveland, 121 F. Supp. 2d 643, 649 (N.D. Ohio 2000) (finding the FCA's retaliation provision "reaches an employer who discriminates against an employee" for reporting the false claims of a customer). *See also* United States *ex. rel.* Bias v. Tangipahoa Parish Sch. Bd., 816 F.3d 315, 322 (5th Cir. 2016) (upholding claim against school board participating in Marine Jr. ROTC program where school board's harassment and unfounded complaints led US Marine Corps to take adverse employment action against officer).

permitted to proceed with an FCA case, the "trail of fraud" language should be dropped from public disclosure jurisprudence or at least significantly reinvented. Since there is nothing in the text of the FCA to support – let alone mandate – the "trail of fraud" inquiry, the course correction can be accomplished by courts rejecting that misguided language and instead relying on the plain language of the PDB to determine "if substantially the same allegations or transactions" of the fraud were publicly disclosed in one or more statutorily enumerated sources.[94] One encouraging sign, as a careful reader might have noticed at the beginning of this Article, is that the "trail of fraud" language seems to be appearing less frequently in appellate court opinions even while it still appears in a number of district court opinions.[95]

In re-examining the scope of the PDB, one key point would be to clarify an existing ambiguity associated with "trail of fraud" cases – whether we are looking to block relators anytime there is arguably sufficient public information to allow the government to investigate a possible fraud,[96] versus having sufficient public information to commence prosecution against a particular wrongdoer. We need to acknowledge that limitations on government investigative and enforcement resources render private citizen assistance through the provision of specific information invaluable even in circumstances where the government might be on notice of a type of wrongdoing.[97] Stated differently, we need to recognize that there is a vast difference between those two situations that the courts often refer to as if they are interchangeable: (1) "whether the publicly disclosed information could have formed the basis for a governmental decision on prosecution" and (2) whether publicly disclosed information "could at least have alerted law-enforcement authorities to the likelihood of wrongdoing."[98] In fact, there is a

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[94] 31 U.S.C. § 3730(d)(4)(A) (2010).

[95] *Supra* note 2.

[96] *See* United States *ex rel.* Boothe v. Sun Healthcare Grp., Inc., 496 F.3d 1169, 1173 (10th Cir. 2007) ("[O]nce the government knows the essential facts of a fraudulent scheme, it has enough information to discover related frauds, ... and the purpose of *qui tam* litigation is fulfilled.").

[97] *See* United States Gov't *ex rel.* Houck v. Folding Carton Admin. Comm., 1988 WL 74829, at *3–4 (N.D. Ill. Jan. 20, 1988) ("Congress proceeded under the realistic assessment that the government might not have the resources necessary to bring an action whenever information at its disposal was capable of forming the basis for a claim.").

[98] United States *ex rel.* Settlemire v. D.C., 198 F.3d 913, 918 (D.C. Cir. 1999) (emphasis added) (*quoting United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 654 (D.C. Cir. 1994)). This loose reference to the two situations as being equivalent for purposes of analysis is commonplace in FCA jurisprudence. *See, e.g.*, United States *ex rel.* Davis v. D.C., 679 F.3d 832, 836 (D.C. Cir. 2012); United States *ex rel.* Joseph v. Cannon, 642 F.2d 1373, 1377 (D.C. Cir. 1981); United States v. N. Am. Health Care, Inc., 173 F. Supp. 3d 943, 949 (N.D. Cal. 2016) ("Put another way, if the public disclosure 'was sufficient to enable [the government] adequately to investigate the case and to make a decision whether to prosecute,' the bar will apply to subsequent FCA suits based on similar allegations.") (*citing* United States v. N. Am. Health Care, Inc., 173 F. Supp. 3d 943, 949 (N.D. Cal. 2016)); United States *ex rel.* Green v. Serv. Contract Educ. & Training Tr. Fund, 843 F. Supp. 2d 20, 29 (D.D.C. 2012); United States *ex rel.* Kester v. Novartis Pharm. Corp., 43 F. Supp. 3d 332, 347 (S.D.N.Y. 2014); Grayson v. AT & T Corp., 980 A.2d 1137, 1145 (D.C. 2009) (accepting, without distinction, the defendant's argument that "the publicly disclosed information ... gave the government what it needed to investigate and to decide whether to file a complaint against them.") (internal quotation marks omitted), *reh'g en banc*

wide gulf between being put on notice to investigate versus having sufficient information to decide whether to prosecute. Allowing the PDB to tank relator cases where courts find that a public disclosure of an industry practice is sufficient to bar a case against a specific defendant that only a post-disclosure relator has targeted, with specific facts that were not previously in the public domain, is a costly application of the PDB.[99]

One approach to appropriately constrain the "trail of fraud" language could be to draw a rough parallel between the standard required to dismiss a case under the public disclosure bar and the standard required for a party to satisfy the general notice-pleading requirements of Federal Rule of Civil Procedure 8, with an eye toward Rule 11's prohibitions on unsubstantiated or bad faith filings as well.[100] This would mean that prior public disclosures must be sufficient to allow a true parasitic relator to use those disclosures to draft a complaint that would pass muster under Rule 8 and not run afoul of Rule 11.[101] If the publicly available information does not allow a viable and

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granted, opinion vacated, 989 A.2d 709 (D.C. 2010), and on *reh'g en banc*, 15 A.3d 219 (D.C. 2011), *amended* 140 A.3d 1155 (D.C. 2011).

[99] *Supra* notes 67–68 and accompanying text.

[100] Rule 8 provides that a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Rule 11 requires an attorney signing a pleading or other document to certify that "(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law; [and] (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." Fed. R. Civ. P. 11(b)(1)-(3).

[101] Others have also suggested a similar standard. *See e.g.*,. Brief of Amicus Curiae Better Markets, Inc. in Support of Petitioner in United States *ex rel.* Advocates for Basic Legal Equal., Inc., 2016 U.S. S. Ct. Briefs LEXIS 3109, at *15–16 (2016) ("In the end, the Sixth Circuit's 'encompass' rule lacks a limiting principle. . . . Thankfully, a familiar limiting principle is ready at hand, which this Court would do well to adopt: Previous public disclosures bar a qui tam action only where they contain information that, taken as true, suffices to state a claim to relief under the False Claims Act. In other words, if a hypothetical complaint against the same defendant, drawing only on the public disclosures and no independent fact-finding, contains information insufficient to survive a motion to dismiss, those disclosures do not bar a real complaint in 16 which the plaintiff adds material information that does state a claim.") *cert. denied* 137 S. Ct. 2180 (2017). Additionally, at least one commentator has made a similar point about the standard that should be applied under the first-to-file bar, which mandates dismissal of a *qui tam* action if it is based on the same facts as another pending *qui tam* action. Brian D. Howe, *Conflicting Requirements of Notice: The Incorporation of Rule 9 (b) into the False Claims Act's First-to-File Bar*, 113 MICH. L. REV. 559, 568 (2015) ("Although both the First and D.C. Circuits drew a distinction between the FCA notice requirements for the government at the first-to-file stage and for defendants at the pleading stage, the courts failed to provide a satisfactory explanation to account for this difference. Instead of advancing detailed justifications as to why the government does not require the heightened notice of Rule 9(b), the courts summarily asserted that complaints deficient under Rule 9(b) 'may nonetheless provide the government sufficient notice to begin an investigation of an alleged fraudulent scheme.") (*quoting* United States *ex rel.* Heineman-Guta v. Guidant Corp., 718 F.3d 28, 35 (1st Cir. 2013) and United States *ex rel.* Batiste v. SLM Corp., 659 F.3d 1204, 1210 (D.C. Cir. 2011)). KeyCite Yellow Flag - Negative Treatment. It is easier to accept that a mere notice or basic similarity of facts standard should apply under the first-to-file provision of the FCA rather than under the public disclosure provision because of the different position of the federal government in the two situations. In a first-to-file situation, there has already been a *qui tam* case filed, with material evidence in support thereof, under seal and with notice to the appropriate actors within the federal government (the Attorney General and Department of Justice). At that point, the presumption that the government will in fact be investigating those claims is warranted and there is less likelihood that the fraud will simply be missed. Although a first-filed complaint that does not contain sufficient detail may not be as useful as a later case that includes more detail, at least the government has been specifically

ethically permissible complaint to be filed against a specific defendant, then that publicly available information has not allowed an unknowledgeable relator to get away with "stealing" information in the public domain. It is only if the publicly disclosed information could sustain a complaint in the first instance that there should be a concern about free-loading relators.[102] Although the court did not articulate it in this fashion, the Seventh Circuit essentially used this approach where it rejected a public disclosure challenge based on a report that concluded that more than half of chiropractors' claims (in a sample of 400) were for non-covered services and about one-sixth of the claims had been improperly upcoded, (*i.e.* charging for services that were not performed or charging for services that were more expensive than those that were actually performed.)[103] The court's explanation strongly supports the approach being suggested herein:

> The United States could not file suit against a chiropractor, tender copies of the 1987, 2000, and 2005 Reports, and rest its case. The chiropractor would prevail summarily, because these reports do not so much as hint that any particular provider has submitted fraudulent bills. It follows that these reports do not disclose the allegations or transactions on which a suit such as [the relator's] is based.[104]

Even in circumstances where the publicly disclosed information provided sufficient information to sustain a complaint under general federal notice-pleading standards, and thus at least preliminarily triggered the PDB, the ability of a relator to pull the complaint past the more exacting standards of particularity required under Rule 9(b) could allow that relator to survive

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alerted to the potential fraud and has means to investigate further in search of the supporting facts. In the public disclosure arena, by contrast, cases will be dismissed based on any aggregation of facts that were in the public domain despite the fact that the government will often not have had any meaningful notice of the facts that were made public. *See generally* Graham Cty. Soil & Water Conservation Dist. v. United States *ex rel.* Wilson, 559 U.S. 280, 299-300 (2010) (concluding that "'news media' include a large number of local newspapers and radio stations, this category likely describes a multitude of sources that would seldom come to the attention of the Attorney General.").

[102] Given the prohibitions against filings made without a good faith basis, it is hard to see why courts might feel a need to use the public disclosure analysis to avoid this situation described in United States *ex rel.* Jamison v. McKesson Corp., 649 F.3d 322, 332 (5th Cir. 2011) (*"[Q]ui tam* relator could arbitrarily select a large group of defendants in any industry in which public disclosures have revealed significant fraud, in hopes that his allegations will prove true for at least a few defendants. We do not countenance such relator lotteries, which are quintessentially "parasitic suits by opportunistic late-comers who add nothing to the exposure of fraud" and which the public disclosure bar is designed to prevent."). The relator there had named almost 450 defendants, and then refused to reveal his basis for having named any of them, seeming to present clear Rule 11 problems. *Id.*

[103] *See generally* United States *ex rel.* Baltazar v. Warden, 635 F.3d 866 (7th Cir. 2011).

[104] *Id.* at 867. *See also* United States *ex rel.* Scutellaro v. Capitol Supply, Inc., 2017 WL 1422364, at *17 (D.D.C. Apr. 19, 2017) (explaining that in the PDB context, "the driving question is whether the publicly disclosed information could have formed the basis for a governmental decision on prosecution, or could at least have alerted law-enforcement authorities to the likelihood of wrongdoing," and finding that a previously-filed complaint with "exceedingly vague" allegations that was dismissed under Rule 9(b) consequently did not invoke the PDB with respect to a later filed lawsuit because "a hypothetical government investigator could not have been meaningfully alerted to alleged fraud by the defendant in this case.") (internal quotation marks omitted).

under the original source exception to the PDB. Rule 9(b)'s heightened pleading standard would thus only come into play in the original source inquiry. The Third Circuit took a significant step in this direction in a 2016 decision,[105] in which it found that Rule 9(b)'s heightened pleading standard "serves as a helpful benchmark" in determining whether a relator has sufficiently alleged facts that "materially added" to the information already publicly disclosed so as to satisfy the original source exception.[106] In invoking customary language under a Rule 9(b) inquiry, the Third Circuit explained 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."[107]

Thus, public disclosures that are considered under the FCA would bar a relator's suit, in the first instance, only if those disclosures would have allowed a random citizen to put together a complaint that would pass muster under the notice pleading standards of Rule 8 and the good faith requirements of Rule 11. Obviously, such a complaint would still be dismissed on a Rule 9(b) motion unless the relator was able to add sufficient detail to satisfy Rule 9(b)'s particularity requirement, but that would be a separate inquiry than the review under the PDB. If there was enough in the public domain to file a legitimate complaint, then the PDB would apply, subject to possible application of the original source exception.[108] Given the well-developed jurisprudence about sufficiency of pleadings, these standards would be much easier to apply and clearer at the outset for all parties. This would be consistent with the FCA's statutory language focused on allegations or transactions since those are precisely what form the basis of any complaint.

Another perspective from which to approach this question is an evaluation of why and when it makes practical sense to shut down a *qui tam* suit.[109] Other than stopping an opportunistic relator from siphoning off part of the government's recovery, what is the public interest in shutting down FCA suits? Obviously, one does not want frivolous lawsuits or phony

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[105] United States *ex rel.* Moore & Co., P.A. v. Majestic Blue Fisheries, LLC, 812 F.3d 294 (3d Cir. 2016).

[106] *Id.*

[107] *Id.* (internal quotation marks omitted).

[108] At that point, in determining whether the relator could escape the PDB as an original source, the court would switch its focus to ascertain whether the relator's information materially added to what was disclosed through enumerated public sources, largely by evaluating whether that additional information helped to defeat a Rule 9(b) challenge. Note that this would not simply substitute a Rule 9(b) analysis for a PDB analysis since it is certainly possible that the initial public disclosures would not have been sufficient to trigger the PDB and then the relator was able to satisfy Rule 9(b)'s particularity standard by virtue of information that might not have qualified her as an original source. This could include various information sources that are not pertinent under the PD analysis or a relaxed application of 9(b) in terms of specific false claim identification or information that the relator cannot claim as "direct" under the original source exception.

[109] A compelling argument can be made that a defendant should not be able to raise the public disclosure argument at all, but that is a question that would likely need to be resolved by Congress.

accusations, which are costly to businesses and bog down the prosecutorial and administrative branches of the government, but an unreasonably strict PDB is not an effective means for weeding out those cases. Relators who might lie, cheat, or seek revenge against a former employer by making up phony allegations of wrongdoing can do so just as easily in the face of or the absence of prior public disclosures. Indeed, one could probably argue persuasively that prior disclosures might increase the likelihood that there is some validity to the allegations made or that such disclosures may encourage people to see violations even where they do not actually exist. Therefore, a strictly applied PDB is not designed to and does not weed out non-meritorious cases.

As a matter of public policy, a rigid and overbroad application of the public disclosure bar harms the government's interests.[110] This is a critical issue for the government because an inside relator or any relator with specific information about particular defendants will often allow the government to target a specific defendant and proceed where otherwise it could not. It is nonsensical to assume that relator's specific information about a target defendant does not accomplish anything for the government, simply because the government *might* have eventually uncovered the fraudulent conduct by the defendant had the government done an industry-wide audit or investigation.

One might argue that the ambiguity interposed by the "trail of fraud" language is largely corrected by the original source exception to the PDB.[111]

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[110] This is problematic given that the FCA is of course designed to permit the government to vindicate its interest when it has been victimized by fraud. *See* State Farm Fire & Cas. Co. v. United States *ex rel.* Rigsby, 137 S. Ct. 436, 443 (2016) ("Because the seal requirement was intended in main to protect the Government's interests, it would make little sense to adopt a rigid interpretation of the seal provisions that prejudices the Government by depriving it of needed assistance from private parties."). In 2010, Congress amended the FCA to provide that the government can veto application of the public disclosure bar. 31 U.S.C. § 3730(e)(4)(A) (2012). Although this would ostensibly mitigate the concerns discussed in this Article, there are obviously internal constraints that the Government has imposed on its exercise of that veto power such that the Government's new found veto authority does not mitigate the need to excise trail of fraud language from the PDB inquiry. In the seven years since the government was empowered to veto any application of the public disclosure bar, it has done so on very few occasions. *See* United States *ex rel.* Conroy v. Select Med. Corp., 2016 WL 5661566, at *15 (S.D. Ind. Sept. 30, 2016) ("Having determined that the government's right to veto dismissal under 31 U.S.C. § 3730(e)(4)(A) passes constitutional muster, the government's exercise of that right means the court's analysis under the public-disclosure bar ends here."); Barnett, *supra* note 9 ("Although this amendment generated substantial commentary upon its passage, it appears that it has yet to be used by the government, or at least that no court has been confronted with addressing this amendment"). But this requires an affirmative step on the part of the government and presumes an in-depth knowledge of all FCA filings within a short time frame, which do not appear to be realistic assumptions based on Department of Justice's current staffing and ability to analyze cases. Limiting the grounds for a motion to dismiss based on public disclosure to instances where the prior disclosures truly revealed allegations and transactions sufficient to target a particular defendant would be a far more practical way of proceeding and appears more in tune with Congressional intent.

[111] The original source exception provides that the court must dismiss a *qui tam* action "unless . . . the person bringing the action is an original source of the information" and that an original source is "an individual who either (i) prior to a public disclosure . . . has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has

This provision permits a private relator's suit to proceed, despite a disabling public disclosure, if the relator was an independent source of the information and the relator's information "materially adds" to the information that was publicly disclosed.[112] While it is certainly true that the original source exception preserves many relator's suits, and thus helps to reach an appropriate balance, there is no reason to permit a loose interpretation of the PDB to throw a relator's case into the original source arena unnecessarily. In the absence of public disclosures of allegations or transactions, it is hard to see how a requirement of independent and direct knowledge (under the prior definition of original source) on the part of the relator provides the right balance of encouraging potential whistleblowers to report suspected fraud. Notably, there is no requirement in the FCA that a relator be an industry insider or even have direct knowledge of the alleged fraud.[113] These inquiries only arise in cases where there has been a public disclosure and the relator needs to satisfy the original source exception. Accordingly, since the FCA does not limit relator status to industry insiders, erecting an improperly broad PDB is not justifiable as a general means of eliminating non-insider relators.

Further, the recent addition of "materially adds" as a component of the original source exception can bar a relator who was the source of the initial disclosure but unfortunately did not hold enough back to satisfy this new requirement.[114] Essentially, although the original source exception limits the sometimes draconian impact of the PDB, there is still no justification in law or logic that supports an unreasonable standard for the bar to fall in the first

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voluntarily provided the information to the Government before filing an action under this section." 31 U.S.C. § 3730(e)(4)(A)-(B) (2012). Prior to 2010 amendments to the FCA, "original source" was defined 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 an action under this section which is based on the information." 31 U.S.C. § 3730(e)(4)(A)-(B) (2009). Thus, the 2010 amendments added the "materially adds" requirement to the definition of original source.

[112] *Id.*

[113] *See* United States *ex rel.* Atkinson v. PA. Shipbuilding Co., 473 F.3d 506, 523 (3d Cir. 2007) ("Although the FCA was most concerned with encouraging whistle-blowing by insiders with first-hand knowledge, neither the text of the FCA nor its legislative history suggests that non-insiders should never be able to bring *qui tam* actions. The public disclosure and original source provisions provide sufficient protection against inappropriate suits by relators without sufficient direct and independent knowledge."); United States *ex rel.* McCready v. Columbia/HCA Healthcare Corp., 251 F. Supp. 2d 114, 119 (D.D.C. 2003) ("[The defendant] asserts that Congress created a policy in the FCA that relators *must* be insiders. This is not the case. It is generally contemplated that an FCA relator will be an insider, and Congress certainly intended to encourage insider whistleblowers to initiate *qui tam* suits. However, the statute contains no such requirement. Any person who can muster sufficient evidence of fraud, that is not publicly disclosed, and be the first to file a complaint alleging that fraud, may maintain a *qui tam* suit.") (citations omitted). Unfortunately, Congress' decision to not limit relator status to insiders has not stopped many courts from expressing a clear dislike or suspicion of non-insider relators, or the pejoratively-named serial relator. *See, e.g.*, United States *ex rel.* Silver v. Omnicare, Inc., 2016 WL 6997010, at *2 (D. N.J. Nov. 28, 2016) (stating at the outset of the opinion that "Relator Silver has never worked for, nor done business with, [the defendant]."); United States *ex rel.* Boise v. Cephalon, Inc., 2014 WL 5089717, at *8 (E.D. Pa. Oct. 9, 2014) ("While it is possible for a non-insider to have direct knowledge of an organization's fraud, I am "mindful of suits based only on secondhand information, speculation, background information or collateral research'") (citing *Atkinson.*, 473 F.3d at 523)).

[114] *See supra* note 111 (citing for language of the original source exception).

instance.

Too high a bar against private relators will unquestionably limit the government's ability to detect fraud and to identify all of the wrongdoers.[115] What is the public interest in discouraging private relators from performing the investigative function of identifying additional companies that are committing similar frauds, aided perhaps by their insider status, industry insights, or even general data mining?

Excising the "trail of fraud" language from FCA jurisprudence would presumably lead to more suits being filed, which is a positive social benefit if the suits are meritorious.[116] A straightforward assessment of whether public disclosures included allegations or transactions about specific entities or sufficient detail to expose fraudulent conduct might, indeed, encourage arguably opportunistic relators, who perhaps learn about a particular illegal practice within their industry, and then seek to ascertain whether their employer or customer is committing the same wrongful conduct. To the extent that such relators provide the government with "inside" information that demonstrates the wrongful conduct, there would be a deterrent and fiscal benefit conferred on the government. Just because the government sees that some companies are cheating in a particular way rarely means that the government will quickly and efficiently be able to identify and prosecute all other offenders. What's wrong with rewarding a whistleblower in those

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[115] United States *ex rel.* Mateski v. Raytheon Co., 816 F.3d 565, 577 (9th Cir. 2016) ("Allowing a public document describing 'problems'—or even some generalized fraud in a massive project or across a swath of an industry—to bar all FCA suits identifying specific instances of fraud in that project or industry would deprive the Government of information that could lead to recovery of misspent Government funds and prevention of further fraud."); Leveski v. ITT Educal. Servs., 719 F.3d 818, 832 (7th Cir. 2013) (reversing district court's dismissal of case under public disclosure and noting that cases that at "first blush" might appear similar are often revealed to rest on distinct information when one studies the details); Cooper v. Blue Cross & Blue Shield of Florida, Inc., 19 F.3d 562, 566 (11th Cir. 1994) ("[The] government often knows on a general level that fraud is taking place and that it, and the taxpayers, are losing money. But it has difficulty identifying all of the individual actors engaged in the fraudulent activity. This casting of a net to catch all wrongdoers is precisely where the government needs the help of its 'private attorneys general.'"); United States *ex rel.* Lopez v. Strayer Educ., Inc., 698 F. Supp. 2d 633, 642 (E.D. Va. 2010) (citing a statement of interest filed by the government and explaining that "[t]he government also voiced its concerns that construing a disclosure too broadly has the unfortunate potential to immunize an entire industry simply because one of its constituent members is referenced in such a disclosure."); *see* United States *ex rel.* Hartpence v. Kinetic Concepts, Inc., 792 F.3d 1121, 1131 (9th Cir. 2015) (*en banc*) (in first-to-file context, cautioning against dismissal where second relator "provided information about a different form of fraud, and without that information the government *might not* have investigated beyond KCI's fraudulent coding practices.") (emphasis added); *Hearing Before the Subcomm. on the Constitution & Civil Justice of the H. Comm. on the Judiciary*, 113th Cong., 113-93 (July 30, 2014) (statement of John E. Clark), *available at* https://judiciary.house.gov/wp-content/uploads/ 2016/02/113-93- 88921.pdf ("Not only do whistleblowers expose fraud schemes otherwise unknown to the government, but through their attorneys they take the necessary steps to initiate damage recovery actions on the government's behalf – the time-insensitive tasks of screening cases, interviewing witnesses, analyzing and organizing available evidence, evaluating legal merit, preparing and filing complaints – thereby augmenting the government's resources without any cost to taxpayers.").

[116] *See* S. Rep. No. 99-345, at 23–24 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5288-89 ("The Committee's overall intent in amending the *qui tam* section of the False Claims Act is to encourage more private enforcement suits.").

circumstances?

Finally, focusing directly on the statutory inquiry of whether the prior public disclosures revealed allegations or transactions of fraud – not mere notice, nor breadcrumbs potentially marking a "trail of fraud," which are never mentioned in the statute – would also be likely to reduce the enormous amount of judicial resources that currently are invested in deciding public disclosure motions. As noted above, PDB motions are one of the most frequently litigated motions in defense of FCA claims.[117] These are generally fact-intensive inquiries, oft-times incorporating bulky appendices of potential public disclosures, and often resulting in lengthy and detailed opinions.[118] If there was some clarity about the standard, such that only actual allegations or transactions involving the target defendant would derail a case, presumably defendants would file far fewer motions of this type. This is also an issue of considerable concern to the Department of Justice, as demonstrated by the significant number of Statements of Interest that they file on the various legal issues at play.[119]

IV. CONCLUSION

The "trail of fraud" has its origins in a long-abandoned provision of the FCA that barred a private relator from proceeding with a suit where there was already government knowledge of the alleged wrongdoing. Under the substituted Public Disclosure Bar adopted as part of the 1986 amendments to the FCA, the "trail" morphed to where some loose equivalent of possible government notice of the alleged fraud can bar a relator, without consideration of why mere notice should bar a relator's suit even while actual government knowledge no longer constitutes a bar. The "trail of fraud" standard is not grounded in the statutory language of the PDB, which focuses on allegations or transactions of fraud. This language encourages a loose standard of review, potentially veering away from the clear intent of the PDB and often resulting in dismissals of important actions that the government would not or could not pursue on its own. Accordingly, the "trail of fraud" should either be dropped entirely or, at a minimum, courts should reorient it so that it only operates to bar relators' actions where allegations or transactions of fraudulent conduct were clearly publicly disclosed and the "trail" that emanates from those

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[117] *Supra* note 9.

[118] *See, e.g.*, United States *ex rel.* Hagerty v. Cyberonics, Inc., 95 F. Supp. 3d 240, 246 (D. Mass. 2015), *aff'd sub nom.*, Hagerty *ex rel.* United States v. Cyberonics, Inc., 844 F.3d 26 (1st Cir. 2016); United States *ex rel.* Colquitt v. Abbott Labs., 864 F. Supp. 2d 499, 524 (N.D. Tex. 2012).

[119] *See, e.g., Opposition and Statement of Interest of the United States of America*, United States *ex rel.* Desjardins v. Tree of Life Behavioral Services, Inc., 2016 WL 6134680 (E.D. Pa. Aug. 26, 2016); *Statement of Interest of the United States Concerning Par's Motion for Summary Judgment on Relator's Corrected Second Amended Complaint*, United States v. Par Pharmaceutical Companies, Inc., 2015 WL 1752768 (N.D. Ill. Mar. 24, 2015); *Statement of the United States Concerning the Defendants' Motion to Dismiss*, United States *ex rel.* Morgan-Lee v. Whittier Health Network, *LLC*, 2015 WL 8777144 (D. Mass. Oct. 8, 2015).

statutorily-enumerated public disclosures indisputably directs the government to the fraud that the relator has alleged against a particular wrongdoer.